

**Attention is drawn to
the order prohibiting
publication of certain
information in this matter**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA 348
3015031**

BETWEEN ZONGLIANG JIANG
Applicant

AND ONO
Respondent

Member of Authority: Eleanor Robinson

Representatives: Nathan Santesso, Advocate for the Applicant
Sherridan Cook & Mere King, Counsel for the Respondent

Submissions received: 27 October 2017 from Applicant and Respondent

Determination: 9 November 2017

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

The Applications

- [1] The Respondent has applied for a non-publication order in respect of:
- a) The name of the Respondent and any specific identifying information; and
 - b) Other names and specific information about any employees or members of the Respondent where publication of that name could identify the Respondent; and
 - c) Any financial documents or evidence that contains personal information relating to any of the Respondent's clients and/or commercially sensitive information of the Respondent.

The Application

[2] The Respondent submits that the following grounds are the basis for its application for non-publication orders, and are necessary to protect its identity and evidence that identifies and discloses information that may be used to identify the Respondent:

1. *Publication of the Respondent's name is prejudicial to the administration of justice*

- (i) The Respondent submits that it is in the interests of both the Respondent and the Applicant to prohibit publication of the pleadings as filed, the parties names, all witness names and their evidence permanently, or alternatively until after a High Court criminal proceedings in relation to these parties has been determined;
- (ii) The Respondent submits that the District Court made an order on 4 October 2016 suppressing the name of the Respondent in the criminal proceedings which remains in effect and would be rendered nugatory if the name of the Respondent were to be published in the Authority hearing prior to the criminal proceedings being heard; and
- (iii) Publication of the Respondent's name and /or other information identifying it may attract media attention and affect the Applicant's right to a fair trial. It could also be detrimental to the maintenance of public confidence in the administration of justice in the Authority and/or the District/High Court.

2. *No public benefit to publication*

[3] The Respondent submits that the general principle of open justice would not be undermined by the making of such an order and would in fact serve to meet the ends of justice.

[4] Further that there would be no precedent effect for other Respondent employees and that even with a non-publication order in place, the contractual interpretation used by the Authority could still be properly considered and act as a precedent, thereby fulfilling the principles of open justice.

3. *Publication is against the public interest*

[5] The matter giving rise to the proceedings in the Authority is a record of settlement which contains a confidentiality provision stating:

The terms of this Record of Settlement (including the circumstances leading to it) are to be kept strictly confidential to the parties and are not to be disclosed to, or discussed by, either of them with any third party (in particular, any of the company's present or past employees), except as required by law.

[6] The Respondent submits that it would be detrimental to the public interest, as highlighted in the objects of the Employment Relations Act 2000 (the Act) to publish the Respondent's name given its compliance with the confidential record of settlement.

4. Publication harmful to the Respondent's commercial position

[7] Given that the subject matter of the proceedings involves the Applicant's bonus arrangement and remuneration with the Respondent, if the non-publication were not to be granted, it would enable the Respondent's competitors to be able to discern the appropriate quantum of its remuneration arrangements with key employees, which is confidential and commercially sensitive information.

5. Non-publication order of the Respondent's employees' names is necessary

[8] The Respondent submits that employees of the Respondent will be providing evidence in the Authority's investigation.

[9] The disclosure of the Respondent employees' names is not necessary in the interests of justice as the Applicant's case can still be considered and determined by the Authority if pseudonyms were used and identifying details redacted.

Non-Publication Order sought in respect of personal and/or commercially sensitive information

[10] The Respondent is seeking non-publication orders in respect of any financial documents or information that contains personal information relating to any of its clients and/or commercially sensitive information relating to it on the following grounds:

Personal information

[11] The evidence to be produced by the Respondent in the proceedings before the Authority will include personal and confidential information of existing and former clients of the Respondent, including their mortgages, their income and bank statements.

[12] Publication of the client names and associated information would involve the Respondent in a breach of confidentiality owed by it to these clients, and moreover is not necessary for the proper administration of justice.

