

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 67
5392332
5394761

BETWEEN ALICE KIWA, JANELLE
KIWA and HAYDEN CLARK
Applicants

A N D PHIL'S PLACE LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: M Whitehead, Advocate for Applicants
S Grice, Counsel for Respondent

Investigation Meeting: By teleconference

Submissions Received: 24 February 2014 from Applicants
24 February 2014 from Respondent

Date of Oral
Determination: 25 February 2014
Date of Determination: 26 February 2014

**INTERIM DETERMINATION OF THE AUTHORITY
(NON-PUBLICATION)**

A. The Authority declines to grant the non-publication order sought.

Employment relationship problem

[1] The respondent seeks a non-publication order. The grounds for the non-publication order related to Mr Phillip Rudd's presence as a witness, "*purient*" interest by the media, the negative impact upon Mr Rudd's current restaurant business, and the effect upon his ability to move about the community. It also raised the effect of allegations of possible employee theft upon the applicants.

[2] The applicants oppose the non-publication order. They submit there are no reputational factors preventing publication. They object to the suppression of media

due to Mr Rudd's celebrity status. They submit he should not be given more protection than anybody else. They are unaware of ongoing media interest.

Issues

[3] There is a sole issue for determination, namely should there be a non-publication order preventing publication of all or any evidence or pleadings leading to the identification of Mr Rudd?

Legal framework

[4] There is a presumption that all evidence should be given in public and freely reportable¹.

[5] The Authority may determine whether an investigation meeting "*should not be in public or should not be open to certain persons*" and to "*follow whatever procedure the Authority considers appropriate*" (s.160(1)(e) and (f)). The Authority has the specific power to "*order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit*" (Clause 10 Schedule 2).

[6] When considering whether to exercise the power of non-publication, the Authority has held that "*there must be exceptional circumstances which reveal the real risk that the administration of justice would be frustrated or rendered impractical if the evidence is published*"².

Determination

[7] Although initially a blanket order was sought relating to the whole of the evidence, the respondent properly conceded the only evidence required to be suppressed was that leading to the identification of Mr Phillip Rudd. Counsel informed the Authority yesterday that Mr Rudd is a well-known musician with security concerns if his identity was revealed.

¹ *Davis v. Bank of New Zealand* [2004] 2 ERNZ 511

² *Lloyd-Barker v. Society for the Prevention of Cruelty to Animals Auckland Inc* (unreported) ERA Auckland AA334/09, 14 September 2009 relying upon *R v. Patterson* [1002] 1 NZLR 45 (HC) at p.50

[8] The grounds do not support the making of a non-publication order. There are no exceptional circumstances or real risk to the administration of justice if this evidence were published.

[9] Mr Rudd's involvement with Phils Place Ltd is well known. His celebrity status was being used to promote the restaurant. Mr Rudd and respondent business have been actively publicising their connection.

[10] Mr Rudd was intimately involved in the cause of action giving rise to this dispute. He was not a passive bystander.

[11] The Authority understands he does not largely dispute what occurred and his involvement. If the so, his reputation cannot be marred by events he accepts are truthful.

[12] There has been considerable delay in making this application for the non-publication order. This matter was filed on 17 August 2012. The application for non-publication was made in or about 4 February 2014.

[13] Prior to the application, various newspapers had already identified Mr Rudd's involvement in an employment dispute with the former staff of his restaurant, Phil's Place³ in October 2013. Any benefits of a non-publication order at this late stage preventing identification of Mr Rudd have been rendered nugatory by the effluxion of time and subsequent publication.

[14] In the circumstances, the Authority declines to grant the non-publication order sought.



T G Tetitaha
Member of the Employment Relations Authority

³ *Herald on Sunday* 27 October 2013; *Bay of Plenty Times* 28 October 2013; and *Sun Live* 28 October 2013