

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2017] NZEmpC 88
EMPC 158/2017**

IN THE MATTER OF an application by AFT for access to Court
documents on file ARC 56/08

Hearing: On the papers filed on 10 and 13 July 2017

Appearances: AFT in person
Counsel for parties affected by the application

Judgment: 19 July 2017

JUDGMENT OF JUDGE M E PERKINS

[1] AFT, who has identity protection in respect of earlier proceedings before this Court, has now sought to have access to another court file unrelated to his earlier proceedings and in which he was not a party. He claims that the file to which he wishes to have access will contain information relevant to proceedings he presently has pending under the Human Rights Act 1993. In case the Human Rights Act proceedings have a connection to AFT's earlier proceedings in this Court anonymity is maintained in this judgment.

[2] While the application which has now been made relates to an Employment Court file AFT claims to be seeking access to the documents under the Senior Courts Act 2016.¹ That Act does not apply because the Employment Court is not considered a senior court for the purposes of the Senior Courts Act 2016. However, this Court does have jurisdiction to consider an application to access its files. The procedure for doing so can be informal and accordingly AFT's present application will be considered on that basis.

¹ File ARC 56/08.

[3] In AFT's application he specifies the documents he wishes to access. These are set out as follows:

All filings connected with the case, including affidavits, letters, emails, administrative notes, notices etc permitted by the description in Part A of schedule 2 of the Senior Courts Act 2016, which deals with access under ss173 and 174 of the Act. I am also seeking access to witness lists, transcripts of evidence and recordings of hearings that may be covered by categories 1, 3 and 4 of Part A of schedule 2. I am not seeking access to anything that is excluded by the Act; notes made by judicial officers for their personal use, for example.

[4] The grounds or reasons why AFT wishes to look at these documents are stated in his application as follows:

I have a mediation meeting on 21 July 2017 under the provisions of the Human Rights Act, following my complaint to the Commission under s201 of the HRA about the conduct of administrative units now part of [deleted] when, in 2011 and 2012, dealing with my dispute with my former employer. It will help me in my dealings with [deleted] to be clear about the extent of the involvement in the [deleted] case, if any, of the former Employment Relations Authority Chief Member, Alastair Dumbleton. He appeared to be unaware of it in the Authority's determination [deleted], or at least not to have applied it conscientiously.

[5] The deletions in the paragraph above have been made by me in compliance with the earlier identity protection order and because of the matters which I have taken into account in this present application, which I intend to decline.

[6] AFT's application to access the file in question was at my direction referred to counsel for the parties likely to be affected so that submissions could be made as to their respective positions in respect of AFT's application. I directed that a response was to be forwarded to the Court within 14 days and the responses have now been received.

[7] Counsel for the defendant in the proceedings to which the file relates correctly points out that, as stated earlier in this decision, the Senior Courts Act 2016 does not apply. However, she points to the fact that in any proceedings the Employment Court has the power to prohibit publication of evidence or pleadings under cl 12 of sch 3 to the Employment Relations Act 2000 (the Act). She further submits that in relation to the case in question AFT already has access to the Employment Relations Authority decisions, which are available to him on the New

Zealand Employment Law database. The Employment Court judgment in that matter is also already available to AFT on the Employment Court of New Zealand database.

[8] Counsel for the defendant in those proceedings then goes on to submit that other than the information which is already available as public information, the other information from the file sought by AFT ought not to be released to him because it relates to the employment relationship between the parties and will contain personal information relating to the plaintiff in that matter and others who gave evidence in the case. Counsel also notes that the Authority in its determination directed that the identities of participants are not to be published and that order was confirmed by the Employment Court in its judgment.

[9] Counsel for the plaintiff in the proceedings about which AFT seeks information concurs with counsel for the defendant having taken instructions from his client.

[10] Access to documents held on a file in the Employment Court is not provided for in the Employment Court Regulations 2000 (the Regulations). Whilst sch 3 to the Act deals with procedural matters having effect in relation to the Employment Court, the schedule does not contain any provision specifically dealing with access to court files. However, reg 6 of the Regulations provides that in any case for which no formal procedure has been provided by the Act or the Regulations, the Court may have regard to the provisions of the High Court Rules 2016 and dispose of the case as nearly as may be practicable in accordance with those rules.

