

Note: This determination contains an order prohibiting publication of certain information at paragraph [8]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 192
3307380

BETWEEN	FJI Applicant
AND	EDK First Respondent
AND	UWK Second Respondent

Member of Authority:	Rowan Anderson
Representatives:	Applicant in person Andrew Finch, counsel for the Respondents
Investigation Meeting:	On the papers
Submissions and further information received:	Up to and including 7 January 2025
Determination:	3 April 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] FJI and EDK entered into a record of settlement in November 2022. The record of settlement was signed by a mediator appointed by the chief executive of the Ministry of Business, Innovation, and Employment to provide mediation services.

[2] UWK is a Director and the Chairperson of EDK. UWK signed the record of settlement on behalf of EDK.

[3] FJI has lodged a statement of problem seeking, amongst other remedies, a compliance order, based on an alleged breach of a non-disparagement provision forming part of the record of settlement.

[4] Two preliminary issues have been raised. First, EDK and UWK take issue with UWK being named as a respondent in the proceeding, on the basis that he was not personally a party to the record of settlement. Secondly, an issue was raised by EDK as to whether a stay of proceedings or adjournment would be appropriate having regard to proceedings concerning the same subject matter in another forum. This preliminary determination deals with those two issues only.

Non-publication

[5] The principle of open justice is of fundamental importance and non-publication will ordinarily only be granted where specific adverse consequences could reasonably be expected to occur.¹

[6] Here, at least two of the parties, entered a confidential settlement of an employment relationship problem. The Authority's investigation relates to the enforcement of that settlement which would otherwise be confidential. Further, the claims relate to an assertion by FJI that there has been a breach of the non-disparagement provision in the terms of settlement.

[7] Having regard to the above, I consider that there are sound reasons, on an interim basis, for a departure from the starting point that the parties be identified. To the extent the parties may disagree, that can be dealt with when considering any permanent non-publication orders in conjunction with the investigation of the substantive issues.

[8] I order, pursuant to clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act), a prohibition on the publication of the name and any identifying details of the applicant, First Respondent, and Second Respondent. This order is interim only and will remain in place until such time as the Authority considers whether permanent non-publication orders should be made or otherwise orders.

¹ *Erceg v Erceg* [2016] NZSC 135.

[9] A random generator has been used to refer to the parties in these proceedings. This is reflected in the intituling of this determination.

The Authority's investigation

[10] The Authority held a case management conference on 6 December 2024. The two preliminary issues were identified and briefly discussed. It was agreed that there was no factual dispute in relation to those issues and that they could be dealt with 'on the papers' without the need for an in-person investigation meeting.

[11] Timetable directions were issued for the provision of any evidence and submissions relating to the preliminary issues.

[12] The following issues required investigation and determination by the Authority:

- (a) Should the Authority's investigation be stayed or adjourned pending resolution of defamation proceeding filed by FJI?
- (b) Should UWK, the Second Respondent, be struck from the proceedings?

[13] In submissions, EDK confirmed that it did not wish to advance any application for a stay of, or adjournment to, the Authority's investigation. Given that, I need not deal with the first of the preliminary issues further and the Authority's investigation is to continue.

[14] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Should UWK be struck from the proceeding?

[15] UWK requests that he be struck out of the proceeding as he was not a party to the record of settlement. He contends that while he signed the record of settlement, that he did so only on behalf of EDK as an officer of the company.

[16] It is submitted for UWK that there is no sufficient nexus between him and the employment dispute and that he was at all relevant times acting only in his capacity as an officer of EDK rather than in any personal capacity.

[17] FJI submits that UWK was aware of the record of settlement and its terms and that the relevant comments said to have been disparaging were made by UWK, as Chairperson of EDK, in a personal capacity. It is submitted that the relevant statements said to have been disparaging were unnecessary and unrelated to the purpose of the relevant document.

[18] FJI's amended statement of problem seeks damages be awarded for breach of the record of settlement as against both EDK and UWK. While the term 'damages' is used, I infer, including having regard to the sums sought,² a reference to penalties in the initial statement of problem lodged, and the limitation on the means of enforcement available provided for at s 151 of the Act,³ that FJI is seeking the imposition of penalties in terms of s 149(4) of the Act. Relevantly for present purposes, FJI also seeks compliance orders.

[19] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority. The imposition of penalties for breach of s 149 terms of settlement are not limited to parties, and they may be imposed where a third party has knowledge of the settlement and the relevant terms of it.⁴ The same approach is applicable in the case of compliance orders.⁵

[20] Formal evidence is yet to be given as to the extent of any involvement, if any, by UWK in relation to the actions said to give rise to the enforcement action being taken. However, it is not disputed that UWK was a signatory to the terms of settlement, albeit that EDK and UWK maintain that he did so only in his capacity as an officer for EDK. Further, the documentation provided to the Authority indicates the contested statements said to be disparaging are attributed to UWK, albeit again that there is disagreement as to the capacity in which UWK was acting. It is noted that these are preliminary observations, and no finding has been made as to whether there has been a breach of the terms of settlement, nor as to whether UWK should be subject to any enforcement action in his personal capacity. Those issues are yet to be determined.

² The sums sought by FJI are consistent with the maximum penalties that may be imposed by the Authority at s 135(2) of the Act.

³ *South Tranz Ltd v Straight Freight Ltd* [2007] ERNZ 704 at [38].

⁴ *Musa v Whanganui District Health Board* [2010] NZEmpC 120 at [57]; *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2010] NZEmpC 165 at [53].

⁵ *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2010] NZEmpC 165 at [51] to [53].

[21] I find there is an insufficient basis on which it would be appropriate to strike UWK from the proceedings at this stage. I consider it appropriate UWK remain a party having regard to the claims made and orders sought.

Conclusion and next steps

[22] UWK is to remain a party to the proceedings.

[23] The Authority will issue draft timetable directions relating to the investigation of FJI's substantive claims.

Costs

[24] Costs are reserved pending determination of FJI's substantive claims.

Rowan Anderson
Member of the Employment Relations Authority