

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 74  
5463588

BETWEEN

ROSEMARY CARTER  
First Applicant

MICHAELA CARTER  
Second Applicant

A N D

MARIE JOSEPHINE VUGLER  
Respondent

Member of Authority: T G Tetitaha

Representatives: E Hartdegen, Counsel for Applicants to 25/11/14  
Applicants in person thereafter  
D Quinn, Counsel for the Respondent

Submissions Received: 1 and 4 December 2014 from the Applicants  
1 and 5 December 2014 from the Respondent

Date of Determination: 13 March 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. An order pursuant s221 of the Employment Relations Act 2000 striking out Helen Erceg as a party to these proceedings.**
- B. I direct the respondent to file a further memorandum and/or affidavit disclosing what has happened to the communications books by 30 March 2015 3 pm. The application for disclosure by the applicants is otherwise refused.**
- C. I direct the applicants to file in the Authority and serve upon the respondent copies of the following documents by 30 March 2015 3 pm:**

- a) **The records referred to in para.5 of the amended statement of problem being the “*record of all time worked and payments made to*” the first applicant.**
- b) **The records referred to in para.28 of the amended statement of problem being the “*record of all time worked and payments made to*” the second applicant.**
- c) **The contract of employment between the first applicant and the Salvation Army (or the relevant associated legal entity that employed the first applicant).**
- d) **The contract of employment between the second applicant and the Salvation Army (or the relevant associated legal entity that employed the second applicant).**
- e) **Copies of time records relating to services performed by the first applicant for the Salvation Army between 22 April 2013 and 9 March 2014.**
- f) **Copies of time records relating to services performed by the second applicant for the Salvation Army between 16 September 2013 and 9 March 2014.**
- g) **The contract of employment between the first applicant and any entity other than the Salvation Army that employed the first applicant between 22 April 2013 and 9 March 2014.**
- h) **The contract of employment between the second applicant and any entity other than the Salvation Army that employed the second applicant between 16 September 2013 and 9 March 2014.**
- i) **Copies of time records relating to services performed by the first applicant for any employer other than the Salvation Army between 22 April 2013 and 9 March 2014.**
- j) **Copies of time records relating to services performed by the second applicant for any employer other than the Salvation Army between 16 September 2013 and 9 March 2014.**

**k) Any and all other written documentation recording dates and times of hours worked by the second applicant for any entity between 16 September 2013 and 9 March 2014.**

**l) Any and all other written documentation recording dates and times of hours worked by the first applicant for any entity between 22 April 2013 and 9 March 2014.**

**m) The settlement agreement between the first applicant and the Salvation Army.**

**n) The settlement agreement between the second applicant and the Salvation Army.**

**o) Any documentation relating to the alleged “malicious allegations” made by Ms Erceg, and in particular any correspondence from the Salvation Army to the applicants relating to the alleged malicious allegations.**

**D. Upon receipt of the settlement agreements, the Authority officer is to refer this to another Authority member to determine if they may remain on the file or not.**

**E. Costs are reserved.**

### **Employment relationship problem**

[1] In a Minute dated 3 December 2014 I directed the filing of any applications for disclosure by 5 December 2014 and that the applications would be dealt with on the papers. Unfortunately I was only made aware of the receipt of these applications yesterday.

[2] Both parties apply for disclosure. The respondent filed a memorandum dated 5 December 2014 and an affidavit of H Erceg. The applicant has filed no response to the respondent’s requests for disclosure.

### **Helen Erceg**

[3] The original pleading named Helen Erceg as a respondent. It was accepted she was not the employer. She held a power of attorney on behalf of her mother, the

respondent. At a teleconference on 7 November 2014 an amended pleading was directed to be filed addressing how the alleged causes of action against Ms Erceg arose.

[4] The amended statement of problem filed on 14 November 2014 does not name Ms Erceg as a party and further states “*the claim against Mrs Vugler as employer is withdrawn.*” In the circumstances I make an order pursuant s221 of the Employment Relations Act 2000 striking out Helen Erceg as a party to these proceedings.

### **Determination**

[5] The Authority may, in investigating any matter, call for evidence and information from the parties or any other person pursuant to s.160(1)(a) of the Employment Relations Act 2000 (the Act). The touchstone for the Authority in exercising its power to call for evidence and information from parties is relevance.

[6] At this stage of the proceeding both parties have filed their amended pleadings. The only evidence before the Authority is an affidavit of Ms Erceg sworn 5 December 2014.

