**ATTENTION IS DRAWN TO AN ORDER PROHIBITING PUBLICATION OF PARTIES' IDENTIFICATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**
**ŌTAUTAHI ROHE**

[2021] NZERA 337
3144782

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| | BETWEEN | OZ<br>Applicant |
| | AND | XVZ<br>Respondent |

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| Member of Authority: | David G Beck |
| Representatives: | Matthew Beleskey, counsel for the Applicant<br>Susan Hornsby-Geluk, counsel for the Respondent. |
| Investigation Meeting: | By video-conference on 23 July 2021 |
| Submissions Received: | 23 July and 27 July 2021 from the Applicant<br>23 July and 30 July 2021 from the Respondent |
| Date of Determination: | 2 August 2021 |

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## DETERMINATION OF THE AUTHORITY

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### Interim prohibition from publication

[1] Pursuant to a discretion available in s 10 (1) Schedule 2 of the Employment Relations Act 2000 ("the Act") the Authority has on an interim basis after hearing submissions, resolved to not publish the parties names, location of the employment and certain features of this dispute due to the potential for long term reputational harm that may occur to the

applicant. The applicant's counsel in submissions has stressed the matters in this dispute are contested and arguably unique and that his client is seeking to maintain the employment relationship.

[2] The respondent party's counsel in submissions opposes non-publication on the grounds that the applicant chose to bring matters into the public domain by electing to litigate, potential adverse consequences have not been sufficiently made out and that the information sought to be supressed is essential to the respondent's case before the Authority.

[3] The legal threshold is high and I am conscious that I am being asked to determine this matter on untested affidavit evidence but the criticism of lack of evidence around the potential for adverse consequences being sparse is not appropriate at an interim stage in proceedings. I likewise, accept that the nature of the proceedings are frustrating to the respondent but on a practical front, non-publication of certain details does not compromise the respondent's ability to rely on the information being supressed in a disciplinary context and if it proceeds, a later substantive investigation meeting.

[4] I make the general observation that at this stage of an employer initiated disciplinary process it is normal for privacy to be preserved and publication may only serve to exacerbate an already complex matter.

[5] I make the non-publication order having regard to the Employment Court on many occasions emphasising the importance of open justice and I have balanced this against the applicant's objectively legitimate concerns around adverse publicity as I must be satisfied of specific adverse consequences or other compelling reasons to order non-publication - it is a fairly high standard to meet but it has been achieved here. [1]

[6] In making this order on an interim basis, I signal that the parties will have to make further submissions during the substantive investigation meeting on whether the non publication order should continue.

[7] I use the following random identifiers and have redacted parts of evidence and quoted correspondence:

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[1] See *Erceg v Erceg* [2016] NZSC 135, *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] NZEmpC 511 and *FVB v XEY* [2020] NZEmpC 182.

- OZ - the applicant.
- XVZ - is the respondent.

**The Authority investigation**

[8] On 30 June 2021, OZ filed a statement of problem together with an application and supporting affidavit, seeking urgency for interim injunctions to restrain XVZ from advancing a disciplinary process and dismissing OZ pending the Authority dealing with a personal grievance claim that OZ has been unjustifiably disadvantaged by the employer's actions.

[9] XVZ filed a statement in reply on 14 July 2021 and a supporting affidavit on 16 July 2021, opposing OZ's application for injunctive relief.

[10] The matter proceeded to an investigation meeting considering counsels' submissions and affidavit evidence on 23 July 2021 by video conference.

[11] The orders sought in this case are primarily to restrain XVZ from advancing a disciplinary process. The seeking of orders of this type because of a fear or apprehension of a breach of rights is pursuit of what is known as a "quia timet" injunction. The anticipated breach identified by OZ's counsel is essentially a belief that OZ may be dismissed in a procedurally and substantively unjustified manner.

[12] Pending the resolution of this application, XVZ's concerns raised with OZ have not been able to be advanced.

[13] Pursuant to s 174E Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received.

**The employment relationship problem**

[14] OZ commenced employment with XVZ in late 2020 in a managerial role reporting to XVZ's Chief Executive after leaving a role with less responsibilities at a comparable organisation.

[15] The extant issue involves a request that OZ expand upon the reasons why OZ left the previous employment. In context, the request for this information arose from a letter to OZ of 18 May 2021, penned by XVZ's lawyer, that disclosed what was described as an "unsolicited comment" made to XVZ's Chief Executive by "someone at another … related organisation" during a function. The letter highlighted that OZ had when interviewed by a recruitment agency engaged by XVZ, replied in the negative to two matters put in a questionnaire seeking to ascertain if any issues of concern needed to be brought to XVZ's attention.

[16] The lawyer's letter proceeded to suggest that the adverse comment "If true" may lead to a conclusion that OZ "may therefore have misrepresented …. during the recruitment process undertaken by our client".

[17] OZ through counsel, responded on 20 May seeking further contextual information including the identity of the person who relayed the information that led to XVZ's concerns.

