THIS JUDGMENT IS SUBJECT TO SUPPRESSION ORDERS AS INDICATED BELOW.

NOTE: INTERIM NAME SUPPRESSION ORDER MADE IN THE EMPLOYMENT COURT REMAINS IN FORCE AS SET OUT IN [5] OF THE REASONS.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA179/2010
[2010] NZCA 263

BETWEEN	S Applicant
AND	AIRLINE LIMITED Respondent

Hearing:	15 June 2010
Court:	William Young P, Ellen France and Randerson JJ
Counsel:	J Haigh QC and R McCabe for Applicant C H Toogood QC and K M Thompson for Respondent
Judgment:	23 June 2010 at 3.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The existing interim order for suppression of the applicant's name is extended until 5 pm on 30 June 2010. The name of the respondent airline is suppressed for the same period. If by 5 pm on 30 June 2010 the applicant has filed an application for leave to appeal to the Supreme Court, the existing orders will be further extended until the Supreme Court makes a determination in the matter.

C The applicant must pay the respondent costs for a standard application on a Band A basis plus usual disbursements.

REASONS

ELLEN FRANCE AND RANDERSON JJ
(Given by Ellen France J)

Introduction

[1] The applicant unsuccessfully brought personal grievance proceedings against the respondent before the Employment Relations Authority (the Authority). The applicant claimed he was unjustifiably disadvantaged by suspension from flying duties and then by his dismissal over a year later. He has now challenged the Authority's determination so the matter will be reheard afresh by the Employment Court.

[2] In the Authority, the applicant, his employer and other key participants had interim name suppression. The Employment Court has declined to continue name suppression in relation to the applicant pending the rehearing in July 2010 in that Court.[1] The power to make suppression orders is found in cl 12 of sch 3 to the Employment Relations Act 2000 (the Act). Clause 12 provides that the Court may make orders prohibiting the publication of material in proceedings and of the name of any party. Those orders may be subject to such conditions as the Court thinks fit.

[3] The applicant seeks leave to appeal under s 214 of the Act from the Employment Court's decision declining name suppression. That means the applicant must show that there is a question of law that, by reason of its "general or public

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1 [2010] NZEmpC 18.

importance or for any other reason" ought to be submitted to this Court.[2] The applicant accepts he cannot rely upon the question of law being of general or public importance and so he relies on the "any other reason" limb. The application is opposed by the respondent.

Factual background

[4] The essential facts are summarised by the Employment Court as follows:[3]

> The [applicant], as pilot in command of a commercial passenger aircraft, made an unscheduled overnight stop. The three crew members purchased alcohol en route to their accommodation and consumed this late into the night and even perhaps into the early hours of the following morning, later on which they would return to flying duties. The [applicant], who is married with a young family, had sexual relations with the cabin crew member. He claimed that these were consensual but she said they were not. She complained promptly about these events and there were subsequent police and employment investigations. The [applicant] was not prosecuted as a result of the incident but the company's investigations resulted, first, in the [applicant's] suspension and, later, in his dismissal.

[5] The Authority did not spell out why it made its non-publication orders, which covered the applicant and the respondent and the two other crew members. The Authority's suppression orders were to end on 8 March 2010 which was the last date for appeals in relation to the Authority's decision. The order suppressing the applicant's name has continued pending this Court's decision on the current application. The Employment Court continued, without objection, the interim name suppression order relating to the female cabin crew member.

The Employment Court decision

[6] The Employment Court concluded that although the suppression orders sought were interim, the countervailing considerations did not outweigh the importance of open justice. The Court emphasised the absence of evidence of any particular circumstances justifying suppression, although acknowledging the obvious embarrassment publication of the applicant's name would cause the applicant and

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2 Employment Relations Act 2000, s 214(3).
3 At [5].

potentially his family.[4] The Court also saw it as significant that there had been a considered substantive determination by the Authority. There was no dispute that the events in issue took place. The contentious matter was the consensual or otherwise nature of the sexual activity. However, the Court did not consider the question of whether the sexual activity was consensual or non-consensual was pivotal. That was because there were a number of reasons for the applicant's dismissal. Of no less importance was the excessive consumption of alcohol and the lack of responsible leadership shown by the applicant.

