

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 527
5535176

BETWEEN BOARD OF TRUSTEES
 MANUNUI SCHOOL
 Applicant

A N D PAUL NORTHWOOD
 Respondent

Member of Authority: T G Tetitaha

Representatives: P Robertson, Counsel for the Applicant
 No appearance by the Respondent

Date of Minute: 19 December 2014

DETERMINATION OF THE AUTHORITY

A. I decline to make an order reopening the investigation and staying my previous orders. The interests of justice do not support the exercise of my discretion under clause 4 Schedule 2 Employment Relations Act 2000.

[1] I have several pieces of email correspondence from Counsel for the applicant dated 18 December 2014 seeking to relitigate this matter. The correspondence does not identify any reason for its submission other than to avoid an appeal. In the circumstances I have elected to treat this as an application to reopen the investigation and to stay my previous orders declining to grant the applicant's orders and directing mediation pursuant to clause 4 Schedule 2 Employment Relations Act 2000.

[2] Originally the applicant had sought the following orders by way of a statement of problem:

- (a) The urgent convening of an investigation meeting including timetabling directions;

- (b) A direction that the respondent does not distribute confidential information relating to the applicant's investigation to any third parties; and
- (c) A direction for the respondent to file a statement of problem setting out his concerns.

[3] I issued a Minute dated 18 December 2014 declining to grant the above orders. I directed the parties to mediation.

[4] On 18 December applicant Counsel sent an email stating:

As discussed the Authority Members decision is factually incorrect.

To avoid the need to appeal to the Court can you kindly advise the Authority that:

- 1. The information has not been disclosed to anyone yet except the board and its advisers.*
- 2. The confidential information includes complaints made by female students alleging sexual harassment. It is information of a deeply personal nature as well as being information held in confidence. The application refers to the Privacy Act.*
- 3. The Authority member has not referred to the obligation of a party to an investigation to act in good faith.*

[5] A second email sent the same day referred to paragraph 117 of *Hosking v Runting* and attached a copy of the decision.

Power to reopen

[6] The power to reopen an investigation is discretionary. The overriding consideration must be the interests of justice, having regard to the likelihood of a miscarriage of justice balanced against other relevant factors such as the importance of finality in litigation.¹

¹ *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9]

[7] The confidential information sought to be suppressed was not obvious from the original statement of problem. It attached an email dated 17 December 2014 with letters and a summary of the allegations attached thereto. I assume the letters and summary of allegations are the confidential information it seeks to suppress. My Minute noted this confidential information appears to have been released to the public given the number of named recipients. Any benefit of orders suppressing this information may now be redundant.

[8] The applicant now submits the information has not been disclosed to anyone except the Board and its advisers. This is not what the evidence shows. The email names recipients including a Member of Parliament and Ministry of Education officials.

[9] The original application did not disclose the legal basis for why the above information was confidential information. The applicant now submits the confidential information relates to the identity of students. It does not identify where that information is and in what form. It then relies upon the Privacy Act and a decision of the Court of Appeal *Hosking v Runting* [2005] 1 NZLR 1 which dealt with a tortious action of breach of privacy and the common law rights.

[10] The Authority was created by statute. As such, it “... *can only do what the statute creating it has authorised it to do*”.² The Court has determined that the Authority is not entitled to determine questions of privacy under the Privacy Act 1993.³ That is a specialist jurisdiction. Privacy principles may guide the exercise of my powers but it is not binding upon the Authority. Tortious actions are specifically excluded from the Authority’s jurisdiction. Section 161(1)(r) of the Act excludes actions founded on tort.

[11] Finally the applicant refers to “*the obligation of a party to an investigation to act in good faith*” as the basis for its orders. I infer it means to rely upon s4 of the Act. It does not explain how that justifies the making of these orders.

[12] While a party has a general duty to act in good faith under s4 of the Act, this does not provide jurisdiction to make a direction about confidential information or for

² *Reid v NZ Fire Service Commission* [1996] 1 ERNZ 228 at 238

³ *New Zealand Public Service Assoc Inc v Southland Regional Council* [2005] ERNZ 1008 (EmpC) at [12]; *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614 (EmpC)

me to direct the respondent to file a statement of problem setting out his concerns. A statement of problem is the document used to commence proceedings within the Authority.⁴ As noted previously in my Minute I cannot direct someone to commence proceedings. I only have jurisdiction over proceedings once they have been commenced.

[13] Having considered the above matters, I decline to make an order reopening the investigation and staying my previous orders. The interests of justice do not support the exercise of my discretion under clause 4 Schedule 2 Employment Relations Act 2000.

[14] With respect, the application for suppression of confidential information appears misconceived. It should more properly be an application for an interim or permanent non-publication order pursuant to clause 10 Schedule 2 Employment Relations Act 2000. Non-publication of the names of the affected students should meet any concerns about their rights to privacy.

[15] If the applicant wishes to pursue a non-publication order, it should file an application with the following:

- a) The exact information it seeks to suppress e.g. the names of affected persons and any identifying detail and the legal grounds for suppression i.e. child, third party witness, privilege etc.;
- b) Sworn evidence from a Board member deposing to the above; and
- c) A draft order it wishes the Authority to make.

[16] This matter has been directed to mediation. The parties may wish to discuss the terms of any non-publication order there.

T G Tetitaha
Member of the Employment Relations Authority

⁴ Regulation 5 Employment Relations Authority Regulations 2000