

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 145
ARC 122/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN TE RUNANGA O KIRIKIROA TRUST
INCORPORATED
Plaintiff

AND MALLORY ALLEN
Defendant

Hearing: (on the papers in response to memoranda dated 29 September 2011
and 7 October 2011 and telephone directions conference on 21
October 2011)

Counsel: Alex Hope, counsel for the plaintiff
Rose Alchin, counsel for the defendant

Judgment: 3 November 2011

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

[1] In the course of a judicial settlement conference (JSC) held on 28 and 29 July 2011 an issue arose between the parties as to whether, in the event of a settlement, the Court had jurisdiction to make an order prohibiting publication of the names of certain individuals mentioned in the determination¹ of the Employment Relations Authority (the Authority) dated 20 October 2010. The named individuals had been employed by the plaintiff. The plaintiff claimed that the individuals in question had been the subject of adverse findings by the Authority but as they had not been heard in the course of the investigation, they had effectively been denied natural justice.

[2] The matter was not finally resolved at the JSC. Subsequently, the parties of their own volition agreed to make a joint application to the Authority to have the

¹ *Selliman v Te Runanga O Kirikiriroa Trust* AA 452/10.

Authority reopen its investigation for the limited purpose of rendering reference to the named individuals and to a particular Hamilton high school anonymous.

[3] In a further determination² dated 14 September 2011, the Authority reviewed its earlier determination and the stated grounds for seeking to have the investigation reopened. After full consideration of the issues raised, the Authority declined the application to reopen the investigation.

[4] On 29 September 2011, Ms Alchin, counsel for the defendant, filed in this Court a document intituled “(POINT OF LAW CHALLENGE TO DETERMINATION) MEMORANDUM OF COUNSEL IN RESPECT OF THE CURRENT POSITION OF THE MATTER”. Although the memorandum referred to a challenge to a determination, it would appear from its contents that what the defendant was really proposing was that this Court exercise its powers under cl 12(1) of sch 3 to the Employment Relations Act 2000 (the Act) to make an order prohibiting publication of the allegedly objectionable parts of the Authority’s determination of 20 October 2010.

[5] Clause 12(1) of sch 3 to the Act states:

12 Power to prohibit publication

- (1) In any proceedings the court may order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the court thinks fit.

[6] In reliance upon the decision of Judge Shaw in *The Chief Executive of the Department of Corrections v Tawhiwhirangi*,³ Ms Alchin contended that the Court had power under cl 12 of sch 3 to the Act to make a non-publication order in relation to an Authority determination. In *Tawhiwhirangi* the plaintiff had challenged a determination of the Authority which found that Mr Tawhiwhirangi had been unjustifiably dismissed from his employment as a corrections officer. The plaintiff also made application for an order of non-publication in relation to the names and identities of persons who were mentioned in the evidence and in the determination of

² [2011] NZERA Auckland 398.

³ WC 14/07, 10 May 2007.

the Authority. In particular, the plaintiff wished to prevent the publication of the name of the prisoner who had been the victim of the alleged assaults of Mr Tawhiwhirangi.

[7] The Court concluded that such an order was appropriate to preserve the privacy of a non-party to the proceedings and an order was, therefore, made prohibiting the publication of the names or any other identifying details of any prisoner named in the document pertaining to the case or “*otherwise mentioned in evidence including in the determination of the Employment Relations Authority.*” (Emphasis added)

[8] On 7 October 2011, counsel for the plaintiff, Mr Hope, filed a memorandum in response in which he respectfully expressed the view that the Court had exceeded its jurisdiction in *Tawhiwhirangi*. In counsel’s words:

6. It is Counsel’s view that clause 12 applies only to decisions of the Court. The Court has no power in respect of Employment Relations Authority determinations except for the power to set aside contained in section 183 of the Act. The Court’s powers in respect of the Authority (and its determinations) are circumscribed by section 188(4) of the Act.

[9] An issue then arose as to whether it was appropriate for me to make a definitive ruling on this contentious issue given that I had conducted the JSC. I directed the Registrar to advise counsel that I was reluctant to deal with the matter any further and I was proposing to refer the case back to the Chief Judge for allocation to the Judge rostered to hear the substantive proceedings. Subsequently, through the Registrar, one party strongly expressed the view that I should continue dealing with the issue; the other party expressed an opposing view.

[10] The difficulty, as I see it, is that the contentious issue is not simply a matter of law. Apart from having to make a decision on the jurisdictional point, there is potentially also a discretionary element involved in the exercise. In other words, if the Court were to rule that it did have power under the legislative provision in question to make an order under cl 12, the issue would then arise as to whether it was appropriate, in the exercise of the Court’s discretion, for such an order to be made in all the circumstances of the instant case.

[11] It is this potential discretionary element that causes me concern. In conducting the JSC, I was the recipient of a considerable amount and variety of information which a Judge assigned to hear the substantive action would simply not be privy to. For that reason, I do not consider it appropriate for me to determine any contentious issue between the parties even though a ruling on the matter at this point in time could potentially facilitate an early settlement.

[12] The Court file is to be referred back to the Registry.

[13] Costs are reserved.

A D Ford

Judge

Judgment signed at 9.30 am on 3 November 2011