IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC 167
WRC 16/05

IN THE MATTER OF	an application for name suppression
BETWEEN	BENJAMIN HARRY TIMMINS Plaintiff
AND	ASUREQUALITY LIMITED (FORMERLY KNOWN AS ASURE NEW ZEALAND LIMITED) Defendant

Hearing: (on the papers)

Counsel: the plaintiff in person
R L Towner and E J Coats, counsel for the defendant

Judgment: 12 December 2011

JUDGMENT OF JUDGE A D FORD

The application

[1] Mr Benjamin Timmins was an unsuccessful plaintiff in a case heard in this Court in December 2005. In a judgment[1] dated 29 June 2006, Judge Shaw held that a settlement agreement between the parties, which Mr Timmins sought to enforce, had never become unconditional and accordingly his claim was dismissed. Mr Timmins then sought leave to appeal the Employment Court decision to the Court of Appeal but, in a judgment[2] dated 7 December 2006, the Court of Appeal dismissed his application.

[2] The next development came on 8 August 2011, when Mr Timmins filed an application seeking name suppression. The defendant, by notice of opposition dated

[1] WC 10A/06.
[2] [2006] ERNZ 1073.

22 September 2011, strongly opposed the application. Helpful written submissions were subsequently filed by both parties and an extension of time was granted to allow Mr Timmins to produce certain medical evidence that he wished to place before the Court.

The background

[3] The defendant was described in the Employment Court judgment as a "State-owned enterprise (SOE) which provides meat inspection functions at freezing works and employs meat inspectors who undertake post-mortem inspection of meat products".[3] In 2001, Mr Timmins qualified as a meat inspector and was employed by the defendant at the AFFCO meat works at Imlay in Whanganui. A dispute then arose over the status of his employment. He claimed to be a permanent full-time inspector but the defendant alleged that he was employed as a casual worker although it was prepared to employ him as a permanent seasonal meat inspector. That dispute was apparently settled at mediation in December 2001 and a settlement agreement was entered into. The agreement, however, was subject to an employment agreement being entered into. Mr Timmins refused to sign any of the employment agreements presented to him.

[4] There was another issue which the Employment Court judgment describes in these terms:

> [2] In addition, Mr Timmins raised allegations that ASURE had failed to comply with food safety regulations and that defective meat carcasses were being exported from New Zealand. Following mediation, he repeated these allegations to customers of AFFCO as well as the US Department of Agriculture. He was formally dismissed on 13 May 2002.

[5] The Court of Appeal held that the Employment Court's primary findings as to the nature of Mr Timmins' employment were entirely factual and were not susceptible to appeal. The Court of Appeal also noted that Mr Timmins had applied for legal aid and was "a sickness beneficiary".[4]

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[3] At [8].
[4] At [10].

Case for the plaintiff

[6] The stated grounds for the application are:

> 1. The consequences of my publicly displayed information relating to a civil case are disproportionate to the ongoing hardships.
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> 2. I was a person who has worked constantly since entering the workforce but since my personal affairs have been published, I have suffered extreme hardships in regards to employment opportunities and this has interfered with my livelihood, physical standing and income.
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> 3. Breaches of the Privacy Act 1993 and the New Zealand Bill of Rights [Act] 1990 are also claimed.
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> 4. The ongoing hardships are attributed to my private affairs and name being publicised.

[7] Expanding on the stated grounds in a supporting affidavit, Mr Timmins made the following additional points: First, that it was part of an employer's "normal vetting procedure today" to check the names of prospective employees on the Internet and the official Ministry of Justice website recorded both Judge Shaw's substantive judgment and her subsequent costs judgment.[5] Mr Timmins further deposed that as his case was a civil proceeding and involved no offence or criminal act, the continued exposure of his name should be regarded as a breach of privacy in terms of the Privacy Act 1993. Finally, Mr Timmins claimed that the ongoing hardship attributed to the continued exposure of "his private affairs" on the website contravened s 9 of the New Zealand Bill of Rights Act 1990.

[8] In a minute dated 3 November 2011, the Court inquired of Mr Timmins as to whether he was aware that the substantive judgment of the Employment Court in his case, along with the judgment of the Court of Appeal in respect of his unsuccessful application for leave to appeal, had both been fully reported in hardcopy format in the official Employment Reports of New Zealand 2006. As reference had also been made in Mr Timmins' submissions to medical evidence, he was invited to forward to the Registrar any medical evidence he was relying on in support of his application.

