

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 110
EMPC 340/2019**

IN THE MATTER OF a declaration under s 6(5) of the
Employment Relations Act 2000

AND IN THE MATTER OF an application to access Court documents

BETWEEN CHRISTINE FLEMING
Plaintiff

AND THE ATTORNEY-GENERAL SUED
ON BEHALF OF THE HONOURABLE
CARMEL SEPULONI IN HER
CAPACITY AS THE MINISTER OF
SOCIAL DEVELOPMENT AND
MINISTER FOR DISABILITY
First Defendant

AND THE ATTORNEY-GENERAL SUED
ON BEHALF OF THE HONOURABLE
ANDREW LITTLE IN HIS CAPACITY
AS MINISTER OF HEALTH
Second Defendant

AND JUSTIN JAMES COOTE BY HIS
LITIGATION GUARDIAN LUKE
MEYS
Third Defendant

Hearing: On the papers

Appearances: P Dale QC, counsel for plaintiff
S McKechnie and T Bremner, counsel for first and second
defendants
L Meys, as litigation guardian for third defendant

Judgment: 23 June 2022

**INTERLOCUTORY JUDGMENT (NO 5)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application to access Court documents)**

Introduction

[1] An application has been made to access Court documents. The application has been advanced by a solicitor for a party (Taikura Trust) to proceedings currently before the Employment Relations Authority. The proceedings have apparently been stayed pending the outcome of proceedings in *Fleming v Attorney-General*.¹

[2] Access is sought to the “court record and court file for [the proceedings], including: court judgments and minutes, applications, pleadings, transcripts, evidence, and any further documents which are filed in relation to these proceedings.” Access is said to be sought on the basis that Taikura Trust has: “a vested interest in the progress and outcomes of [*Fleming v Attorney-General*] as it will significantly impact (and perhaps be determinative of) the Authority proceedings to which the Taikura Trust is a party.”

[3] Each of the parties in *Fleming* have advised that they are content to abide the decision of the Court on the application.

Framework for analysis

[4] The Employment Relations Act 2000 does not deal with access to documents held by the Court, nor do the Employment Court Regulations 2000. The Senior Courts (Access to Court Documents) Rules 2017 (the Rules) have been applied by way of reference to reg 6 of the Regulations and/or by way of helpful analogy.²

[5] The Rules are made under the Senior Courts Act 2016. Section 173 of that Act provides that “[a]ny person may have access to court information of a senior court to the extent provided by, and in accordance with, rules of court.” As the Rules make

¹ *Fleming v Attorney-General* [2021] NZEmpC 77, [2021] ERNZ 279.

² *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 160 at [4].

clear, the Court may adopt a range of procedures for dealing with a request and any objections, including on the papers, which is the approach I consider appropriate in this case.³

[6] The applicant has asked for documents contained in the Court record which, given the context, I take to be a reference to the formal Court record as defined in the Rules. The Rules provide a general right of access to the formal Court record,⁴ so there is no issue in relation to the first part of the applicant's request. The formal Court record includes, among other things, the published judgments and any other minutes or orders made by the Court.⁵

[7] The applicant also seeks access to documents on the Court file. The Rules define "court file" as meaning "...a collection of documents in the custody or control of the court that relate to a civil proceeding..." There is no general right of access to documents held on the Court file – a request must be advanced under r 11.⁶

[8] Rule 11(2) sets out the requirements for requests. It provides that the person seeking access must:

- Identify themselves and give their address;
- Set out sufficient particulars of the document to enable it to be identified;
- Give reasons for asking to access the document, which must set out the purpose for which access is sought;
- Set out any conditions of the right of access that the person proposes as conditions they would be prepared to meet were a Judge to impose those conditions (for example, conditions that prevent or restrict the person from disclosing the document or contents of the document, or conditions that enable the person to view but not copy the document).

³ Rule 14.

⁴ Rule 8(1).

⁵ Rule 4.

⁶ Noting that the rules relating to access do not affect the Court's inherent power to control its own proceedings: r 5(1).

[9] A Judge may grant a request for access in whole or part, and may impose any conditions considered appropriate.⁷ A request may be refused solely for the reason that the request does not comply with any of the requirements set out above.⁸ The current request does comply with the applicable requirements.

[10] The principle of open justice is recognised as being fundamental to the common law system of justice.⁹ The principle may need to be departed from in certain circumstances when it is in the interests of justice to do so.¹⁰

[11] Rule 12 of the Rules specifies a range of matters that must be considered when determining an application for access. It provides:

12 Matters to be considered

In determining a request for access under rule 11, the Judge must consider the nature of, and the reasons given for, the request and take into account each of the following matters that is relevant to the request or any objection to the request:

- (a) the orderly and fair administration of justice:
- ...
- (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
- (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
- (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):

⁷ Rule 11(7)(a).

⁸ Rule 11(8).

⁹ *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2]; *Commissioner of Police v Doyle* [2017] NZHC 3049; and *Berry v Crimson Consulting Ltd* [2017] NZHC 3026 upheld on appeal in *Berry v Crimson Consulting Ltd* [2018] NZCA 460.

¹⁰ See the discussion in *Schenker AG v Commerce Commission* [2013] NZCA 114, (2013) 22 PRNZ 286; referred to in *Crimson Consulting Ltd v Berry* [2018] NZCA 460, [2019] NZAR 30 at [32]. See too [33].

- (f) the freedom to seek, receive, and impart information:
- ...
- (h) any other matter that the Judge thinks appropriate.

[12] Rule 13 deals with the approach to balancing the matters to be considered under r 12:

13 Approach to balancing matters considered

In applying rule 12, the Judge must have regard to the following:

- (a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to documents be limited:
- (b) during the substantive hearing, open justice has—
 - (i) greater weight than at other stages of the proceeding; and
 - (ii) greater weight in relation to documents relied on in the hearing than other documents:
- (c) after the substantive hearing,—
 - (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but
 - (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

Analysis

[13] I return to the reasons why access to documents on the Court file is sought. It is squarely focused on Taikura Trust's interest in the progress and outcomes of the *Fleming* matter. The Trust says that the progress and outcomes in *Fleming* will significantly impact on, and may be determinative of, the Authority proceedings to which the Trust is a party.

[14] The *Fleming* proceedings are now in the Court of Appeal, following the grant of leave to appeal by way of publicly available judgment.¹¹ Any substantive judgment

¹¹ *Attorney-General v Fleming* [2021] NZCA 510.

of that Court will be delivered in due course and no doubt be publicly available. This Court has granted a stay on the proceedings pending the outcome of the appellate process – again, via publicly available judgment.¹² A list of fixtures in both the Court of Appeal and Employment Court are posted online. The short point is that the applicant’s interest in following the progress of this matter, and its potential impact on the Authority proceedings, are met by public means. Access to, for example, the pleadings, briefs of evidence and transcript of hearing will cast no light on the stage at which the proceedings are at. In other words, granting access to the Court file would not assist in meeting the objectives set out in the application.

[15] Nor do I consider that granting access for the purposes identified in the application would be consistent with the principle of the orderly administration of justice. And previous cases have observed such a principle is of limited applicability to a private party seeking access to documents for a commercial purpose.¹³

[16] There is, of course, a recognised interest in the freedom to seek and receive information. That interest needs to be balanced against other factors in the assessment exercise, including the timing of the application. The proceedings in this Court are part-heard, in the sense that residual matters relating to remedies remain to be determined, and the Court’s liability judgment is now the subject of an appellate process. The effect of r 13(b) is to accord open justice a higher priority at the operative date of the application. The point has relevance in this case for the reasons set out by the Court of Appeal in *Greymouth Petroleum Holdings*.¹⁴

Conclusion

[17] Standing back and considering the matters in rr 12 and 13, and the authorities I have referred to, I do not consider it to be in the broader interests of justice to grant access to the Court file and decline to do so. The applicant remains able to view the formal Court record, and track the progress of the litigation process via publicly

¹² *Fleming v Attorney-General* [2021] NZEmpC 143, [2021] ERNZ 649.

¹³ *Schenker AG*, above n 9, at [38].

¹⁴ *Greymouth Petroleum Holdings Ltd v Empresa Nacional del Petróleo* [2017] NZCA 490, [2017] NZAR 1617 at [25].

available means, in order to meet the objectives identified in support of their application.

[18] The applicant is entitled to access minutes, orders and judgments of the Court made in relation to the *Fleming v Attorney-General* proceedings. The application is otherwise declined.

[19] No issue of costs arises.

Christina Inglis
Chief Judge

Judgment signed at 4.40 pm on 23 June 2022