

**NOTE: This determination  
contains an order prohibiting  
publication of certain information  
at [9] –[10]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 115  
3093872 and 3140141

BETWEEN	UXK Applicant
AND	TALENT PROPELLER LIMITED Respondent

Member of Authority: Sarah Kennedy

Representatives: Ashleigh Fechny, advocate for the Applicant  
Richard Upton, counsel for the Respondent

Investigation meeting: 9 November 2021

Date: 29 March 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This is a preliminary determination of the Authority. Talent Propeller Limited (Talent Propeller) seeks to have an unredacted decision of a District Court judgment (the judgment) included in an Authority investigation to determine the employment relationship problems the parties have with each other.

[2] The investigation meeting is set down in May 2022 before Member Marija Urlich.

### **The Authority's Investigation**

[3] UXK challenged directions of the Authority in relation to disclosure of the judgment for the purposes of resolving a disclosure dispute between the parties. In its decision in *UXK v Talent Propeller* the Employment Court directed the following:<sup>1</sup>

- (a) UXK is to produce an unredacted copy of the District Court judgement for the purposes of consideration of the issue as to its relevance to the proceeding, under a timetable to be fixed by the Authority.
- (b) The document is to be provided to Mr Upton on a representative to counsel basis, providing he has first given a written undertaking to the Authority and to the representative for UXK, in the form referred to earlier. That undertaking may be varied by the Authority, if necessary following its ruling on relevance.
- (c) The relevant issue is to be investigated by a member other than the Member who has dealt with the matter to date.
- (d) The interim order for non-publication of that document is to continue until the determination as to relevance is issued; following the investigation meeting, further protections may be necessary.

[4] Mr Upton provided the undertaking and after further discussion with the parties, the unredacted version of the judgment was provided to both the Authority and Mr Upton.

[5] Both parties' representatives filed written submissions and I heard oral submissions from the parties about the relevance and admissibility of the judgment on 9 November 2021, via Zoom.

[6] On 17 November 2021, after the Zoom hearing, further submissions and information were received from UXK's advocate and counsel for Talent Propeller provided an email in response. I have not taken those submissions into account in considering this matter because they do not appear to be relevant to the issues that need to be decided at this juncture.

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<sup>1</sup> *UXK v Talent Propeller Limited* [2021] NZEmpC 167 [5 October 2021].

[7] Having regard to s 174E of the Employment Relations Act (the Act), it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has, however, been considered.

[8] As permitted by 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

### **Non-publication order**

[9] There is an order of interim non-publication of the name, address and identifying details of UXK, and as to the contents of the District Court judgment until further order of the Authority or Court.<sup>2</sup>

[10] At this preliminary stage I am satisfied that it is in the interests of justice to continue the Employment Court's interim non-publication orders set out above until further orders are made by the Authority or the Court.

### **Background**

[11] A short summary of the facts is necessary for the purposes of this determination, however, the full background to these proceedings is set out in Judge Corkill's decision.<sup>3</sup>

[12] UXK and Talent Propeller were in an employment relationship from 4 February 2019 to 19 February 2020 when UXK was dismissed following a disciplinary investigation into conduct concerns. The concerns raised were about alterations to the parties draft employment agreement and it was asserted that UXK was responsible for these. UXK was suspended while the matter was investigated.

[13] UXK says the dismissal was unjustified and/or she was disadvantaged by the actions of Talent Propeller, and Talent Propeller did not act in good faith towards UXK.

[14] Talent Propeller says its actions were what a fair and reasonable employer could have done in all the circumstances at the time of the investigation and dismissal. It says the dismissal

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<sup>2</sup> Above n1 at [169].

<sup>3</sup> Above n1.

was justified both procedurally and substantively and that it has not breached its good faith obligations toward UXK.

[15] Talent Propeller also makes several counter claims against UXK, alleging that she falsified her employment agreement, two emails and her curriculum vitae.

[16] A redacted copy of the judgment was lodged in the Authority by UXK, albeit without leave from the Authority. Talent Propeller requested disclosure of an unredacted copy of the judgment and UXK declined to provide that.

[17] In order to determine the disclosure dispute between the parties, the Authority made a number of directions concerning disclosure including that UXK disclose an unredacted copy of the judgment to allow the Authority to determine the disclosure dispute between the parties.

[18] UXK challenged the Authority's directions and sought orders from the Employment Court to set aside the Authority's directions. UXK was partially successful in that challenge and the Employment Court orders are set out above.

### **The judgment**

[19] The judgment in issue is one that is deemed to be an acquittal<sup>4</sup> and a suppression order prohibiting publication of name, address, occupation or identifying particulars of the defendant was made under s 200 of the Criminal Procedure Act 2011.

[20] The Supreme Court in *ASG v Hayne*, held that "publication" in s 200 of the CP Act means distribution to the public at large, and "...does not encompass the dissemination of information to persons with a genuine need to know ...".<sup>5</sup>

[21] Caution is still advised. In discussing disclosure in this case in *UXK v Talent Propeller Limited*, Judge Corkill stated:<sup>6</sup>

“[109] Any conclusion as to a genuine need to know must be one reached objectively. Where that issue arises before the Authority or Court, it is necessary to ensure that any disclosure, even to either of those bodies, does not undermine the very purpose of the suppression order.”

