

Attention is drawn to the
non-publication order
at paragraph [33(c)]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 434
3183960

BETWEEN WAIROA DISTRICT COUNCIL
Applicant

AND SIMON MUTONHORI
Respondent

Member of Authority: Michael Loftus

Representatives: Charles McGuinness, council for the Applicant
Respondent in person

Investigation Meeting: 30 August 2022 at Napier

Submissions Received: At the investigation meeting

Date of Determination: 2 September 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Wairoa District Council (Council) has applied for:

- (a) Injunctive and permanent orders requiring Mr Muttonhori comply with his obligations regarding Mediation confidentiality; and
- (b) Injunctive and permanent orders requiring Mr Muttonhori comply with his express and implied obligations of confidence; and
- (c) Non-publication orders

[2] The Council also sought an order precluding the public or certain persons (s 160(1)(e)) of the Employment Relations Act 2000 (the Act) from the investigation meeting but the request was declined at the commencement of the investigation meeting and not pursued.

[3] Mr Mutonhori is of the view Council's applications should be declined.

Background

[4] For some time Mr Mutonhori and the Council have been at odds over various issues which saw Mr Mutonhori lodge a statement of problem with the Authority seeking interim orders on 26 May 2022. The issue he was primarily seeking to address through that application was effectively resolved, though a number of others remained and that led to the lodging of an amended statement of problem on 26 July. In essence the Council had raised various concerns with Mr Mutonhori and he is claiming to have been disadvantaged by virtue of both the concerns substance, the way they have been handled and warnings that resulted.

[5] As part of the efforts to resolve these differences the parties attended a mediation conducted by the Mediation Service of the Ministry of Business, Innovation and Employment on 2 August 2022.

[6] The mediation was unsuccessful and the following day, 3 August, Mr Mutonhori was dismissed. The disadvantage claims are yet to be addressed though an investigation of these claims is imminent. The dismissal is yet to be challenged but it is not these events which this determination addresses – it is what happened next.

[7] While the events which led to his dismissal were coming to a head Mr Mutonhori decided to stand for Mayor of Wairoa District in the forthcoming local government elections. That undoubtedly led to several newspaper articles with the Council taking exception to the content of three and that gives rise to this application.

[8] In each there is reference to the fact of dismissal and one refers to the mediation having occurred. Also, and of far greater concern to the council, was the fact that to differing degrees two of the articles mentioned elements of the offers council purportedly made during the mediation, one states the letter of dismissal had been released to the press and two make reference to the content there-of. That concerns the council as the letter's content is such that council employees who complained about Mr Mutonhori are readily identifiable.

Analysis

[9] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but from a consideration of various questions which culminate with a conclusion about the overarching question of what does the overall justice require?¹

[10] There are four broad areas of inquiry which are considered on the basis of untested affidavit evidence. They are:

- (a) Does the applicant have an arguable case for making the orders sought?
- (b) Is an adequate alternative remedy, such as damages, available?
- (c) Where does the balance of convenience lie with thought being given not only to the interests of the parties and the impact upon them of either making or not making the interim orders sought, but also the possible impact on third parties?
- (d) What does the overall justice of the case require?

A Serious Question to be Tried

[11] The threshold for a serious question is a relatively low one, with the requirement being that the claim is not frivolous or vexatious.

[12] In this instance it is, I conclude, clear there is a strong argument Mr Mutonhori has failed to comply with his obligations regarding mediation confidentiality and it follows there is a more than arguable case for the order sought. That is because Section 148 of the Employment Relations Act 2000 (the Act) states that:

Except with the consent of the parties or the relevant party, a person who... (b) is a person to whom mediation services are provided; ... must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

[13] Mr Mutonhori accepts he made various comments about his employment situation to the press but asserts he should be allowed to do so. This is because his mayoral candidacy

¹ *Klisser Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA)

means the public should be fully informed regarding his dispute with the Council and he must also counter various false and ill-informed rumours about the situation.

[14] Mr Mutohori is a person to whom mediation services have been provided and offers made by one party in order to attempt settlement are clearly statements or admission made for the purpose of the mediation. It follows Mr Mutohori is obliged to keep these confidential and putting aside a question as to whether or not the reporting of the purported offers is accurate, his statements to the press clearly contravene that requirement. The only remaining question is whether or not he can argue an exception to the statutory prohibition on such statements such as an argument that in this case public policy dictates otherwise (and even that is couched by the Court of Appeal as only being a possibility).²

[15] What underpinned the Council's application regarding a wider breach of confidentiality was not as clear given some confusion as to what the Council sought to preclude given reference to both the dismissal letter and the fact Council employees were named therein. Council clarified this in the investigation meeting – the intended preclusion relates to the identification of Council employees with Council conceding Mr Mutohori is entitled to discuss why he was dismissed if he sees fit to do so.

[16] In saying it has an arguable case Council relies on the fact Mr Mutohori's employment agreement contains a clause, 29, precluding Mr Mutohori from disclosing or distributing confidential information including "personal information about the management and staff" either during or after the cessation of his employment.

[17] I conclude it is at least arguable information regarding complaints identifiable staff might have made falls into this category meaning Council also has an arguable case with regard to this application at least on an interim basis.

