

**NOTE: This determination
contains an order prohibiting
publication of certain
information at paragraph [20]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 432

3173624

BETWEEN CDK
 Applicant

AND LVQ
 Respondent

Member of Authority: Leon Robinson

Representatives: Beth Smith and Lizzie Thomas, counsel for Respondent

Date: 31 August 2022

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] This matter comes before me as duty member. LVQ (the Trust) seeks an interim non-publication order on an urgent basis and without notice to the Applicant CDK.

Background

[2] The Applicant lodged a very comprehensive statement of problem on 27 May 2022 asking the Authority to resolve his claims of unjustifiable constructive dismissal and unjustifiable disadvantage. CDK resigned on 17 March 2022. The Trust had commenced an investigation into allegations of bullying and unreasonable behaviour by CDK.

[3] CDK asks the Authority to resolve the employment relationship problem by granting him formal orders including reinstatement, reimbursement, and compensation. He also asks

the Authority to make recommendations and order the Trust to issue a public apology. The Authority does not have the power to order a public apology.

[4] By its statement in reply of 21 June 2022 the Trust denies that CDK was unjustifiably disadvantaged or unjustifiably constructively dismissed. It says that its actions were what a fair and reasonable employer could have done in all the circumstances. It says that it received complaints of bullying, intimidation and threatening behaviour against CDK, that it engaged an external investigator to carry out an investigation into the complaints and that it provided CDK with reasonable opportunities to respond to the Trust's concerns throughout the process of investigation and that it genuinely considered CDK's explanations. The Trust says CDK is not entitled to the remedies he seeks from the Authority.

[5] The parties were unable to resolve the employment relationship problem by the use of mediation. It presently awaits assignment to an investigating member of the Authority.

The orders sought

[6] The Trust makes application on an urgent basis and without notice to the Applicant for an interim non-publication order prohibiting the publication of:

- (i) the names of the parties in this matter (or information that would identify the parties involved in this matter);
- (ii) the Statement of Problem and Statement in Reply (including any amended Statements of Problem or Statements in Reply that may be filed in the matter) or details of their contents;
- (iii) the names of any witnesses involved in the proceeding and any evidence filed in the Authority;
- (iv) any communications between the parties, the representatives and the Authority; and
- (v) the nature of the claims in this matter.

[7] The Trust also asks for a direction that CDK be prohibited from making public comments including to the entities and individuals identified in an email of 29 August 2022 CDK sent to the Trust's lawyers, about the Trust, its management, or that relate to the matters before the Authority.

[8] The Trust asks that these orders remain in force until the later of two weeks after the Authority's determination has been issued in relation to the substantive matter between the parties, or any application for permanent non-publication orders has been determined. It also asks that leave be reserved for it to apply for permanent orders after the Authority has determined the substantive matter.

The grounds for the orders sought

[9] The Trust lodges evidence in support of its application for non-publication orders through an affidavit of Mr Z (Mr Z). Mr Z is the General Manager People and Customer for the QQQ. He is also a trustee on the board of the Trust.

[10] The Trust denies CDK's assertion that it took issue with his use of Te Reo Māori in the workplace, and it denies that he has valid personal grievances. The Trust says that since he raised his personal grievance, CDK has repeatedly sought a public apology from the Trust, including that it apologises for "wrongfully questioning his use of Te Reo Māori at work."

[11] There is evidence that on 28 June 2022, the Trust received a document headed "Illegal investigation by Y Trust of Māori Executive for speaking Te Reo Māori while protecting whanau from Covid." The document appeared to be a draft press release relating to the dispute between these parties. The Trust is unaware of how widely that document has circulated.

[12] There is evidence too that on 29 August 2022, CDK threatened to contact the Trust's stakeholders and funders, and send them a copy of the Statement of Problem and other information related to his claims, unless by 12pm on Wednesday 31 August 2022 the parties could reach agreement, including the Trust agreeing to issue a public apology. Apparently, CDK would not agree to a reasonable extension to the 31 August deadline and he advised that "my proposal ends 12pm (sharp) Weds 31st Aug, my 'campaign then commences".

[13] The Trust fears that should CDK carry out the threats recorded in the 29 August 2022 Email, there is a serious risk that it will suffer unfair and unjust reputational damage, which could have adverse financial consequences and/or impact on its access to the land on which it operates. In particular:

- (i) The Trust is a charitable trust and is tasked with managing the X project at X (X) in the X region. The Trust works with local iwi, mana whenua, local government and other entities to protect X.

- (ii) CDK's assertions that the Trust is not supportive of the use of Te Reo Māori in the workplace or other cultural practices, which are denied by the Respondent, will likely cause significant concerns for the groups identified in the 29 August Email, and could damage the relationships between the Trust, local iwi and mana whenua.
- (iii) Funding applications submitted by the Trust to local government and other funders often require the support of local iwi. The Trust could suffer adverse financial impacts if CDK's actions damage the Trust's relationships with local iwi and mana whenua, and as a result, the Trust loses support for funding applications.
- (iv) Mana Whenua and local iwi own most of the land on which the Respondent operates. The Respondent relies on its relationships with mana whenua and local iwi for access to the land at X and it could lose access to that land if those relationships are damaged.

[14] The Trust says that requiring it to proceed on notice would cause prejudice to it and the interests of justice require the application to be determined without serving notice of it. The Trust is concerned that, if its application is required to be notified to the Applicant before interim non-publication orders are made, the Applicant may take immediate steps to publish material relating to the proceeding thus defeating the purpose of the Respondent's application before it is determined by the Authority.

The reasoning

[15] Non-publication orders are a departure from the fundamental principle of open justice. In considering whether to grant non-publication orders, the Authority must strike a balance between the principle of open justice and the interests of the party seeking non-publication orders, noting that the standard for departing from the principle of open justice is high.

[16] While the person applying for non-publication orders does not need to show exceptional circumstances, they must establish sound reasons for the presumption favouring publication to be displaced, showing that, if non-publication is not granted, there will

be specific adverse consequences that are enough to justify an exception to the fundamental principle.

[17] I note too that where an application for non-publication is for an interim non-publication order, the principle of open justice has less weight than at a later stage in the proceedings. The institutions are cautious about permitting public opinion to be formed based on allegations rather than determinations of the institutions and courts.

[18] I am particularly mindful that it is an interim non-publication order that is now sought. I recognise that the principle of open justice has less weight at this current stage of the Authority's investigation. I am satisfied that if non-publication is not granted, there will be specific adverse consequences that are enough to justify an exception to the fundamental principle. Those consequences are the matters set out in Mr Z's affidavit. The threshold, such as it is at this juncture, I am satisfied has been met. I grant an interim non-publication order.

[19] I prefer however that CDK be heard on the continuation of an interim non-publication order that I have made. I direct that CDK lodge his opposition and affidavit evidence within 7 days of the date of this determination for my further consideration.

The orders

[20] I grant an interim non-publication order until further order of the Authority prohibiting the publication of:

- (i) the names of the parties in this matter (or information that would identify the parties involved in this matter);
- (ii) the Statement of Problem and Statement in Reply (including any amended Statements of Problem or Statements in Reply that may be filed in the matter) or details of their contents;
- (iii) the names of any witnesses involved in the proceeding and any evidence filed in the Authority;
- (iv) any communications between the parties, the representatives and the Authority; and
- (v) the nature of the claims in this matter.

[21] I further direct that CDK is to refrain from making public comments including to the entities and individuals identified in his email of 29 August 2022 sent to the Trust's lawyers, about the Trust, its management, or that relate to the matters before the Authority.

[22] I direct the Trust's lawyers to immediately serve a copy of this determination on CDK.

[23] Costs are reserved.

Leon Robinson
Member of the Employment Relations Authority