

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 339  
3016715

BETWEEN MELISSA BOWEN & JESSICA  
LEWIS  
Applicants

A N D BANK OF NEW ZEALAND  
Respondent

Member of Authority: David Appleton

Representatives: Rob Lewis, advocate for the applicants  
Emma Butcher, counsel for Respondent

Investigation Meeting: Decided on the papers

Submissions received: 18 October 2017 from the respondent;  
30 October 2017 from the applicants

Date: 31 October 2017

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**DETERMINATION OF THE AUTHORITY ON AN INTERLOCUTORY  
ISSUE**

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**Background**

[1] The applicants have each raised a personal grievance of unjustified disadvantage against the respondent and have asked the Authority to investigate their grievances. The underlying background to the grievances involves allegations raised by the applicants against a senior member of the respondent and another named individual which the respondent is treating as protected disclosures under its Group Whistleblower Protection Policy (the protected disclosures) and which are being investigated by the respondent.

[2] The applicants also allege that they have been subjected to retaliatory action by the respondent for having raised the protected disclosures; namely, by having had their roles selected for redundancy. Neither the original allegations that comprise the protected disclosures nor the alleged retaliatory action are before the Authority, as the applicants have asked the Human Rights Commission (the Commission) to assist them with those aspects of their complaints against the respondent.

[3] The matter before the Authority is an alleged unjustified disadvantage arising out of a review by the respondent of the original decision to make the applicants' roles redundant which found that it was sound. The applicants say that the conclusion of the review was in breach of promises made in an earlier memorandum to them from the respondent. The applicants both remain employed by the respondent, but are, I believe, on special paid leave.

[4] Following discussions between the parties and the Authority, it was agreed that the Authority's proceedings should be stayed *sine die* whilst the Commission's process was ongoing. This was because the Authority would have to investigate aspects of the matter which is before the Commission in order to determine whether the actions of the respondent in carrying out the review were justified.

### **The issue to be determined**

[5] However, there is one matter which needs to be determined now; that is, an application by the respondent that a prohibition from publication order should be made by the Authority prohibiting the publication of the allegations comprising the protected disclosures, the identities of the persons against whom they have been made and the alleged retaliatory action. Whilst these are not matters which the Authority is asked to determine substantively, a significant amount of detail has been stated in the statement of problem, and a significant amount of materials have been lodged with the Authority by the applicants which disclose the protected disclosures and the identities of the persons against whom they have been made, and the alleged retaliatory action.

[6] The respondent proposes a wide order which encompasses much of the information lodged with the Authority, although it boils down to all information which identifies details of the protected disclosures, the names of the individuals

named in the protected disclosures who are not parties of the proceedings in the Authority, and any information leading to the identification of those persons, until further order.

[7] The applicants oppose the issuing of a prohibition from publication order. They cite four reasons. First, they say that it would reduce their protection from threats and attempts to terminate their roles.

[8] Second, the applicants say that, now that the matter is ‘suspended’ (that is, stayed), they do not believe that it is consistent for the Employment Relations Authority to make an order in respect of an application that was made before the decision to stay the process was made.

[9] Third, the applicants state that a Commission representative has advised that a prohibition of publication order “could potentially impact on the Human Rights Commission process, but the representative advised that they would need to obtain legal advice on this first”. They say that, based on the Authority’s decision that the Authority’s process must not impact on the Commission’s process, it ‘stands to reason’ that the Authority must not make a prohibition from publication order.

[10] Finally, the applicants say that the respondent’s own policies have always given them the right to escalate the entire matter to a number of entities, including, in New Zealand, The Ombudsman, The Serious Fraud Office and the Financial Markets Authority or any Cabinet Minister, and in Australia, The Australian Prudential Regulatory Authority (APRA) or directly to the Minister of APRA.

## **Discussion**

[11] I shall address each of the applicants’ arguments in turn, but first set out the legislative power of the Authority.

[12] Clause 10(1) of Schedule 2 of the Employment Relations Act 2000 provides that 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.

[13] Prohibition from publication orders have been considered by a full court of the Employment Court in a number of decisions, and a leading case is *H v A Ltd*<sup>1</sup>. That case considered the suppression of the names of the parties, which is not sought here. However, the court said the following, in paragraphs [78] to [80].

[78] We agree that non-publication of names or other identifying particulars in employment cases will be “exceptional” in the sense that such orders are and will be made in a very small minority of cases. However, we do not agree that an applicant for such an order must make out, to a high standard, that there are such exceptional circumstances that a non-publication order is warranted. That is not the standard that Parliament has prescribed for such orders in this Court or the Authority.

[79] By making a non-publication order in a case in which the interests of justice warrant that order does not mean, in our view, that the Court has abandoned a commitment to “open justice”. Whilst the identification of all persons involved in a case is a contributor to “open justice”, so too are a number of other safeguards that are not at issue, and therefore at risk, in this case. These include a public hearing of the case, a publicly issued and reasoned judgment of it, together with the rights of appeal and judicial review to attach to all of the work of the Authority and the Court. In addition, the statute clearly allows for a change to the presumption (and the reality in the vast majority of cases) that there will be no restriction on publishing any relevant information about a proceeding or of the judgment deciding the case.