The basis of the proposed appeal

[7] The particular questions of law that the applicant seeks leave to advance are as follows:

> Did the Employment Court fail to take into account all relevant factors and wrongly take into account irrelevant factors; in particular:
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> (i) Did it fail to attach sufficient weight to the fact that in a *de novo* challenge the Employment Court could find that there was no sexual harassment (and/or that there was no justification for the dismissal) in which case the refusal to allow the application for non-publication would irreparably damage the reputation of the Applicant and would prevent and pre-empt any subsequent application for permanent non-publication of his name?
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> (ii) Did the Court wrongly hold (paragraph [20]) that the distinction between consent and non-consent would not be an issue for the Court in the *de novo* challenge?
>
> (iii) Did the Court wrongly find (at paragraph [21]) that permitting the publication of the Applicant's name might encourage other persons to come forward and relate other instances of previous sexual harassment, when the Court had concluded that the issue of consent or non-consent would not be an issue in the *de novo* challenge?
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> (iv) Did the Court wrongly conclude that the principles embodied in two previous judgments of the Employment Court namely *Z v Y Limited and A* [1993] 2 ERNZ 469 and *Sloggett v Taranaki Health Care Limited* [1995] 1 ERNZ 553, were relevant to this application for interim non-publication order, given that those judgments appear to specifically address permanent name suppression?

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4 At [19].

(v) Did the Court fail to attach sufficient weight to the interim nature of the application and attach undue weight to the importance of the "public right to know"?

(vi) Did the Court fail to address the disparity issue when finding that the Flight Attendant's name should be the subject of a non-publication order (not opposed by this Applicant) but refused to accord the Applicant the same protection when a *de novo* challenge had been made to the entirety of the Authority's findings, (it being a low level investigative body)?

(vii) Did the Court fail to place sufficient weight on the permanent reputational damage to the Applicant's reputation where a *de novo* challenge might result in the overturning of the Authority's decision?

Discussion

[8] We do not consider any of the proposed questions involve questions of law in terms of s 214(3). All of the matters raised under the proposed questions were considered by the Employment Court. The applicant's complaints relate to the weight accorded to these factors.

[9] The position in terms of such matters was set out by the Supreme Court in *Bryson v Three Foot Six Ltd*:[5]

> An appeal cannot however be said to be on a question of law where the fact-finding court has merely applied law which it has correctly understood to the facts of an individual case. It is for the court to weigh the relevant facts in the light of the applicable law. Provided that the court has not over-looked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly unsupportable.

[10] We need to specifically address the submissions made on behalf of the applicant by Mr Haigh QC in relation to proposed questions (ii) and (iv).

[11] As to (ii), Mr Haigh says that whether or not the sexual activity was consensual will be critical in the Employment Court hearing to the question of whether or not there was sexual harassment. On Mr Haigh's analysis, the Authority

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5 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25].

accepted the employer's finding that what occurred was sexual harassment by non-consensual sexual intercourse.

[12] Mr Haigh also submits that without suppression there will be practical difficulties should the question of reinstatement arise after the rehearing. He says this is particularly so as any publicity may include the employer's finding on the issue of consent. In these circumstances, it is argued that the Employment Court's decision wrongly pre-empts any subsequent decision by that Court which might have justified an application for non-publication.

[13] There may have been an arguable error of law if the matter had proceeded in the Authority on the basis the employer had found the intercourse was non-consensual. If that was so, the applicant could argue the Employment Court had "overlooked" a relevant matter in the way discussed in *Bryson*. However, we do not read the Authority's decision in that way. Rather, as was submitted by Mr Toogood QC for the respondent, the factual basis for the finding of sexual harassment was the female crew member's obvious distress after the encounter. The position could hardly be otherwise because the only response to the applicant's narrative was evidence that the female crew member made two distressed phone calls immediately after the incident. The crew member herself said she could not remember anything that occurred after around 11:30/midnight that night.

[14] The possible impact of any publicity on reinstatement was a matter addressed by the Employment Court.[6] As Mr Toogood acknowledged, publication may have some practical consequences. But, again, the proposed challenge is to the weight accorded that factor.

