IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC 166
WRC 35/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GARRY HEPBURN Plaintiff
AND	HUHTAMAKI HENDERSON LIMITED Defendant

Hearing: (on the papers)

Counsel: Tanya Kennedy, counsel for the plaintiff
Anthony Drake, counsel for the defendant
Robert Stewart, counsel for the Dominion Post

Judgment: 9 December 2011

REASONS FOR JUDGMENT OF JUDGE A D FORD

NOTE: THE NON-PUBLICATION ORDER DATED 25 NOVEMBER 2011 IN 2011 NZEMPC 154 REMAINS IN FORCE

[1] On Tuesday, 29 November 2011, I issued a brief ruling to the parties confirming that I did not consider that there had been any contempt of Court on the part of the *Dominion Post* in this matter. I said that I would provide written reasons for my decision in the near future and I now do so.

[2] The brief background is that shortly before 5.00 pm on Friday, 25 November 2011 an urgent application was filed by Ms Kennedy on behalf of the plaintiff. The application sought a non-publication order in relation to "the naming and any other identifying details" of two overseas exchange students who had

featured in the determination[1] of the Employment Relations Authority (the Authority). The Authority Member had issued a non-publication order[2] earlier on 25 November in respect to the naming of either or both of the exchange students referred to in his determination. The urgent order Ms Kennedy sought from the Court was effectively to extend the non-publication order so as to incorporate not only the naming of the students but also "any other identifying details".

[3] Given the urgency of the matter, I issued the order sought on 25 November 2011.[3] In doing so I noted that it was alleged in the statement of claim that the Authority's determination disclosed that the plaintiff had travelled overseas during a period of paid sick leave to allegedly pursue "a romantic/sexual relationship" with one of the students. The allegation was based on work emails which the employer had accessed during the plaintiff's absence overseas. The plaintiff's wife works at the high school in New Zealand that the two students attended and the exchange students had stayed with the plaintiff and his family while in New Zealand. It is pleaded in the statement of claim that both the plaintiff and the exchange student in question deny the existence of any romantic/sexual relationship.

[4] On Saturday, 26 November 2011, the *Dominion Post* newspaper published an article on the case under the headline: "Dismissal after sick leave used for holiday". The article also apparently appeared on the *Dominion Post* website. At 9.03 am on Saturday, 26 November, Ms Kennedy sent an email to the *Dominion Post* alleging that the article was inaccurate and also breached this Court's non-publication order. Ms Kennedy sought urgent confirmation that the article "has been removed from the internet and any further print editions."

[5] On 28 November 2011, Ms Kennedy filed a memorandum alleging that the *Dominion Post* and the author of the article had breached s 196(1)(c) of the Employment Relations Act 2000 (the Act) and been in contempt by "wilfully" disobeying an order of the Court. She requested that the matter of alleged contempt of Court be referred to the Solicitor General and she also sought a compliance order

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[1] [2011] NZERA Wellington 184.
[2] [2011] NZERA Wellington 191.
[3] [2011] NZEmpC 154.

pursuant to s 139 of the Act requiring observance of the Court's order of 25 November 2011.

[6] Section 196 of the Act deals with contempt of Court and the Authority. It is a self-contained provision in the sense that subsection (1) sets out the matters that amount to contempt and subsection (2) prescribes the actions the Authority or Court can then take to deal with the situation, including the sentence that may be imposed on an offender which may be either a fine not exceeding $5,000 or imprisonment for any period not exceeding three months. The particular subsection relied upon by counsel for the plaintiff, namely (1)(c), refers to any person who:

> wilfully and without lawful excuse disobeys any order or direction of the Authority or the court in the course of the hearing of any proceedings.

[7] The allegation of contempt against the *Dominion Post* and the author of the article is couched in these terms:

> 6. The articles contain identifying information which enabled the exchange students to be readily identified including (without limitation):
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> (i) References to an exchange student and two "former" overseas exchange students;
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> (ii) Travel to Europe "to visit the students";
>
> (iii) They had "hosted six young overseas nationals".

It is alleged that the information particularised amounted to a breach of the Court's non-publication order.

[8] In response to the plaintiff's application, helpful memoranda were received from counsel for the *Dominion Post* and counsel for the defendant.

[9] Counsel for the *Dominion Post*, Mr Stewart, noted that the Authority's decision referred to the exchange students as: (1) "German"; (2) "Young woman", and (3) "Having stayed in the applicant's home with his family". Counsel submitted that the *Dominion Post* article had disclosed none of those particulars but it had made reference to: an "Exchange student" and "two former overseas exchange students"; travel to Europe "to visit the students"; and they had "hosted six young overseas nationals". Mr Stewart submitted that the Court's non-publication order,

"did not suppress the fact that the applicant had visited two exchange students, but rather any particulars likely to identify those exchange students". As counsel expressed it:

> An order prohibiting the publication of all details relating to a subject would effectively amount to a "blanket" suppression order. Such orders are generally discouraged unless required by the interests of justice and no other less restrictive order will suffice.

[10] Mr Stewart made the additional relevant submissions:

> 7. The underlying rationale for the applicant seeking the non-publication order must have been to prevent the identification of the overseas exchange students. If the Court's intention was to prohibit the publication of the fact the two students were exchange students (or even students). ... the order would have included the words "including the fact the students were exchange students".
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> 8. It is submitted that the description of the young women as "exchange students", and "former overseas exchange students", even when coupled with the information that the applicant travelled to Europe to visit them is not sufficient, or even likely, to identify the students.
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> 9. The reference in the article to the applicant and his wife having "hosted six young overseas nationals during the past seven years" is a particular that arguably relates to the applicant. Even if interpreted as applying to the exchange students, the word "hosted" has many meanings and if there were six young overseas nationals hosted during the past seven years there is clearly significant doubt in relation to whether those nationals were also exchange students and whether that group of six included the two referred to in the article.

[11] Mr Stewart confirmed that if, contrary to his understanding, the Court had intended to prevent publication of the fact that the two persons were exchange students, then the *Dominion Post* apologised both to the Court and to the exchange students concerned.

[12] In my brief interlocutory judgment of 25 November 2011, I referred to the relevant principles involved in any consideration of an application for a non-publication order. The test, as set out by this Court in *Y v D*,[4] is whether it is "in the interests of justice including those of the parties and the community". The

[4] [2004] 1 ERNZ 1 at [18].

principle of open justice is always an important consideration. Chief Judge Colgan in *Y v D* stated that an applicant for a non-publication order must:[5]

> ... displace the usual presumption that there should be no restriction on publication of evidence or of a judgment and its reasons ... the tests to be met are exceptional circumstances and that the interests of justice must prevail.

A non-publication order should be no wider and last for no longer than is necessary in order to achieve the interests of justice in any given case. Subject to those basic considerations, the principle of open justice requires that nothing should be done to discourage the publication of fair and accurate reports of proceedings before the Court.

[13] It is stating the obvious to record the seriousness of any allegation that a person has acted in breach of a court order. The onus of proof is on the party making the assertion. To allege a breach of an order, amounting to contempt of court under s 196(1)(c) of the Act, is an even more serious matter because such an allegation involves the mental element of wilfulness. The subsection reads: "wilfully and without lawful excuse disobeys any order". I do not consider, however, that s 196(1)(c) of the Act has any relevance to the facts of the present case. The actions described in s 196, which are said to amount to contempt of court, are quasi-criminal actions. They are described in s 196(2) as offences and the perpetrator is described as "the offender". They are actions that occur in the face of the court and either disrupt or otherwise adversely affect the conduct of an actual hearing. In effect, the actions are offences against the administration of justice. The disobedience envisaged in subsection (1)(c) is disobedience to an order or direction of the Court "in the course of the hearing of any proceedings". That is not the situation in the present case. There was no court hearing in progress. The section relied upon by Ms Kennedy, therefore, has no application.

[14] No other grounds were relied upon in relation to the contempt allegation. It was not contended, for example, that the Court had inherent powers to deal with alleged civil contempt. In any event, the full Court in *Ryan Security & Consulting*

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[5] At [19].

(Otago) Ltd v Bolton[6] indicated, obiter, that the Court does not have any such inherent powers. The full Court's views were based primarily on the fact that the Act provides a special statutory mechanism, in the form of compliance orders, for enforcing orders of the Court and it is, therefore, unnecessary to imply inherent contempt powers. Section 141 of the Act also allows for orders or judgments of the Court to be enforced through the District Court.

[15] Turning to the application for a compliance order in the present case, the problem for the plaintiff is that a compliance order under s 139 of the Act may, in terms of s 139(2), be made only with respect to a person who is a party or a witness to a proceeding. The *Dominion Post* is not a party to this proceeding.

[16] I have a further basic concern in relation to this application which is relevant to any enforcement proceedings. The wording of the non-publication order followed the wording sought in the urgent application, namely, "prohibiting the publication of the names and any other identifying particulars" relating to the two exchange students. The statement of claim gave an example of the type of identifying information that would "easily" identify the students if made available to the public. The example referred to "including the school and families at the school which the two students had attended". None of that information was included in the *Dominion Post* article. On the face of it, I see nothing in the *Dominion Post* article that would flout the terms of the non-publication order.

[17] If it was important to the plaintiff to obtain an order prohibiting the publication of the fact that the two students were exchange students (or even students) then it behoved counsel to make that fact clear in the application itself, or preferably in a draft order, so that the appropriate wording could be embodied in the Court order. The same applies to the two other examples relied upon by the plaintiff, namely, the reference to "Europe" and to the fact that "they had hosted six young overseas nationals". The Court had no background knowledge of the case and was entirely dependent upon the information conveyed by counsel. The wording of the non-publication order in question followed the usual format of prohibition orders issued by this Court under cl 12, sch 3 of the Act to prevent identification. If that

[6] [2008] ERNZ 428.

wording needs to be expanded upon in any given case then the initiative needs to come from counsel presenting the application.

[18] These are the reasons why I declined to make the orders sought on behalf of the plaintiff. I have considered the question of costs and have concluded that the justice of the case does not require the making of any costs order.

A D Ford
Judge

Judgment signed at 10.45 am on 9 December 2011