



# New Zealand Employment Relations Authority Decisions

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## R v A (Auckland) [2018] NZERA 250; [2018] NZERA Auckland 250 (13 August 2018)

Last Updated: 12 September 2018

<b>IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND</b>		
		[2018] NZERA Auckland 250 3033038
	BETWEEN	R Applicant
	A N D	A
		First Respondent
	AND	C
		Second Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Samuel Hood and Erin Anderson Counsel for Applicant A in person and as Director of Second Respondent	
Investigation Meeting:	On the papers	
Submissions:	03 August 2018 from Applicant 03 August 2018 from First and Second Respondents	
Date of Determination:	10 August 2018 from Applicant 13 August 2018 from First and Second Respondents  13 August 2018	
<b>DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY</b>		

### Employment relationship problem

[1] The Authority issued a non-publication order in respect of this matter on 27 July 2018.<sup>1</sup> The respondents also provided undertakings during the telephone conference held on 27 July 2018 that influenced the ambit of the Authority's non- publication order.

<sup>1</sup> [2018] NZERA Auckland 237.

[2] The non-publication order previously issued prohibited the publication of the names of the parties, and any information that is likely to identify them, until the Applicant's substantive claims had been determined.

[3] The non-publication order was subject to the following conditions;

- a. It would be reviewed by the Authority when the compliance order application was being determined.
- b. If it remained in place after that first review then it would be reviewed again by the Authority during the substantive investigation meeting to be held on 22 August;
- c. The parties had leave to apply on notice to the Authority to review the terms of the non-publication order if they believed it impeded their preparation for the substantive investigation.

[4] The Authority will be determining the compliance order application on the papers this week. As part of determining the compliance order application the Authority has also undertaken a review of the current non-publication order.

[5] The Applicant has asked that the non-publication order be varied to prevent publication of its name and information likely to identify it as the Applicant in this matter but that the non-publication order regarding the names of the Respondents be lifted.

[6] The Respondents say that the current non-publication order should be vacated. They say the non-publication order is an unreasonable restriction on their rights and is therefore inappropriate.

[7] Given there is no dispute that the Respondents in this matter should be named the non-publication order issued on 27 July 2018 is now varied as follows;

- a. The non-publication order in so far as it prohibited publication of the names of the Respondents and information leading to the identification of the Respondents is vacated;
- b. The non-publication order in so far as it prohibited publication of the Applicant's name and information leading to the identification of the Applicant remains in place until further order of the Authority;
  - c. The non-publication order regarding the Applicant's name and information that would lead to the Applicant being identified is made subject to the following conditions;
    - i. It will be reviewed again during the substantive investigation meeting on 22 August 2018;
    - ii. If it remains in force past 22 August 2018 then it will be reviewed again once the substantive claims have been determined;
- iii. The parties may apply on notice to have it varied if they consider it impedes their ability to appropriately prepare for the substantive investigation meeting on 22 August 2018.<sup>3</sup>

[8] This new (and more limited) non-publication order is issued in accordance with the Authority's power under clause 10 of the Second Schedule of the [Employment Relations Act 2000](#) (the Act).

[9] Just to be clear, the current position regarding non-publication means the Respondents can now be named but the Applicant and information identifying the Applicant cannot be published until further order of the Authority.

[10] This non-publication determination should not be seen by the parties as any indication by the Authority of what is likely to occur regarding non-publication once the substantive claims have been determined. The non-publication issue will be revisited in their entirety at that point.

[11] The grounds for the issuing a more limited non-publication order regarding the Applicant are essentially based on the same discretionary considerations discussed in the Authority's determination dated 27 July 2018.<sup>4</sup>

<sup>2</sup> Parties are invited to provide evidence and submissions on the non-publication issue at the 22 August investigation meeting.

<sup>3</sup> The information currently available to the Authority suggests that the non-publication order would not impede preparation for the substantive investigation but leave has been reserved in case that changes between now and then.

[12] The Authority has exercised its discretion to prevent publication of the Applicant's name and information leading to the identification of the Applicant because it is satisfied on the balance of probabilities that failing to issue a non-publication order pending the outcome of the substantive claims risks defeating the overall interests of justice.

