IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 216
ARC 47/04

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	Q Plaintiff
AND	W Defendant

ARC 70/08

IN THE MATTER	of proceedings removed
AND IN THE MATTER	of further and better particulars
BETWEEN	Q Plaintiff
AND	W Defendant

Hearing: On the papers

Appearances: Q, plaintiff
David France, counsel for defendant

Judgment: 14 December 2012

REASONS FOR INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] In my interlocutory judgment of 18 September 2012, dealing with an application for further and better particulars brought by the defendant, I noted that my judgment was the first to be issued since the making of an interim suppression order. I stated, for reasons that would be given in a separate judgment, that the interim suppression order was discharged. That judgment, and my judgment of 26

March 2010 were allowed to be circulated in accordance with the Court's practice. The following are my reasons for lifting the interim suppression orders.

[2] Whilst reviewing the entire file for the purposes of preparing a judgment on a preliminary issue in February 2010, I noted that in a five page letter dated 3 December 2009, addressed to the Registrar of the Employment Court, the plaintiff stated:

> [36] [Q] is seeking name suppression for all past and present employment matters, which she has previously raised with the Court.

[3] There was no indication that this matter had been raised in any prior memoranda filed by the plaintiff and was not addressed by Q in the chambers conference held on Wednesday 9 December 2009. I advised that if Q wished to pursue the matter of name suppression she would need to file a formal application supported by affidavit evidence and serve it upon the defendant. Because of the need to issue a judgment on the preliminary issue in a timely fashion, after delays had already been occasioned to enable the plaintiff to file her submissions, I required the application for name suppression to be filed and served by Wednesday 3 March 2010.

[4] The plaintiff then proceeded to file an affidavit dated 26 February 2010, which listed six determinations of the Employment Relations Authority (the Authority), issued between 13 September 2004 and 17 August 2009 that had carried her name. The plaintiff sought name suppression on all of those determinations and all matters to be decided by the Employment Court.

[5] The plaintiff deposed that the issue of name suppression on all the Authority's determinations was never processed by the Authority, although she claims that it was requested on numerous occasions over the years, both verbally and in writing, but that, to date, the issue had never been addressed formally or informally by the Authority.

[6] The plaintiff also applied for name suppression for all judgments issued by the Court or yet to be decided and that past judgments be amended to suppress the plaintiff's name. She sought an order that all judgments naming her were to be removed from public searches, especially on the internet, or any other public search listings or search engines.

[7] The plaintiff's request for name suppression was said to be made to enable her to obtain employment more easily as the fact that she has to now notify any potential employee in advance of her disability, occupational overuse syndrome, affects her employment opportunities negatively. She also claimed that all her employment issues were as a result of the defendant's deliberate actions to decline her claim for accident compensation which resulted in years of unnecessary litigation and resulted in the plaintiff's name being publicly listed. This I took to be a reference to the various claims in the District Court for review of Accident Compensation Commission rulings. The plaintiff addressed her concerns over the defendant's alleged activities and advanced these matters as additional reasons for seeking name suppression. I note that the defendant disputes these allegations.

[8] A notice of opposition was filed and served by the defendant on 5 March 2010. The grounds were that the plaintiff's affidavit did not meet the burden of proof for the granting of name suppression, that there were no exceptional circumstances affecting the plaintiff that provided grounds, that the granting of an order would not be consistent with the interests of justice and there were no grounds to exercise the Court's discretion to override the presumption that the administration of justice is to occur publicly.

[9] Q responded by way of a memorandum filed on 8 March 2010, in which she cited, as an example of the most usual ground on which the Court will exercise its power to prohibit publication, the existence of strong medical reasons. I issued a minute that day in which I stated that if the strong medical reasons referred to by the plaintiff were to be pursued they would need to be supported by medical evidence by way of affidavit.

[10] Q responded on 9 March 2010 with a memorandum annexing an index of documents which she submitted were relevant to her claim for suppression.

[11] A chambers conference was convened on 26 March 2010 to deal with directions for the disposition of the plaintiff's application for suppression and a timetable was agreed between the parties for the filing of affidavits and written submissions. The parties agreed that the Court could determine the issue of suppression on the papers.

[12] On the same day I issued my interlocutory judgment dealing with a preliminary matter and directed that it was to be sent only to the parties, the registry and the other Judges and not to have any other wider circulation. I indicated that this order would be reviewed depending upon the outcome of the Court's determination of the application for suppression.

[13] The plaintiff filed a further set of exhibits including a medical certificate and an affidavit from a police constable, which I will refer to when dealing with the submissions. The plaintiff and the defendant also filed full submissions in relation to the application.

[14] On 6 May 2010, the plaintiff filed a notice of appeal to the Court of Appeal against my judgment issued on 26 March 2010 dealing with the preliminary issue. After convening a telephone conference call, I directed all the current matters before the Court should be placed on hold, awaiting the outcome of the plaintiff's appeal. The Court received, on 14 December 2010, a certificate from the Court of Appeal stating that under rule 44 of the Court of Appeal (Civil Rules) 2005 the plaintiff's application for leave to appeal out of time, filed on 6 May 2010 had been abandoned. There was no indication on the certificate that the plaintiff had applied for name suppression in the Court of Appeal.

