**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2017] NZERA Auckland 148
5639198

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| | BETWEEN | T<br>Applicant |
| | A N D | K<br>Respondent |

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| Member of Authority: | Rachel Larmer |
| Representatives: | Allan Halse, Advocate for Applicant<br>Shima Grice, Counsel for Respondent<br>Andrea Twaddle, Counsel for Ms X |
| Investigation Meeting: | On the papers |
| Information and/or affidavit evidence: | 01 March 2017 from Ms X and Respondent<br>08 March 2017 from Applicant<br>10 March 2017 from Ms X and Respondent<br>26 March 2017 from Respondent<br>28 March 2017 from Respondent<br>13 April 2017 from Ms X and Respondent<br>20 April 2017 from Applicant<br>27 April 2017 from Respondent |
| Submissions Received: | 10 March 2017 from Respondent<br>20 March 2017 from Applicant<br>31 March 2017 from Respondent<br>31 March 2017 from Respondent<br>13 April 2017 from Ms X and Respondent<br>20 April 2017 from Applicant |
| Date of Determination: | 18 May 2017 |

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**DETERMINATION OF THE**
**EMPLOYMENT RELATIONS AUTHORITY**

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**1 A final non-publication order is issued to prohibit publication of the:**

**a. names of the parties,**

**b. name of the workplace where Mrs T worked,**

**c. location where Mrs T worked,**

**d. names of the witnesses who gave evidence to the Authority,**

**e. Ms X's name.**

**2 This final non-publication order relates to the matter filed under AEA 5639198 which has resulted in the following determinations being issued:**

**a. [2017] NZERA Auckland 14;**

**b. [2017] NZERA Auckland 52;**

**c. [2017] NZERA Auckland 57;**

**d. [2017] NZERA Auckland 147;**

**e. [2017] NZERA Auckland 148.**

## Procedural background

[1] *Determinations issued* - The Authority has issued five determinations in this matter. The first was a non-publication order relating to Mrs T's medical evidence.[1] The second was the substantive determination.[2] The third was an interim non-publication order.[3] The fourth was the costs determination.[4] This is the fifth determination.[5]

## Employment relationship problem

[2] *Issue over allegedly inaccurate information in substantive determination* - This determination addresses how the Authority should deal with allegedly inaccurate information about Ms X (who was not a party to the proceedings and who was also not a witness) which has been recorded in the substantive determination issued on 28 February 2017. [6]

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[1] [2017] NZERA Auckland 14.
[2] Supra.
[3] [2017] NZERA Auckland 57.
[4] [2017] NZERA Auckland 147.
[5] [2017] NZERA Auckland 148.
[6] [2017] NZERA Auckland 52.

[3] *Publication to date* – the substantive determination has been provided to the parties and their representatives. K shared the substantive determination with its employee, Ms X, who is referred to in it. The Authority's determinations in this matter have not yet been published on the Employment Law Database maintained by the Ministry of Innovation Business and Employment library. That will occur in accordance with usual practice once this determination has been released to the parties.

[4] *Non-publication application* – Ms X has applied for a final non-publication order. Ms X's application is supported by K but opposed by Mrs T. Mrs T in her affidavit dated 18 April 2017 says "*as a compromise*" she is *"happy for the determination to have all the names anonymised."*

[5] *Disputed information* - The information set out in the substantive determination that Ms X alleges is inaccurate was provided by Mrs T to the Authority during its substantive investigation. I consider that Mrs T gave what she believes is truthful evidence about the information in issue.

[6] *Authority's reference to disputed evidence* - Mrs T's evidence about the issues involving Ms X and Ms Y was treated by the Authority as having been proved to the required standard because it was uncontested evidence. Although the issue Mrs T referred to pre dated her employment by K it was referred to because the Authority considered it to be an aggravating factor in terms of how K dealt with Mrs T. That evidence also justified Mrs T's concerns about returning to work under the terms offered by K.

[7] *K's failure to challenge disputed evidence* – Although K was privy to Mrs T's evidence about issues involving Ms X and Ms Y, K did not object to Mrs T's evidence about that, it did not cross examine her on it, and K's two witnesses did not contradict Mrs T's evidence or otherwise challenge it.

[8] *K's position* - K did nothing to alert the Authority to the fact that it believed Mrs T's evidence was incorrect. K says it did not do so because it did not consider that Mrs T's (subsequently) disputed evidence was material. K further says it did not expect the Authority to refer to that information in its determination so it did not see a need to correct Mrs T's misunderstanding about the issues that arose between Ms X and Ms Y, which had occurred prior to Mrs T's employment. K says that Ms X's

ability to do her job effectively is likely to be significantly undermined if the incorrect information about her is published.

[9] *Accuracy of disputed information* – An interim non-publication order was issued to enable the Authority to investigate claims that new evidence (produced to the Authority after the substantive determination was issued) now calls into question the accuracy of information regarding previous issues between Ms X and Ms Y which was referred to in the substantive determination.

[10] *Contradictory evidence* - Three of the people who were directly involved in the issues between Ms X and Ms Y (at the time they arose) now say (by way of affidavit evidence) that Mrs T's previous evidence about such matters is incorrect. Mrs T stands by her previous evidence regarding the events involving Ms X and Ms Y.

[11] *Factual finding* – I find that this new direct evidence is of higher probative value than the previous hearsay evidence of Mrs T because she was not personally involved in that issue, nor was she employed by K at the material time. I am therefore now satisfied on the balance of probabilities that information recorded in the substantive determination about the issue between Ms X and Ms Y and how K dealt with that is more likely than not to be inaccurate and therefore incorrect.

**Investigation**

[12] *Reopening declined* - Although the Authority explored whether new information presented subsequent to the substantive determination being issued should result in a re-opening of the substantive investigation, none of the participants wanted that. They all asked that the concerns be addressed by determining whether or not a final non-publication order should be issued.

[13] *Substantive outcome not affected* - I do not consider reopening the substantive investigation appropriate because the new information that gives rise to this non-publication application does not change the Authority's view about the substantive outcome or the level of remedies awarded to Mrs T.

[14] *Determined on papers* – By agreement of all participants, the issues raised by Ms X and K have been investigated and determined on the papers. The principles of natural justice have been complied with.

[15] *Nature of investigation* - This investigation involved ongoing exchanges of communications, a lengthy telephone conference, affidavit evidence being filed by Mrs T, Ms X and two of K's employees, and submissions from the parties and from Ms X's counsel. K provided an email from Ms Y saying that she did not want to become involved in any way with the current investigation.

**Authority's jurisdiction**

[16] *Non- publication jurisdiction* – The Authority's jurisdiction to issue non-publication orders is set out in clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act). The power to prohibit publication relates to all or any part of any evidence or pleadings, and to the names of parties, witnesses or other person.[7]

[17] *Publication of determinations* – There is no jurisdiction in the Act for the Authority to suppress some or all of any determination. The Employment Court has made it clear that a non-publication order must be restricted to the matters expressly referred to in clause 10(1) of the Second Schedule of the Act.[8]

[18] *Amendments to substantive determination* – Ms X and K both sought to have the Authority delete existing paragraphs from the substantive determination. They also suggested new wording which they say should be substituted instead of what is currently recorded. I find the Authority does not have jurisdiction to redraft its substantive determination.

[19] *Correction of error* – I consider the Authority has an inherent jurisdiction to correct a genuine error. This is sometimes referred to as the 'slip rule'. As discussed with participants during the last telephone conference, a genuine error occurred in the substantive determination so that has been corrected under the slip rule. The errors have been identified to the parties during the telephone conference and in writing so I see no reason to traverse the specific errors again here.

[7] Clause 10(1) of Second Schedule of ERA.
[8] See *GWD Russells (Gore) v Muir* [1993] 2 ERNZ 332; *Fowler v Waiau College Board of Trustees* EmpC Christchurch CEC 35/93 13 July 1993; *Z v A* [1993] 2 ERNZ 469.

