Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 72
5547551

	BETWEEN	KIM ALICE BALDWIN (LABOUR INSPECTOR) Applicant
	A N D	X Limited Respondent

Member of Authority:	Helen Doyle
Representatives:	Gregory La Hood, Counsel for the Applicant Stephanie Dyhrberg, Counsel for the Respondent
Investigation Meeting	On the papers
Application and Memorandum of Counsel:	11 and 29 May 2015 from the Applicant 24 April and 22 May 2015 from the Respondent
Date of Determination:	3 June 2015

DETERMINATION OF THE AUTHORITY OF A PRELIMINARY ISSUE

A **The application for an interim non-publication order is declined.**

B **There will be an interim order prohibiting from publication the respondent's name for 28 days from the date of this determination to enable a challenge to the Employment Court if the respondent wishes. At the end of 28 days, unless there is a further order of the Authority or Employment Court, the interim order will lapse and there will be no restriction on publication.**

C **The parties are directed to mediation.**

D **Costs are reserved.**

Application for interim non-publication orders

[1] The respondent seeks an interim non-publication order under clause 10.1 of the Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting the name of the respondent and its employees and any other details that may lead to the identification of the respondent and its employees being published.

[2] The applicant opposes an interim non-publication order.

[3] By agreement this matter is to be dealt with on the basis of the papers lodged and submissions made.

The Proceedings

[4] The proceedings before the Employment Relations Authority are at an early stage. The respondent is of the that view mediation would be constructive. The applicant is not opposed to mediation but acknowledges that there are legal issues in dispute and resolution of these issues may ultimately need to be addressed by the Authority in due course. The applicant was not prepared to agree to an interim non-publication order until mediation had taken place.

[5] The statement of problem describes the problem or matter for resolution by the Authority as a claim against the respondent for penalties for breaches of section 12A (1) of the Wages Protection Act 1983 in that it sought or received premiums in respect of the employment of 25 employees it recruited from overseas prior to August 2013.

Power to prohibit publication

[6] The Authority has the power to make non-publication orders under clause 10(1) of the Schedule 2 of the Act which provides:

> *The Authority may, in respect of any matter, 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 Authority thinks fit.*

Grounds on which the application is made

[7] The application is made on the following grounds:

(i) The respondent suffered reputational and financial damage (in the region of $200,000 in lost net profit) last year as a result of publicity around the issues;

(ii) Negative media attention resulted in the Philippines Overseas Employment Administration (POEA) suspending the ability of the respondent to hire workers from the Philippines;

(iii) The respondent is likely to suffer further damage if it were to be identified in these proceedings, which is unlikely to be remedied even if the applicant's case is subsequently unsuccessful, including an effect on the respondent's ability to employ and retain staff;

(iv) The applicant has provided no evidence in support of its claim that the respondent has sought or received premiums in breach of s.12A(1) of the Wages Protection Act 1983;

(v) The applicant appears to agree that the respondent acted constructively and in good faith throughout the audit process and immediately took voluntary steps to remedy the concerns raised by the Inspectorate;

(vi) If it is determined that there was a breach, any such breach was inadvertent and promptly remedied.

[8] The applicant opposes the application on the basis that:

(i) The starting point is a presumption that in the Authority all evidence should be in public and freely reportable;

(ii) That the basis on which this application is made is distinguishable from other cases where non-publication orders have been made;

(iii) There is no evidential basis provided for the concerns raised with respect to financial and reputational concerns and that it is not accepted the Inspectorate has not provided evidence in support of a breach of s.12A(1) of the Wages Act 1983;

(iv) The merits of the proceeding are not relevant to the application for a non-publication order or the conduct after an alleged breach of legislation;

(v) Many employers have concerns about reputation or finances and that if this was the ground for a non-publication order then it would be available to virtually all employers in proceedings brought by the Labour Inspectorate;

(vi) There are no reasons in the interest of justice why a non-publication order should be made.