### ***Application for Disclosure by Applicant***

[7] The applicants seek the following documents:

- (a) Copies of all cheques and cheque stubs from the respondent’s cheque book from 24 April 2013 to 10 March 2014;
- (b) “Communications book (A4)” x two;
- (c) Wages notebook containing a record of wages and expenses;
- (d) An email dated 24 November 2014 from H Erceg to M Carter;
- (e) Correspondence between H Erceg and J Mills on or about 21 November 2014;
- (f) Phone records of H Erceg between 24 April 2013 and 10 March 2014 for all calls made by Ms Erceg to specified telephone number;

- (g) Bank statements, cheques and records of outgoing wages for payment to the respondent's "helpers".
- (h) Medical records of respondent relating to a fall on an unspecified date.

[8] There is little indication from the applicants of the relevancy of the disclosure requested or whether it has been provided by the respondent by consent.

[9] I understand from the respondent's Memorandum copies of the cheques and cheque stubs from the respondent's cheque book from 24 April 2013 to 10 March 2014 are being provided by agreement. That does not require an order from me.

[10] The communications books are agreed as relevant but no longer in the possession or control of the respondent. The respondent does not disclose where the books have gone. I shall be directing the respondent to disclose what has happened to the communications books.

[11] The respondent states the wages books do not exist. Accordingly, no order shall be made.

[12] Emails between Ms Erceg and the second applicant should be in her power and possession and do not require an order from me.

[13] Correspondence between the Salvation Army (J Mills) and Ms Erceg around 21 November 2014 are not relevant to these proceedings. Ms Erceg is not a party and was not the employer. She is alleged to have been an 'agent' of the respondent without more. In my view there is no properly pleaded basis for viewing this correspondence. Any contractual relationship between the parties ended on 9 March 2014. There is no pleading or evidential disclosed to show the subsequent behaviour by Ms Erceg was pursuant to any 'agency.'

[14] Similarly the phone records of Ms Erceg are irrelevant to the proceeding. Ms Erceg is not a party and was not the employer. The fact she may have called several numbers does not assist me in determining whether the applicants were employees or not.

[15] Payments made to Ms Vugler's "helpers" are irrelevant. This will not assist me in determining whether these applicants were employees.

[16] I am not minded to make a wide ranging order for disclosure of the respondent's medical records given their limited relevancy. The reason for seeking the records is to define dates the respondent was hospitalised during this period. Ms Erceg has already deposed to the respondent being in hospital from 25 to 27 November 2013 and was out of the country from 4 to 16 February 2014. The applicants would be better placed to reconsider the amount of time they allege they provided care services to the respondent given the above. A medical certificate from the respondent's doctor attesting to her hospital admissions and a copy of her passport should be sufficient. There is no basis to seek disclosure of the entire medical file. I decline to order any disclosure of the respondent's medical records at this juncture. I will revisit this order if the dates and times the respondent was in hospital or absent from the country remain at issue following the filing of further evidence.

[17] I direct the respondent to file a further memorandum and/or affidavit disclosing what has happened to the communications books by **30 March 2015 3 pm**. The application for disclosure by the applicants is otherwise refused.

***Application for Disclosure by Respondent***

[18] The respondent cross-applies for discovery. She seeks copies of various documents from the applicants relating to the times worked for the respondent, Salvation Army and any other employer during the relevant period. She also seeks copies of any contracts of employment between the applicants, Salvation Army and any other employer during the relevant period and a settlement agreement reached with the Salvation Army pertaining to a personal grievance. The respondent also applies for an order for discovery against a third party, namely the Salvation Army for some of the documents above.

[19] The respondent alleges the documentation is relevant to the issue of whether the applicants were independent contractors or employees and their credibility about the dates and times allegedly spent providing services to her. She refers to the affidavit of Helen Mary Erceg in respect of discovery applications sworn 5 December 2014.

[20] From the evidence of Ms Erceg it is clear there are relevant documents held by the applicant about whom they were working for during the relevant periods of time. The Amended Statement of Problem appears to allege they worked exclusively for the

respondent. During the material times, it appears one or both of the applicants worked for the Salvation Army and possibly elsewhere as well. As noted above, there is evidence the respondent was in hospital or overseas during times the applicants allege they worked for her.

