

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 MAKAURAU ROHE**

[2021] NZERA 343
3134439

BETWEEN GHX
 Applicant

AND HEC
 Respondent

Member of Authority: Nicola Craig

Representatives: Tania Kennedy, counsel for the applicant
 Philip Skelton QC and Bridget Smith, counsel for the
 respondent

Investigation Meeting: On the papers

Submissions received: 15, 20 and 30 July 2021 for the applicant
 16 and 30 July 2021 for the respondent

Date of determination: 3 August 2021

SECOND DETERMINATION OF THE AUTHORITY

- A. GHX’s application to join QOI as a party to this proceeding is declined.**
- B. The non-publication order is continued.**
- C. Costs are reserved.**

What is the employment relationship problem?

[1] The Authority previously issued a determination in this matter declining the application for an interim injunction by the applicant, identified as GHX, who formerly worked for the respondent, identified as HEC. The claim relates to a settlement agreement 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] What remain to be decided are claims that HEC breached the settlement agreement, compliance orders should be made and penalties imposed. HEC denies that there has been breaches of the settlement agreement.

[3] GHX then filed an amended application to the Authority identifying QOI as second respondent. QOI is the chief executive of HEC. No application for leave to bring a claim against another party was made.

[4] HEC's representatives objected strongly to QOI's inclusion, both on procedural and substantive grounds.

[5] Under s 221(a) of the Act the Authority may direct parties to be joined or struck out. I decided to treat the inclusion of QOI as an application to join the CEO as a party. The parties had filed memoranda and were given another opportunity to make any further comment, which they both took up.

[6] 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 is the claim against QOI?

[7] QOI was the CEO at the time the settlement agreement was entered into. At least one of the alleged breaches of that agreement relates directly to QOI's actions.

[8] The amended application asserts that QOI breached the settlement agreement.

[9] GHX seeks a compliance order against HEC and QOI requiring them to comply with the settlement agreement. More detailed wording is supplied. There is no claim for penalties against QOI.

What is GHX's position?

[10] At the previous investigation meeting GHX notes that there was some objection by HEC to the prospect of a compliance order being made against QOI as he was not a party to the proceeding. It is submitted that this gave rise to significant concerns for GHX given that QOI is described as the "main protagonist in this matter". The joinder of QOI is therefore sought.

[11] GHX seeks to join QOI on the basis that he personally attended the mediation and made some of the alleged disparaging comments.

[12] Mention is made of an alternative of filing separate proceedings against QOI which the Authority could join to the current proceeding.

What is HEC's position?

[13] HEC objects to the process adopted to attempt to join QOI. However, having regarded the amended application as including, amongst other things, an application to join QOI, that concern is dealt with.

[14] HEC also objects on the basis that QOI was not personally a party to the settlement agreement nor named in it. By contrast the agreement requires HEC to instruct some named people, presumably employees, regarding confidentiality.

[15] HEC accepts that QOI has been acting throughout the matters raised by GHX in the capacity as an employee of HEC and not in a personal capacity. If there is a breach (which is denied) it is a breach by HEC. It is submitted that there is therefore no power to award a penalty against QOI or made a finding of breach by QOI in a personal capacity.

[16] HEC does not consider that is appropriate to make a compliance order against an employee as there is no basis to suggest that HEC would not comply with an Authority compliance order if made against it.

Should QOI be joined?

[17] QOI was at the mediation where the settlement agreement was concluded, being and remaining the HEC's CEO. QOI's actions are also the basis for at least some of the alleged breaches of that agreement. QOI is clearly connected to this claim.

[18] However, that connection is as the CEO of HEC. There is no indication of any involvement in any personal capacity. QOI remains the CEO of HEC. QOI is the organisation's agent and the organisation is thus bound by QOI's actions. HEC accepts that and is not attempting to distance itself from QOI.

[19] QOI will also be a witness at the next investigation meeting.

[20] The wording of s 137 of the Act can be seen as envisaging compliance orders being made against those who are not parties for example, to the employment agreement or a settlement agreement. Under s 137(1) the section applies where "any person has not observed or complied with" various provisions, orders etcetera.

[21] Further, under s 137(2) the Authority may by order require those who are parties or witnesses to do a specified thing or cease any specified activity. Given that orders can be made against witnesses I therefore conclude that QOI does not need to be a party for an order to be made against him although I see any exercise of that power as being required to meet the requirements of natural justice.¹

[22] In any event I question whether, in circumstances where QOI was involved in his capacity as agent of HEC and remains the CEO, an order would be seen as necessary when an order against HEC would be sufficient to bind QOI.

[23] I am not satisfied that having QOI as a party enables the Authority to more effectually dispose of the matter before it and therefore decline to direct that QOI is joined as a party.

[24] The case proceeds against HEC.

Non-publication order

[25] In the first determination the following order was made:

- (a) 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;² and

¹ The Act, s 157(2)(a).

² Explanation relating to the situation at the time of the first determination not referred to here.

(b) 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.

[26] The order shall continue in place.

Costs

[27] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority