

NOTE: An order prohibiting publication of the name of the parties and other evidence identifying the parties has been made in this matter.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 104
5547814

BETWEEN P
 Applicant

AND Q
 Respondent

Member of Authority: Robin Arthur

Representatives: Matthew Ward-Johnson, counsel for the Applicant
 Respondent in person

Investigation Meeting: On the papers

Determination: 2 April 2015

SECOND DETERMINATION OF THE AUTHORITY

- A. In compliance with the interim injunction ordered by the Authority on 24 March 2015 Mr Q must immediately remove posts from his Facebook page dated 5, 8 and 9 March 2015 that include information that he may not publish under the terms of that order.**
- B. P's application for the existing order prohibiting publication to be amended, in order to include a wider scope of information, is declined.**
- C. Costs are reserved**

Further orders sought

[1] An order made on 24 March 2015 prohibited publication of the names of the parties in this matter and identifying details of those parties, except for the descriptions of them given in the determination – that P was a local authority and Mr Q was an information technology specialist previously employed by P.¹

[2] On 1 April 2015 P sought two further orders from the Authority in relation to that non-publication order. One related to a post on Mr Q’s Facebook page that included a link to a website address and other information subject to the non-publication order. The other sought what was described as “*a blanket prohibition order*” about publication of the substance of the proceeding. P considered such an order was necessary because a newspaper article and a radio commentary had reported the Authority’s earlier determination and what it revealed about the background to the matter. P’s concern was that the information still on Mr Q’s Facebook page and the media coverage created a significant risk that some people could more easily identify the parties, contrary to the intended effect of the existing order prohibiting publication.

[3] Attempts to contact Mr Q for a case management conference by telephone today were not successful. An Authority officer attempted to contact him several times on a mobile telephone number and at an email address previously used to communicate with him. I went ahead with a brief conference call involving only P’s counsel. Although reluctant to determine P’s application for further orders on what was effectively an *ex parte* basis – that is without hearing from Mr Q first – I considered it was necessary given the information I had and what orders I thought were appropriate, for reasons set out below.

The Facebook post

[4] On 26 March 2015 Mr Q advised the Authority by email that he had completed the requirements of the interim injunction issued on 24 March 2015. One element of that order was for Mr Q to immediately desist from publicising his website (with the particular website name or address given).

¹ P v Q [2015] NZERA Auckland 85.

[5] P's application on 1 April 2015 accepted Mr Q had disabled access to that website but drew the Authority's attention to three posts on Mr Q's Facebook dated 5, 8 and 9 March 2015. Comments written in each post included the website address and referred either directly or indirectly to his former employer, P, and information that is – for the present – subject to the terms of the interim injunction.

[6] At my direction an Authority officer used her own Facebook access around midday today to check whether any Facebook user could see those posts. She was able to do so. This confirmed for me that the privacy settings Mr Q had on those posts allowed public access. An icon that showed on screen beside each posting confirmed their open status.

[7] As a result I was satisfied those posts were outside the terms or requirements of the existing non-publication order. Unless they were removed or had their status changed by Mr Q to "*only me*", their availability to his Facebook 'friends' or any member of the public with Facebook access, amounted to publication in the legal sense that it is used in the order. Publication in this sense does not only mean issuing a statement in writing or by broadcast media, but also by other means of communicating – including by talking in person with someone else or by postings on social media sites.

[8] As I have not heard from Mr Q about this material I have not assumed he deliberately failed to remove those posts when he did the other things he did to comply with the terms of the interim injunction. Giving him the benefit of the doubt the oversight leaving those Facebook postings open to others must be deemed inadvertent. Nevertheless it was appropriate to order him to take steps to comply with the injunction terms by promptly removing the Facebook posts – either by deleting them entirely or changing their status so that no-one else but Mr Q can see them. The requirement to do so has been set out in the order labelled A at the head of this determination.

The scope of the order prohibiting publication

[9] The present order prohibiting publication of the names of the parties and identifying details, issued along with the interim injunction on 24 March 2015, is in

place until the Authority has investigated and determined P's substantive claim that Mr Q has breached certain confidentiality obligations. That later determination may confirm, vary or revoke the non-publication order.

[10] P sought a wider order because it said a *New Zealand Herald* article and commentary about the Authority's earlier determination by a lawyer on a Radio New Zealand programme this week had each referred to the contents of the determination in a way that increased the risk that readers and listeners could identify the parties.

[11] I have not accepted a wider order was presently necessary or would have any beneficial effect. The non-publication order made in the earlier determination was made at the Authority's own volition and had not been sought by P. In making it I had carefully considered the necessary and permissible scope of such a restrictive order. There was a risk that people who already knew the background or had some connection with the fact of the case – such as having been sent an earlier email by Mr Q advertising his website – could make the link anyway. Neither the order made nor any wider order could undo that knowledge and the ability of some people to make such connections. What has been put in place was, I considered, sufficient to minimise the spread of that knowledge before the Authority can properly consider the substantive case.

[12] As noted in the earlier determination, if a later determination of the Authority (on the substantive issues) found that P's view about Mr Q's confidentiality obligations was wrong, he would be free to restore links to his website and material such as his Facebook postings. In short, the present arrangement is temporary but the terms of the interim injunction and the order prohibiting publication of certain information are in place and must be obeyed.

[13] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority