

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 509
3186300

BETWEEN KXS
 Applicant

AND NXJ
 Respondent

Member of Authority: Eleanor Robinson

Investigation Meeting: On the papers

Submissions 11 April 2022 from the Applicant and the Respondent

Determination: 08 September 2023

SECOND PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, NXJ, was employed by the Respondent, KXS, until his employment ended by way of resignation.

[2] KXS claims that NXJ breached confidentiality obligations contained in his employment agreement and a Record of Settlement with KXS. KXS applied for, and was granted, (in preliminary determination [2023] NZERA 486 dated 30 August 2023) a witness summons requiring NXJ to attend a preliminary investigation meeting with his devices and platforms.

[3] KXS has retrospectively applied for a non-publication order on an interim basis prohibiting the publication of the parties' names in Determination [2023] NZERA 486 and as appearing in any pleadings, evidence or other material that might lead to the identification of them, pending the outcome of the substantive proceeding or further order of the Authority.

[4] This determination addresses only the interim non-publication application.

Discussion and orders

[5] The principle of open justice and the importance of that concept has been emphasised by the courts on many occasions, noting the judgments in *H v A Limited*, *XYZ v ABC*, *Crimson Consulting Ltd v Berry* and the Supreme Court decision in *Erceg v Erceg*.¹

[6] In the latter case, the Supreme Court noted that a high standard must be met before departing from the principle of open justice.² As a consequence there must be specific adverse consequences or other sound reasons to order non-publication.

[7] KXS has applied for an interim non-publication order citing the Court's judgment in *FVB v XEY* in which the Court commented that in cases of application for interim non-publication orders, the principle of open justice has less weight than it has later in proceedings.³

[8] In the present case, KXS bases its application upon the adverse effect on its current and former employees when they become aware, as a result of the Authority's preliminary determination [2023] NZERA 486, that there is a likelihood that their personal information was removed from KXS's computer systems and KXS has been unable to verify what has happened to it. This will result in an appreciable risk that those employees will, prematurely, lose confidence in KXS's ability to safeguard their information and ensure its safety.

[9] It is submitted on behalf of KXS that once the summons and ancillary orders sought and granted have been complied with, it will have more knowledge about the downloaded information and certainty about what happened to it.

[10] It is further submitted that publication of its name in the preliminary determination without a non-publication order being granted may cause irreparable harm to KXS.

[11] It is submitted on behalf of NXJ that he neither consents nor objects to the application for a non-publication order.

[12] I consider that the high standard required to depart from the principle of open justice is met in this case, noting in this case the adverse consequences which might flow to the former and current employees of KXS if alerted to a possibility of their personal information being downloaded and not subsequently deleted by NXJ after his employment with KXS had ended.

¹ *H v A Ltd* [2014] ERNZ 38 at [78]; *XYZ v ABC* [2017] NZ EmpC 40; *Erceg v Erceg* [2016] NZSC 135

² *Erceg n1 above* at [63] and [69]

³ *FVB v XEY* [2020] ERNZ 441 at [11]

[13] In making this determination I have sought information of KXS as to steps it had taken in respect of the potential breach. Mr Langton on behalf of KXS advised that it had taken advice from the Privacy Commissioner in this matter and had taken the decision not to inform its employees at this stage because it does not apprehend serious harm to result. Clearly the forensic examination may confirm that view.

[14] On the basis that I regard any potential privacy breach as a serious matter where third party individuals could be adversely affected, this non-publication order is granted on an interim basis only.

[15] The Authority therefore orders that the name of the Applicant and the Respondent and any information which may identify them be subject to an interim non-publication order until further determined. The names of the Applicant and Respondent are identified only by initials which have no correlation to their names pursuant to Schedule 2 clause 10(1) of the Employment Relations Act 2000.

Costs

[16] Costs are reserved pending determination of the substantive matter.

Eleanor Robinson
Member of the Employment Relations Authority