

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 151  
3135660

BETWEEN            AEX  
                                 Applicant  
  
AND                    NSO  
                                 Respondent

Member of Authority:    Helen Doyle  
  
Representatives:        Jills Angus Burney, counsel for the Applicant  
                                 James Pullar and Amy Kennerley, counsel for the  
                                 Respondent  
  
Investigation Meeting:    14 April 2021 by telephone  
  
Submissions:            On the day  
  
Date of Determination:    16 April 2021

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**DETERMINATION OF THE AUTHORITY**

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- A     The application for an interim injunction is declined.**
- B     The investigation can proceed.**
- C     Costs are reserved until after the substantive investigation and  
         determination.**

**Prohibition from publication**

[1] The non-publication order in the Authority determination dated 6 April 2021 continues to apply.<sup>1</sup>

**Employment relationship problem**

[2] AEX is a teacher. NSO is a Board of Trustees.

[3] NSO received two complaints from students in 2021 about AEX.

[4] NSO wrote to Ms Angus Burney and stated it was intending to have the complaints investigated by a named external investigator. Terms of reference for the investigation were attached. Ms Angus Burney raised concerns about the investigator, the provision of information to the investigator and the scope of the investigation. She also raised concerns about the widespread rumours and malicious comments within the student population and wider school community about AEX that are untrue. The concern was that these rumours and comments have not been adequately managed by NSO and this has damaged the reputation of AEX and caused him mental anguish.

[5] A personal grievance was raised that NSO's actions have disadvantaged him. Pending the hearing of that grievance, AEX seeks orders by way of interim injunction.

[6] The orders were clarified in a memorandum lodged by Ms Angus Burney dated 6 April 2021.

[7] During submissions Ms Angus Burney amended some of the orders. I set out below the original orders sought and amendments:

- (a) That NSO is directed by the Authority to release statements to the students and their parents to discourage the rumours. The proposed statements are provided;
- (b) That NSO engages another investigator and not the proposed investigator on the basis they are not sufficiently independent. Ms Angus Burney confirmed this order is no longer sought. There was an affidavit from the proposed investigator lodged as part of these proceedings. The appropriateness of the

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<sup>1</sup> *AEX v NSO* [2021] NZERA 129

investigator was conditional on another order sought and whether information had already been provided to the investigator.

- (c) That NSO not discuss, summarise, provide copies of information, material or documents from investigations undertaken from September 2018 or a copy of a document from a third party to the independent investigator;
- (d) That NSO broaden the scope of its investigation beyond the two complaints and include examination of the alleged student bullying and “toxic” culture in the workplace. In submissions Ms Angus Burney stated that the order sought was not as broad as that in the memorandum. As I understood it, AEX seeks an order that the scope of the investigation be expanded to interviewing identified students who may have engaged in rumours.

[8] NSO does not accept that there is a basis for injunctive orders. It says that when it has become aware of comments made about AEX, the students involved are referred to senior leadership for appropriate action. It is concerned that a broader statement or statements is likely to amplify the discussion.

### **The approach to an interim injunction**

[9] I am satisfied that the Authority has jurisdiction to make interim injunctive orders.<sup>2</sup>

[10] The orders sought in this case are to restrain the actions of NSO in its investigation of complaints. The seeking of orders of this type because of a fear or apprehension of a breach of rights is a “quia timet” injunction. Pending the resolution of this application for an injunction, the investigation of the complaints has not been able to be advanced.

[11] The Authority proceeded to deal with the matter on the basis of the affidavit evidence and submissions. An undertaking as to damages has been provided.

[12] Chief Judge Inglis of the Employment Court has referred to the approach to interim injunctions as stated by the Court of Appeal.<sup>3</sup>

[13] The applicant needs to establish a serious question to be tried, or in other words, that the claim is not vexatious or frivolous. Injunctive relief is discretionary, however an

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<sup>2</sup> *Credit Consultants Debt Services NZ Limited v Wilson* [2007] 4 NZELR 372 at 46-47.

<sup>3</sup> *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC at 8 with reference to *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

assessment of whether or not there is a serious issue to be tried requires judicial evaluation. The balance of convenience needs to be considered with the impact on the parties of granting or refusing to grant an order. Finally an assessment of the overall justice by standing back is required as a check.

**Does the applicant have a serious issue to be tried?**

[14] The Employment Court has observed that an employer is usually entitled to conduct an investigation into the conduct and performance of an employee and it is a grave matter for the Court to interfere with this entitlement by way of prior restraint.<sup>4</sup>

[15] The Employment Court more recently in *Ports of Auckland Limited v Carl Finlay* referred to orders restraining an employer from proceeding with an investigation/disciplinary process as rare.<sup>5</sup> Some of the difficulties with such orders are referred to in that judgment.<sup>6</sup>

[41] I consider that the overall interests of justice also weigh against the grant of the order sought. There is an interest in progressing employment processes in a timely manner without unnecessary interruption and legal wrangling, until final decisions and outcomes with substantive impact are known. Halting the employer's inquiry at this stage, to carry out a warrant of fitness check in respect of various aspects of it which may or may not be remedied prior to any decision ultimately being made, is a significant step which should not be lightly taken. It runs a risk of derailing a process which an employer is obliged to undertake, and of fixing a problem that may not exist, which may not ultimately need fixing, or which may have no substantial impact.

*Malicious conduct and rumours*

[16] AEX says that there has been inaction on the part of management to deal appropriately with the rumours and this this has prejudiced and disadvantaged him. There is documentary evidence of rumours spreading and distress that this has caused to AEX in and attached to the affidavit evidence.

[17] The Head of School acknowledged in their affidavit that this can be damaging and upsetting. They say that there are actions and consequences for students when conversations are heard and they have tried to deal with it in that way. Whilst they have considered a more

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<sup>4</sup> *Russell v Wanganui City College* [1998] 3 ERNZ 1076 at 1082

<sup>5</sup> *Ports of Auckland Limited v Carl Finlay* [2017] NZAmpC 45 at [23].

<sup>6</sup> At [41]

public statement, there are concerns that this will bring more attention to the matter and amplify gossip and chatter further.

[18] Ms Angus Burney referred to another approach taken by the school on a different occasion. I consider the two situations distinguishable for reasons known to counsel and unable to be set out here.

[19] I also weigh that an announcement at this stage would alert those informed of a current investigation in circumstances where there has been a more discreet reference to the situation to date.

[20] I accept that the situation is very distressing for AEX. It is a balancing act how to deal with it and whether a different approach would assist or make matters worse. Counsel could not refer me to a case where orders had been made along the lines proposed in this matter. I accept that this is probably because usually such things are agreed at mediation or otherwise between the parties themselves.

[21] There is a serious issue to be tried whether the approach taken by the school to deal with harmful gossip and rumour is justifiable. Given the complexities about how to deal with the issue without exacerbating the situation, I cannot conclude it is strongly arguable.

#### *Independence of the investigator*

[22] It was conceded that the investigator is independent. I do not find any serious issue to be tried that the investigator is not independent or otherwise suitable. The suitability of the investigator will also need to be considered if the Authority gets to the point of making orders to restrain the provision of information to the investigator. Mr Pullar confirmed the investigator had been provided with the documents in question before the proceedings had been lodged.

#### *Provision of information*

[23] As a result of the concerns raised by Ms Angus Burney before lodging the application for an interim injunction NSO agreed to redact allegations that are not substantially similar from an earlier investigation document to be provided to the investigator. This was also the case for the third party document. These changes are confirmed in an amended terms of

reference. For completeness another report at or about the same time attached to the Head of School's affidavit will not be provided to the investigator.

[24] AEX says that the release of these documents will be prejudicial and will create an unconscious bias underlying the investigator's findings and will cause disadvantage.

[25] NSO say that the earlier investigation report and the third party document with agreed redactions are relevant to the investigation. The employer has the documents and Mr Pullar submits they contain information in the mind of the employer. Reference has been made to an agreed amendment to the scope of the investigation to investigate concerns of AEX about the extent to which the current complainants heard comments and whether that may have impacted the complaints that followed.

[26] It is arguable that without that information, the investigator will only have information about unsubstantiated rumours. The investigator would in all likelihood have to ask for the information to be able to sensibly and fully investigate. Failure to provide that may impact on the subsequent fullness and fairness of any report and there is a risk that the investigator may be left with the incorrect impression.

[27] It is arguable that the information is relevant for the further reasons set out in Mr Pullar's submission. I do not need to set those out here.

[28] I do not think there is no serious issue to be tried about the justification of the provision of these documents to the investigator and any prejudice as a result. It did not impress as a strongly arguable case on the untested affidavit evidence.

#### *Increased scope for investigation*

[29] Ms Angus Burney seeks that the scope of the investigation be increased to include the interview of identified students who have spread rumours. I understand that the broader extension to culture and bullying in the memorandum is no longer pursued.

[30] In the usual course of events it is for the employer to decide the shape of the investigation. The terms of reference provide the investigator may interview individuals that they deem necessary to assist in determining the facts relevant to the allegations. Ultimately there are two complaints to be investigated. The employer is obliged to undertake investigations into these. As part of that, the scope for the investigation has been extended to

the impact of any gossip or rumour on those complaints. That would seem to deal with at least some of the concerns of AEX in respect of the amended order sought.

[31] I conclude there is a serious issue to be tried about the justification of the scope of the investigation on the untested affidavit evidence but it does not impress as a strong case whether in respect of the original order sought or the amended order.

### **Balance of convenience**

[32] The Authority needs to look at the impact on the parties of granting or refusing to grant an order.

[33] It is accepted by counsel that this is a serious and sensitive matter about which care needs to be taken. An experienced and suitably qualified investigator has been appointed to investigate the complaints.

[34] The rumours are distressing for AEX and this is acknowledged by NSO.

[35] There are risks with the proposed statements. The effect could be to increase the rumours and there could be media interest. At the moment as I understand it there is very limited knowledge that there is to be an investigation. A public statement would increase the knowledge of a live investigation and that could lead to more speculation and rumour. It could also impact third parties such as the complainants and other teachers at this stage. If there is a written statement to parents then there is no ability to control who that gets shown to or where it ends up.

[36] NSO is in a position to ascertain day-to-day what is occurring and any risks with public statements.

[37] Mediation is scheduled to take place within about a month. Discussion at mediation could take place between the parties about the best approach to take.

[38] AEX still has the ability to pursue his unjustified disadvantage grievance and he can ask for appropriate remedies if he consider the actions of NSO are unjustified.

[39] Against that there has already been delay in the investigation of two complaints because of this application. There will be further delay over the next two weeks for reasons I

do not need to set out here. The Head of School says in their affidavit that families of complainants are anxious to have the matters resolved.

[40] NSO has already considered concerns from AEX and made some amendments to the terms of reference to try to progress the matter. If the interim orders are granted with respect to restraining information to be provided to the investigator and requiring a different external investigator there would be more delay. The investigator would not in the absence of the information understand what may have given rise to the rumours. They will not be able to compare the rumours with the actual facts.

[41] The increased scope of the investigation may cause delay and/or increase gossip and rumour. Weighed with this the investigator does have the ability to interview those individuals they feel would assist to establish the facts under the terms of reference. The concerns about an unduly restrictive investigation could be premature.

[42] I conclude the balance of convenience weighs against the grant of interim injunctions.

### **Overall justice**

[43] I have stood back and considered the strengths of the respective cases at this interim stage. Whilst there are serious issues to be tried, on the untested evidence I have not found them to be strongly arguable. I have found that the balance of convenience weighs against the grant of an interim injunction. I conclude overall justice does not favour the making of the interim orders sought. I am not satisfied that this is one of the rare occasions where the Authority should halt and intervene in the employment process to shape it on the basis of the orders sought.

[44] The investigation should proceed. Mediation should take place as scheduled.

[45] Contact will be made with the parties about the substantive investigation in due course.

### **Costs**

[42] Costs are reserved and will be dealt with after the substantive investigation and determination.

**Helen Doyle**  
**Member of the Employment Relations Authority**