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<sup>4</sup> Sentencing Act 2002, s 106 (2).

<sup>5</sup> *ASG v Hayne* [2017] NZSC 59 at [12] – [23].

<sup>6</sup> Above n1 at [109].

[22] In *UXK v Talent Propeller Limited* Judge Corkill also set out the legislative framework regarding disclosure as it applies to the Authority.<sup>7</sup> There is no formal process for the discovery of documents in the Authority. The Authority is an investigative body and is not bound by strict rules of evidence. However, as part of its investigative role, the Authority has broad powers to call for and consider evidence and information that is relevant to the matter before it.

### **Submissions – District Court judgment**

[23] Talent Propeller submits that the judgment is relevant to both UXK’s application for non-publication orders and her credibility. In addition, it says the original statement of problem contains multiple references to the judgment and an unredacted version was lodged with the Authority by UXK. Given that, UXK cannot now suggest that it is not relevant.

[24] UXK submits that the judgment is not relevant to the substantial merits of the case because Talent Propeller did not have the judgment at the time it took the disciplinary action against UXK and it was not referred to as a substantive reason for terminating her employment.

[25] Further all the allegations have a logical explanation so there are no credibility issues. Name suppression will be sought on the basis of medical information and not name suppression of the judgment.

[26] UXK accepts that the unredacted version was lodged in the Authority but says this was at a time when it was important to ensure that the District Court name suppression was not breached.

### **Discussion**

[27] In circumstances where Talent Propeller did not rely on UXK’s refusal to provide further information about the District Court proceedings, to form part of the rational for the termination, the judgment is unlikely to be directly relevant to that aspect of the investigation.

[28] Talent Propeller also argues the judgment is relevant because it says there are issues regarding UXK’s credibility and that the content of the judgment will show “at least similar” conduct by UXK on a previous occasion and for that reason it is indirectly relevant.

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<sup>7</sup> Above n1 at [94]-[99].

[29] At this point in time, having read the judgment myself, I am not able to give that argument much weight because there is little detail in the judgment about the conduct engaged in to enable conclusions about similarity to be drawn with any certainty.

[30] Talent Propeller also says it is relevant to name suppression and I do not disagree with that submission. At the point in time after factual findings have been made, prior conduct or contribution may become relevant to name suppression. I remain unpersuaded that this is a strong ground in relation to resolving the substantive employment relationship problems.

[31] My conclusion is the same in relation to the other counterclaims by Talent Propeller alleging that UXK altered her curriculum vitae and created emails.

[32] Despite that I note that UXK did make multiple references to the judgment in her original statement of problem and lodged a redacted copy in the Authority. UXK also disclosed to her employer, the fact of the District Court proceedings and the outcome, but did not provide the judgment.<sup>8</sup> Two representatives from Talent Propeller also provided character references for UXK for the purposes of those proceedings.

[33] I also note it appears there is no complaint to Police about the current matter.

## **Findings**

### *Unredacted version*

[34] Taking a principled approach, I find that the full unredacted judgment is not directly relevant to the substantial merits of the employment relationship problems the parties have raised about each other because its content does not inform the decision maker in the current matter who is yet to hear and test the evidence relied on to justify the dismissal.

[35] As a matter of fairness, UXK is entitled to have her employment relationship problem investigated by the Authority and defend Talent Propeller's claims against her based on the merits of the case as determined by the Authority's investigation about what happened on this occasion between the parties and not what occurred on a previous occasion.

[36] The fact that representatives of Talent Propeller provided character evidence to the District Court proceeding is an unusual feature of this case but it does not make the content of

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<sup>8</sup> Above n1 at [9].

the judgment relevant to the employment proceedings. What that does mean is that the fact of the proceedings was and is known to Talent Propeller.

*Unredacted version*

[37] I do, however, consider that the unredacted version is relevant to the substantial merits of the case as the applicant mentions it in her statement of problem and filed a redacted version with the Authority. It will also be relevant to any future consideration of non-publication orders because the suppression orders under the CP Act are permanent orders.

[38] While I do not find the unredacted version of the judgment to be relevant at this point in time, that is not to say, that depending on the evidence at the substantive hearing, that may change.

**Order**

[39] A copy of the unredacted version of the judgment is not relevant to the Authority investigation and what is to be decided. The redacted version is currently in the Employment Relations Authority file and should remain.

**Undertaking**

[40] Following the Minute of the Authority that I issued on 22 October 2021, the parties can be heard on retention and/or destruction of the District Court judgment. UXK may lodge, and then should serve, submissions on retention and/or destruction of the judgment within 14 days of issue of this determination. From the date of service of those submissions Talent Propeller would then have 14 days to lodge its submissions. This issue will be heard on the papers.

**Costs**

[41] Costs are reserved.

**Sarah Kennedy**  
**Member of the Employment Relations Authority**