

**NOTE: This determination contains an order prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 565  
3300420

BETWEEN HZZ  
Applicant

AND WFW  
Respondent

Member of Authority: Lucia Vincent

Representatives: Maryline Suchley, advocate for the Applicant  
WFW's Director for the Respondent

Investigation Meeting: 16 September 2024 in Christchurch

Submissions Received: 16 September 2024 from the Applicant  
16 September 2024 from the Respondent

Determination: 23 September 2024

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication**

[1] This determination contains an order for non-publication regarding the parties' names and any identifying details such as the company director of WFW.<sup>1</sup>

[2] A record of settlement (**ROS**) between HZZ and WFW included the following clause about confidentiality:

The terms of this Record of Settlement, the settlement within it and all matters pertaining to it, shall remain strictly confidential to the parties and their advisers. The Employee and the Employer may only disclose to third parties, if asked, that all matters have been satisfactorily resolved between them, unless otherwise required by law.

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<sup>1</sup> Pursuant to clause 10(1) of Schedule 2 of the Employment Relations Act 2000 (**Act**).

[3] Prior to the investigation meeting, HZZ made a formal request for a non-publication order. In support of the application, HZZ referred to the following factors:

- (a) They felt embarrassed about the position they found themselves in.
- (b) They had experienced the adverse impact of public exposure during a challenging period of their life due to previous involvement with the Authority in the past, resulting in an unwelcome online presence.
- (c) The sensitive nature of the circumstances. I gathered this related to the terms of the ROS and events leading up to and following the ROS.
- (d) The risk to future job opportunities due to unwarranted public scrutiny in a relatively small job market locally.

[4] WFW sought the protection of an order for non-publication too. HZZ did not oppose the extension of the order to WFW. An order extending to WFW may be necessary not to undermine any order made in favour of HZZ i.e. to reduce the risk of inadvertently identifying HZZ who continues to work in the profession in the same industry and region.

[5] There is some speculation by HZZ about what may result online from any publication. WFW's director gave evidence about what was discovered online leading to non-compliance with the ROS, resulting in current proceedings. That is not insignificant.

[6] I am satisfied the evidence shows that the suggested adverse consequences could reasonably be expected to occur, and that fairness requires an exception to the general rule of open justice. There is little if any public interest in knowing the names of the parties to a confidential ROS where one party has been forced to enforce the ROS because the other party has failed to comply with its obligations. This is the kind of case the Employment Court has indicated should be protected by an order for non-publication.<sup>2</sup>

[7] I make an order for non-publication of the parties' names and any details that would identify them such as the name of the sole director of WFW.

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<sup>2</sup> At [87] to [89], *MW v Spiga Ltd* [2024] NZEmpC 147, numbering and footnotes omitted.

### **What is the employment relationship problem?**

[8] HZZ and WFW entered into a ROS dated 18 April 2024. The ROS required WFW to pay HZZ specified amounts of money.

[9] It is common ground that WFW has not paid HZZ any amounts owing under the ROS.

[10] HZZ has asked for a compliance order to require WFW to pay these amounts, as well as a non-publication order.

### **How did the Authority investigate?<sup>3</sup>**

[11] HZZ lodged a statement of problem on 30 May 2024. The statement of problem was served on 5 June 2024 at the registered office and address for service for WFW.<sup>4</sup> It was also served on 6 June 2024 on the sole director for WFW.

[12] WFW did not lodge a statement in reply within 14 days as required.

[13] The Authority contacted WFW and WFW's director by way of letter dated 25 June 2024 to remind them of the obligation to lodge a statement in reply which was overdue. No reply was received.

[14] The Authority set the matter down for a case management conference call (CMC) on 19 August 2024 at 11:00am. The Authority served a CMC notice dated 1 August 2024 on 6 August 2024 on WFW and WFW's director.

[15] I held a CMC on 19 August 2024. HZZ and WFW's director attended. The parties agreed to an investigation meeting scheduled for 1pm on 16 September 2024. Timetabling directions were agreed.

[16] A notice of direction was sent to the parties along with a notice of investigation meeting on 19 August 2024. These required WFW to lodge a statement in reply by 23 August 2024 and a statement of evidence with any further relevant document by 13 September 2024. No documents were lodged by WFW.

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<sup>3</sup> 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.

<sup>4</sup> As listed on the companies office website.

[17] The Authority held an investigation meeting in person on 16 September 2024. HZZ, HZZ's advocate, and WFW's director attended. I heard evidence under oath or affirmation from HZZ and WFW's director. HZZ's advocate and WFW's director gave closing submissions.

**What were the issues?**

[18] The issues were:

- (a) Has WFW breached the ROS?
- (b) Should I order compliance under section 137 of the Act?
- (c) Should I award costs and reimburse the filing fee?

**Has WFW breached the ROS?**

[19] After HZZ and WFW's director signed the ROS, a mediator contacted the parties and signed it on 8 May 2024. HZZ and WFW's director confirmed they had signed the ROS and given the mediator permission to do so.

