

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**

[2024] NZERA 777
3347760

BETWEEN IGD
Applicant
AND SAJ
Respondent

Member of Authority: Nicola Craig
Representatives: Stephen Corlett, counsel for IGD
Donna Pokere-Phillips, advocate for SAJ
Investigation Meeting: On the papers
Submissions (and further information received): 18 and 20 December 2024 from the applicant
19, 20 and 23 December 2024 from the respondent
Determination: 24 December 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] IGD is an organisation providing community services, which is identified here by randomly chosen letters. SAJ is a senior employee of IGD, also identified by such letters.

[2] SAJ is still employed by IGD. Issues arose between them in 2024 and the parties went to mediation within the last couple of months. No resolution was reached.

[3] After the mediation, a communication on SAJ's behalf was received for IGD. It contained a press release headed "Embargoed until 20 December 2024".

[4] IGD comes to the Authority seeking an interim order restraining SAJ from publishing the contents of mediation communications including issuing the press release.

[5] SAJ's position is that there is an entitlement to publish.

The Authority's process

[6] Late on Wednesday 18 December 2024 IGD lodged a statement of problem, an undertaking as to damages, an affidavit from a senior IGD board member and a memorandum in support of the application for urgent interim relief. The organisation was seeking without notice urgent injunctive relief. Urgency was sought on the grounds that it was understood SAJ intended to publish mediation material on Friday 20 December 2024.

[7] A Duty Member of the Authority held a case management conference by phone with IGD's representative on 19 December 2024. Urgency was granted provisional on any comment SAJ wished to make. The application and a notice of direction from that case management conference were to be served on SAJ's representative.

[8] A further case management conference was held at 9am on Friday 20 December 2024 with the representatives. In the meantime SAJ's representative had lodged submissions on their behalf and the file had been allocated. I observed the matter was having to be dealt with in a very short period leading up to the Christmas holidays.

[9] At that case management conference the issue of the interim order sought and the wider proceeding was discussed. SAJ wished to file affidavit/s in opposition to the interim application. Given the impending break, the affidavit/s were to be provided by noon on Monday 23 December so a determination could be issued before Christmas. SAJ's representative undertook that the press release would not be published until Tuesday 24 December at the earliest, subject to any Authority order.

[10] After the case management conference IGD's representative provided comment, sought by the Authority, on the issue of publication, which was referred to in the statement of problem. SAJ's representative was then given the opportunity on that point.

[11] Affidavits were received from SAJ and their partner along with further submissions.

[12] In the absence of any offer to extend undertakings not to publish for a longer period, beyond 23 December 2024, the matter must be decided now.

[13] In the usual way, I have dealt with this application for interim orders on the basis of untested evidence and submissions. Disputed matters cannot be decided on such evidence.

[14] As permitted by s 174E of the Employment Relations Act 2000 (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.

Non-publication

[15] Orders are sought regarding publication. Reliance is placed on the importance of upholding the confidentiality of mediation and the detriment to be suffered if identification of those involved occurs. No specific comment on non-publication orders was received for SAJ but noted are the stated intention to issue a press release and submissions generally on the importance of transparency and being able to respond publicly.

[16] The Authority has the power to prohibit publication under clause 12(1) of Schedule 2 of the Act.

[17] The starting point is open justice with the question then of whether there are sufficient grounds established to justify the displacement of that presumption. Also to be considered is that this is an interim application on short notice. An interim granting of non-publication does not necessarily mean that a permanent order is warranted.

[18] The context here is mediation, with mediation confidentiality highlighted below. There is also evidence of significant potential for reputational harm to IGD and individual board members.

[19] On an interim basis an order for non-publication is warranted, as set out below.

The issues

[20] The issues for determination in this interim application are:

- Is there a basis for a compliance order to be issued?
- In terms of what is effectively an interim injunction sought, is there a serious question to be tried - does IGD have an arguable case that there has been, or is a reasonably anticipated, breach of obligations, including mediation confidentiality?
- Where does the balance of convenience lie?
- Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?¹

Mediation

[21] Under other circumstances the Authority would not refer to what occurred at mediation in light of s 148 of the Act:

Confidentiality

(1) Except with the consent of the parties or the relevant party, a person who –

...

(b) is a person to whom mediation services are provided; ...

must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of mediation. ...

(2) No evidence is admissible ...of any statement, admission, document or information, that, by subsection (1), is required to be kept confidential.

Events after mediation

[22] IGD says it has not waived, and will not be waiving, its rights to privilege in respect of any matters raised and discussed at mediation or during without prejudice discussions.

¹ For example, *Brooks Homes Limited v New Tax Refunds Limited* [2013] NZSC 60, *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 and *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59.

[23] After mediation a 4 December 2024 letter was emailed to IGD's solicitor with the subject line "Response to Mediation Communication". That letter includes SAJ's proposal to resolve the situation. Further it says that if the board does not act appropriately they are prepared to put out a press release, with a release attached heading "Embargoes until 20 December 2024".

[24] IGD's solicitor emailed SAJ's representative noting that everything discussed at mediation was statutorily privileged and cannot be discussed outside mediation. Urgent confirmation was sought that mediation confidentiality would be abided by and nothing published about what occurred at mediation.

[25] No such confirmation was provided, with SAJ's representative writing, denying mediation confidentiality would be breached or that the contents of the draft press release were without prejudice, and that SAJ would be proceeding to publish the press release.

No compliance order issued

[26] IGD argues that it appears a breach of mediation confidentiality has already occurred. This concerns a comment from an attendee at mediation with SAJ, quoted in the press release. An element of the interim order sought is that SAJ complies with mediation confidentiality, which is effectively a compliance order. Historically, actual non-compliance (namely a breach) is required for a compliance order to be issued.²

[27] In the absence of more detailed information I cannot be sufficiently satisfied that the comments were spoken by that person outside of mediation.

[28] In any event it is not obvious that the Authority has a power under the compliance provision, s 137 of the Act, to issue a compliance order regarding s 148 which is in Part 10 of the Act.

Arguable case regarding breach of obligations

[29] I move to examine the injunction application.

[30] Without wanting to detail what occurred in mediation the embargoed press release does contain part of an IGD settlement offer made at mediation and SAJ's

² *Talley v United Food and Chemical Workers Union of NZ* [1993] 2 ERNZ 360.

comment on that. It also refers to serious allegations which SAJ or their representative raised at mediation regarding IGD which, on the basis of the evidence before the Authority, were made for the first time at mediation.

[31] IGD also relies on breaches of the employment agreement:

- (a) in an express clause, requiring SAJ to use best endeavours to promote, develop and extend the employer's business interests and reputation and not do anything to its detriment; and
- (b) the implied duty of fidelity.

[32] The parties are also in an existing employment relationship and so the duties of good faith apply.

[33] The 4 December letter from SAJ's representative to IGD's lawyer accepts it is in the best interests of the organisation to resolve these matters privately and professionally.

[34] For SAJ it is argued that s 148 of the Act does not extend to:

- (a) issues already circulating in the public domain;
- (b) discussion in breakout sessions, used solely to substantiate each party's case; and
- (c) matters covered in the press release come within an exception to mediation confidentiality.

[35] There is also some criticism of the mediation process, although this argument may be impacted by s 152 of the Act which refers to mediation services not being "challenged or called in question".

[36] Both parties relied on the Court of Appeal's decision in *Just Hotel Limited v Jesudhass*.³

[37] The Authority would need to look at the points raised by SAJ but none of them are sufficiently established to negate there being a serious question to be tried that the draft press release contains mediation material which on its face should not be published. Further reference is made below to the public domain issue.

³ *Just Hotel Limited v Jesudhass* [2007] NZCA 582.

[38] There is an arguable case that the draft press release contains details of discussions which were the subject of, and only occurred at mediation and which IGD has not consented to the disclosure of, and are private, privileged and confidential and its release would breach SAJ's employment agreement.

Balance of convenience favours IGD

[39] I now move on to weigh the interests of IGD against those of SAJ, including a consideration of the adequacy of damages.

IGD

[40] There is evidence that some allegations made by or on behalf of SAJ at mediation have the potential to seriously damage the organisation and the standing of board members. Those allegations are denied. The board member's affidavit expresses fear that if the "scandalous allegations" are published all their reputation will be forever tarnished and irreparably harmed. IGD is also concerned that its income streams may be jeopardised impacting its ability to provide services.

[41] The letter from SAJ's representative to IGD's lawyer echoes the possible impact on board members.

[42] Damages are not a suitable alternative remedy for IGD to the interim orders sought.

SAJ

[43] I now look at any detriment which SAJ could or would suffer if the interim orders were made. SAJ is concerned at being approached by several unnamed attendees at a community gathering and asked about sensitive employment matters. SAJ says this information must have been shared publicly by the IGD board. Further SAJ describes being impacted by stress as a result and SAJ's partner refers to family stresses.

[44] The evidence for SAJ focuses on the impact of processes and events which have already occurred rather than what would happen if the order was or was not made.

Conclusion on the balance

[45] The balance currently falls somewhat in favour of IGD in terms of the risk of serious and substantial damage to it and its board members.

Overall justice favours IGD

[46] In summary, IGD has an arguable case that SAJ proposes to release material in contravention of their obligations. The balance favours the organisation. I now step back and check where the overall justice lies.

[47] SAJ claims a public interest in disclosing information as it considers the situation to come within an exception to mediation confidentiality. That is a difficult matter to properly decide in this short notice application. The fact that the proposed release of information is in the form of a press release rather than to a regulatory agency could be seen as detracting somewhat from SAJ's argument.

[48] On behalf of SAJ it is suggested that IGD or board members have also breached confidentiality, both before and after mediation, by disclosing information about employment matters. I note the 4 December letter from SAJ's representative to IGD's lawyer refers to the board's actions having "already inadvertently brought these matters to public attention".

[49] IGD should be careful that it does not place itself in a position of having these arguments further developed in future. Confidentiality continues as a solemn obligation and applies to both parties.

[50] Mediation is a vital part of the system for resolving employment disputes in New Zealand, including an ability for parties to have frank discussions under the cloak of confidentiality.

[51] This decision has been made at short notice under possible impending publication and the day before Christmas and holidays for many. Overall I consider that IGD's application for an interim order should be granted.

Costs and next steps

[52] Costs are reserved.

[53] IGD seeks to go to mediation again in a further attempt to resolve the employment relationship problems between the parties. SAJ's representative previously communicated a withdrawal from the mediation process. However, submissions on mediation suggest that elements of the mediation were unsatisfactory and I take that to leave open the possibility of attending mediation in a somewhat different format. An order for mediation should be made. The parties are encouraged to communicate with the mediation service about their needs.

[54] Once either party notifies the Authority that mediation has not resolved this matter and wishes it to proceed, an Authority Officer will be in touch with the parties regarding the next steps in this proceeding.

[55] The parties should reflect on their s 4 good faith obligations, including those requiring them to be active and constructive in maintaining a productive employment relationship.

[56] The parties also have leave to return to the Authority in the New Year if aspects of the interim order pose substantial difficulties.

[57] SAJ has indicated that they also intend to lodge proceedings regarding their employment situation. SAJ is entitled to do so. Consideration would be given to whether these matters should be heard together.

Orders

[58] I order as follows:

- (a) The parties' names (and any identifying details) in relation to this proceeding are subject to an interim non-publication order to be in place until further order of the Authority;

- (b) SAJ is restrained on an interim basis until further order of the Authority, from publishing the contents of any discussions, statements and/or communications which occurred, or refer to what occurred, at mediation, including but not limited to the press release and/or an amended version of it; and
- (c) The parties are directed to attend mediation within 20 working days of the date of this determination and attempt in good faith to resolve the differences between them.

Nicola Craig

Member of the Employment Relations Authority