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

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 738
3230619

	BETWEEN	LDJ Applicant
	AND	EZC Respondent

Member of Authority:	Peter Fuiava
Representatives:	Mark Donovan, counsel for the Applicant Michael O'Brien, counsel for the Respondent
Submissions received	19 May, 11, 28 September, and 2 October 2023 from the Applicant 2 June, 25 September and 2 October 2023 from the Respondent
Investigation Meeting:	On the papers
Determination:	13 December 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

What are the preliminary issues?

[1] This is an application for interim non-publication orders and an application for removal to the Employment Court under s 178 of the Employment Relations Act 2000 (the Act).

How did the Authority investigate?

[2] Written submissions were lodged by counsel who provided affidavits in support from LDJ and EZC's general in-house counsel. On 2 October 2023, a case management teleconference with the representatives for the hearing of further oral submissions was held. By consent, this preliminary determination has been determined on the papers.

[3] 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.

What are the issues?

[4] The issues requiring investigation and determination are:

(a) Should an interim non-publication order be made for the respondent as well as the applicant?

(b) Should the applicant's employment problem be removed to the Employment Court?

What are the relevant facts?

[5] LDJ claims that during the course of her employment for EZC over a fourteen-and-a-half month period, she suffered from extreme stress and burnout which has resulted in adverse and ongoing physical and psychological problems as a result of her work. LDJ has since been diagnosed with post-traumatic stress disorder attributable to occupational stress and has severe depression and anxiety.

[6] Some eight weeks after her employment at EZC ended, LDJ emailed its then people and culture director (the HR director) the first of a series of emails in which LDJ made an initial offer to settle her personal grievances with EZC for the sum of three months' wages plus verbal and written references. That amount was not accepted by EZC. LDJ then made another offer of $25,000 which was also not accepted by the respondent. The HR director made a counter offer of $20,000 which on its face LDJ accepted but now contests on the ground that she lacked the requisite mental capacity at the time to settle.

[7] The parties settlement agreement was evidenced in writing, made on a without liability basis and was signed by LDJ and by the HR director on EZC's behalf. However, the agreement was not certified by an MBIE-employed mediator under s 149 of the Act.

[8] LDJ's employment problem against EZC is that when she signed the settlement agreement, she did not have the requisite mental capacity to do so. It is submitted that the settlement agreement does not comply with s 108B of the Protection of Personal Property Rights Act 1988 because LDJ, as a 'specified person' under that Act, the

agreement needed to be approved by a 'court' for it to be valid. EZC denies LDJ's claim of a lack of mental capacity and says that the agreement is a full and final settlement of all matters between them.

Issue one: Whether non-publication is warranted?

[9] Under cl 10 sch 2 of the Act, the Authority may 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. The discretion must be exercised on a principled basis acknowledging that open justice is fundamental to our common law system of civil and criminal justice.[1]

[10] Both parties agree that given the sensitivities around LDJ's mental health, an interim non-publication order for her is justified. A letter from Dr Rob Shieff (19 September 2022) a psychiatrist/cognitive behavioural therapist described LDJ as presenting with a "state of fragile overwhelm" and that she was prescribed a combination of psychologically active medications for severe depressive illness.[2] Moreover, LDJ, under medical advice, has undertaken bilateral transcranial magnetic stimulation to address significant depression, agitation, anxiety and insomnia.

[11] The Supreme Court in *Erceg* held that the party seeking a non-publication order is required to show specific adverse consequences sufficient to justify the exception to the fundamental rule and that the standard is a high one.[3] Having regard to Dr Shieff's letter noted above, I am satisfied that there are specific adverse consequences for LDJ that rebut the presumption of open justice to warrant an interim non-publication order.

[12] The interim non-publication order shall apply to LDJ's name and other details that would readily identify her. Other details that will be anonymised in the determination is the name of LDJ's manager at EZC and the names and identities of relevant employees including company directors at EZC (both past and present) that would reasonably lead to LDJ being identified. However, for ease of comprehension with the narrative, LDJ's occupation within EZC will be referred to in general and broad

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[1] *Erceg v Erceg* [2016] NZSC 135 at [2].
[2] LDJ affidavit of 18 May 2023, annexure "G".
[3] *Erceg* n 1, at [13].

terms so as to connect (if necessary) the nature of her work to the subsequent mental health difficulties as alleged.

Whether to grant non-publication to the respondent also?

[13] There is disagreement between the parties as to how far the non-publication order should go with LDJ submitting that in *Erceg* the court held that there are circumstances in which the interests of justice require that the general rule of open justice be departed from *but only to the extent necessary to serve the ends of justice.*[4] In other words, the primary concern is LDJ's vulnerability and ensuring that the principle of open justice is encroached so far as reasonably necessary to protect her interests and no further.

[14] Mr Donovan submits that granting a non-publication order to the respondent goes beyond what is necessary. Counsel relies on the Employment Court's decision in *TUV v WXY*[5] in which it was held that a non-publication order for *WXY* was not necessary because it was a large public sector organisation and that there was public interest in knowing that it was involved in litigation.[6]

[15] Mr O'Brien for EZC submits that a non-publication order for the respondent is required because the public interest is not absolute, what matters rather is the interests of justice which requires an interim non-publication order of the respondent's name and details so as to protect the applicant from being identified. *TUV v WXY* is distinguishable because EZC is not a public sector organisation but a private company. In addition, Mr O'Brien refers to an affidavit from EZC's general in-house counsel (22 September 2023) that suggests another motive in having the respondent named.

[16] In particular, the in-house counsel refers to an email from LDJ (7 July 2022) that was sent to EZC's managing director advising that LDJ was going to ask for an investigation as to how EZC had received an employer award. It has now been some 17 months since that email was sent and there have been no further emails of a similar nature. Without something more recent, no weight can be given to the theory of an ulterior motive.

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[4] *Erceg* n 1, at [3].
[5] *TUV v WXY* [2018] NZEmpC 154.
[6] At [85].

[17] However, I am persuaded that, owing to the particulars of her role and gender, there is a real risk of LDJ being identified if her employer's name and details were made known. Erring on the side of caution it would be best to prevent that from happening. The *TUV v WXY* decision to name the defendant (later revealed to be the Chief of the New Zealand Defence Force) must be contextualised. That decision was made after a two-day hearing in the Employment Court and further oral submissions. This is to be contrasted with the present case which is at its beginning and not its end. For now, an interim non-publication order for both parties shall apply.

Conclusion as to interim non-publication

[18] At this interim stage, the interests of justice supports anonymity for both parties being maintained. This will carry through to the investigation meeting at the end of which counsel may apply for a permanent non-publication order which will be considered in the usual way.

[19] The Authority grants an interim non-publication order for both the applicant and the respondent whose real names have been replaced with three randomly chosen letters that have no resemblance to their actual names.

[20] By consent, it is a further order of the Authority that its file relating to the present application for removal[7] and the substantive matter[8]are sealed and may only be searched with the written permission of the Chief of the Authority or his authorised delegate.

Issue two: Removal of this employment problem to the Employment Court?

[21] Under s 178 of the Act, the Authority may on its own initiative or by application by any party, order the removal of any matter to the Employment Court to hear and determine without the Authority investigating it.[9] While s 178 of the Act confers on the Authority a discretion to remove matters to the court on certain grounds, the Court of Appeal has observed the following:[10]

> … removal under s 178 is contemplated in relatively limited circumstances, with particular caution expected in cases that have not been fully investigated by the Authority.

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[7] 3230619.
[8] 3228900.
[9] Employment Relations Act 2000, s 178(1).
[10] *A Labour Inspector v Gill Pizza Ltd and Others* [2020] NZCA 192 at [48].

[22] Section 178(2) of the Act sets out the relevant grounds that may result in a matter being removed to the Employment Court:

> **178 Removal to court**
> …
> (2) The Authority may order the removal of the matter, or any part of it, to the court if—
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> (a) *an important question of law is likely to arise in the matter other than incidentally; or* (emphasis added).
>
> (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or
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> (c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
>
> (d) *the Authority is of the opinion that in all the circumstances the court should determine the matter*. (emphasis added).

[23] In the event one or more of the above grounds permitted in s 178 are satisfied, the Authority has a residual discretion to determine whether or not the matter should be removed to the court. However, in exercising that discretion relevant factors against removal must be considered.[11]

[24] LDJ's application for removal has been advanced on the basis of s 178(2)(a) and (d) of the Act.

Is there an important question of law likely to arise other than incidentally?

[25] LDJ submits that two important questions of law will likely arise other than incidentally, the first being whether s 108B of the Protection of Personal and Property Rights Act 1988 (the PPPRA) apply in relation to employment settlement agreements not certified under s 149 of the Act. Section 108B of the PPPRA states:

> **108B Approval of court required to settle claims of specified persons**
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> (1) This section applies where money or damages claimed by or on behalf of a *specified person*, whether alone or in conjunction with another person (emphasis added).
>
> (2) If the claim is not the subject of proceedings before a *court*, an agreement for the compromise or settlement of the claim entered into by the specified person, or on his or her behalf by a person who, in the opinion of a *court*, is a fit and proper person to do so, is binding on the specified person if the agreement, or a release of the claim, is in writing and is approved by the *court* under section 108C (emphasis added).

[11] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [29]-[31].

> (3) If the claim has not been compromised or settled in accordance with subsection (2), and has become the subject of proceedings before a court, a settlement, compromise, or payment, or acceptance of money paid into court, whenever entered into or made, is valid so far as it relates to the specified person's claim only with the approval of the court under section 108C.

[26] Section 108A of the PPPRA defines "specified person" as "a person who is incapable of managing his or her own affairs."

[27] The second question of law that is said to arise other than incidentally is whether s 108B(2) means that LDJ's settlement agreement with EZC is not binding or is invalid.

LDJ's submissions

[28] Mr Donovan submits that the answers to the above questions of law will decide whether LDJ can proceed with her substantive claims against EZC. Not only would the answers decide important aspects of her case, the answers will have broad effect for employment law generally. While the Supreme Court in *TUV v Chief of the New Zealand Defence Force* determined that s 108B of the PPPRA did not apply to records of settlement certified by an MBIE-employed mediator under s 149 of the Act, the court was not tasked with considering whether s 108B applied to non-certified settlement agreements as is the case here.

[29] Mr Donovan further submitted that in considering s 108B, there will be a need to define what is meant by a 'specified person' in the employment context and that it is unclear whether the Authority is a 'court' under s 108B of the PPPRA to approve a claim that was not settled or compromised in accord with s 108(B)(2).

[30] However, at its core, this is an employment problem concerning the validity of a non-certified settlement agreement between an employer and a former employee. The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally,[12] which was made clear by the Supreme Court in *FMV v TZB*.[13] It is further noted that the Authority may act as it thinks fit in equity and good conscience,[14]which aligns well with the protective and pastoral intent behind s 108(B) of the PPPRA.

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[12] The Act, s 161(1).
[13] *FMV v TZB* [2021] NZSC 102.
[14] The Act, ss 157(3) and 160(2).

[31] In designing the Authority, Parliament intended it to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, *without regard to technicalities* (emphasis added).[15] If there is a lack of clarity with the Authority being a 'court' for the purposes of the PPPRA, it is a technical point that has subsequently been addressed by s 157(1) of the Act.

EZC's submissions

[32] Mr O'Brien submits that no important question of law arises under s 178(2)(a) of the Act because whether or not the PPPRA applies turns on whether LDJ was, at the material time, a 'specified person' which is a purely factual inquiry. In the alternative, if the Authority determined that there is a question of law arising other than incidentally, s 177 of the Act could be utilised whereby the question of law could be referred to the Court while the Authority continued its investigation. The relevant section states:

> The Authority may, where a question of law arises during an investigation,—
>
> (a) refer that question of law to the court for its opinion; and
>
> (b) delay the investigation until it receives the court's opinion on that question.

[33] Mr O'Brien stated the question of law for referral to the court under s 177 as follows: whether the PPPRA applies in relation to a settlement agreement between an employer and an employee that is not certified pursuant to s 149 of the Act and where the employee is a 'specified person'?

[34] Both counsel refer to *Clerk of the House of Representatives v Witcombe* in which Chief Judge Colgan considered s 177.[16] Mr Donovan submits that, similar to Mr Witcombe's employment which was inextricably bound up with the processes of Parliament[17], the questions of law and the facts of LDJ's case are similarly interwoven to be inseparable. For this reason, a referral under s 177 would not be appropriate as the court would need to consider the facts as well.

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[15] The Act, s 157(1).
[16] *Clerk of House of Representatives v Witcombe* [2006] ERNZ 196.
[17] At [15].

[35] As one of the essential issues in this preliminary determination is removal rather than referral, my preference is to establish the facts first which may, depending on how they fall, determine whether a referral to the court under s 177 is required. Moreover, as the section makes clear, a referral can be made at any point during an investigation meaning that this question need not be determined now.

Analysis

[36] While there is no definitive statement from the higher courts regarding the application of s 108B of the PPPRA to settlement agreements between an employer and an employee not certified under s 149 of the Act, this case will fall to be decided on its facts. If after an investigation meeting it is determined that LDJ knew what she was getting into when she both negotiated and signed the settlement agreement, the question of law regarding s 108B falls away.

[37] However, if on the other hand it is determined that LDJ did not have the requisite mental capacity to enter into her settlement agreement with EZC, the Authority, exercising its equity and good conscience jurisdiction, has the ability to approve (or not approve) a settlement agreement that does not comply with s 108B(2) of the PPPRA.

Conclusion as to question of law

[38] At its core, the present case is a factual inquiry the key question being whether LDJ entered into the settlement agreement with EZC with the requisite mental capacity. Sequentially, before s 108B of the PPPRA can even be considered, it must first be determined that LDJ was a 'specified person' under that Act which is a question of fact not law. For this reason, no important question of law is likely to arise in this matter other than incidentally. The ground for removal under s 178(2)(a) of the Act is not made out.

Whether there are other circumstances that warrant removal?

[39] The second ground relied on for removal was s 178(2)(d) where the Authority is of the opinion that in all the circumstances the Court should determine the matter.

Submissions

[40] Mr Donovan submits that there is a public benefit in having the court's interpretation of s 108B because it does not appear to have been considered previously

and its interpretation will have broad application beyond the parties. However, as noted above, the need for a definitive interpretation is conditional on whether LDJ was a 'specified person' at the time she entered into her settlement agreement with EZC. While there is the potential for a novel legal issue to arise in this case, this is first and foremost, an investigation into the facts which falls squarely within the Authority's wheelhouse.

[41] Mr Donovan has signalled that a challenge to the substantive matter is inevitable and that this will result in additional costs being incurred. Even so, removing the matter to the court does not immunise either party from subsequent challenges to the higher courts which will result in further costs being incurred in any event.

[42] Mr O'Brien refers me to a recent determination from the Authority, *Krishna v Valley King Limited* in which Authority Member Blick was not satisfied that the Authority should exercise its discretion of removal under s 178(2)(d).[18] At [31] of the determination it was observed:

> Given the historic nature of aspects of the claim and the impact this may have on the evidence, combined with the backdrop of Ms Krishna and Mr Raju's relationship matters, *the Authority is reluctant to lightly dispense with Valley King's entitlement to challenge in the Court* (emphasis added).

[43] I agree with Mr Donovan that the loss of an appeal right is not determinative because if it were, no matters could ever be removed to the court. However, that said, the loss of an appeal right remains a relevant consideration and I agree with my sister Member that the right to challenge a determination should not be dispensed with lightly.

Conclusion as to other circumstances

[44] For the above reasons, I am not of the opinion that in all the circumstances the court should determine this matter under s 178(2)(d) of the Act.

[45] Having considered the relevant grounds relied upon for removal namely s 178(2)(a) and (d), the Authority finds these not to be made out.

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[18] *Krishna v Valley King Limited* [2023] NZERA 562.

Summary of Orders

[46] The Authority makes the following orders:

(i) Interim non-publication orders are granted for the respondent as well as the applicant. Their names and details are not to be published until further order of the Authority. The determination shall have the names of past and present employees of EZC anonymised where this is reasonably necessary to protect LDJ's identity from being arrived at. This includes but is not limited to the name of her manager at EZC.

(ii) The Authority's files for the removal and substantive applications are sealed and can only be accessed or searched with the written permission of the Chief of the Authority or his authorised delegate.

(iii) For the reasons given, the application for removal to the Employment Court is declined.

Costs

[47] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority