

Attention is drawn to orders prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 268
3134439

BETWEEN	GHX Applicant
AND	HEC Respondent

Member of Authority:	Nicola Craig
Representatives:	Tanya Kennedy, counsel for the applicant Philip Skelton QC and Bridget Smith, counsel for the respondent
Investigation Meeting:	24 May 2021
Submissions received:	At the investigation meeting and 26 May 2021 for the applicant At the investigation meeting and 28 May 2021 for the respondent
Date of determination:	22 June 2021

DETERMINATION OF THE AUTHORITY

- A. GHX's application for an interim injunction is declined.**
- B. A non-publication order is made.**
- C. Costs are reserved.**

What is the employment relationship problem?

[1] The applicant, identified as GHX, formerly worked for the respondent, identified as HEC. A settlement agreement was reached between the parties and signed off under s 149 of the Employment Relations Act 2000 (the Act) by a mediator from the Ministry of Business, Innovation and Employment.

[2] GHX claims that there have been past breaches of the settlement agreement by HEC and a future breach, albeit of a somewhat different nature, is forecast. A compliance order and penalties are sought. In addition GHX seeks an interim injunction restraining HEC from further breaches including a proposed provision of information.

What has the Authority's process been?

[3] This matter was originally dealt with by the Duty Member. Urgency was granted for the interim injunction application. Undertakings were given by HEC which are now the subject of dispute between the parties. An interim non-publication order was also made.

[4] Once this matter was allocated to me a case management conference was held. GHX had lodged an affidavit with the injunction application. HEC was given the opportunity to provide affidavit evidence but chose not to do so.

[5] There was discussion about the prospect of hearing the compliance order application at the same time as the interim reinstatement claim. However, I subsequently indicated by Minute that I did not consider I could deal with the compliance order application at that early stage.

[6] It is now agreed that no interim compliance order may be issued.¹ On that basis any compliance order would need to be a permanent one. Although there is some common ground regarding the facts, whether HEC has a defence, based on legal obligations bringing into play exceptions in the settlement agreement, will need further exploration. There is some case law under previous legislation indicating that compliance orders may only be sought where there have been past breaches but I leave that question open for the moment.²

¹ *AFFCO New Zealand Ltd v NZ Meat Workers & Related Trades Union Inc* [2016] NZEmpC 154.

² *Mills v Primary Producers Co-operative Society Ltd* [1989] 2 NZILR 460.

[7] I have proceeded with the interim injunction application only. An investigation meeting was held on 24 May 2021 to hear submissions. A further affidavit from GHX along with additional submissions and documents were subsequently received, followed by additional submissions for HEC.

[8] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[9] HEC's primary argument is that the Authority has no jurisdiction to order an interim injunction regarding a settlement agreement signed off by a mediator. If I consider that I do have jurisdiction then the usual interim injunction questions of arguable case, balance of convenience and overall justice will need to be examined.

[10] References were made to GHX's privacy but it was agreed that the Authority does not have jurisdiction to deal directly with claims under the Privacy Act 1993.

What does the settlement agreement provide?

[11] The settlement agreement contains provisions constraining what the parties could say and do after the agreement was signed. Clause 3 requires that an announcement be made to staff and others about GHX's departure and restricts other communications. Clause 4 is a non-disparagement provision.

What led to the application being filed?

[12] GHX claims that HEC has at least twice breached the settlement agreement. HEC accepts that events occurred but does not agree that there was a breach of the agreement. It challenges that some statements were disparaging and also claims its legal obligations provide a defence.

[13] It is the proposed provision of information which has led to GHX's immediate concern about future non-compliance with the settlement agreement provisions limiting provision, disclosure and comments. HEC indicates that it has no intention of breaching the settlement agreement although some information provision is envisaged.

Is the Authority able to grant injunctions regarding settlement agreements?

[14] Submissions for HEC argue that the Authority has no power to grant an interim injunction, or a permanent one for that matter, to enforce the terms of a record of settlement.

[15] GHX maintains that injunctions can issue regarding records of settlement. This is based on:

(a) the broad basis on which the Authority operates, such as in s 160, 161 (r) and (s) and s 221 of the Act; and

(b) the absence of any exclusion such as exists for freezing and search orders.³

[16] HEC's arguments regarding jurisdiction have developed over time. At one point it appeared that HEC's argument related to quia timet injunctions that is, those for threatened breaches. However, ultimately the question became whether injunctions can enforce settlement agreements concluded under s 149 of the Act. The parties agree that there are no decisions directly on this point.

[17] The Authority is a creature of statute and its jurisdiction and powers are limited to those provided in the Act or by other pieces of legislation.

[18] HEC referred to s 161(1)(r) of the Act under which the Authority is empowered to make determinations about employment relationship problems generally including:

any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort).

[19] This reflects the wording of the employment relationship problem definition in s 5 of the Act.

[20] Under s 162 of the Act the Authority may make any order which the High or District Courts may make under any enactment or rule of law relating to contracts. This includes the power to impose injunctions.

[21] HEC relies on the Court of Appeal's conclusion in *JP Morgan Chase Bank NA v Lewis* that the settlement agreement in that case (albeit one not signed by an MBIE

³ The Act, s 160(4).

mediator) was not an employment agreement or a variation of one.⁴ Rather it was regarded as a new agreement and not one which arose from or was related to the employment relationship.

[22] However, regardless of how widely ss 161(1)(r) and 162 are seen as being, I view the key question here as whether any powers which might otherwise be available to the Authority are able to be used in cases involving a s 149 record of settlement.

[23] Under s 149(3)(b) of the Act after terms of settlement are signed by the mediator:

except for enforcement purposes, no party may seek to bring those terms before the Authority..., whether by action, appeal, application for review, or otherwise.

[24] Penalties for breaches of settlement agreements are specifically provided for, as are compliance orders.⁵ Under s 151(2) of the Act s 149 settlement agreements:

...may be enforced -

(a) by compliance order under section 137; or

(b) by using, as if the settlement ... were an order under section 141, the procedure under s 141.

[25] Section 141 provides that orders may be filed in the District Court and be enforceable in the same manner as an order given by the District Court.

[26] I accept GHX's point that there is no specific exclusion for injunctions in the powers or jurisdictions sections of the Act, as there is with freezing and search orders.⁶ However, s 149(3)(b) prevents some claims which would otherwise be well within the Authority's usual work from being dealt with when a settlement has been signed by a mediator.

[27] Decisions, both before and after *JP Morgan* have identified that damages are not available for a breach of a record of settlement.⁷ Of particular note is the statement by the Full Bench of the Employment Court in *South Tranz Ltd v Strait Freight Ltd*:

We find the scheme of the ... Act ... as it applies to this case to be clear. Where parties have concluded an agreement which is enforceable under s 149(3), the only means of enforcement available are those provided for in s 151. **Where, as**

⁴ *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255.

⁵ The Act, s 149(4) regarding penalties and s 137 (1)(a)(iii) regarding compliance orders.

⁶ The Act, s 160 (powers) and s 161 (jurisdiction).

⁷ *South Tranz Ltd v Strait Freight Ltd* [2007] ERNZ 704 and *CultureSafe NZ Ltd & Ors v Turuki Healthcare Services Charitable Trust* above at n 4, at [74].

in this case, the term of the agreement which is found to have been broken does not require the payment of money, the only remedy available to the Authority is to order compliance with the term in question. No other remedies are permitted under s 151 and the effect of s 149(3)(b) is that the agreement may not be the subject of any form of proceedings other than enforcement proceedings. A compliance order is an order made under s 137 and is limited to an order of the type specifically provided for by s 137(2). It cannot be made to include an order for damages and any other order related to an order for damage such as an account of profits.⁸

[28] I have considered whether injunctions could be seen as different to damages and thus not be caught by the restriction but am unable to identify a basis for that. By way of compliance order the Act makes provision for orders targeting future breaches.⁹

[29] A preliminary review of decisions has disclosed a couple of applications for injunctions regarding breaches of settlement agreements. The determinations refer to the applications but neither include an injunction being ordered.¹⁰ The cases proceeded on other bases. The absence of orders could be seen as significant although to be fair, there was no indication that the injunction was a remedy viewed as unavailable.

[30] Having considered all of the above, I conclude that the Authority has no power to impose injunctions regarding breaches of settlement agreements signed under s 149 of the Act. That does not leave a party remediless where the other party has breached, as the compliance order and penalty claims are available along with District Court enforcement.