[13] Using pseudonyms and redaction of identifying details would not prevent the Authority considering and determining the Applicant's case.

Commercially sensitive information

[14] It is submitted that a number of the documents and information to be provided in the Respondent's evidence are confidential and commercially sensitive.

[15] Such information will include (i) compliance and internal audit documents; (ii) client home loan transaction documents and other supporting information; (iii) New Zealand Overseas Investment Office notices identifying the Respondent clients, properties and transactions of concern; and (iv) enforcement orders from the Environment Court.

[16] The Respondent submits that public knowledge of this information would cause a loss of confidence in the Respondent's business and thereby damage it.

[17] In addition, confidentiality of information is required to preserve the Respondent's position in respect of the criminal case which is yet to be heard.

[18] The Applicant does not oppose the orders sought by the Respondent.

The Principles

[19] The principles of open justice and the right to freedom of expression are rights which go to the very existence and vigour of our political and legal institutions¹. The principle of open justice is fundamental to the common law system of civil and criminal justice as was observed by the Supreme Court in *Erceg v Erceg*², describing it as: "*a principle of constitutional importance*", and noting it has been described as: "*an almost priceless inheritance*"³.

[20] Pursuant to Schedule 2 clause 10(1) of the Act the Authority has a wide discretion to prohibit the publication of evidence. However in making such a prohibition, the Authority

¹ *Suppressing Names and Evidence*, New Zealand Law Commission, Report 109, October 2009 at page 7.

² [2016] NZSC 135 at [2] and [12]

³ *Erceg* at [2]

must carefully consider and balance the respective interests of the parties and determine whether there are sufficient grounds for displacing the presumption of open justice.

[21] The Supreme Court held in *Erceg v Erceg*⁴ that there are circumstances in which the interests of justice require the general rule of open justice to be departed from: “*but only to the extent necessary to serve the ends of justice.*” The Court accepted:⁵

...the need to protect trade secrets or commercially sensitive information, the value of which would be significantly reduced or lost if publicised, are obvious examples of situations where such [non-publication] orders may be justified.

[22] However the Supreme Court proceeded to observe that: “... *the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional*”. Factors the Court considered as relevant to an assessment in respect of such an order include:⁶

- a) A court can only depart from the fundamental rule that the administration of justice must take place in open court where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule.
- b) An order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it.
- c) An order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve due administration of justice.
- d) The making of the order must also be reasonably necessary.
- e) There must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient.

⁴ 2016] NZSC 135 at [3]

⁵ Ibid at [13]

⁶ Ibid at [17] and [18] citing an example from *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 nSWAL 465 (NSWCA) at 476-477

[23] Included in the matters the Authority will have regard to in the exercise of the power to order non-publication is where there is proof that the publication of evidence would have an adverse effect on the party seeking the order.

Determination

[24] The Applicant does not oppose the orders sought by the Respondent.

[25] Having carefully considered the grounds as submitted by the Respondent I am satisfied that in the present case specific adverse consequences would flow from publication of the name of the Respondent and evidence that may identify or disclose information that could be used to identify the Respondent. Further that there may well be adverse consequences to clients of the Respondent who are not parties to the investigation.

[26] **I order that pursuant to clause 10 (1) of Schedule 2 of the Act the following are subject to a non-publication order:**

- A. The name of the Respondent and any specific identifying information; and**
- B. Other names and specific information about any employees or members of the Respondent where publication of that information could identify the Respondent; and**
- C. Any financial documents or evidence that contains personal information relating to any of the Respondent's clients and/or commercially sensitive information of the Respondent.**

[27] **In this determination the name of the Respondent is referred to by three randomly selected letters as ONO. In the subsequent determination(s) employees of ONO and/or clients of ONO will also be referred to by three randomly selected letters.**

**Eleanor Robinson
Member of the Employment Relations Authority**