IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 91
CRC 8/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for permanent non-publication order
BETWEEN	GARY BURROWES Plaintiff
AND	COMMISSIONER OF POLICE Defendant

Hearing: (on the papers dated 25, 26 January, 11 February, 14 and 21 May 2015)

Appearances: A Shaw, counsel for the plaintiff
S Turner and S Clark, counsel for the defendant

Judgment: 16 June 2015

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In an interlocutory judgment of 5 February 2015, I made various orders for the purposes of the substantive hearing which included an interim order of non-publication in respect of the plaintiff's name and identifying details, and of his wife's name and identifying details, and as to the couple's children.[1] They were to apply until further order of the Court. I also made other non-publication orders as well as an order that certain aspects of the substantive hearing would be heard *in camera*.

[1] *Q v Commissioner of Police* [2015] NZEmpC 8.

[2] Subsequently, I issued a substantive judgment on 7 May 2015; at the same time I issued directions for resolving the plaintiff's application for permanent non-publication which had been advanced at the conclusion of the hearing.[2] This judgment determines that application.

[3] The plaintiff's application was in summary advanced on the basis that a permanent order was necessary for reasons of security and safety due to the plaintiff's past but also potential future involvement with a Police specialist unit.

[4] The application was supported by an affidavit from the plaintiff in which he described the need for security for persons involved in the work of the unit, and referred to incidents where a breach of security could lead to significant concerns for an employee within the unit. He was concerned that even if not reinstated, a release of his name in connection with the case could result in information coming "into the wrong hands" which would cause significant concerns for the safety of himself and his family. He noted in his affidavit that he had been involved as a member of the unit for some 14 years. In her affidavit, the plaintiff's wife echoed these concerns; she particularly referred to a concern that if members of the public became aware the plaintiff was a police officer who had formerly worked for the unit, there could be safety issues for herself and her children.

[5] The plaintiff's submissions referred to the relevant legal provisions and then emphasised the points traversed in the plaintiff's affidavit. At the time the application was made, the plaintiff's claims had not been resolved and so a submission was advanced which assumed the plaintiff's reinstatement to his former role. In the alternative, it was submitted that if reinstatement was not ordered, name suppression was still required to protect the plaintiff and his family, having regard to his former role in the unit. The submission referred to issues relating to the plaintiff's medical condition and outlined that the application was not made to protect the plaintiff from reputational harm, humiliation and embarrassment; rather, it was emphasised that it was about safety and security for him and his family, as well as the integrity of the unit. It was explained that an order was sought in respect

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2 *Q v Commissioner of Police* [2015] NZEmpC 57.

of the plaintiff's wife so as to preclude undue hardship to herself and other family members.

[6] The defendant opposed the application. An affidavit in support of the defendant's position was filed by Detective Inspector M.[3] In that affidavit he stated that whilst the effective and safe operation of the unit relies on details of its current membership remaining out of the public domain, the same considerations did not apply to past members. This was particularly so for former staff who were no longer police officers as they no longer conducted an operational role.

[7] He said that even current members of the unit did not live completely covert lives. They are required to maintain covert identities in case they were challenged by a member of the public when carrying out their duties. Consequently once a member left the unit, there was no issue with the public knowing who they were, or that they were previously a police officer, since any interactions with that person when in the unit would have been taken whilst using a covert identity.

[8] It was stated that many of the officers who have left the unit currently work as police officers with their real identity and occupation being public knowledge. It was also explained that members of the unit are known to be police officers by family and friends; what they do operationally must, however, be protected information.

[9] The view was expressed that there was nothing in the Court's substantive judgment which would suggest the plaintiff had worked undercover (which he had not) or that would connect him to the activities of the unit. Detective Inspector M stated that he did not understand the claim that if the plaintiff's name was published information could pass into the wrong hands. He said the very nature of the plaintiff's work in the unit was that his identity was covert. He did not consider that a relevant connection could be made. Information regarding previous incidents was also given which, according to Detective Inspector M, indicated there was a low risk of further security issues. He concluded that given the plaintiff's absence from the

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[3] This officer gave evidence to the Court at the substantive hearing; the anonymisation of his name is as adopted in my substantive judgment of 7 May 2015, *Q v Commissioner of Police*, above n 2.

unit it was highly unlikely anyone would now be interested in the fact that he was formerly a police officer.

[10] Submissions filed for the defendant focused on relevant legal principles and then emphasised that as factors relating to reinstatement were no longer applicable, there was no basis for alleged safety and security concerns. No evidence had been provided as to the need to make an order due to a relevant medical condition, and there was no evidence of a potential adverse effect on the plaintiff's family. Finally it was submitted that the matter was of current general interest which favoured publication of names.

Discussion

[11] In my interlocutory judgment of this matter I outlined the relevant principles for the making of orders for non-publication. I repeat what I then said:[4]

> [29] The principles relating to the making of orders for non-publication are well known. Clause 12(1) of Sch 3 of the Act permits orders of non-publication by the Court, and the applicable principles were recently considered by this Court in both the interlocutory and substantive judgments of *H v A Limited*.
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> [30] As I stated in that case:
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> > The principles of open justice, as articulated in many cases to the highest level … also warrant very careful consideration, along with any other factors pointing to publication. Factors against publication must also be carefully assessed, so that a proper balancing exercise is undertaken. It will often be necessary for reliable evidence to be produced in relation to relevant factors especially where an application for a non-publication order is opposed. Whilst the weighing of all factors must be undertaken carefully the Court or Authority must determine what outcome in all the circumstances is in the interest of justice; it does not have to find that there are exceptional circumstances.
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> [31] I note that non-publication orders have been granted by the civil courts where there is evidence that sensitive work is undertaken. So, in *Dotcom v Attorney-General* the High Court granted orders releasing certain details relating to the defendant's Special Tactics Group and the Armed Offenders Squad as there was significant public interest in the effective and safe operation of those agencies, and the safety of their members.

[12] As previously mentioned the main factor which is advanced to support the application for a permanent order is the plaintiff's assertion that there is a risk to his

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4 *Q v Commissioner of Police*, above n 1 (footnotes omitted).

safety and security. Those concerns were outlined in his affidavit which was filed prior to the substantive hearing, at a time when his application for reinstatement was unresolved.

[13] Had he been reinstated, then it is likely that I would have been persuaded that the interim orders should be made permanent so as not to undermine the activities of the unit as well as for the other reasons outlined in my interlocutory judgment. However, the application for reinstatement was declined, and it is more than five years since the plaintiff worked for Police as a member of the unit.

[14] Whilst in his January affidavit the plaintiff referred to a particular incident, detailed information as to the context of that matter has now been placed before the Court by the defendant. The opinion is expressed that it is highly unlikely anyone would now be interested in the fact that the plaintiff used to be a police officer. Shortly after the incident the plaintiff is recorded as stating he believed the threat was low at that time, which was a number of years ago. On the evidence in relation to that particular incident it does not suggest a significant on-going risk.

[15] It is significant in my view that the defendant submits that a continued order is not necessary for former members of the unit. The Police officer who gave evidence is well placed to evaluate any risks to former members. In the absence of any contrary evidence I must accept the opinion provided to the Court.

[16] I accept the other submissions made for the defendant, to the effect that there is no reliable evidence that the plaintiff's medical condition would be adversely affected by publication. The Court is informed that the plaintiff has indicated to third parties that he has succeeded in his claim, an assertion which is not challenged by the plaintiff. There is no evidence that publication would lead to personal humiliation and/or aggravate a medical condition. That being so, I am not persuaded that this is an example where compelling medical reasons justify non-publication, as for instance arose in cases such as *Y v D*[5] or *W v Police*.[6]

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5 *Y v D* [2004] 1 ERNZ 1.
6 *W v Police* AC73/00, 29 August 2000.

[17] The concerns raised by the plaintiff's wife are entirely understandable, but they were made at a time when reinstatement was contemplated, and there would have been a natural concern as to the potential security risks if the plaintiff had resumed his former role.

[18] Against the factors which have been raised for the plaintiff are the important principles of open justice. I am not persuaded the factors raised for the plaintiff should displace those principles.

[19] Although a discharge of the interim orders will mean that members of the public will be able to identify the plaintiff in this proceeding, and also that he was the applicant in the relevant determination of the Employment Relations Authority where name suppression was granted, there is now no reason as to why non-publication of his name should continue in respect of the determination. This Court need not make an order which reinforces the Authority's order.

Conclusion

[20] The interim orders made by this Court on 5 February 2015 relating to the plaintiff and his wife are discharged with effect from 12 noon on 25 June 2015. I direct further that this judgment is not to be published until that time.

[21] I shall deal with costs in relation to this application when dealing with the application for costs which the plaintiff has made in respect of the substantive matter in a separate judgment.

B A Corkill
Judge

Judgment signed at 9.45 am on 16 June 2015