**Assessment of new evidence**

[20] *Information in determination contradicted* – The affidavit evidence filed by Ms X and K's witnesses undermines the accuracy of the information referred to by the Authority in its substantive determination.

[21] *Mrs T's view* – Mrs T wants that evidence she gave about Ms X and Ms Y to be published because Mrs T believes it is accurate. It is important to note that an honest witness may nevertheless also be a mistaken or misinformed witness. I consider that is more likely than not to be the case here. I consider that the new affidavit evidence and the complete lack of supporting documentation for Mrs T's version of events undermined the accuracy of her evidence.

[22] *Strength of new evidence* - Because Mrs T was not directly or personally involved in the issues she gave evidence about, her evidence relied on hearsay information from others. I find that the affidavit evidence from those individuals who were personally involved is more likely to be correct than Mrs T's second or third hand understanding of it. I therefore consider that Mrs T's hearsay evidence is not as strong as the affidavit evidence of three people who were directly involved.

[23] *Inaccurate information in determination* – The new evidence submitted in support of this non-publication application satisfied me on the balance of probabilities that the substantive determination is more likely than not to contain inaccurate information about Ms X's issues with Ms Y.

**Equity and good conscience jurisdiction**

[24] *Identification of Ms X* – Ms X believes there is a serious and significant likelihood that she will be identified from other information in the substantive determination. Ms X says that will in turn result in her being unfairly linked to adverse statements about her that are inaccurate and untrue. I accept that is a realistic concern based on the evidence currently before the Authority.

[25] *Effect on Ms X* - Ms X says that the inaccurate statements in the substantive determination are personally distressing and professionally damaging to her. K and Ms X both claim that failure to issue a final non-publication order is likely to adversely impact Ms X's reputation and to undermine Ms X's ability to do her job.

They further say it will cause unnecessary concern among other staff and service users.

[26] *Equity and good conscience jurisdiction* – I consider the Authority has the power under its equity and good conscience jurisdiction to take steps to mitigate as far as is possible, provided such action is not inconsistent with the Act, potential damage to an individual (where that person is not a party or witness) that may arise as a result of information in a determination, where such information has been established to the required standard as being more likely than not to be inaccurate.

[27] *Replacement of names with initials inadequate* – The use of initials instead of names in the substantive determination will make it more difficult (although not impossible) for Ms X to be identified. However, the publicity Mr Halse has already generated about this case,[9] and which he appears keen to continue creating, means that I am satisfied on the balance of probabilities that merely anonymising just the parties' and their witnesses' names is unlikely to provide sufficient protection to Ms X.

[28] *Risk of identification of Ms X* - I consider there is a serious and unacceptably high risk that Ms X will be easily personally identified if a non-publication order is not issued.

**Relevant law**

[29] *Principle of open justice* – The starting point is that the Authority proceedings should be public and able to be freely reported. The Authority's determinations are to be a matter of public record unless to publish them would be likely to undermine the interests of justice. Strict proof to a high standard is required before there can be departure from the norm of publication.

[30] *Discretion* – The Authority has the discretion under clause 10 of the Second Schedule of the Act to issue a non-publication order. This discretion is to be exercised on a judicial basis and will only be exercised if the interests of justice require it. It is important to note that any such order must also be couched in terms that are no more than reasonably necessary to meet the interests of justice.

[31] *Burden of proof* - Ms X and K bear the onus of proving that an order is necessary and of proving the scope of the non-publication order. The application must

[9] Including (but not limited to) in social media and in interviews with media.

be supported by credible evidence and reasons for apprehending that some serious impediment to the interests of justice may result if the order sought is not made.

[32] *Legal test* – The Authority must be satisfied on the high end of the balance of probabilities that there are exceptional circumstances, proven to the required standard, that reveal a real risk that the overall interests of justice are not served if a final non-publication order is not made.

**Assessment of the interests of justice**

[33] *Interests of justice* – The interests of justice that must be carefully assessed do not just relate to the interest of those seeking a non-publication order but include the wider interests of other parties, the media and of the general public in having open justice.