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[5] WC 10A/06, 2 November 2006.

[9] In response to the query about the official law reports, Mr Timmins advised the Registrar that he was not aware that the judgments had been reported but he still wished to continue with the application noting:

> 3. I understand it may be difficult but not impossible to apply the ruling to hardcopies but I am mostly concerned about electronic forms that the general public can access.

[10] In response to the query about medical evidence, Mr Timmins subsequently produced two medical reports from Wicksteed Medical Centre and the Whanganui District Health Board dated 4 and 16 November 2011 respectively. I need not go into details but the reports were light on particulars and did not detail any specific symptoms. Both reports simply confirmed that the employment issue identified above has had an ongoing effect on Mr Timmins.

[11] In his detailed written submissions to the Court, Mr Timmins elaborated on the various grounds relied upon in his application. He also stated that "another disproportionate consequence" of the name publication was that he was "being constantly reminded of the private events between the defendant and I, which was not my making or choosing..." In this regard, Mr Timmins raised issues regarding an incident in July 2004 when he was apparently threatened with imprisonment for breaching a High Court injunction preventing him from disclosing certain information. The matter is referred to in passing in paragraph [64] of Judge Shaw's judgment as part of the background narrative. Mr Timmins described the effect which that particular incident had on him. He claims that he was totally unaware that his name "would be publicised in relation to an employment dispute" and that he had been informed, "that matters discussed during the dispute would remain strictly confidential".

The defendant's position

[12] Mr Towner, on behalf of the defendant, submitted that the plaintiff had not made out any recognised ground for the making of a permanent name suppression order and there was no basis upon which the Court should exercise its discretion to grant the order sought. Counsel stressed the point that the Employment Court

judgments referred to in the application were delivered in June and November 2006 respectively and they have been in the public domain ever since. In counsel's words:

> 17. Significantly, the two decisions in question have been in the public domain since June and November 2006 respectively. Therefore, a permanent non-publication order some five years later would be futile. The plaintiff's evidence is that the decisions are available on the Ministry of Justice website; it is entirely possible that the decisions were also referred to in news stories around the time of the judgment or have been cited in subsequent Authority or Court decisions. Given the publicity that the decisions have already received, the well-established principle of futility applies and should operate to defeat the plaintiff's application here.

[13] Mr Towner referred to various authorities in support of his submissions and, citing *Y v D*,[6] noted that the relevant test in determining whether to grant an application for non-publication is whether it is in "the interests of justice including those of the parties and the community". Mr Towner also stressed the importance of open justice considerations submitting, again in reliance on *Y v D*, that an applicant must:[7]

> ...displace the *usual presumption that there should be no restriction on publication of evidence or of a judgment and its reasons*... the tests to be met are exceptional circumstances and that the interests of justice must prevail.
>
> (Emphasis added)

[14] Mr Towner summarised his principal submission in these terms:

> 19. The interests of justice do not require that the plaintiff's application be granted. The plaintiff's experience in having had potential employers find out about the Court's decision on this matter, and his concern for the impact of this publication of his name or his reputation, is not "exceptional". The publication of the Court's decision was an inevitable consequence of the plaintiff having brought his claim against the defendant, and in the absence of any compelling, recognised grounds to prohibit publication of the plaintiff's name, the presumption of open justice should prevail.

Discussion

[15] The Court's jurisdiction to prohibit publication is prescribed in cl 12(1) of sch 3 of the Employment Relations Act 2000 in these terms:

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[6] [2004] 1 ERNZ 1 at [18].
[7] At [19].

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.

[16] In *Y v D*, Judge Colgan stated:

> [25] There are no immutable rules governing the question. The Court has broad discretion which should not be fettered except to the extent that it must be exercised in the interests of justice in a particular case.

That case involved allegations of sexual harassment in employment coupled with unchallenged expert medical evidence of a serious risk of self harm or suicide if the plaintiff's name were published. The Chief Judge granted the plaintiff permanent name suppression.

[17] The evidence before the Court in the present case discloses no exceptional medical circumstances which would displace the usual presumption in favour of open justice. In her judgment, Judge Shaw noted that Mr Timmins was suffering from stress and depression but she noted that there were other medical reports which showed that, "by November 2003, he was feeling better and had decided to focus on other matters which had a positive effect on him."[8] As noted in [10] above, the latest medical reports indicate some undefined ongoing effects that can be related back to the employment issue in "2000".

[18] Apart from the alleged health issue which I have dealt with, the thrust of Mr Timmins' case for name suppression appears to be that the continuing exposure of his cases on the Ministry of Justice website has caused him disproportionate embarrassment, humiliation and loss of enjoyment of life. In addition, the exposure has allegedly adversely affected his prospects of gaining meaningful employment (although no particulars were provided). There is then the additional allegation referred to in [11] above that Mr Timmins is being "constantly reminded" of what, no doubt, would have been a particularly stressful experience when he was apparently accused of being in breach of a High Court injunction.

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[8] At [63].

[19] The difficulty Mr Timmins faces, however, is that the possibility of embarrassment or adverse publicity to a party, particularly a plaintiff, is unlikely in itself to amount to an exceptional circumstance sufficient to warrant name suppression. This principle was highlighted in the High Court decision in *Clark v Attorney-General*:[9]

> [8] A corollary of the principle that the courts proceed in public is that those persons who are engaged in its processes, as litigants or witnesses, will also necessarily be publicly identified. They might well prefer that that were not so. However, that is seen as a necessary consequence of the public administration of justice. As Lord Atkinson said in *Scott v Scott* [1913] AC 417 at p 463:
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>> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.
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> [9] Those principles have been applied in cases involving applications for the suppression of names of litigants in civil proceedings. ...

[20] The additional point Mr Timmins raised about being "constantly reminded" of the unpleasant outcome of his alleged breach of the High Court injunction is something that Mr Timmins simply has to live with. It is part of the factual narrative of the litigation process which he became caught up in. It is the type of experience that he is unlikely ever to forget, even without the fleeting reference Judge Shaw makes to the incident in her judgment. In any case, the incident, which no doubt would have been fully documented at the time, does not amount to an exceptional circumstance warranting a non-publication order.

[21] Mr Timmins alleges that he was informed that matters discussed would remain strictly confidential. He does not disclose who the informant was or the context in which the statement was made. I suspect, however, that the statement would have been made in relation to the mediated settlement of his employment dispute referred to in December 2001. Certainly, no such assurance would have been given in relation to the Employment Court hearing. Mr Timmins was represented by

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[9] (2004) 17 PRNZ 161.

two experienced counsel at the time and there is no suggestion that they misled him in any way.

[22] Mr Timmins' reference to and purported reliance upon the Privacy Act 1993 and New Zealand Bill of Rights Act 1990 is misconceived. Neither of those legislative enactments assist his application. The Court is not an "agency" bound by principles 10 and 11 of the Privacy Act upon which he relies and with respect to his Bill of Rights Act argument, the publication of the two judgments comes nowhere near the high threshold required to establish a breach of s 9.

Conclusions

[23] Quite apart from the matters I have referred to, perhaps the most overwhelming consideration in weighing up where the justice of the case lies is the extraordinary delay on the part of Mr Timmins in pursuing his application for a non-publication order. I agree with Mr Towner that the futility of a permanent non-publication order, where the matters for which non-publication is sought have been in the public domain for some years, is a factor that militates strongly against the making of such an order. Mr Towner referred the Court to *Zanzoul v Removal Review Authority*[10] where the High Court said:[11]

> In the course of this argument, Mr Ellis made an oral application for suppression in these present proceedings of Mr Zanzoul's name, and any details leading to his identity. The Supreme Court has previously declined such an application, essentially on the well-settled basis that the Court will not order suppression where it would be futile because the matter is already in the public arena.

I respectfully agree with that statement of principle.

[24] The plaintiff fails in his application for a non-publication order. If costs are sought and cannot be agreed upon then Mr Towner is to file and serve an application before the end of January 2012 and Mr Timmins will have 30 days from service in which to respond.

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[10] HC Wellington CIV-2007-485-1333, 9 June 2009.
[11] At [106].

A D Ford
Judge

Judgment signed at 10.30 am on 12 December 2011