[20] Among other things, the ROS required WFW to pay HZZ the following amounts:

- (a) Four weeks' notice in lieu pursuant to HZZ's employment agreement (to be paid within seven days of the date of receipt of the mediator signed ROS from MBIE):
- (b) Accrued annual holidays calculated at the rate of eight percent of HZZ's gross earnings since starting, in accordance with section 23 of the Holidays Act 2003 (to be paid in the next pay round):
- (c) Payment for the public holiday on Easter Monday, pursuant to section 49 of the Holidays Act (to be paid in the next pay round):
- (d) \$5,000.00 without deduction pursuant to section 123(1)(c)(i) of the Act (to be paid within seven days of the date of receipt of the mediator signed ROS from MBIE).

[21] HZZ and WFW's director agreed WFW had not made the above payments in accordance with the ROS.

[22] WFW's director explained his reasons for WFW not making the payments. I understood these to essentially be that he had discovered information online about HZZ and a different former employer involving proceedings in the Authority. This caused WFW's director to conclude HZZ had a habit of being involved in employment disputes. WFW's director no longer wanted WFW to be bound by the ROS based on this information.

[23] WFW agreed to make payments under the ROS. Not doing so within the timeframes set out in the ROS has breached the ROS.

[24] I am satisfied WFW has breached the ROS.

### **Should I order compliance?**

[25] Section 137 of the Act gives the Authority discretion to make an order requiring someone to comply with any terms of settlement that section 151 provides may be enforced by a compliance order. If I make an order for compliance, then I must specify a timeframe within which the order is to be obeyed. Section 151 applies to any agreed terms of settlement enforceable by the parties under section 149(3).

[26] I am satisfied the ROS is a section 149 settlement, enforceable under section 151, and able to be subject of a compliance order under section 137, if appropriate to do so.

[27] It appears WFW's director does not intend to make the payments under the ROS because of a change of heart based on information found online. This information and WFW's unwillingness to make the payments do not assist WFW who is bound to make the payments in accordance with the ROS. It appears WFW will not rectify this unless a compliance order is made.

[28] An order for compliance is appropriate. I order WFW pay HZZ the amounts payable under the ROS within 14 days of this determination.

### **Should I award costs?**

[29] HZZ has sought costs:

- (a) An amount that is one half of the tariff rate: \$2,250;
- (b) Recovery of an invoice for \$892.50 previously paid; and

(c) Reimbursement of the filing fee of \$71.55.

[30] HZZ incurred costs of \$892.50 for legal counsel, 50% of which was estimated related to attempts to obtain payment under the ROS (the remaining 50% relating to legal advice and negotiation of the ROS).

[31] HZZ incurred further costs instructing an advocate of \$2,193.63, more than half of which involved preparation for and attending the investigation meeting for enforcing the ROS.

[32] HZZ's advocate provided a copy of an offer to settle prior to the investigation meeting to avoid the costs incurred after that date. It was dated 27 August 2024, labelled "without prejudice as to save costs," and contained an offer of settlement should WFW pay the amounts owing under the ROS along with costs by 29 August 2024. I am not satisfied two days was a sufficient time for a response to qualify as a Calderbank offer for the purposes of costs. I have not taken this into account.

[33] The Authority has discretion to order any party to a matter to pay to another party such costs and expenses as it thinks reasonable.<sup>5</sup> If unsuccessful, a party will usually have to contribute to the costs of the successful party, as well as meeting their own costs. The daily tariff applied by the Authority sets the starting point from which relevant factors and principles may guide an upward or downward adjustment of the amount of costs awarded. The Authority currently sets the tariff for costs at \$4,500 for the first day of any matter.<sup>6</sup>

[34] The Employment Court has endorsed the average daily tariff approach of the Authority and relevant principles governing costs in the Authority.<sup>7</sup> These include considering whether the conduct of the parties increased costs unnecessarily (warranting an adjustment up or down), without compromising the Authority's otherwise modest approach to costs.

[35] The investigation meeting lasted an hour. In the circumstances, where HZZ has necessarily taken action to recover amounts under a ROS that ought to have been paid

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<sup>5</sup> Clause 15, Schedule 2, of the Act.

<sup>6</sup> See: [Practice Direction of the Employment Relations Authority \(era.govt.nz\)](https://era.govt.nz)

<sup>7</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [43-47] and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [108].

without needing to do so, I view one third of the tariff rate appropriate (\$1,500). I award this amount and reimbursement of the filing fee (\$71.55).

### **Summary of Orders**

[36] I order WFW to comply with the ROS by paying HZZ the amounts payable under the ROS within 14 days of the date of this determination.

[37] I also order WFW to pay HZZ costs of \$1,500 and \$71.55.

[38] I have made a non-publication order regarding the parties' names and any details that would identify them such as the name of the sole director of WFW.

Lucia Vincent  
Member of the Employment Relations Authority