[21] In my view the information sought is relevant and cogent to the matters I need to determine. Accordingly I direct the applicants to file in the Authority and serve upon the respondent copies of the following documents by **30 March 2015 3 pm**:

- a) The records referred to in para.5 of the amended statement of problem being the “*record of all time worked and payments made to*” the first applicant.
- b) The records referred to in para.28 of the amended statement of problem being the “*record of all time worked and payments made to*” the second applicant.
- c) The contract of employment between the first applicant and the Salvation Army (or the relevant associated legal entity that employed the first applicant).
- d) The contract of employment between the second applicant and the Salvation Army (or the relevant associated legal entity that employed the second applicant).
- e) Copies of time records relating to services performed by the first applicant for the Salvation Army between 22 April 2013 and 9 March 2014.
- f) Copies of time records relating to services performed by the second applicant for the Salvation Army between 16 September 2013 and 9 March 2014.
- g) The contract of employment between the first applicant and any entity other than the Salvation Army that employed the first applicant between 22 April 2013 and 9 March 2014.
- h) The contract of employment between the second applicant and any entity other than the Salvation Army that employed the second applicant between 16 September 2013 and 9 March 2014.

- i) Copies of time records relating to services performed by the first applicant for any employer other than the Salvation Army between 22 April 2013 and 9 March 2014.
- j) Copies of time records relating to services performed by the second applicant for any employer other than the Salvation Army between 16 September 2013 and 9 March 2014.
- k) Any and all other written documentation recording dates and times of hours worked by the second applicant for any entity between 16 September 2013 and 9 March 2014.
- l) Any and all other written documentation recording dates and times of hours worked by the first applicant for any entity between 22 April 2013 and 9 March 2014.
- m) The settlement agreement between the first applicant and the Salvation Army.
- n) The settlement agreement between the second applicant and the Salvation Army.
- o) Any documentation relating to the alleged "*malicious allegations*" made by Ms Erceg, and in particular any correspondence from the Salvation Army to the applicants relating to the alleged malicious allegations.

[22] There is an issue whether the settlement agreements in paragraph [20](m) to (n) can be brought before the Authority at all especially if they were executed pursuant to s149(3) of the Employment Relations Act 2000. Upon receipt of the settlement agreements, the support officer is to refer this to another Authority member to determine if they may remain on the file or not.

[23] I decline to order any disclosure against the Salvation Army at this stage. If the applicants are compliant, no further information is required. However if they are non-compliant, the application for disclosure can be revived at a later stage.

### ***Application for Closed Hearing***

[24] The applicants also request a “closed hearing” on the grounds that Helen Erceg has made threats that a number of people are “*looking forward to seeing us at the hearing*”, referring to her sons, brother, sisters and family friends, etc. The applicants have allegedly applied for a protection order against Ms Erceg and attach a copy of an unsigned letter from Michaela Carter to “*Whomever this may concern*”. The letter alleges harassing behaviour by Ms Erceg, including text messaging and phone calls. This is not evidence of an application for protection order.

[25] I have the power in investigating any matter to “*decide that an investigation meeting should not be in public or should not be open to certain persons*” pursuant to s.160(1)(e) of the Act.

[26] The basis for the applicant’s request for a “closed hearing” is Ms Erceg’s allegedly harassing behaviour. I have no evidence that a protection order has been applied for and/or granted. That is not a basis for closing a hearing from the public. It is a basis for ensuring adequate security is available. The venue for this matter shall be the Tauranga District Court. There is adequate security available in the event any harassing behaviour occurs.

[27] In the circumstances, I decline the application for the hearing to be closed to the public.

[28] Costs are reserved in respect of all of these applications. Any award of costs in respect of these applications shall be determined at the end of the hearing.

### **Next Steps**

[29] I issued a Minute on 3 December 2014 asking parties to confirm their availability for hearing on 12 to 13 March 2015 in Tauranga. There was no confirmation from either party as to their availability and those dates were reallocated elsewhere.

[30] This matter needs to be resolved. The parties are to confirm their availability for hearing this matter in Tauranga in May, June and July 2015. They are also to confirm that this matter is ready for hearing i.e. that there are no outstanding pre-trial issues including compliance with the above orders.

[31] A two day hearing shall be set down by the Registry thereafter together with timetabling orders for the filing of evidence. If the parties do not provide their hearing availability or are non-compliant with my above directions, no hearing time shall be allocated. The matter shall be referred back to me for directions.

**T G Tetitaha**  
**Member of the Employment Relations Authority**