[34] *Impact of inaccurate information* – I am satisfied at the high end of the balance of probabilities that the likely inaccurate information in the substantive determination (which relates to Ms X's issues with Ms Y) is damaging to Ms X's reputation.

[35] *Overall interests of justice* – I do not consider it is in the overall interests of justice for the Authority to allow likely inaccurate and damaging information about a non-party to be published once the evidential burden establishing the likelihood that such information is inaccurate has been discharged. Even more so when the person affected was not aware of the disputed information or that such information had not been challenged by their employer.

[36] *Public interest* - I do not consider there is any public interest in having Ms X personally identified. To do so would effectively result in Ms X being publicly exposed for something she disputes doing, in circumstances where the accuracy of the evidence that the Authority relied on when making such comments has been fundamentally undermined.

[37] *Mrs T's interests* – Mrs T's claim was against her former employer, K, not against Ms X personally. I consider Mrs T has been vindicated by K upholding her complaint about Ms X and by the Authority's substantive determination in her favour. I do not consider that Mrs T's interests require Ms X to be publicly identifiable.

[38] *K's interests* – K says that failure to issue a final non-publication order will adversely impact on its working relationship with Ms X, with relationships involving other employees and its service users. I give K's interests less weight than other interests because I consider that this situation arose due to K's failure, prior to the substantive determination being issued, to correct what it now says was inaccurate information.

[39] *K's clients* – I accept K's claim that if Ms X and/or the workplace or location is identified it is likely to create unnecessary stress or anxiety for users of K's services regarding the historical issue involving Ms X and Ms Y and K's handling of it. I consider that to be undesirable.

[40] *Other cases* – The Full Employment Court in *H v A Limited*[10] recognised that the interests of justice may be served by issuing a non-publication order to protect the identity of persons who have been subjected to criticism in evidence but who have not had an opportunity to challenge or refute that criticism. Non-publication orders have also previously been issued to protect a non-party who is not an active participant in the matter under investigation.[11]

[41] *Overall assessment* - After carefully weighing the competing interests I am satisfied on the high end of the balance of probabilities that a final non-publication order regarding the names of the parties and their witnesses, the workplace and location, and the names of Ms X and Ms Y is in the overall interests of justice.

**Outcome of non-publication application**

[42] *Exercise of discretion* - I am satisfied on the high end of the balance of probabilities that this is an appropriate matter in which to exercise the Authority's discretion to issue a final non-publication order.

[43] *Reason for order* - This final non-publication order is issued to ensure that even if Ms X is able to be identified from the substantive determination[12] (notwithstanding the anonymization of names), information cannot be published

[10] [2014] NZEmpC 92. [10] *Y v D* [2004] 1 ERNZ 1; *Dallinger v Attorney General* ERA Wellington WA162/03, 17 November 2003.
[11] *Y v D* [2004] 1 ERNZ 1; *Dallinger v Attorney General* ERA Wellington WA162/03, 17 November 2003.
[12] Which Ms X and K remain very concerned about.

which links her to the information about her which the Authority is satisfied on the balance of probabilities is likely to be inaccurate.

[44] *Non- publication order* – Pursuant to clause 10(1) of the Second Schedule of the Act a final non-publication order is issued prohibiting the publication of the:

a. names of the parties,

b. name of the workplace;

c. location where Mrs T worked,

d. names of the witnesses who gave evidence to the Authority,

e. names of Ms X and Ms Y.

[45] This final non-publication order supersedes and replaces the interim non-publication order issued on 02 March 2017.[13] The parties and their representatives will need to ensure their social media postings and future media interviews do not breach this final non-publication order.

**Costs**

[46] The parties are encouraged to resolve costs by agreement. However if that is not possible, either party has seven days from the date of this determination to apply for costs. The other party has seven days from service of the costs application to file a costs memorandum. The party who has applied for costs then has a further three working days within which to file any response.

[47] Any costs application must be supported by evidence of the actual costs incurred in respect of the non-publication application only. Costs regarding the substantive matter have been deal with already.

**Rachel Larmer**
**Member of the Employment Relations Authority**

[13] Ibid 3.