

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 553
3188179

BETWEEN VCS
 Applicant

AND SIH
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michael O'Brien, counsel for the Applicant
 William Fotherby and Lizzie Thomas, counsel for the
 Respondent

On papers determination: 25 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] An employee VCS applied to the Authority for an order of interim reinstatement, alleging he had been subjected to an unjustifiable disadvantage by his employer SIH.

Non-publication order

[2] The Authority held a case management conference and gave directions. It made an interim non-publication order, preventing publication of the parties' names until further order.

[3] Clause 10 of Schedule 2 of the Employment Relations Act 2000 (the ER Act) empowers the Authority make orders prohibiting publication.

[4] They may be subject to such conditions as the Authority thinks fit. The name of any party, or evidence given, or the statements of problem and reply filed, may be the subject of such an order, as in this case.

Investigation meeting and oral indication

[5] The application for interim reinstatement was discontinued before hearing. Instead, the parties prepared for an investigation of the substantive claims, which included an allegation of unjustified dismissal as well as unjustified disadvantage.

[6] The non-publication order continued in force without variation.

[7] An investigation meeting was held from 21 to 23 March 2023. On 27 March the Authority met again with the parties and counsel, to give an oral indication of its preliminary finding of fact as to whether the employment of VCS had ended by resignation or dismissal, or some other way.

[8] It was anticipated the parties would consider the Authority's indication and decide whether they wished to renew attempts to settle matters between themselves.

Claims resolved by agreement

[9] In August 2023 the Authority was advised that VCS's employment relationship problems had been resolved and his application would be withdrawn, without any issue as to costs.

Application for permanent non-publication order

[10] Jointly, the parties have Applied for the non-publication Order to be made permanent.

Discussion

[11] Although the Authority has been given a broad discretion by clause 10 of Schedule 2, it is to be exercised in accordance with principle. A fundamental principle is the openness of justice¹.

¹ *Erceg v Erceg* [2016] NZSC 135

[12] Before imposing any limitations on knowledge that is usually available from an Authority investigation, the Authority must be satisfied, to a high standard, that there are specific adverse consequences of publication which are sufficient to justify an exception to the fundamental rule².

[13] In this case, there was no evidence before the Authority from which a finding could be made that VCS had done anything wrong inside or outside his employment and that could have led to disciplinary action against him. The contrary was not alleged by SIH, which had investigated concerns raised with it. Disciplinary action was never commenced against VCS.

[14] The Authority considers there is a real risk that if VCS is identified he will be prevented by uninformed and irrational prejudice from exercising his freedom to work in his chosen occupation, one for which he has undertaken extensive education and training. He is likely to suffer harm to his career, future career prospects and reputation.

[15] VCS encountered a level of adversity which contributed to the ending of his employment and became the subject of his personal grievances. Some prospective employers may feel there is a risk attached to employing VCS, simply because, through no fault of his, and without any basis of fact shown, he became a focus of unsought attention in his workplace.

[16] There was evidence from VCS as to the way a promising employment opportunity had been withdrawn from him, following communication with SIH and the prospective employer. Although SIH disputed VCS's account of that communication, the Authority was not required to make any findings. The evidence demonstrates the fragility of VCS's situation, despite having invoked the grievance procedure and having his employment subjected to close examination during the Authority's investigation, and despite any misconduct being found or alleged at any time.

[17] Publication is likely to place VCS at an unreasonable disadvantage in finding employment and in retaining it.

² at paras [12] and [13]

[18] This consequence is contrary to the public interest and contrary to one of the objectives of the ER Act, which is to build productive employment relationships. Section 157 of the ER Act requires the Authority in carrying out its role to generally further the object of the Act.

Order

[19] The Authority is satisfied that as requested by both VCS and SIH, the non-publication Order should become permanent. Accordingly, in the interests of justice;

- A. An order is made by the Authority prohibiting publication of the names of VCS and SIH and any identifying details, including;**
- (i) The names of any past and present directors, partners, officers or staff of SIH; and**
 - (ii) The following details about VCS;**
 - 1. Academic institutions where he has studied, is studying, or has expressed an interest to study;**
 - 2. His current and previous employers;**
 - 3. His age;**
 - 4. Any academic prize(s) he has been awarded; and**
 - 5. His father's illness and death.**
- B. The Authority further orders that its computer-based file is only to be accessed from outside the Authority at the direction of an Authority member.**