

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2022] NZEmpC 64
EMPC 363/2021**

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 HOSEA COURAGE, DANIEL
PILGRIM AND LEVI COURAGE
Plaintiffs

AND THE ATTORNEY-GENERAL SUED
ON BEHALF OF THE MINISTRY OF
BUSINESS, INNOVATION AND
EMPLOYMENT, LABOUR
INSPECTORATE
First Defendant

AND HOWARD TEMPLE, FERVENT
STEDFAST, ENOCH UPRIGHT,
SAMUEL VALOR, FAITHFUL
PILGRIM, NOAH HOPEFUL AND
STEPHEN STANDFAST
Second Defendants

AND FOREST GOLD HONEY LIMITED
AND HARVEST HONEY LIMITED
Third Defendants

AND APETIZA LIMITED
Fourth Defendant

Hearing: On the papers

Appearances: B P Henry, D Gates and A Kenwright, counsel for plaintiffs
J Catran and A Piaggi, counsel for first defendant
S G Wilson, counsel for second, third and fourth defendants

Judgment: 13 April 2022

**INTERLOCUTORY JUDGMENT (NO 11)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application to access Court documents)**

Introduction

[1] An application has been made by the Gloriavale Leavers' Support Trust to access a copy of the opening and closing statements made during the course of the hearing of this matter. The application follows an earlier application made by the Trust for access to the notes of evidence, which was granted.¹

[2] The Trust supports a number of people who have left, or who are considering leaving Gloriavale, and family members. It is said that access to the submissions would provide an accurate record of what went on during the course of the hearing, and an opportunity for discussion and commentary amongst Trust members. Difficulties with the technology at the hearing (which was conducted via remote means) meant that members of the Trust who did attend missed portions of the submissions. This, I infer, has impeded their ability to report back to their members about what went on at the hearing.

[3] I directed that the application be provided to the parties. The second, third and fourth defendants oppose the application; the first defendant abides the decision of the Court; and the plaintiffs do not oppose the application.

Framework for analysis

[4] The Employment Relations Act 2000 does not deal with access to documents held on the Court file, 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

¹ *Courage v Attorney-General (No 10)* [2022] NZEmpC 54.

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

[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 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 Rules provide a general right of access to the formal Court record;⁴ there is no general right of access to other documents held on the Court file – a request must be advanced under r 11.⁵ Copies of the submissions filed in Court (to which access is sought in this case) do not comprise part of the formal Court record.⁶ That means that a request is required.

[7] 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).

[8] A Judge may grant a request for access in whole or part, and may impose any conditions considered appropriate.⁷

³ Rule 14.

⁴ Rule 8(1).

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

⁶ Defined in r 4.

⁷ Rule 11(7)(a).

[9] A request may be refused solely for the reason that the request does not comply with any of the requirements set out above.⁸

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

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, [2019] NZAR 30.

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].

[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.

Grounds for objection

[13] As I have said, the second, third and fourth defendants oppose the application. Mr Wilson, counsel for the Gloriavale defendants, makes the point that while these defendants had not opposed an earlier application for access to the written submissions by a media outlet,¹¹ the Trust is not subject to the same restrictions on use as the media. The Trust is described as a “hostile, non-media, third party organisation ... which explore many inherently sensitive matters.”

[14] The reason why access is requested (technological difficulties during opening and closing submissions) is described as speculative, and there is said to be a lack of specificity as to what portions of the submissions have been impacted. It is submitted

¹¹ *Courage v Attorney-General (No 9)* [2022] NZEmpC 51.

that, in any proceeding conducted virtually, a non-party could simply assert unspecified and non-particularised “technical difficulties” in order to be granted access to a range of Court documents. Granting access in such circumstances would “allow de facto public dissemination of written court documents with no effective controls on who can access them.” This would, it is submitted, be inconsistent with the underlying purpose of the Rules and the wider principle of the orderly administration of justice.

[15] Particular concerns are raised about access to the plaintiffs’ written submissions and what are described as unfounded accusations against non-party individuals; personal attacks on witnesses; and pejorative allegations. Broadly I understand the submission to be that the Trust is not seeking access for a legitimate purpose; rather it is to further its own private purposes. In these circumstances the application does not accord with the principles underlying the Rules, and the principle of open justice carries less weight accordingly.¹²

[16] Finally, it is submitted that if the application is granted it be on the condition that any person who requests that the applicant provide them with the requested documents agree in writing not to pass them on to any other person and that the documents are not made publicly available.

Analysis

[17] The application has been advanced after the hearing and prior to judgment. The timing of the application is relevant to the assessment exercise, as r 12 makes plain. That is because the effect of r 13(b) is to accord open justice a higher priority at the operative date of the application.¹³ Access to information covered by the Rules is to be given greater weight than at other stages of the proceedings.

[18] There is, as Mr Wilson says, a need to guard against non-parties gaining back-door access to Court documents by simply citing technological difficulties experienced

¹² Citing the approach recently taken in *New Zealand Animal Law Assoc v Attorney-General* [2020] NZHC 2376, (2020) 25 PRNZ 488.

¹³ *Cridge v Studorp Ltd* [2020] NZHC 1836 at [16].

during remote hearings. I do not consider the circumstances surrounding the current application fall into that danger zone. I accept that the outages would likely have impacted on the Trust's ability to follow the submissions advanced by counsel and impeded their access to the hearing, which had been granted by leave. And, while the application does not identify which parts of the submissions were impacted, it is difficult to see how that level of particularisation could be provided in this case, absent a copy of the documentation requested. Finally, it is notable that the Guidelines for Remote Viewing of Hearings¹⁴ which apply to any hearing in respect of which the Court has made a direction that remote viewing of the hearing is permitted, sets out a number of restrictions that must be complied with,¹⁵ but provides that the usual courtroom etiquette in relation to note-taking does not apply.¹⁶ It follows that had the technological difficulties not occurred, the Trust could have taken verbatim notes of what was said by counsel during submissions.

[19] It is, as has recently been observed, desirable to take a broader view of what open justice means, and how it is to be supported, in light of current modes of accessing information.¹⁷ The point has particular application in this case. The Trust represents a number of members. COVID-19 restrictions meant that the hearing, which would otherwise have been open to the public to physically attend, had to be conducted via remote technology. The Trust applied for, and was granted, leave to attend the hearing via Virtual Meeting Room. As the Court of Appeal made clear in *Greymouth Petroleum Holdings*:¹⁸

When a court is engaged in hearing a dispute its workings, including documents referred to or relied on, should be open to full scrutiny by all members of the public, unless there are particular and strong reasons to the contrary. The public should be able to follow and understand the hearing process.

¹⁴ Employment Court of New Zealand “Guidelines for Remote Viewings of Hearings” (September 2021) <www.employmentcourt.govt.nz>.

¹⁵ At [10]-[12].

¹⁶ At [13].

¹⁷ *Electrix Ltd v Fletcher Construction Co Ltd* [2019] NZHC 2678, (2019) 25 PRNZ 137 at [11]. Access to various documents, including opening and closing submissions, had been granted to a media outlet and the same documents were subsequently granted to a private individual for apparently private purposes by minute - referred to in *Electrix Ltd v Fletcher Construction Co Ltd (No 3)* [2020] NZHC 2348, 25 PRNZ 483 at [3].

¹⁸ *Greymouth Petroleum Holdings Ltd v Empresa Nacional del Petróleo* [2017] NZCA 490, [2017] NZAR 1617 at [25].

[20] I infer that the Court of Appeal was directing its observations at in-person hearings, but there is no reason to suggest that a different policy imperative would apply to hearings conducted remotely.

[21] The Trust is a private organisation with interests which do not align with those of the Gloriavale defendants. However, on its face the Trust seeks access to the documentation sought for a legitimate purpose, namely, to inform its members of what went on during the course of a public hearing and to facilitate informed discussion amongst a group with a particular interest in the proceedings. The purposes identified by the Trust fit comfortably with those recognised in r 12(f) (the freedom to seek, receive and impart information).¹⁹ The application is not in the same category as one made by an individual for a speculative or irrelevant purpose.²⁰ And the circumstances differ from cases such as *New Zealand Animal Law Assoc v Attorney-General*.²¹

[22] No confidentiality or commercial sensitivity interests have been identified which might otherwise carry weight in the balancing process. Nor do I think that granting access in the circumstances of this case would cut across the interest in the orderly and fair administration of justice, for the reasons expressed in the earlier judgment on the Trust's prior application.²²

[23] The Gloriavale defendants have identified some concerns relating to submissions made by counsel for the plaintiffs which identified a number of individuals. Those individuals were named throughout the evidence given in open Court. In any event, I consider that concerns raised on behalf of the Gloriavale defendants are appropriately dealt with by way of the imposition of conditions, rather than as a basis for declining the application.

[24] Standing back and considering the matters in rr 12 and 13, and the authorities I have referred to, I consider it to be in the interests of justice to grant access sought to the written submissions (opening and closing) filed in these proceedings. Access is to

¹⁹ *Electrix Ltd (No 3)*, above n 14, at [7].

²⁰ See the discussion in *Greymouth*, above n 15, at [56]-[61].

²¹ *New Zealand Animal Law Assoc*, above n 12, at [21].

²² *Courage*, above n 1, at [25].

be provided on the following conditions (which mirror those made in the earlier judgment):²³

- (a) the written submissions are not to be made publicly available, for example, on a website or social media;
- (b) the Trust may provide the written submissions on request to those it supports who express an interest, provided that person agrees in writing to comply with the requirement set out in (a) above. If they do not agree they remain able to advance their own application to the Court.

Christina Inglis
Chief Judge

Judgment signed at 8.45 am on 13 April 2022

²³ *Courage*, above n 1, at [26](a)-(b).