



New Zealand Employment Relations Authority Decisions

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R v A (Auckland) [2018] NZERA 237; [2018] NZERA Auckland 237 (27 July 2018)

Last Updated: 1 August 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 237
3033038

BETWEEN R Applicant

A N D

AND

A
First Respondent

C
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Samuel Hood/Erin Anderson Counsel for Applicant

A in person and for Second Respondent

Investigation Meeting: 27 July 2018 by telephone conference

Submissions:

Date of Determination:

23 July 2018 from Applicant
23 July 2018 from First Respondent
26 July 2018 from Applicant

27 July 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] This matter involves claims for compliance orders, penalties and non- publication orders that arise from alleged breaches of a Record of Settlement.

[2] A non-publication order was issued on 20 July 2018 which expired this morning.

[3] The Applicant seeks a further non publication order. The First and Second

Respondents object to that. They say that the first non-publication order should not

have been issued and that a further non-publication order is inappropriate and would unfairly infringe on their legal rights.

[4] The parties have expressed in writing their views on the merits or otherwise of non-publication orders being issued in respect of this matter.

[5] The parties also attended a telephone conference today during which they had an opportunity to make submissions and representations on whether or not the Authority should issue a non-publication order, and if so on what terms and for what duration.

[6] The Authority has power under clause 10 of the Second Schedule of the [Employment Relations Act 2000](#) (the Act) to make a non-publication order regarding some or all of the evidence, pleadings filed, names of parties or witnesses or other person. A non-publication order may be subject to such conditions as the Authority thinks fit.

[7] The Authority's power to make a non-publication order is discretionary. This discretion to be exercised on a principled basis.

[8] The Authority also has a wide power under [s.160](#) of the Act to follow whatever procedure it considers appropriate in investigating and resolving employment relationship problems.

[9] The issuing of directions and orders to ensure a timely and efficient investigation of claims over which it has jurisdiction prior to its substantive determination falls within this discretion.

[10] The Applicant bears the onus of establishing on the balance of probabilities that failing to issue a non-publication order will defeat the interests of justice. That is a high standard to meet. Mere embarrassment or a desire to avoid unfavourable publicity will be insufficient.

[11] The presumption of open justice is a fundamental one so limitations on that will be rare. However the Authority's power to make a non-publication order recognises that there may be exceptional circumstances which raise a real risk that the interests of justice will be frustrated if publication occurs.

[12] There are a number of competing interests that must be weighed and balanced with the overriding concern being an objective assessment by the Authority of what is in the overall interests of justice.

[13] It is important to recognise that the interests of a particular party or individual person cannot supercede the wider interest the public, community and employment institutions have in the overall administration of justice.

[14] Different considerations apply to the assessment of what is required in the interests of justice prior to substantive claims being determined, as is the case here, compared to after the Authority has expressed its final determination on the merits of the claims.

[15] The nature of the claims in this case and the evidence produced to date in support of such claims raise legitimate concerns that the overall interests of justice may require a limited non-publication order to be issued pending determination of the disputed matters.

[16] The Applicant claims that a Record of Settlement has been breached multiple times. It says that such breaches by the Respondents are causing it significant reputational damage.

[17] The Applicant says that it will suffer harm and damage to its reputation that cannot be adequately addressed. The Applicant says that failure to issue a non- publication order is likely to render any remedies it obtains, should its claims succeed, nugatory if a non-publication order is not issued pending a substantive determination.

[18] The Respondents deny breaching the Record of Settlement. The First Respondent admits signing a Record of Settlement. The Respondents also admit making or permitting the disputed communications that are in issue to be made.

[19] However the Respondents deny liability because they say they are legally entitled to communicate in the way they have, about the matters they have communicated about which have given rise to the current claims against them.

[20] The Respondents say the Authority doesn't have power to make a non- publication order in this case. I disagree. The Employment Court has previously

recognised the Authority's power to make a non-publication order pending the substantive determination of a matter.¹

[21] The Respondents say that imposing a non-publication order would unduly interfere with their fundamental right, and what they categorise as a duty, to speak freely about any matters of concern, including those involving the Applicant.

[22] The Respondents says that there are no grounds which would support the Authority's exercise of its discretion to issue a non-publication order and that to do so would be an improper exercise of that discretion.

[23] I do not agree. The Authority's concern is in preserving the overall interests of justice.

[24] The documentation presented in support of the non-publication application suggests that there are, on the face of it, some legitimate concerns regarding adherence to Record of Settlement obligations. Whether or not the Applicant can prove its claims about that is yet to be determined.

[25] The observation that on the face of it there is an apparently valid issue to be investigated is made, not because the Authority has formed any concluded views on the substance of the claims made by the Applicant but, to show that the Applicant's claims are not without an evidential foundation.

[26] That is a critical element in the exercise of the Authority's discretion because any non-publication order must be based on evidence and not on opinion or speculation.

[27] However whether or not there have been breaches of a Record of Settlement, and if so what the remedies for any such breaches should be, are matters that are keenly contested. As such they will need to be thoroughly tested during the substantive determination which is scheduled for 22 August 2018.

[28] The issue for the Authority to assess is - what do the overall interests of justice require from now until the substantive claims are investigated on 22 August and determined?

1 *Auckland DHB v X (No 1)* [2005] ERNZ 487.

[29] The Applicant has asked the Respondents numerous times to remove the disputed communications from public display. The Respondents have declined to do so.

[30] The Authority invited the Respondents to remove the disputed items until the substantive claim can be determined but they have declined to do so.

[31] I am concerned that there is a substantial risk that if the non-publication order sought is not made that the Applicant will suffer reputational damage that cannot be adequately remedied should its claims succeed.

[32] This situation is therefore analogous to the *Auckland DHB v X (No1)*² case in which a challenge to the Authority's non-publication order of a party's name pending the substantive determination of the matter was upheld by the Employment Court.

[33] The Authority understands that there are now in excess of 10,000 Records of Settlement under [s.149](#) of the Act each year entered into by parties as a way of resolving their employment relationship issues. Accordingly there is a compelling public interest in ensuring the sanctity of such arrangements.³

[34] Parties need to have confidence that any [s.149](#) settlement terms they entered into under the Act will be observed. Where alleged breaches occur parties need to feel confident that Record of Settlement legal obligations will be enforced by the employment institutions in a way that doesn't inappropriately or unnecessarily amplify any potential breach.

[35] The need for the Authority to give the parties adequate time to prepare for its substantive investigation means that there is necessarily a delay between the Statement of Problem being filed and determination of the substantive claims.

[36] A non-publication order will effectively pause the Respondents' usual rights of free speech for a relatively short period while the scope of, and compliance with, any potential obligations they may have entered into under the Record of Settlement is

determined.

² *Supra*.

³ *ALA v ITE* [2016] NZEmpC 42 at paragraph [62].

[37] I am concerned that if a non-publication order is not made for the relatively short period between now and the substantive determination of this matter the alleged (but disputed) breaches of the Record of Settlement may continue.

[38] This assessment is based on the Respondents' representations to the Authority about their position regarding the disputed communications.

[39] Based on my review of the available evidence I also consider there is a real risk of further breaches occurring which would escalate the potential harm the Applicant says it is suffering.

[40] It is therefore in the interests of justice for the Authority to take steps to ensure that any remedies for possible breaches of the Record of Settlement, that may ultimately end up being proven to the required standard, are not rendered nugatory.

[41] That is a compelling public interest reason for granting the Applicant's application for a non-publication order. The overall public interest is served by preventing the Authority's investigation process from being used to increase potential harm to a party that is seeking to enforce their legal rights.

[42] The legitimate interest the Respondents have in retaining their right to speak freely and publicly about anything they wish to communicate about must be balanced against the civil obligation the First Respondent entered freely and voluntarily into under the Record of Settlement, which on the face of it may have restricted some of the First Respondent's free speech rights so far as the Applicant was concerned.

[43] The merits of all parties' views, which are obviously strongly held, on the substance of the matters in issue are yet to be determined.

[44] I have considered whether the issuing of a non-publication order would risk impeding any parties' preparation for the investigation meeting and I am satisfied it will not.

[45] Each party is likely to have one witness and those people have already seen and have copies of the evidence of the alleged breaches. There is no need for wider publication of the evidence at this stage. However in case that changes a condition can be imposed to prevent any prejudice occurring.

[46] It is important that any non-publication order is limited to no more than is absolutely necessary to protect the interests of justice.

[47] The Respondents provided formal undertakings to the Authority and Applicant today undertaking not to publicise;

- a. The evidence filed with the Authority in relation to this matter; and
- b. The Statement of Problem and Statement in Reply and an amendments to these that may be filed.

[48] The Applicant urged the Authority not to accept these undertakings in light of the Respondents' previous conduct. The First Respondent assured the Authority he was man of his word so he would adhere to the undertakings given. He also has overall control over the Second Respondent's actions.

[49] I am satisfied from discussions today that both Respondents are clear about what their undertakings mean in practice and how such undertakings restrict their activities pending determination of this matter. I also explained to the Respondents how their offer of these undertaking was a compelling factor in the Authority's assessment of the merits of issuing a non-publication order.

[50] I have therefore decided to give the Respondents the benefit of any doubt regarding their compliance with the undertakings they offered. In light of that, the non-publication order will not be as wide as that sought by the Applicant. Instead it can be limited to preventing publication of the parties' names and information leading to the identification of the parties.

[51] The Authority therefore orders that the names of the parties, and any information that is likely to identify them be subject to a non-publication order until the substantive determination of this matter⁴ subject to the following conditions;

- a. This non-publication order will be reviewed by the Authority again after the compliance order application has been determined.⁵

⁴ AEA 3033038.

⁵ This has been timetabled by agreement to be dealt with on the papers prior to the substantive investigation meeting. A determination on the compliance order application is expected during the w/c

13 August 2018.

b. If it is still in place subsequent to that first review then it will be reviewed again by the Authority during the substantive investigation meeting on 22 August. Parties may make submissions about it at that time;

c. The parties may also apply on notice to the Authority to review the terms of this order if they believe it in any way impedes their preparation for the substantive investigation.

[52] The Authority records the discussion it had today with the parties regarding its view that this non-publication order may require the Respondents to take action regarding some of the material they have already made publically available. This includes redacting (with reference to the terms used in the Amended Statement of Problem);

- a. The Applicant's name in the "First Post"
- b. The Applicant's name in the "Fourth Post"
- c. The Applicant's name in the "First ERA Post"
- d. The parties' names in the "ERA Letter."

[53] The Respondents indicated to the Authority today that they did not wish to address those issues. The Authority invites them to take legal advice about their legal rights and obligations in this regard as failure to adhere to this non-publication order may result in further legal action.

[54] As expressed to the parties today, the fact that a non-publication order has been issued, to effectively preserve the position pending the issuing of its substantive determination, should not be taken as any indication of the Authority's view about whether or not it would be appropriate to extend a non-publication order past that point.

[55] Costs on this application are reserved and will be addressed once the substantive matter has been determined.

Rachel Larmer

Member of the Employment Relations Authority

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