Alternate remedies

[18] I have no qualms in accepting Council's submission there is no alternate remedy. Breaches such as those alleged here are addressed through penalties and damage would be difficult to establish and almost impossible to quantify. Penalties may also be an inadequate

² *Just Hotel Ltd v Jesudhass* [2007] NZCA 582, [2007] ERNZ 817 at [31]

option as there is no guarantee they will be payable to Council or affected staff, especially as they are not to be used as a de-facto means of compensation.

Balance of convenience

[19] Mr Mutohori advised a conscious decision not to offer any evidence and by doing so has placed himself at a serious disadvantage in respect to this element of the consideration. That said his argument is twofold. There is that about the public's right to know given his mayoral candidacy and another that the preclusions in s 148 of the Act should only apply to the private sector and not bodies that rely upon and spend public money.

[20] This approach faces two impediments. The first is the effect of s 148 is, on the face of it, absolute and there is no limitation on its coverage. The second is the issues being raised here are ones of "public policy" which will, given the comments of the Court of Appeal in *Just Hotel*, have to be fully and properly argued. In any event I note the Council's concession Mr Mutohori can discuss the reasons for his dismissal and this must go a long way toward satisfying his desire to inform the public if he chooses to so do.

[21] There is then the fact there can be no doubt Mr Mutohori has breached mediation confidentiality and an arguable case that by allowing the press access to the dismissal letter he may also have breached his contractual obligations.

[22] Council is, on the face of it and as it submits, entitled to rely on the statutory confidentiality that applies to the mediation process and avoid the possibility of repetition, especially when Mr Mutohori will only be capable of setting that aside with a strong argument he is yet to adequately tender. On this the balance of convenience must strongly favour the Council.

[23] While the argument is not as strong with respect to the second application regarding contractual confidentiality, the fact remains there is an arguable case and no alternate remedy. Again, there is evidence a possible breach might already have occurred and Council has tendered evidence regarding its obligations to staff and the consequences of a failure. There is then the fact that a breach, should it occur, can only be remedied by a subsequent penalty and the limitations with that have already been discussed (18 above).

[24] Finally, I conclude the question of whether or not permanent orders are appropriate will only be known once Mr Mutonhori's substantive claims are heard and the context in which the complaints were made becomes known. Given that is in the future it must support a conclusion the balance of convenience again favours Council.

Overall justice

[25] Council has, as already said, an arguable case (strongly so with respect to mediation confidentiality) and there is no viable alternate remedy should a breach occur. Add to that the conclusion the balance of convenience favours Council with respect to both orders sought it follows they shall be made.

Non Publication

[26] Council also seeks an order preventing the publication of details that might lead to the identification of Council staff whose complaints are discussed in the letter of dismissal. There are, other than the Council's Chief Executive, at least two others.

[27] In what is probably New Zealand's leading case on prohibition orders the Supreme Court confirmed the importance of the principle of open justice.³ That said, and while open justice was the fundamental rule, parties could seek a departure but that had to be justified and the threshold is high.

[28] In applying that in the employment jurisdiction the Court has said:

The starting point when considering an application for non-publication orders is that such orders are a departure from the fundamental principle of open justice. The person applying for non-publication orders must establish sound reasons for the presumption favouring publication to be displaced, showing that, if non-publication is not granted, there will be specific adverse consequences that are sufficient to justify an exception to the fundamental principle.⁴

[29] Accepting the starting point is the principle of open justice there are many instances where non-publication is granted in order to protect the rights of third parties. In this instance there is evidence there may be such rights which require protection but as already said I will not know until after I have heard Mr Mutonhori's substantive claims.

³ *Erceg v Erceg* [2016] NZSC 135 at [2]

⁴ *FVB v XEY* [2020] at [9] with the words *specific adverse consequences* quoting *Erceg* at [13]

[30] That, in turn, means it would be prudent to grant the orders sought at least on a temporary basis and awaiting knowledge as to whether or not permanent orders are appropriate. To do otherwise could permit the publication of material that possibly should not be in the public domain and create the possibility of damage that cannot be remediated.

[31] This order does not, however, extend to the Chief Executive. That is because of Council's concession Mr Mutohori may discuss the issues which led to disciplinary action being taken against him and one of those was a failure to follow instructions. Given the Council's management structure and s 42(2)(g) of the Local Government Act 2002 there is only one person who could have given such instruction so a non-publication order is, in this instance, worthless.

Conclusion and Orders

[32] For the above reasons I conclude the orders sought by Council should be granted on an interim basis.

[33] It is therefore ordered that:

- (a) Mr Mutohori comply with his obligations regarding Mediation confidentiality and make no further comment about what occurred there-in; and
- (b) Mr Muonhori comply with the provision of clause 29 of his employment agreement and make no comment which might identify staff, other than the Chief Executive, involved in the matters that led to disciplinary action being taken against him; and
- (c) There be an order preventing the publication of anything that might identify staff of Wairoa District Council, other than the Chief Executive, involved in the issues which led to disciplinary action being taken against Mr Mutohori.

[34] These orders, while interim, shall remain in place until amended or lifted by the Authority.

[35] Costs are reserved⁵ but given the interim nature of the orders made I consider they are best left till the substantive claims have been resolved. If either party disagrees that party shall

⁵ www.era.govt.nz/assets/Uploads/practice-note-2.pdf

have 14 days from the date of this determination to lodge a memorandum on costs. The other party will then have a further 14 days to lodge a reply memorandum.

Michael Loftus
Member of the Employment Relations Authority