

Express law

fast track information for clients

24 MAY 2019

Keyzer v La Trobe University [2019] FCA 646

In *Keyzer v La Trobe University* [2019] FCA 646, Anastassiou J of the Federal Court denied an application seeking suppression orders preventing the publication of names in connection with court proceedings which challenged the applicant's suspension from work. The decision was made on the basis that the suppression order would be ineffectual due to previous disclosure of the names. But his Honour also rejected arguments that the Court is required to conform to confidentiality provisions of a disciplinary process and that the 'chilling effect' on potential complainants under the grievance procedure prejudices the proper administration of justice.

Factual background

Two interveners, Dr Murray and Ms Brenton (the Interveners), brought an application for leave to intervene in the main proceeding for the purpose of seeking suppression or non-publication orders preventing the publication of their names in connection with the main proceeding. The main proceeding concerned the suspension from work of Mr Keyzer, Head of the School of Law at La Trobe University. The investigation arose from certain complaints made by the Interveners under the relevant collective agreement.

Issue for consideration

The primary issue for consideration was whether a suppression or non-publication order was 'necessary to prevent prejudice to the proper administration of justice' under s 37AG(1)(a) of the *Federal Court of Australia Act 1976*.

Reasoning

Justice Anastassiou considered that confidentiality of the Interveners' names had already been lost because their identities and some details of their complaints had been published in an online journal called Lawyerly: [23]. Accordingly any confidentiality order the Court could now make would be ineffectual: [26]–[27]. This was considered sufficient reason to refuse the application.

However, even if confidentiality had not been lost, Anastassiou J indicated he would still have refused the application: [28]. His Honour rejected the Interveners' argument that the Court's processes should conform to the grievance process

contained in the collective agreements, which provided for confidentiality of complainants: [31]. His Honour followed the Full Court decision of *Herald & Weekly Times Limited v Gregory D Williams (formerly identified as VAI)* [2003] FCAFC 217, which stated that giving 'practical effect' to entitlements under collective agreements 'cannot afford a proper basis ... to determine that a similar order appears to be "necessary in order to prevent prejudice to the administration of justice": [35].

His Honour also rejected a further argument that failure to make an order would have a 'chilling effect' on potential further complainants under the grievance procedure in the collective agreements: [36]. His Honour recognised that the potential for publicity associated with a proceeding issued in connection with the grievance process may adversely affect the preparedness of potential complainants to invoke the process: [42]. However, his Honour concluded that protection of the interests of the Interveners in maintaining their privacy was not necessary to prevent prejudice to the administration of justice: [47]. Due to the public interest served by open justice, an order under s 37AG(1) will only be warranted where it is necessary in the strictest sense to prevent prejudice to the proper administration of justice: [47].

Significance of decision

The decision shows both the impact that any earlier publication of names will have on the Federal Court's willingness to grant a suppression order and how the confidentiality of a disciplinary process may not be capable of being maintained when a party takes steps to challenge that process in a Court.

Impact on Federal Circuit Court, Fair Work Commission and Administrative Appeals Tribunal

Federal Circuit Court

The provisions relating to suppression orders in the *Federal Circuit of Australia Act 1999* (see: s 88G) mirror those of the Federal Court, where the FCC must consider whether the 'order is necessary to prevent prejudice to the proper administration of justice'. As a result, the FCC will likely be similarly hesitant to grant a suppression order on the basis of the provisions of a grievance process or the 'chilling effect' on future applicants.

Fair Work Commission

The *Fair Work Act 2009* gives greater scope to the Fair Work Commission (FWC) to make a confidentiality order. The FWC may make an order if 'it is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason': s 593(3) and 594(1). With no requirement to be satisfied of whether an order is necessary to prevent prejudice to the proper administration of justice, the FWC has a broad scope to grant confidentiality orders for any reasons it sees fit.

Administrative Appeals Tribunal

AAT hearings must be held in public unless the AAT makes a direction to the contrary under s 35 of the *Administrative Appeals Tribunal Act 1975*. In considering whether to make such an order s 35(5) requires that the AAT must apply the principle that it is desirable:

- (a) that hearings of proceedings before the Tribunal should be held in public
- (b) that evidence given before the Tribunal and the contents of documents received in evidence by the Tribunal should be made available to the public and to all the parties
- (c) that the contents of documents lodged with the Tribunal should be made available to all the parties.

The AAT must also pay due regard to any reasons in favour of such a direction.

As a result, the AAT has often taken an approach that preferences the disclosure of names. In *Paul v Minister for Immigration and Citizenship* [2011] AATA 831, the AAT rejected 'the proposition there is no public interest in disclosing the identity of a party to proceedings', instead stating that identification 'of parties and witnesses discourages perjury, allows unrestricted reporting by the media'.

For further information please contact:

Craig Rawson
Senior Executive Lawyer
T 03 9242 1248
craig.rawson@ags.gov.au

Fiona Dempsey
Senior Executive Lawyer
T 07 3360 5737
fiona.dempsey@ags.gov.au

Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to:
unsubscribe@ags.gov.au