Determination on Non-Publication Order

[9] I accept Ms Dyhrberg's submission that the Authority has a broad, but not unfettered, discretion to do justice on a case by case basis in a principled way when exercising its discretionary power under clause 10.1 of Schedule 2 of the Act.

[10] Both counsel agree that the starting point is the principle of open justice, which is a fundamental principle of the New Zealand legal system. The interests of justice must require an order be made.

[11] As to what an applicant needs to establish for a non-publication order, Ms Dyhrberg referred the Authority to the Employment Court judgment in *H v. A Limited*[1] . The majority of the Full Court of the Employment Court stated that they did not agree that an applicant for non-publication orders needs to make out to a high standard that there are exceptional circumstances, as that is not the standard that Parliament had prescribed for such orders in this Court or the Authority[2].

[12] There must, however, be evidence and circumstances that support and justify non-publication orders and the departure from open justice. The application in *H v. A Limited* was made primarily on the basis that identifying the applicant may impact on the applicant's child and there was expert evidence to support a risk of adverse psychological effects if there were publicity.

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1 [2014] NZEmpC 92
2 At [78]

[13] I do note, that as stated at [78] of the judgment, non-publication of names or other identifying particulars in employment cases will be *exceptional* in the sense that such orders are and will be made in a very small minority of cases.

[14] The stage of the proceeding and the fact that this is an application for an interim non-publication order and not a final order is a relevant consideration.

[15] One of the grounds the application is based on is that further damage could be caused to the respondent if it is identified in these proceedings. This concern is primarily based on previous financial and reputational damage the respondent says that it sustained after earlier negative publicity. It includes a concern that the respondent will be permanently barred from bringing workers from the Philippines into the country. At the current time the respondent is suspended from bringing workers in from the Philippines. There is also a concern that the respective Immigration Authorities in the Philippines and New Zealand may take an adverse view of the respondent because of its involvement in the proceedings.

[16] I accept Mr La Hood's submission that there is no evidence for the Authority to reach a view on any causal link between any earlier publicity and the extent reputational and/or financial damage was suffered.

[17] It is also unclear why it is likely that the respondent would be permanently barred from bringing workers from the Philippines into New Zealand. The suspension of the respondent's ability to hire workers arose followed the airing of a television programme. I cannot be satisfied that any publicity arising from this proceeding between the applicant and the respondent would attract the same negative or adverse views and consequences that have arisen following the television programme. The issues between the applicant and the respondent are of a technical legal nature. The argument that any initial damage that flowed from publicity about the proceedings could not be remedied if the respondent is subsequently successful is not as strong as it would be in some other situations where non-publication orders have been made. This applies equally, I find, to the argument that the applicant has provided little evidence in support of its claim.

[18] The concern about the Immigration Authorities' reaction can only be a possible concern rather than a likely one. It is speculative in nature.

[19] Ms Dyhrberg is not seeking a blanket order but simply an order in respect of the respondent's identity and that of its employees. The hearing could still be open and the applicant named as a party.

[20] There is a risk though, I find in this case, that prohibition from publication of the respondent and its employees could lead to speculation and rumour about the identity of the employer in a case that concerns hiring of overseas employees and could be damaging for other employers or recruiters.

[21] I accept Mr La Hood's submission that the reasons for the respondent's application for non-publication, which are primarily commercial, are distinguishable from many cases in which non-publication orders have been made.

Determination

[22] I have carefully considered the application and supporting submissions. I am not, however, persuaded in this case, even at this interim stage of the proceedings, that the respondent's application for non-publication should be granted. I find that the principle of open justice in this case is not displaced by the concerns of the respondent.

[23] The application for interim non-publication is declined.

[24] I will however make an interim order prohibiting from publication the respondent's name for 28 days from the date of this determination to enable a challenge to the Employment Court if the respondent wishes. At the end of 28 days, unless there is a further order of the Authority or Employment Court, the interim order will lapse and there will be no restriction on publication.

Mediation

[25] The parties are directed to mediation and Mr La Hood should advise the Authority of the outcome of mediation.

Costs

[26] I reserve the issue of any costs.

Helen Doyle
Member of the Employment Relations Authority