Should directions be issued?

[31] For GHX, in the alternative to an injunction, orders are sought to ensure the investigation is fairly conducted.

[32] GHX relies on *Bay of Plenty District Health Board v CultureSafe* where the Authority is described as having “broad and flexible procedural powers, all designed to ensure its processes are fair to both parties”.¹¹ Directions included that a representative

⁸ *South Tranz Ltd v Strait Freight Ltd*, as above, at [38], emphasis added.

⁹ The Act, s 137(2) includes orders “for the purpose of preventing further non-observance of or non-compliance with ...”.

¹⁰ *The Trustees of the Ahipara Health and Resource Trust v Adlam* ERA, Auckland, AA383/10, 25 August 2010 and *Ho v Chief of Defence Force* [2005] ERNZ 93.

¹¹ *Bay of Plenty District Health Board v CultureSafe & Ors* [2020] NZEmpC 149 at [50].

not contact the other party directly, no public comments were to be made pending the Authority's determination and website posts be taken down.

[33] GHX seeks broad directions including one which appears to effectively amount to an injunction. The directions powers are procedural rather than substantive in nature and I do not regard it as right to bypass the limitation on injunctions in s 149 situations by making a procedural order to essentially the same effect. Other parts of the orders sought are covered under the undertaking and non-publication heads below.

[34] The remaining matter is whether HEC should keep the Authority and the applicant informed regarding any further contacts from anyone seeking information about GHX. Information on this front was volunteered for HEC at the investigation meeting and given the way this proceeding has unfolded I direct HEC to inform the Authority and the applicant promptly in the event that further information about GHX is sought.

Undertakings

[35] Whilst the matter was with the Duty Member, HEC's representative gave an undertaking which is recorded in a Minute of the Authority. A draft Minute containing the wording was sent to the parties for comment before the Minute was finalised.

[36] The Minute records undertakings restricting HEC's communications, followed by:

The undertakings remain in place until the proceedings are disposed of or otherwise relevant orders made or otherwise varied.

[37] The applicant's view is that the undertaking was envisaged to continue until the substantive resolution of the claims. The respondent argues that the undertakings only apply until the interim application is concluded.

[38] Often undertakings are used as a means to avoid the need for interim proceedings, amounting to a holding pattern until the substantive proceedings are heard and decided. However, in this case it was clear from the same Minute that urgency had been granted for the interim injunction application and so the assumption was that the interim matter would be dealt with first by the Authority. The connection between the undertakings and Authority orders are recognised by the fact that they are described to remain in place until "otherwise relevant order made or otherwise varied ...".

[39] I regard the undertakings as ceasing to have application from the date of this determination.

Non-publication order

[40] The Duty Member made an interim non-publication order that the names of the parties, any identifying details of the parties, the fact of the application and supporting documents attached to that application were not to be published.

[41] GHX seeks to have that order continued. Affidavit evidence details the adverse effects on GHX's physical and mental wellbeing and family relations due to recent events as well as concerns about reputational damage. Evidence from a doctor and psychologist supports and elaborates on GHX's evidence.

[42] HEC is not opposed to GHX continuing to be the subject of an order but seeks to have its own name published so that it can deal with any issues arising from the provision of the information.

[43] Although I understand HEC's desire to be able to defend itself externally, in light of the strong evidence regarding GHX's health situation it is right to extend an interim non-publication order at least until the point where the substantive matter is considered and decided. At that point the non-publication order can again be reviewed.

[44] The parties' names (and any identifying details) in relation to this proceeding, the fact of the application and supporting documents attached to that application are subject to an interim non-publication order to be in place until further order of the Authority. This does not prevent HEC releasing information as referred in paragraph 14 above, however recognising that the Authority is yet to determine whether such provision would be in breach of the settlement agreement.

[45] In addition, the Authority's file may only be accessed by anyone outside the Authority, other than by the parties, with the prior approval of a Member.

What are the next steps?

[46] An Authority Officer will contact the parties' representatives to set up a case management conference, where arrangements will be made in the lead up to a substantive investigation meeting. This will include a discussion about the prospect of further mediation.

Costs

[47] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority