

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**Attention is drawn to the order
prohibiting publication of
certain information**

[2014] NZERA Auckland 335
5435060

BETWEEN A
 Applicant

AND B LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: R McCabe/C Abaffy, Counsel for the Applicant
 A Caisley/D France, Counsel for the Respondent

Investigation: On the papers

Submissions Received: 30 June 2014 from the Applicant
 No submissions from the Respondent

Date of Determination: 13 August 2014

DETERMINATION OF THE AUTHORITY

- A. The substantive determination with the names of the parties redacted shall be released.**
- B. A permanent non-publication order shall be made suppressing the names of the complainant and the employee known as “PM”.**

Employment Relationship Problem

[1] This determination deals with a residual matter regarding publication of the substantive determination issued on 4 April 2014¹. The Authority determined the applicant was justifiably dismissed. As a consequence, the application for personal grievance was dismissed.

¹ *A v. B Ltd* [2014] NZERA Auckland 131

[2] The Employment Court has now issued its decision² on the appeal of the Authority's earlier grant of a time limited interim non-publication order.³ The Courts decision granted a further interim non-publication order. The applicant has challenged the Authority's substantive determination he was justifiably dismissed which is yet to be heard by the Court.

[3] A Minute dated 24 June 2014 sought the parties' submissions on the release of the substantive determination. A copy of the determination for publication was attached with the names of the parties replaced with "A" and "B Limited". Parties were to directed to file submissions setting out any objections, identifying the relevant part of the determination and any applicable law. A decision was to be made on the papers⁴.

Applicant's objection to release of the determination

[4] Submissions objecting to the release of the determination as drafted were received from the applicant only. The applicant objects to the release of the Authority's determination with only the names redacted because it is likely to identify "*the parties and in particular, the applicant/plaintiff*".

[5] He further submits the details in the determination likely to identify the applicant/plaintiff (individually or in combination) include:

- (a) his residential location;
- (b) his age;
- (c) his aircraft type;
- (d) the destination where the incident occurred; and
- (e) his employer; and
- (f) his manager.

² *H v A Ltd* [2014] NZEmpC 92

³ *A v B Ltd* [2013] NZERA 575

⁴ Minute of the Authority dated 24 June 2014

[6] The applicant submits “*it would be likely, for example, that another parent at the applicant/plaintiff’s youngest child’s school, would read the determination and identify the applicant/plaintiff as the pilot involved based on the above identifying information*”.

[7] The applicant submits that naming the employers and the destination where the alleged harassment occurred, including the type of aircraft, would likely identify the respondent/defendant party. The applicant submitted that a google search of these employee’s names disclosed their employment with the respondent. The applicant states the respondent was the only commercial airline that flew to the destination.

[8] The applicant has supplied the Authority with his own redacted version of the determination which it submits the Authority ought to release instead.

Determination

[9] A non-publication order should be no wider and last for no longer than is necessary in order to achieve the interests of justice in any given case. Subject to those basic considerations, the principle of open justice requires that nothing should be done to discourage the publication of fair and accurate reports of proceedings before the Court⁵ or Authority.

[10] The starting point in determining the scope of the non-publication order is the Court’s judgment. The majority of the Court (Inglis J dissenting) found that the interests of justice supported the granting of the interim non-publication order upon the following terms:⁶

Until further order of the Court there will be an order prohibiting publication of the parties’ names and other identifying particulars (judgment of the majority).

[11] The above order was the standard non-publication order made by the Court. The order does not expressly prohibit publication of the details now sought to be suppressed by the applicant. If that had been intended, specific conditions of the non-publication order suppressing those details should have been sought by the applicant.

⁵ *Hepburn v Huhtamaki Henderson Ltd* [2011] NZEmpC 166, (2011) 9 NZELR 411 at [12]

⁶ *H v A* [2014] NZEmpC 92

[12] As emphasised by the Court in *Hepburn v Huhtamaki Henderson Ltd*⁷ if it was important to the applicant to suppress these details then it should have been made clearer in the application for the non-publication order or preferably in a draft order, so that the appropriate wording could be embodied in the Court order.

[13] The Court has expressed concerns about the effect of suppression orders upon decisions:⁸

Different considerations apply to the actual decisions of the Tribunal or the Court. There is no express power in the 1991 Act to prohibit publication of part or all of the decision itself. We have reservations as to whether any general implied power to do so exists, although there may be a limited power to postpone publication of a decision in the interests of justice. We are, however, concerned about the continuation of a practice whereby the decision itself is required to be bowdlerised as a result of what is described as a 'Suppression Order' after it has been signed, sealed, and delivered to the parties.

[14] The applicant's submissions do not address how reference to any of the above detail it now seeks to suppress would identify the applicant. For example the applicant seeks removal of references to his residence within the determination. There is no reference to the applicant's residence in the determination. I cannot see how or what residence detail the applicant now seeks to be redacted.

[15] This case bears striking similarities to *C v Air Nelson*⁹. The case involved an allegation of sexual harassment. The Court had previously granted an interim non-publication order¹⁰ which it subsequently made final. The standard non-publication order was issued by the Court. The published decisions on the interim non-publication order and substantive hearing gave detail of the applicant's age, respondent's name, the appellant's job and the destination where the alleged harassment occurred. The basis for publication of this detail appears to be the Court's pragmatic acceptance that "*for all, except some in the industry, the Authority's reference to the plaintiff as "C" has been an effective disguise of his identity*"¹¹. It is

⁷ See above at [16] and [17]

⁸ *GWD Russells (Gore) Ltd v Muir* [1993] 2 ERNZ 332 (CEC43/93)

⁹ [2011] ERNZ 207

¹⁰ [2010] NZEmpC 18

¹¹ See above n 11 at [4].

inferred the reason the Court declined to suppress the respondent's name was any reference in the decision to an employer of pilots and cabin crew inevitably led to the respondent or its parent company.¹² The Court still suppressed the applicant's identity, accepting the respondent's may be revealed because of the nature of the applicant's job.

[16] This respondent employs several hundred pilots, many of whom fly the same aircraft type as the applicant. Evidence was given about rostering that allows pilots to manage to some extent where and when they shall fly through a 'bidding' system. While the respondent may fly to the destination where the incident occurred, the applicant may not have always done so.

[17] It is a reasonable inference this applicant did not work with the same crew all of the time, was one of many pilot's managed by the Fleet manager, did not fly exclusively to the destination where the incident occurred and was one of many pilots of aircraft of this type. It is reasonable to infer this applicant is a similar age to many other pilots employed by the respondent. These details would not lead to the applicant's identification.

[18] The only persons able to identify the applicant based upon these details would be the complainant and witnesses involved. Applying the Court's pragmatic approach, except some in the industry, the reference to the applicant as "A" is an effective disguise of his identity.

[19] The determination with the names of the parties redacted shall now be released for publication.

Other Non-publication orders

[20] A permanent non-publication order suppressing publication of the names of the complainant employee and the employee known as PM shall be made.

T G Tetitaha
Member of the Employment Relations Authority

¹² See above.