

Attention is drawn to an order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2023] NZERA 429
3225219

BETWEEN GXQ
 Applicant

AND TWD
 Respondent

Member of Authority: David G Beck

Representatives: Andrew Shaw and Gwen Drewitt counsel for the Applicant
 Janet Copeland counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 8 June 2023 from the Applicant
 30 June 2023 from the Respondent

Date of Determination: 9 August 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] GXQ is seeking a compliance order relating to an alleged breach of a record of settlement agreement made by the parties, pursuant to s 149 of the Employment Relations Act 2000 (the Act). The disputed matter relates to the interpretation of a term of the agreement that

GXQ be paid a sum of remuneration at a specified termination date as “an ex-gratia payment from which PAYE will be deducted” after completing what was effectively a lengthy notice period. In the event, during the notice period GXQ found alternative employment and left TWD prior to the expiry of the envisaged notice period. As a result, TWD determined GXQ’s ongoing remuneration ceased upon the expiry of GXQ’s employment. The dispute, expressed narrowly is: should the ex-gratia payment be calculated up to GXQ’s last day of employment or the later specified termination date in the settlement agreement?

[2] However, before the matter can proceed to an investigation meeting a preliminary issue has arisen as to whether TWD is to be ordered to disclose what GXQ considers to be documentation that will aid my investigation but which is currently the subject of privilege (being legal advice privilege and without prejudice to settlement privilege). GXQ has indicated a willingness to waive privilege attached to the documentation but TWD has not and is opposing a direction from the Authority on the basis that public interest and case law precedent does not warrant such disclosure.

[3] The material sought to be disclosed is described broadly as:

- (a) Without prejudice correspondence and file notes of telephone conversations between the respective parties’ legal representatives; and
- (b) Correspondence and file notes of telephone conversations between the respective parties and their legal counsel.

Application for non-publication order

[4] As a further preliminary matter is GXQ is asking the Authority pursuant to s 10 (1) Schedule 2 of the Act, to impose a permanent non-publication order to protect their identity. The application is made primarily on the basis that the confidentiality provisions of a s 149 of the Act settlement agreement, naturally support the notion of ongoing confidentiality, including that of the parties and to reinforce the public interest in encouraging parties to view confidential settlement options as a means of enforcing their rights, without the sanctity of confidentiality being broken. In essence, counsel is ascribing an added value to ‘confidentiality’ as a distinct component of a settlement agreement that may typically include a compromise of legal rights.

[5] Counsel also cited the fact that GXQ lives and continues to work in a smallish community and if he is identified in a publicly available determination, he may be placed under pressure to disclose the circumstances of the departure from TWD which may impact standing and credibility with the new employer.

[6] TWD's counsel opposes the non-publication order being granted suggesting GXQ has not met the high standard required to depart from the concept of open justice, citing a leading Supreme Court authority and suggesting that the GXQ has failed to produce evidence to support a submission that publication would be detrimental.¹

[7] Notwithstanding submissions, I need to be satisfied that a sound basis for the exercise of the discretion the statute provides is apparent as non-publication does depart from the important principle of open justice. I must normally be convinced of specific adverse consequences pertaining to the applicant that would allow me to depart from the open justice principle as the standard for such a departure is a high one.² However, in terms of viewing the role of the Authority broadly as resolving employment relationship problems, I struggle to see any compelling public interest in a narrow dispute over the interpretation and application of a specific term of what is a confidential settlement agreement.

[8] I consider the legal issues involved in this dispute are not intricately linked to the identity of the parties and their actions, as they would be in, for example, a breach of a non-disparaging provision or a party refusing to abide by an unambiguous term or a default in monetary payments owed involving a party seeking a penalty for non-compliance. I also agree that there is a possibility in publishing the parties' names that it may lead to unhelpful speculation as to what their dispute was about and the impact upon GXQ's future career may also be at issue. The Employment Court in considering how the interest in open justice should be weighed, has noted that:

The reality is that the routine online publication of decisions of the Employment Relations Authority and the Employment Court creates a search mechanism for those who wish to use it, for example, to screen applicants for employment. It has become

¹ *Erceg v Erceg* [2016] NZSC 135.

² *Ibid.*

increasingly well recognised that the spectre of publication puts many employees off pursuing their claims, which in turn raises important access to justice issues.³

[9] In opposing non-publication, counsel also suggested that a public interest exists as to transparency of knowledge of stakeholders in the organisation's expenditure. With respect, that is not a relevant factor I consider compelling, as the perspective must be of the parties to the settlement agreement and their interests – at a basic level, they both chose a path to settle by compromise and on a strictly confidential basis, this pathway normally has mutual benefits worth preserving.

[10] In carefully weighing the factors identified, I have resolved to not publish the parties' names and any identifying locational features of the dispute on the basis that the specific disputed issue warrants a continuing cloak of confidentiality as originally agreed. This order is made on a permanent basis.

[11] I use the following random identifiers for the parties:

- GXQ – the applicant.
- TWD – the respondent

The disclosure issue

[12] Unlike other jurisdictions, the Authority has no regulations setting out a specific regime allowing the Authority to compel disclosure of documents. However, ss 157 and 160 of the Act empower the Authority to 'direct' that documents that will assist an investigation be produced and the Employment Court has specifically acknowledged that ss 160(1)(a) and 160(2) of the Act allow for the direction of disclosure. In addition, s 134A of the Act provides for the awarding of a penalty (including on the motion of the Authority) should a party obstruct or delay an Authority investigation. In reviewing the scope of the Authority's investigative role Member van Keulen has noted he could:

³ *Chief of Defence Force v Darnley* [2021] NZEmpC 40 at [3].

... call for evidence and information from the parties or any other person and I may take into account such evidence and information, which in equity and good conscience I believe is fit for me to do so; and:

The guidance from ss 157 and 160 of the Act coupled with the investigatory powers and the obligations I have to discharge in investigating indicates that I can call for information to be provided on a fairly broad basis.⁴

[13] Some further assistance on assessing the admissibility of material that has privilege attached is provided by the Evidence Act 2006 and the Employment Court Regulations 2000. These lead to a conclusion that the Authority should apply the generally accepted principles of privilege when assessing the disclosure of documents.⁵

Relevance

[14] Following on from the observations above and putting aside potential issues that the doctrine of privilege present, the first and perhaps only consideration, is whether the material sought will assist me in what is essentially an interpretation and application dispute of a settlement term. This requires me to consider the basic premise of how such a task is to be approached. In *Crossen v Yangs House Ltd*, in a parallel issue of a disputed s 149 settlement agreement term, it was noted that the Supreme Court in *Firm P11 Ltd v Zurich Australian Insurance Ltd* determined the broad approach to interpreting a settlement agreement was:

... an objective exercise to ascertain the meaning it would convey to a reasonable person having all the background knowledge reasonably available to the parties in the situation they were in at the time of the agreement. In this exercise context is significant and taking it into account does not depend on establishing any ambiguity in the agreement being interpreted.⁶

[15] The question essentially is, will having some knowledge of the parties documented negotiating positions leading up to the execution of the settlement agreement assist in my interpretation of matters in dispute to presumably aid me in drawing inferences on what was subjectively intended by the parties in entering the settlement agreement. I think not, as logically they are a separate consideration to my objective consideration of the s 149 settlement

⁴ *New Zealand Tramways and Public Passenger Transport Employees Union Wellington Inc v Tranzurban Hutt Valley Ltd* [2019] NZERA 159 at [14] and [15].

⁵ See observations in *New Zealand Meat Workers Union inc v South Pacific Meats Ltd* [2015] NZEmpC 138.

⁶ *Crossen v Yangs House Ltd* [2021] NZEmpC 102 at [12] citing *Firm P11 Ltd v Zurich Australian Insurance Ltd* [2024] NZSC 147, [2015] 1 NZLR 432 at [62] – [63].

agreement wording and how it has been applied, as is here, in an ongoing employment relationship.

[16] My view is that the wording of the s 149 settlement agreement is sufficient in itself, to enable me to draw an objective conclusion about the meaning of the agreement and its application, subject to consideration of submissions from the parties. There is no additional evidence that would assist this task, apart from the potential of undisclosed ‘open’ communication between the parties. The obvious inference I can draw from the actual settlement agreement is that the parties reached a point in the employment relationship where they wished it to end on a full, final and confidential basis.

[17] Counsel for TWD also drew my attention to how the Employment Court has approached the issue of privilege in *Elisara v Allianz New Zealand Ltd* where it is noted there is “a distinction between the process leading up to a settlement agreement being entered and the resultant settlement agreement itself. The former is privileged. The latter is not”.⁷ I have not been convinced that an exception allowing me to waive privilege in these circumstances exists nor am I persuaded that any exceptional circumstances prevail that would allow without prejudice communications to be disclosed.

[18] I have found that the application for a direction from the Authority that TWD disclose privileged and without prejudice material is unsuccessful. The Authority will be in contact with the parties to timetable an investigation meeting and to discuss the scope of such.

Costs

[19] Costs are reserved until conclusion of the substantive matter.

David G Beck
Member of the Employment Relations Authority

⁷ *Elisara v Allianz New Zealand Ltd* [2018] NZEmpC 100 at [40].