[13] 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 the wider administration of justice. This involves a broader examination than just accepting the parties' individual views on the non-publication issue.

[14] As identified in the non-publication order issued on 27 July 2018 different considerations apply to the assessment of what the overall interests of justice require prior to substantive claims being determined, as is the case here, compared to after the Authority has had an opportunity to fully consider and test the merits of the parties' various claims during an investigation meeting.

[15] This varied non-publication order effectively preserves the position as stated in the 27 July 2018 determination in so far as the Applicant is concerned. The substantive investigation meeting is nine days away during which the non-publication order will be revisited again.

[16] The Authority's objective balancing of the parties' respective rights and risks for this nine day period weighs in favour of continuing non-publication of the Applicant's name for this relatively short time.

[17] The Applicant claims that breaches by the Respondents of its legal obligations have caused and are causing it significant reputational damage. The Applicant believes it will suffer harm and damage to its reputation that cannot be adequately addressed if the previous non-publication order is vacated entirely.

[18] The Respondents deny breaching their legal obligations. While they admit making or permitting the disputed communications to be made they say there is nothing that could or should prevent such communications being made.

4 *Supra*.

[19] The documents produced to the Authority and the information provided by the First Respondent on behalf of himself and his company (which is the Second Respondent) make it clear that the Respondents are keen to publicise their views of the Applicant.

[20] Whilst this varied non-publication order will impact on the Respondents' ability to publicise the Applicant's name and information identifying the Applicant that limitation is for a short period and is unlikely to result in any actual detriment or adverse consequences for the Respondents.

[21] Balanced against the relatively neutral potential consequences for the Respondents of extending this more limited non-publication order is the potential harm the Applicants say they are likely to suffer in the intervening period if this more limited non-publication order is not issued.

[22] The Respondents' submissions that the Applicant's claims are frivolous, vexatious or malicious is entirely without merit. Underlying this matter are the very real factual and legal issues that arise from alleged breaches of a Record of Settlement entered into under [s.149](#) of the Act.

[23] The Act gives the Authority power to investigate and determine alleged breaches of a Record of Settlement. There is a strong evidential foundation<sup>5</sup> to support the Applicant's claims. The Employment Court has also issued judgments that must be followed by the Authority as binding precedent which are directly relevant to the Authority's determination of this matter.

[24] The Employment Court in *Auckland DHB v X (No 1)*<sup>6</sup> upheld the Authority's non-publication order regarding the Applicant's name pending the substantive determination of the matter notwithstanding the Respondent's views that non-publication was inappropriate on public interest grounds.

[25] This current non-publication determination follows the Employment Court's precedent in *X (No 1)*.

[26] This 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,

<sup>5</sup> Based on documents produced by the parties, the information given by the Respondents during the telephone conference in 28 July 2018 and on the Applicant's affidavit evidence.

any potential obligations they may have entered into under the Record of Settlement is determined.

[27] The respective merits of continuing a more limited form of non-publication order for a short duration versus no non-publication order involves consideration that the overall public interest is best served by ensuring that the Authority's investigation process<sup>7</sup> is not improperly used as an opportunity to increase potential harm to a party

that is seeking to enforce their legal rights.

[28] The Respondents' legitimate interests in exercising their free speech rights over the next nine days also has to be balanced against any potentially enforceable civil obligations one or both Respondents may have entered into under a s.149 Record of Settlement.<sup>8</sup>

[29] Restricting the current non-publication order to just the Applicant's name and details identifying the Applicant in this matter is no more than is absolutely necessary to protect the overall interests of justice.

[30] For the avoidance of any doubt, I record that the undertakings provided by the Respondents at the telephone conference, as recorded in the 27 July 2018 non- publication order, still stand.

[31] 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**

6 Supra.

7 Pending determination of the merits of the substantive claims.

8 What if any civil obligations the Respondents may have entered into and the ambit of any such obligations that may have been entered into is currently being investigated by the Authority but has not yet been determined.

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