[15] We turn then to proposed question (iv). The Employment Court in referring to *Z v Y Ltd and A*[7] and to *Sloggett v Taranaki Health Care Ltd*[8] was setting out general principles. Those general principles cannot be quibbled with. The Employment Court did expressly consider the interim nature of the order sought but

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6 At [21] – [22].
7 *Z v Y Ltd and A* [1993] 2 ERNZ 469 (EC).
8 *Sloggett v Taranaki Health Care Ltd* [1995] 1 ERNZ 553 (EC).

considered other factors favouring publication outweighed that fact. Again, the proposed question is one of weight.

[16] Whilst Mr Haigh did not abandon the other proposed questions, he did not press their merit and we do not need to address them specifically.

[17] Having written the judgment, we have now had the benefit of reading the draft of William Young P. We accept the availability of that viewpoint but do not agree that the issues can give rise to a question of law.

Disposition

[18] The application for leave to appeal is dismissed. To preserve the applicant's ability to seek leave to appeal from the Supreme Court, the existing interim order for suppression of the applicant's name is extended until 5 pm on 30 June 2010. To avoid identifying the applicant, the name of the respondent airline is suppressed for the same period. If by 5 pm on 30 June 2010 the applicant has filed an application for leave to appeal to the Supreme Court, the existing orders will be further extended until the Supreme Court makes a determination in the matter.

[19] There is no reason why costs should not follow the event. The applicant must pay the respondent costs for a standard application on a Band A basis plus usual disbursements.

WILLIAM YOUNG P

[20] I have found this case rather more difficult than Ellen France and Randerson JJ.

[21] Part of my concern arises out of unease at the way the allegations against the applicant tend to be abbreviated to his disadvantage and the associated potential for inaccurate and unfair reporting.

[22] One aspect of this relates to the question whether the sexual activity was non-consensual. Evidence suggesting that it was non-consensual is confined to the actions of the flight attendant the following morning. She has declined to engage with the applicant's narrative of events (to the point that she objected to the record of his police interview being released by the police with the result that it was not shown to the respondent's investigator or the Authority). Unsurprisingly, therefore, the respondent has been careful in formulating its allegations against the applicant. It has disavowed the suggestion that its investigator concluded that the sexual activity was non-consensual. Instead the respondent has sought to rely on what, in the context of the facts of this case, may be a rather narrow distinction between sexual harassment and non-consensual sex. In all of this, I sense that the respondent has been willing to wound, but afraid to strike. While that is all very well as a litigation strategy, it has the potential to set the scene for unfairness, because, as [6] of this judgment indicates, it is so easy for the issue in the case to be treated as coming down to the "consensual or otherwise nature of the sexual activity".[9]

[23] A second aspect of the case where the allegations against the applicant may potentially be misreported is in relation to alcohol consumption. As I understand the facts (from what we were told by counsel), the applicant did not breach the respondent's alcohol policy albeit that he may not have kept prudently well to windward of the mark. Yet his alleged "excessive consumption of alcohol" (see [6] of this judgment), alongside his alleged "lack of responsible leadership", was seen by the Employment Court as being as important as his alleged sexual misconduct in the context of his dismissal.

[24] The other, but related, feature of the case that troubles me is whether releasing the applicant's name might have a practical impact on his ability, if otherwise successful in the Employment Court, to obtain reinstatement. The allegations against the applicant may receive widespread publicity ahead of the hearing in the Employment Court. If so, it is well within the bounds of possibility

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[9] It is, of course, also easy to overlook the reality that the ultimate issue in the Employment Court will not be what actually happened between the applicant and the flight attendant but rather the appropriateness or otherwise of the respondent's investigation.

that the respondent will invoke that publicity (even if it is unfair and inaccurate) as a basis for refusing reinstatement.

[25] If I were exercising a de novo jurisdiction, I would be inclined to grant interim name suppression. Of course, that is not the nature of the jurisdiction which this Court is currently exercising which requires a point of law to be identified. Doing so is not an easy task in the context of this type of decision but I see at least scope for argument that the Employment Court's approach was erroneous in point of law in not addressing sufficiently the possibility that publicity ahead of the hearing in the Employment Court might unfairly constrain the practical ability of the applicant to secure reinstatement. I therefore favour granting leave to appeal on that ground.

Solicitors:
NZALPA, Manukau for Applicant
Airline Ltd, Auckland for Respondent