

Attention is drawn to the order prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 473
3124294

BETWEEN X
 Applicant

AND Y Limited
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Tanya Kennedy, counsel for the Applicant
 Marie Wisker, counsel for the Respondent

Investigation Meeting: On the papers

Date of Determination: 16 November 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant seeks a non-publication order. The respondent opposes it. Counsel for the applicant filed a memorandum in support of her application for urgency and non-publication orders on 9 November 2020. Counsel for the respondent filed a memorandum in reply on 13 November 2020.

[2] A case management conference was held on an urgent basis at which time the parties made submissions in respect of the application for non-publication orders. I confirmed at the case management conference that an order would be made on a limited basis prohibiting the publication of certain information, pending the substantive an investigation meeting to

determine the substantive issues between the parties. This determination sets out the reasons for that decision.

Application for non-publication

[3] Non - publication is sought on the basis that naming the applicant would likely cause damage to her personal and professional reputation and "...the substantive merits and equities... on the facts of this case, outweigh the public interest". In her affidavit in support of her applications for urgency and non-publication, the applicant cites the impact the publication of her name and any identifying details may have on her mental state. A letter from her doctor was provided by the applicant in support of this evidence. The applicant also referred to significant damage she considered would occur to her professional damage if allegations made by the respondent and vehemently denied by her were not suppressed.

Opposition to application for non-publication

[4] The respondent opposes the application on a number of grounds, including;

- That the starting point in considering applications for non-publication is the principle of open justice and that a high standard must be met to depart from that principle..;
- The fact that material adverse to the applicant's interests may enter the public domain and affect her reputation is not sufficient to grant a name suppression order;
- There is already media interest and a public interest;
- There are no exceptional circumstances to warrant the non- publication order sought

Authority's discretion to grant non-publication orders

[5] The Authority's discretion to grant non-publication orders is contained in clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act). Clause 10(1) of the Second Schedule of the Act states:

The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[6] This discretion must be exercised on a principled basis.

[7] The Employment Court in *Crimson Consulting Limited v Berry* reviewed and summarised a recent Authority's order regarding non-publication in the employment jurisdiction.¹

[8] The Court recognised that the general principle that justice should be administered openly was a strong one and that a party seeking to depart from the fundamental principle of open justice was required to provide evidence identifying specific adverse consequences that should result in a non-publication order being issued. This principle was recently restated by the Employment Court in *JGD v MBC Limited*²

[9] The onus is therefore on the applicant to show that a non-publication order should be made because it is in the overall interests of justice to do so.

[10] The Employment Court recognised that every case would be very fact specific and that the employment institutions had to weigh and assess all of the competing factors carefully and in a principled manner.

[11] The applicant has filed claims that involve a claim of unjustified disadvantage in respect of her suspension from employment by the respondent. The applicant says the suspension is unreasonable, unlawful and not an action a fair and reasonable employer could have taken in all the circumstances. The applicant's claims include that the respondent significantly breached her privacy prior to suspending her from her employment.

[12] The respondent denies the applicant's claims. It says issues have arisen about the applicant and her employment by it which require investigation. While it completes this investigation the respondent says the applicant has been lawfully suspended from her employment.

¹ [2017] NZEmpC 94

² [2020] NZEmpC 193 at [5]

[13] The employment relationship is ongoing. The parties are at an early stage in having their dispute resolved by the Authority, they have been to mediation but this was not successful. The pleadings filed were done on an urgent and interim basis.

[14] In *JGD v MBC Limited*, the Court considered some of the interests to be balanced with the fundamental principle of open justice when exercising its discretion to issue a non-publication order. These include exercising the discretion "...consistently with the objectives of the legislative framework that applies in this specialist Court. These include the need to support successful employment relationships and to address the inherent inequality of bargaining between employers and employees..."³

[15] Relevant to the current case, the Court referred to and agreed with observations made in *FVB v XEY* that "...where an application is made on an interim basis, the principle of open justice will hold less weight than at a later stage in the proceedings".⁴ The Court stated this was important "...because the Courts are cautious about permitting public opinion to form, and potentially reputational damage to occur, on the basis of allegations."⁵ I also agree with Judge Holden's observations about the significant detrimental impact that the publication of the names of parties or even witnesses can have on their ongoing prospects of employment, regardless of the outcome of the case".⁶

[16] I accept that there is potential for serious damage to the applicant's professional reputation and job prospects if her name and identifying details are published at this interim stage. There is minimal public interest in this particular matter and naming the applicant would seriously impact the applicant and potentially undermine the objectives of the Act in acknowledging and addressing inequality of power in relationships.

[17] Accordingly, until further order of the Authority no person is to publish the names or identifying details of the applicant, the respondent and any witnesses who may be giving evidence, any documents filed and any other issues relating to the employment relationship before the Authority.

³ Ibid para[6]

⁴ *FVB v XEY* [2020] NZEmpC 187 at [11]

⁵ [2020] NZEmpC 193 at [8]

⁶ Ibid para [9]

[18] The condition of an ‘until further order of the Authority’ leaves open the possibility that new evidence, or evidence heard during the substantive determination, may make it appropriate for the non-publication order to be reviewed.

[19] It also leaves open the possibility that when issuing a substantive determination, the Authority considers that one or both parties should be named and whether or not witnesses and information filed in the Authority should no longer be subject to a non-publication order.

Costs

[20] Costs are reserved pending the outcome of the substantive matter.

Anna Fitzgibbon
Member of the Employment Relations Authority