

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 54/08
ARC 84/08**

IN THE MATTER OF application for orders to disclose particular
documents before proceeding commenced
and name suppression

BETWEEN A
Applicant

AND THE INTERNET COMPANY OF NEW
ZEALAND
Respondent

Hearing: By submissions filed on 8, 10 and 23 December 2008
(Heard at Auckland)

Appearances: Michael O'Brien, counsel for the plaintiff
Andrew Laurenson, counsel for the defendant

Judgment: 16 February 2009

JUDGMENT OF JUDGE B S TRAVIS

[1] The applicant ("A") has commenced these proceedings against The Internet Company of New Zealand Limited ("ICONZ") seeking pre-proceedings disclosure.

[2] The proceedings seek disclosure of all documents that may reveal the identity of a particular account holder, holding a particular ISP address. A also seeks suppression of its name as well as the name of a third party ("B") to whom an offensive and derogatory email was sent, but apparently not received because A's computer system blocked it.

[3] The proceedings have been served upon ICONZ which has filed a memorandum of counsel confirming that it neither consents to, nor opposes A's

application. The memorandum advises that should the Court consider that A's application is appropriate then ICONZ will abide by the Court's decision. The memorandum also records that the parties are agreed that there is no issue as to costs and notes that the proposed order provides that the plaintiff shall pay ICONZ's reasonable costs of and incidental in complying with those orders.

[4] The memorandum also advises that unless the Court so requires, ICONZ intends to have no further participation with regard to A's application although counsel for ICONZ has made himself available to provide assistance if required by the Court. I record that this is a most appropriate response from ICONZ but I have not found it necessary to avail myself of Mr Laurenson's helpful offer.

[5] I am satisfied from the written submissions filed by counsel on behalf of A that this Court has the jurisdiction to make the necessary orders. Clause 13(1) of the Schedule 3 of the Employment Relations Act 2000 gives the Court jurisdiction in relation to discovery to make any order that a District Court may make under sections 56A or 56B of the District Court Act 1947. Section 56A of the District Court Act 1947 states:

56A Powers of Court exercisable before commencement of proceeding

On the application, in accordance with the rules, of a person who it appears to the Court is or may be entitled to claim in the Court relief against another person, the Court shall, in such circumstances as may be prescribed, have power to order any person who appears to be likely to have or to have had in that person's possession, custody, or power any document or class of documents, which are relevant to an issue arising or likely to arise out of that claim, -

- (a) To disclose to the Court and to any other prescribed person whether the document or documents are in his or her possession, custody, or power; and*
- (b) If a document has been but is no longer in that person's possession, custody, or power, to disclose to the Court and to any other prescribed person when he or she parted with it and what has become of it; and*
- (c) To produce such of those documents as are in that person's possession, custody, or power to the Court or any other prescribed person.*

[6] Counsel submitted this power is reflected in Rule 321 of the District Court Rules 1992 which mirrored Rule 301 of the former High Court Rules. Those Rules

provide that if it appears to the Court that where a person referred to as the intended plaintiff “*is or may be entitled to claim in the court relief against another person*” but it is impossible or impracticable for the intending plaintiff to formulate a claim without reference to one or more documents in a group of documents, then appropriate orders may be made. The difficulty with the Rules for the present application is the references to the entitlement to “*claim in the court*”. In the present case, based on the affidavit that has been filed, the potential claims of the intending plaintiff A are proceedings to be taken against the persons involved in the writing and sending of the email which was blocked by A’s computer from reaching its intended addressee, B. The potential claims are said to include:

- a) declarations that the employees involved have breached their statutory obligations of good faith in s4 of the Employment Relations Act 2000;
- b) declarations that the employees concerned have breached their employment agreements and applications for penalties for these breaches (ss134 and 135 of the Employment Relations Act);
- c) penalty claims against any non-parties who may have assisted in the production and sending of the email, (s134(2) of the Employment Relations Act).

[7] The difficulty with applying the Rules of the District Court or the High Court directly to the current situation is that the relief that would be sought by A as indicated above, would have to be sought, in the first instance, from the Employment Relations Authority. Sections 134 and 135 of the Employment Relations Act deal with the jurisdiction of the Authority to impose penalties for a breach of an employment agreement. Relief can be sought from the Court only by way of a challenge or through the provisions for the removal of proceedings from the Authority to the Court. It is thus difficult to say that the intended plaintiff who is applying to the Court for disclosure, is entitled to claim in the Court, relief against any other person.

[8] The saving grace appears to be the wording in clause 13(1) of the Schedule 3 of the Employment Relations Act which states that the sections in the District Court Act apply accordingly with all necessary modifications. In order for the Court to have the jurisdiction to make the order sought where the Court itself is not the originating body from which relief is to be sought, the sections in the District Court Act would require modification to read that the person may be entitled to claim in the Court, or the Authority, relief against any other person.

[9] Counsel for A submit that the suggested modification is a proper one. They submitted that the nature of the order in contemplation in the present case was an attempt to establish the identity of potential respondents in potential Employment Relations Authority claims, which are a recognised category of pre-proceeding discovery. A leading case, which was the origin of the High Court and District Court Rules, is *Norwich Pharmacal Co & Ors v Commissioners of Customs and Exercise* [1973] 2 All ER 943 where the House of Lords used the residual power of the equitable jurisdiction to order third party discovery. Counsel noted that in the *Norwich Pharmacal* case the House of Lords held that there were three conditions that must be present before an order for third party discovery will be made:

- a) A wrongful act has been carried out by someone;
- b) Without discovery of the information in the possession of the person against whom discovery was sought, no action could commence against the wrongdoer; and
- c) The person against whom discovery is sought had, himself or herself, albeit through no fault, been involved in the wrongful act of another so as to facilitate the wrongdoing.

