

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 96
3032773

BETWEEN ELIYA IKUNDABOSE
 Applicant

AND MCWATT GROUP LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Philip Howard-Smith, Counsel for the Respondent

Correspondence from the From the Applicant on 20 and 21 February 2019 and
parties: from the Respondent on 21 February 2019

Determination: 22 February 2019

SECOND DETERMINATION OF THE AUTHORITY

[1] By determination issued on 19 February 2019 the Authority declined an application from Eliya Ikundabose seeking a finding that he was unjustifiably dismissed on the grounds of redundancy by his former employer.¹

[2] By email on 20 February 2019 Mr Ikundabose asked for some information in the Authority’s determination to be “sealed and protected”. He also wrote “please don’t publish anything at all”, which seemed to be a request for the entire determination to be withheld from the public record.

[3] Although informal in nature his email has been treated as an application for the Authority to either prohibit publication of some of the evidence referred to in the determination or to prohibit publication of the entire determination.

¹ *Ikundabose v McWatt Group Limited* [2019] NZERA 85.

[4] The remainder of this determination explains why Mr Ikundabose's application for some or all of the 19 February determination not to be published has been refused. Under the Authority's usual administrative procedure the determination would be published next week on the Employment Law Database. The database is maintained by the Ministry of Business. It is the main means of providing public access to Authority determinations. For reasons explained at the end of the present determination, the 19 February determination and this present determination about publication will not be published on the Employment Law Database before Friday 8 March 2019, unless there is an order of Employment Court before then to do something else.

Authority investigation

[5] McWatt Group Limited was given an opportunity to comment on Mr Ikundabose's request. Through counsel the company advised it did not oppose Mr Ikundabose's application for some evidence regarding family members being redacted from the determination.

[6] The application has been determined on the papers, comprising three emails from Mr Ikundabose and a letter from counsel for McWatt Group Limited.

Legal principles

[7] The Authority has the power to prohibit publication of all or any part of any evidence given, pleadings filed and the names of parties and witnesses.²

[8] Use of this discretionary power is guided by principles developed by the courts over the years, including decisions of the Employment Court in *H v A* and *XYZ v ABC*.³ In *XYZ*, Judge Inglis (as she then was) held the Supreme Court's decision in *Erceg v Erceg* had superseded the approach taken by the majority of the Employment Court in *H v A Ltd*, that a high standard was not needed to establish exceptional circumstances warranting a non-publication order.⁴ Rather, in *Erceg*, the Supreme Court emphasised that the starting point was the principle of open justice, and that a high standard must be met before that principle could appropriately be departed from.

² Employment Relations Act 2000, Schedule 2 clause 10.

³ *H v A Ltd* [2014] NZEmpC 92 and *XYZ v ABC* [2017] NZEmpC 40.

⁴ *Erceg v Erceg* [2016] NZSC 135.

While a broad discretionary power exists to make non-publication orders, the power is not unfettered or cannot be exercised at the whim of the decision maker.⁵

[9] As the Supreme Court made clear in *Erceg*, the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule of open justice.⁶ The Court cited these observations by Justice Kirby in *John Fairfax Group v Local Court of New South Wales* as explaining the reason for the stringent approach:⁷

It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of the courts, or the issue of suppression orders in their various alternative forms: ... A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. ...

Mr Ikundabose's application

[10] Mr Ikundabose's request that the Authority "don't publish anything at all" arose from a number of criticisms he had about the content and conclusions set out in the determination. He considered the employer had not provided the Authority with all the relevant documents and had provided him with incorrect copies of what documents the employer did provide. He said the Authority had relied on incorrect information that the company gave about the cost of his position and savings made from disestablishing that role. He was also concerned publication of the determination might make him look like "a bad person".

[11] None of those were reasons amounting to exceptional circumstances which could displace the ordinary, prevailing principle of open justice. Both parties were advised at the outset of the investigation meeting that the Authority's determination would be published. They were also advised that if one or both parties were dissatisfied, there was a right of challenge to the Employment Court. That is the option open to Mr Ikundabose if he wants to have the evidence considered again.

[12] Mr Ikundabose's request for the determination, at least in part, to be "sealed and protected" referred specifically to information about his wife and one of his

⁵ XYZ, above n 3, at [69].

⁶ *Erceg*, above n 4, at [13].

⁷ (1991) 26 NSWLR 131.

children. He said a reference to his wife undergoing a surgical procedure and one of his children having suffered an injury at birth during that procedure was “private medical information”.

[13] Both items of information came from his own evidence that he chose to put forward as part of his case. They were relevant to a situation where Mr Ikundabose was initially declined paid sick leave for time he was away from work attending hospital appointments with his injured new-born child. It was not until his employer was told of the circumstances of the baby suffering an injury during delivery that the leave was granted. The delay proved to be the result of a misunderstanding about why Mr Ikundabose expected to be able to use part of his sick leave entitlement to attend the hospital appointments.

[14] Having put the information into the public arena as part of his litigation, the normal assumption of privacy did not apply.⁸

[15] Mr Ikundabose said his wife did not want the circumstances of the birth of her children to be public knowledge. Preference is not a ground for prohibition of publication. There was no evidence of any specific adverse consequences might result from that part of Mr Ikundabose’s evidence referred to in the determination. What happened at the birth was part of the factual context considered for determination of an issue in the proceeding. The same applied to the circumstances of the baby. Although currently still under one year old, Mr Ikundabose said the child “doesn’t want people to know what he passed through”. Again there was no evidence any specific adverse consequences might result from the publication of the information. The more likely outcome from that detail in the determination is that any reader would feel considerable sympathy for Mrs Ikundabose, Mr Ikundabose and their baby for the tribulations they had experienced and understand why sorting out his leave entitlement had been important to Mr Ikundabose at the time.

[16] Accordingly this was not a circumstance where the Authority’s discretion to prohibit publication of some or all of the evidence or a determination could properly be exercised. The determination is to remain as issued and, in due course, to be published on the Employment Law Database.

⁸ Privacy Act 1993 Privacy Principle 11(e)(iv).

[17] However, to preserve the efficacy of a right to challenge this determination regarding publication, an administrative arrangement is in place so the 19 February determination and this present determination about publication are not to be published on the Employment Law Database before Friday, 8 March 2019. This gives Mr Ikundabose the opportunity to ask the Employment Court to consider his request and make a different decision regarding publication of the Authority's determination or some of the evidence referred to in it.

[18] Whether or not Mr Ikundabose challenges the publication determination, he also has a right to challenge the Authority's substantive determination that rejected his claim about the redundancy of his position. He has been notified of the time limit for doing so.

[19] As a final point I note the administrative arrangement is not a complete prohibition on publication of the substantive determination or its contents for any interim period. It is already in the hands of the respondent party but the details of concern to Mr Ikundabose were known to various personnel at that workplace anyway. There was no reason to expect the respondent would need or want to publicise the determination or its contents any wider at this stage in any event.

Robin Arthur
Member of the Employment Relations Authority