[80] There are, of course, other circumstances in which this Court (and the Authority and other courts) prohibit publication of information about cases. Commercially sensitive information that may be misused by a competitor, if published, is perhaps the most common example of non-publication orders in this jurisdiction. Others have included information about the security arrangements of prisons which, if publicised, might endanger prison staff; the identities of persons who have been subjected to criticism in evidence but have had no opportunity to challenge or refute that criticism; and the identities of hospital patients whose care and treatment are the subject of proceedings involving professional health staff. There are many other instances of ad hoc non-publication orders which are, nevertheless, very much the exception than the rule.

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<sup>1</sup> [2014] NZEmpC 92

[14] It is clear from these passages that, whilst relatively rare, prohibition from publication orders do not need exceptional circumstances.

*Reduction in the applicants' protection from threats and attempts to terminate their roles.*

[15] It is, of course, at this stage no more than an allegation that the applicants were threatened. However, I understand that the applicants are saying that a prohibition from publication order may enable the respondent to hide behind it to subject them to detrimental or disadvantageous treatment.

[16] I wonder whether this fear is borne out of a misapprehension as to the scope and effect of a prohibition from publication order. It may be helpful to say what a prohibition from publication order would not do. It would not prevent the applicants from raising further personal grievances with their employer, nor from raising further protected disclosures through the proper channels, nor from bringing further applications to the Authority, or to the Commission, or any other appropriate judicial or administrative body charged with determining whatever matter is properly placed before them.

[17] If the applicants believe that the possibility of them going to the press or resorting to publication in social media will protect their jobs, they may or may not be right. Only the respondent knows what effect such a possibility may have on it. However, it cannot be the case that an employee wishing to protect herself from unjustified adverse treatment has an unfettered right to repeat in the public domain allegations which have yet to be proven by a properly considered investigative process, whoever may be charged with carrying it out.

[18] The applicants remain employees of the respondent and are protected from unjustified adverse treatment by the duty of good faith and other legislative and contractual protections. The respondent is a major organisation with access to significant internal and external resources to advise it on its duties. These ought to be enough to protect the applicants without them resorting to publication of as yet unproven allegations in the public domain.

*The Authority's matter is stayed*

[19] It is true that the application for a prohibition from publication order was made before the decision to stay the proceedings *sine die*. However, the matter is still a live one in the Authority, in the sense that it has not been disposed of. The materials containing the allegations remain on its files, both paper and electronic.

[20] Therefore, it remains pertinent to consider the potential damage that may be done if the as yet unproven allegations comprising the protected disclosures were to be made public.

*A Commission representative has advised that a prohibition of publication order could potentially impact on the Commission process*

[21] The applicants have not said who this representative was, what his or her standing is, nor how he or she considers the Commission's process could be impacted upon. In addition, the applicants have not stated what information they gave the representative, nor that the legal advice alluded to has been obtained.

[22] Given the apparent misunderstanding of the scope and effect of a prohibition from publication order, I am doubtful that the representative has been given a full and accurate account of what is proposed by the respondent. I am not suggesting that there has been deliberate misleading by the applicants, but that the representative of the Commission may have been inadvertently misled.

[23] To be absolutely clear, any prohibition from publication order made by the Authority would not prevent the Commission from taking whatever steps it may need to take to progress the applicants' complaint to it. It has its own processes and the Authority cannot and does not purport to interfere with those processes.

*The respondent's own policies have always given them the right to escalate the entire matter to a number of entities*

[24] Again, any prohibition from publication order made by the Authority would not prevent the applicants from taking whatever steps they are permitted to take under the respondent's Group Whistleblower Protection Policy, or any other internal policy, or any enactment of which they are entitled to avail themselves.

### *Conclusion*

[25] The allegations comprised in the protected disclosures concern identified individuals who have not been named as parties to the Authority's proceedings. The allegations against them are serious, but are as yet unproven. The quotation from *H v A* at paragraph [80] recognises that the Authority and Court will, where necessary, issue a prohibition from publication order to protect from publication in the public domain "the identities of persons who have been subjected to criticism in evidence but have had no opportunity to challenge or refute that criticism".

[26] Once information has been published in the public domain, it cannot be taken back, and whilst steps may be taken to correct it, or to issue denials, the nature of digital information is that it never completely disappears. The effects on the individuals concerned could be far reaching and long lasting.

[27] I am satisfied that it is appropriate to issue a prohibition from publication order. The terms of the order are as follows:

### **Order**

[28] I prohibit from publication all information contained in the applicants' statement of problem and the documents annexed thereto which:

- a. Identifies the details of the protected disclosures made by the applicants; and
- b. Identifies or could lead to the identification of the individuals named in the protected disclosures who are not parties to these proceedings.

[29] For the avoidance of doubt, this order does not prevent the applicants from:

- a. Raising further personal grievances with relevant managers or HR advisers of their employer;
- b. Making further protected disclosures in accordance with the National Australia Bank Limited Group Whistleblower Protection Policy or any other formal relevant process in place within the respondent;
- c. Communicating relevant information with their representative, Mr Lewis, in order to enable him to represent them;

- d. Seeking legal advice; or
- e. Communicating relevant information to the Commission.

[30] This prohibition from publication order shall remain in place until further order of the Authority. Either party may apply to the Authority for a variation or discharge of the order. Such application must explain the reasons for it and what has changed since the order was made.

**Costs**

[31] Costs are reserved, and shall be determined after the Authority has disposed of the substantive matter before it.

David Appleton  
Member of the Employment Relations Authority