

**Attention is drawn to the order
prohibiting publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 259
5400880

BETWEEN G
 Applicant

AND H (a former employee of G's)
 Respondent

Member of Authority: M B Loftus

Representatives: Karina Coulston, Counsel for the Applicant
 Michael Guest, Advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 20 and 26 November 2012 from the Respondent
 26 November 2012 from the Applicant

Determination: 26 November 2012

DETERMINATION OF THE AUTHORITY

[1] The applicant, G, has initiated a claim against H seeking penalties for alleged breaches of both the Employment Relations Act 2000 and H's obligations to G as an employee.

[2] H, along with his statement in reply, filed an application seeking the determination of three preliminary issues. They are:

- a. Interim suppression of H's identity;
- b. A request the substantive matter be heard by a specific member of the Authority; and
- c. An application the substantive claim be referred to the Employment Court.

[3] G opposes all three requests.

[4] Having considered the submission of the parties and the relevant law, I reach the following conclusions.

[5] A significant document has been tendered in support of the application for interim suppression. Notwithstanding that, the issue is, I conclude, relatively narrow. The nub of the defence is that the issues giving rise to this claim have already been litigated and determined in another jurisdiction. H's identity was suppressed there. If that is correct, then the issue of suppression has already been decided and it is not for me to interfere with that decision. Unfortunately I will not know whether or not the defence has validity until I have heard the substantive matter.

[6] Suppression is granted where the circumstances of a case outweigh the principle of open justice. Such circumstances exist where there is a real risk the administration of justice would be frustrated or rendered impractical (*R v Patterson* [1992] 1 NZLR 45 (HC) at p50). To potentially nullify the effect of a decision of another body would, in my view and given the lack of the power to do so, frustrate the administration of justice.

[7] I therefore grant the application on an interim basis. It will be revisited in the substantive investigation meeting when a decision can be made about the defences validity that is fully informed and contextualised. A properly informed decision can then be made about whether or not suppression should continue.

[8] I also suppress G's identity on the same basis as to do otherwise could lead readers to an earlier decision in which H is identified (see 9 and 10 below).

[9] H also asks that consideration be given to assigning the substantive matter to a specific member of the Authority. The argument tendered in support is the identified member *heard and decided the substantive case between the parties in April 2012*.

[10] The request is declined. First, the argument tendered in support is factually inaccurate. The matter referred to was between G and another former employee. H was a witness and not a party. This is a new, and separate, application. Second, it is for the Authority to determine who hears a matter and third, the inference that a party might have influenced the selection of a member could raise the spectre of bias and that, as Ms Coulston submits, should be avoided at all cost.

[11] The application for removal simply reads *I ask that consideration be given to whether this is a matter which ought to be determined as a matter of law by the Employment Court.*

[12] In response Ms Coulston notes there is no supporting argument and a question of law has not been identified. She goes on to say this *is a low level and non-technical matter with no question of law which would require determination by the Court.*

[13] As Ms Coulston notes there is a failure to identify a question of law that should be transferred and no argument has been tendered in support of the request. If that were not enough to see the application fail, I add that I agree with Ms Coulston's second observation in 12 above. This is a penalty application. The law is well established and the outcome will depend on the facts.

[14] For these reasons the application for removal fails.

Conclusion

[15] For reasons given above I determine the preliminary matters as follows:

- a. The application H's identity be suppressed is granted on an interim basis. The issue will be revisited at the investigation meetings to consider the substantive claim. G's identity is also suppressed on the same basis;
- b. The request the substantive matter be assigned to a specific member of the Authority is declined; and
- c. The application the matter be removed to the Employment Court fails.

Costs

[16] Costs are reserved though I express the view the parties should avoid additional effort and expense and deal with the issue as part of the costs consideration that will follow determination of the substantive claim.

M B Loftus
Member of the Employment Relations Authority