[15] After considerable delays in the filing of a further amended statement of claim, I considered the matter of suppression should be dealt with following the hearing on 10 September 2012, which led to my judgment on 18 September.

The grounds for suppression

[16] The plaintiff requested that I take into account all of the material she has placed before the Court in support of her claim for name suppression and this I have done. I will not, however, set it all out in detail, but will address the grounds under separate headings with the assurance that I did take those matters placed before the Court into account when considering her application and deciding to lift the interim suppression.

The Court's jurisdiction

[17] There was no issue between the parties that the Court has express statutory power to order name suppression. This is found in cl 12 of schedule 3 to the Employment Relations Act 2000 (the Act), which states:

> **12 Power to prohibit publication**
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> (1) In any proceedings the Court may order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Court thinks fit.
>
> (2) Where proceedings are resolved by the Court making a consent order as to the terms of settlement, the Court may make an order prohibiting the publication of all or part of the contents of that settlement, subject to such conditions as the Court thinks fit.

[18] The Court in many cases has exercised that power to grant name suppression of parties, witnesses and of evidence. The reasons for so doing have varied widely. However, it is clear from the authorities[1] that the discretion should be exercised in favour of making an order for suppression only to the extent required by the interests of justice and that the burden of proving that an order is necessary rests upon the applicant. This is because the Employment Court is a public forum and there is a presumption in favour of open justice. Suppression should therefore only be granted where there are exceptional circumstances giving rise to a real risk, supported by

[1] Q cited *Parker v Silver Fern Farms Ltd (No 2)* [2009] ERNZ 327and *X v A* [1992] 2 ERNZ 1079, *A v A-G* WC1/00, 21 January 2000; *W v Police* AC73/00, 29 August 2000.

evidence, that either the administration of justice would be frustrated or rendered impracticable, or there may be irremediable consequences if publication is allowed.[2]

[19] There is, however, a real issue as to whether the Court has jurisdiction to order name suppression in relation to previous Authority determinations. The Authority has power to prohibit publication provided by cl 10 of schedule 2 of the Act, but apparently did not exercise it in the six determinations the plaintiff listed. The question is whether ss187 and 188 of the Act, which set out the jurisdiction of the Court and its role in relation to that jurisdiction, allow the Court to issue a non-publication order over previous Authority determinations. The issue was considered by Judge Shaw in the *Chief Executive of the Department of Corrections v Tawhiwhirangi.*[3] Her honour held that such an order was appropriate to preserve the privacy of a non-party to the proceedings and therefore prohibited the publication of the names or any other identifying details of any prisoner named in the case including in the determination of the Authority.

[20] By contrast, in *Te Runanga O Kirikiriroa Trust Inc v Allen*[4], Judge Ford observed in that case that the plaintiff's counsel had submitted that the Court had exceeded its jurisdiction in *Tawhiwhirangi*. Counsel for the plaintiff had relied on s 188(4) of the Act which states that:

> It is not a function of the Court to advise or direct the Authority in relation to –
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> (a) the exercise of its investigative role, powers and jurisdiction; or
>
> (b) the procedure –
>
> (i) that it has followed, is following, or is intending to follow; or
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> (ii) without limiting subparagraph (i), that it may follow or adopt.

[21] Because of Judge Ford's involvement in a Judicial Settlement Conference he was unable to rule on the issue so the jurisdictional point is yet to be determined.

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[2] *C* v *Air Nelson Ltd* [2010] NZEmpC 18. The appeal to the Court of Appeal [2010] NZCA 263 was dismissed.

[3] WC14/07, 10 May 2007.

[4] [2011] NZEmpC 145.

[22] Because the Court has clear jurisdiction about suppression in relation to any aspects of its own decisions, it is not necessary to canvass the various statutory bodies relied on by the plaintiff to show the appropriateness of a suppression order in her favour. The factors she isolated, where relevant, are dealt with under the following headings.

Health issues

[23] There is no issue between the parties that the impact of publication of a person's name on her or his health can be a relevant factor in determining whether name suppression is appropriate. There are several cases in which suppression has been granted on the basis of medical grounds. They relied on detailed and specific medical evidence outlining the specific health concerns and the impact that the publication of an applicant's name would have on her or his health. An example of this is *A v Attorney-General*[5] where the medical evidence is canvassed in considerable detail.