[11] The relevant High Court rules are at Part 3, Subpart 2, dealing specifically with access to court documents. Primarily, hearings are to be open to the public and can be freely reported as part of the overriding principle of access to justice. Documents produced in court are available for inspection. The High Court Rules recognise that outside of that hearing process, and for a brief period afterwards covering the appeal period, persons other than the parties need permission to inspect documents held on a court file. As referred to in *Eden Group Ltd v Jackson*,² the

² *Eden Group Ltd v Jackson* [2017] NZEmpC 38.

reason for the restriction to persons who are not parties to the proceedings was set out in the High Court decision in *X v Standards Committee (No 1) of the New Zealand Law Society*.³ In *X Toogood J* stated:

[61] No doubt one of the reasons for the distinction between the preliminary stages of Court proceedings and the substantive hearing stage is that it is not until the hearing that the parties have fully identified the issues with which the Court is required to deal. The preliminary stages of litigation involve the parties in a great deal of paperwork, such as the filing of statements of claim and defence, and discovery by way of the exchange of lists of relevant documents. Changes of pleading often follow discovery and inspection, and the parties may be requested to provide further particulars of their pleadings.

[62] It is only once the case is fully shaped, at the commencement of the substantive hearing, that the presumption in the Rules against public disclosure of documents related to the proceedings ceases to apply, and the presumption changes to one of open justice.

[12] As Judge Smith stated in *Eden Group Ltd*, a balancing exercise is necessary by weighing up the privacy interests of the parties concerned in the litigation and the public interest in open justice.⁴

[13] The scheme prescribed under Part 3 Subpart 2 of the High Court Rules, so far as persons who are not party to the proceedings are concerned, is that the general right of access is simply to the formal court record. This would not satisfy AFT in this case and to have access to the documents which he now seeks to inspect requires the permission of the Court. There are some types of proceedings prescribed in the High Court Rules where any access at all, including even the court record, is not permitted without permission being granted by the Court. The proceedings in question in this particular case do not come within those categories.

[14] Rule 3.16 of the High Court Rules sets out the matters which need to be taken into account in considering AFT's application. That rule reads as follows:

3.16 Matters to be taken into account

In determining an application under rule 3.13, or a request for permission under rule 3.9, or the determination of an objection under that rule, the Judge or Registrar must consider the nature of, and the

³ *X v Standards Committee (No 1) of the New Zealand Law Society* HC Auckland CIV 2011-404-7750, 13 December 2011.

⁴ *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [9].

reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:

- (a) the orderly and fair administration of justice:
- (b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
- (c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:
- (d) the freedom to seek, receive, and impart information:
- (e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:
- (f) any other matter that the Judge or Registrar thinks just.

[15] In considering each of the categories set out in that rule, a balancing exercise is required between the orderly and fair administration of justice, the principle of open justice, and other such matters, against the need for protection of confidentiality or privacy in a particular case.

[16] As stated in the memorandum of counsel for the defendant in the file in question, there have already been orders prohibiting publication in order to protect the identities of the participants. AFT was not a party to those proceedings and if he were granted access to view the file, the Registrar would be involved in substantial attendances in ensuring that no information which might lead to the identity of the persons presently protected could be revealed. The proceedings themselves were of a sensitive nature and to require the Registrar to undertake that responsibility, in my view, is not justified.

[17] In his application AFT states that he is also trying to obtain information as to the involvement in the particular case in question of a former Chief Member of the Authority. It is difficult to ascertain exactly how that information might be relevant to the Human Rights Act proceedings in which AFT apparently is presently involved. However, it does not seem to be an appropriate reason for allowing AFT to have access to a file in which there is a substantial danger of the identities of parties involved and the sensitive nature of the matters covered in the proceedings being

revealed contrary to the protection they already have under the respective prohibition orders.

[18] Sometimes an order can be made enabling access to parts of a court file and subject to conditions. However, in this case such an order would be confined primarily to the decisions issued by the Authority and the Court. AFT already knows how to access those decisions, they already having been published on websites giving access to them.

[19] This is a case where the need to protect confidentiality and privacy interests outweighs the wider principle of open justice.

[20] Accordingly, AFT's application is declined.

M E Perkins
Judge

Judgment signed at 4.30 pm on 19 July 2017