[10] Counsel submitted that ICONZ falls precisely into category c).

[11] Counsel also submitted that besides establishing the identity of wrongdoers, a recognised proper use of pre-proceeding discovery is to enable a potential plaintiff to

determine whether it should proceed with its proposed claim, citing *Bell South NZ Ltd v Telecom Mobile Communications Ltd* (1985) 8 PRNZ 635.

[12] Counsel observed that the Employment Relations Authority has no process to entertain claims without a named respondent. Nor does it have any express jurisdictional powers to order pre-proceedings discovery. They submit that the Authority's powers to call for evidence to summons witnesses is only triggered by a proceeding, after a proceeding has been commenced, citing s160 of the Employment Relations Act.

[13] Counsel submit that if the suggested modification was not adopted, the Employment Court will only be able to exercise its powers under clause 13(1) of Schedule 3 in a matter where it has the originating jurisdiction, for example, to hear and determine proceedings founded on tort resulting from or related to a strike or lockout (s187(1)(h)).

[14] Counsel submitted that the absence of the modification would deprive parties, who would otherwise have claims falling within the jurisdiction of the Authority under s161, of the ability to determine the identity of the wrongdoer and to bring a claim if that knowledge was needed. They submitted that this was the exact issue that the *Norwich Parmacal* case addressed at p947:

... Here if the information in the possession of the respondents cannot be made available by discovery now, no action can ever be begun because the appellants do not know who are the wrongdoers who have infringed their patent.

[15] Counsel submitted that Parliament has expressly conferred on this Court, under clause 13(1) of Schedule 3 of the Act, a power to order pre-proceeding discovery and, because there is no limitation expressed, this should be available to potential litigants in the Authority and not restricted to the limited originating jurisdiction of the Court set out in s187 of the Act. They also accepted that while it is a requirement of s56(A) of the District Court Act 1947 to show that the intending plaintiff is or might be able to claim relief against another person, there is not a requirement that the potential litigant will bring such a claim. They observed that

this was addressed in *British Steel Corpn v Granada Television Ltd* [1981] 1 All ER 417, where Lord Templeman in the Court of Appeal stated at p443:

In my judgment the principle of the Norwich Pharmacal case applies whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice. The remedy of discovery is intended in the final analysis to enable justice to be done. Justice can be achieved against an erring employee in a variety of ways and the plaintiff may obtain an order for discovery providing he shows that he is genuinely seeking lawful address of the wrong and cannot otherwise obtain redress. In the present case BSC state that they will finally determine whether to take legal proceedings or whether to dismiss the employee or whether to obtain redress in some other lawful manner until they have considered the identity, status and excuses of the employee. The disclosure of the identity of the disloyal employee will by itself protect BSC and their innocent employees now and for the future and is essential if BSC are to address the wrong.

[16] This decision was upheld in the House of Lords.

[17] I therefore conclude that the proper use of pre-proceeding discovery supports the modification sought, whether or not the applicant intends to bring proceedings in the Authority or the Court or intends to conduct an enquiry which may lead to a personal grievance. Clause 13(1) must have been intended to be remedial and to give the Court the necessary power to make the orders of the nature sought in the present case.

[18] Turning to the application for suppression of the name of both the applicant and the intended recipient of the email, B, counsel for A rely on clause 12(1) of Schedule 3, which allows the Court to order the name of any party or witness or other person not be published. They observed that the Court held in *Y v D* [2004] 1 ERNZ 1, that the test for non-publication is “*the interests of justice*”. The burden of proof is on the applicant and must be supported by credible evidence and must show

exceptional circumstances why the usual presumption in favour of publication should be displaced.

[19] The affidavit that has been filed supports the submission that it would be contrary to the interests of justice not to order these names to be suppressed. B had no part in sending the email and is apparently unaware of the contents or even the fact that an email was sent to him. Naming him would unfairly prejudice his position. I also accept the submission that it is necessary to suppress the intended plaintiff's name from any judgment to avoid identification of B by association, and therefore have extended the suppression order to cover this.

[20] There will therefore be orders in terms of the draft order filed in this Court as follows:

1 The Internet Company of New Zealand ("ICONZ") disclose all documents relevant to the identity of the account holder who was allocated ISP address 202.37.231.124 on 9 October 2008 at 1422 NZDT ('documents') and that the disclosure occur by:

- a within 28 days after being served with the Orders ICONZ assemble in a relevant place all the documents in its possession, custody or control and make a concise and ordered list or index of those documents*
- b within 28 days after being served with the Orders ICONZ advise the applicant in writing a time (which time must be within 35 days of it being served with the Orders) at which and a place where the documents, and list or index made under (a) above, may be inspected and copied and allow that inspection and copying to occur*
- c If any of the documents have been in ICONZ's possession, custody or control and are no longer in its possession, custody or control, within 28 days after being served with the Orders ICONZ will advise the applicant in writing of when each document was parted with and what became of each document.*

- 2 *The applicant pays ICONZ's reasonable expenses of, and incidental to, complying with the Orders above.*
- 3 *The name of the intended addressee of the email "B" is suppressed from any judgment delivered in this matter.*
- 4 *The applicant's name is suppressed from the judgment delivered in this matter and shall be referred to as "A".*

B S Travis
Judge

Judgment dated at 3.45pm on 16 February 2009