[24] Chief Judge Goddard also summarised the earlier authorities on what he described as the contentious question of whether to prohibit publication of the plaintiff's name. The plaintiff, he found, was sensitive about publication of her name to an extreme degree and she had shunned all publicity. The Chief Judge also addressed whether to grant an order if it might, in part, be futile, because of publicity that had already taken place in relation to that particular case. He would not accept that other persons, such as the plaintiff in that case, would be reluctant to seek justice in this Court because of apprehension of publication of their names if orders for suppression were not granted. In that case a settlement had been achieved. In the end, while the Chief Judge thought the matter was finely balanced, in what he described as circumstances peculiar to the plaintiff's personality, he determined to make a permanent and unconditional order prohibiting publication of her name in connection with any report or discussion of the proceedings.

[25] In the present case the plaintiff provided a statement of Doctor N, dated 25 May 2009, which referred to the significant mental consequences the plaintiff had

[5] WC1/00, 21 January 2000.

suffered as a result of her occupational overuse syndrome. The particulars referred to by Doctor N related to a pain disorder with both physiological factors and a general medical condition. She also referred to earlier medical specialist reports, dating back to May 2004. Unlike the evidence of the plaintiff's psychiatrist in *A v A-G*, there is no indication from the medical evidence provided to the Court by the plaintiff that her conditions would be ameliorated by continued name suppression. A similar fact situation arose in the recent case of *Timmins v Asurequality Ltd.*[6] There Judge Ford held that the evidence before the Court disclosed no exceptional medical circumstances which would displace the usual presumption in favour of open justice and declined to grant permanent name suppression.

[26] Judge Ford observed that the difficulties Mr Timmins faced in that case were the possibility of embarrassment or adverse publicity, which in itself was unlikely to amount to an exceptional circumstance sufficient to warrant name suppression. He adopted the principle highlighted in the High Court decision in *Clark v Attorney-General.*[7]

> [8] A corollary of the principle that the courts proceed in public is that those persons who are engaged in its processes, as litigants or witnesses, will also necessarily be publicly identified. They might well prefer that that were not so. However, that is seen as a necessary consequence of the public administration of justice. As Lord Atkinson said in *Scott v Scott* [1913] AC 417 at p 463:
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> > The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.
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> [9] Those principles have been applied in cases involving applications for the suppression of names of litigants in civil proceedings. …

[27] The plaintiff also claimed that publication of the fact that she has occupational overuse syndrome will adversely affect her ability to find employment. Mr France for the defendant submitted that there was no evidence that she has been

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[6] [2011] NZEmpC 167 at [17].
[7] (2004) 17 PRNZ 161.

seeking work as she has been receiving Accident Compensation from 2002 until 2009. He also submitted that, depending on the type of work that the plaintiff was seeking, it may be that the plaintiff will be required to disclose her disability to a prospective employer, so name suppression would not override this obligation.

[28] I accepted Mr France's submission on the point that the Human Rights Act 1993 expressly prohibits discrimination on the grounds of disability. On that basis it would not be an appropriate exercise of the discretion to grant name suppression in anticipation that identification of her disability would lead a prospective employer to illegally discriminate against her. In such a case the plaintiff's remedy would lie in making a complaint to the Human Rights Commission.

[29] I therefore found that there were no medical reasons to justify the continuation of the interim suppression order.

Risk of retaliation

[30] The plaintiff raised concerns regarding retaliation as a result of giving evidence in criminal proceedings dating back to 2002. She supported this by an affidavit from the police officer who investigated the case in which she gave helpful evidence. The police constable was highly complementary of the plaintiff's assistance to the prosecution. The plaintiff submitted she was the key witness and therefore stood at risk to date, as her name was still appearing in search engines online with her full name and other details relating to her work at the defendant. She provided the Court a search link in support. I was not persuaded by the material provided by the plaintiff in support of this particular contention that there was a real risk of retaliation at this late stage, if interim name suppression was removed. This was particularly so because of the next matter, namely that the plaintiff's name has already been published in a number of places, and it would be futile to continue the interim name suppression.

Futility of permanent non-publication

[31] In several cases the Court has held that where the matters for which non-publication is sought have already been in the public domain for some years that is a factor that militates strongly against the making of such an order. That is a factor that was addressed by the Chief Judge in *A v A-G*, as I have indicated above. It is also referred to in *Timmins,*[8] where Judge Ford respectfully agreed with the following statement of principle contained in the High Court judgment *Zanzoul v Removal Review Authority,*[9] which stated:

> In the course of this argument, Mr Ellis made an oral application for suppression in these present proceedings of Mr Zanzoul's name, and any details leading to his identity. The Supreme Court has previously declined such an application, essentially on the well-settled basis that the Court will not order suppression where it would be futile because the matter is already in the public arena.

[32] In the present case it is clear that the Authority's determinations and the decisions of the District Court on ACC reviews have been in the public arena for a number of years. It would have been futile for the Court to have continued to order suppression.

[33] In all these circumstances I considered it would be futile to continue the interim suppression order and that is why I lifted it.

[34] At the request of the defendant costs are reserved.

B S Travis
Judge

Judgment signed at 3.15pm on 14 December 2012

[8] At [23].
[9] HC Wellington CIV-2007-485-1333, 9 June 2009.