[18] XVZ did not initially disclose in their counsel's letter of 22 May that on 14 April their HR Manager following up on contact initiated by XVZ's lawyers and without seeking OZ's permission, had telephoned OZ's former employer's Chief Executive to explore the validity of the concerns they had. A file note of the conversation was made that disclosed information avowedly prejudicial to OZ. The Chief Executive of OZ's previous employer referred the HR Manager on to their lawyers to respond to a formal request for further information. From disclosed correspondence this further formal request was not made until 24 May by XVZ's counsel and the response of 15 June indicated that OZ's former employer was not prepared to respond and provide specific information; citing statutory privacy restrictions.

[19] It was not until 16 June, that XVZ disclosed to OZ, the HR Manager's 14 April file note of the conversation with OZ's previous employer's Chief Executive and the correspondence with OZ's previous employer's lawyer denying access to personal information.

[20] Further exchanges culminated in a letter from XVZ's Chief Executive to OZ of 28 June that set out their dissatisfaction with OZ's initial responses and signalled the matter had now escalated to a potential summary dismissal situation with the consequent possibility of summary termination being at issue.

[21] OZ is denying the misrepresentation alleged and is challenging the basis of XVZ being legally or fairly and reasonably, able to advance their concerns in a disciplinary context. OZ's counsel in an earlier letter of 18 June had indicated the reasons why OZ left the previous employment were innocuous.

[22] At the time of this investigation meeting the above sought disciplinary meeting had not taken place.

**Further contextual matter**

[23] In addition to the above, OZ is currently, and has been for a significant period, on a combination of paid suspension and sick leave. The suspension and the reasons for such which are unrelated to the matter giving rise to these proceedings, is the subject of a separate application to the Authority alleging personal grievances for unjustified actions causing disadvantage that I have signalled will be dealt with in a future investigation meeting together with the subject matter of this application. I refer to the suspension as an allied contextual feature that I must inevitably take into account when assessing the relative positions of the parties in this application as it bears on the overall state of the employment relationship that can best be categorised as fraught.

**OZ's affidavit evidence**

[24] OZ indicated having answered "each of the questions asked honestly and truthfully in relation to my employment status" at the time, when interviewed by a recruitment agency and that: "I answered each question during my recruitment process accurately, so I have no idea how I have supposedly misrepresented myself".

[25] Upon being identified as the preferred candidate after a formal interview with XVZ that was not discussed in the affidavit, OZ also completed a satisfactory psychometric test. Referee checks conducted by the recruitment agency then led to a commencement of employment date in spring 2020 being identified. OZ says in the interim, a negotiated shortened notice period led to a resignation from the previous employment effective on 4 September.

[26] Upon taking up the new appointment OZ sold a home and purchased a property in a location some distance away from the previous location. OZ provided copies of emails of 8 September from the former employer that OZ says indicate nothing untoward.

[27] OZ then described receiving an "odd letter" of 18 May 2021 from XVZ (note: it is the one referred to above at para [14] authored by counsel) that related a comment made to the Chief Executive by an unidentified source suggesting concerns.

[28] OZ described being shocked "to receive the letter" and in particular its allegation that OZ may have misrepresented information during the recruitment process.

[29] OZ engaged counsel and as described above is facing extant disciplinary proceedings.

**XVZ's Chief Executive's affidavit evidence**

[30] XVZ's Chief Executive says the concerns XVZ has stem from the solicited comment of OZ's former employer's Chief Executive. Further, XVZ's Chief Executive indicated a decision had been made to pursue a formal disciplinary process when OZ had failed in their opinion, to provide a satisfactory explanation. The Chief Executive concluded the matter "could go to the heart of the employment relationship of trust and confidence" requiring that the disciplinary investigation be properly concluded in a timely manner.

**Submission in support of OZ's application for interim restraining order**

[31] OZ's counsel suggests that the application was not about halting an employer's disciplinary process or interfering in managerial prerogative but:

> It is about stopping an unfair and unreasonable action (a breach) by the employer occurring imminently. Such a breach/unlawful act will have a severe and possibly irrevocable impact on the applicant's career, reputation and family if it were to occur.

[32] The imminent breach was described as the "very real risk" of an "unlawful dismissal".

**Submission in response – XVZ's case**

[33] XVZ's counsel suggested no unusual features existed in this case that would meet the high threshold to restrain XVZ from further pursuing a disciplinary investigation.

**The approach to an interim injunction/legal test**

[34] The well-established legal framework that I must follow in respect of assessing an application for an interim injunction is in summary:

> **Step one** — the applicant must establish that there is a serious question to be tried;
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> **Step two** — consideration must then be given to the balance of convenience and the impact on the parties of the granting of, or refusal to grant, the interim orders sought. The impact on any third parties will also be relevant to this weighing exercise; and
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> **Step three** — the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

**Discussion - is there a serious question to be tried?**

[35] The first issue OZ has to convince the Authority on, is should I depart from the Employment Court's fairly long standing position that it is a grave matter to interfere with an employer's right to conduct a disciplinary investigation by way of granting prior restraint (*Russell v Wanganui City College*).[2]

[36] A more recent case, *Ports of Auckland v Findlay*, comments on the rarity of circumstances where such restraint may be granted and highlighted why this is so, stating that:

> … the overall interests of justice also weigh against the grant of the order sought. There is an interest in progressing employment processes in a timely manner without unnecessary interruption and legal wrangling, until final decisions and outcomes with substantive impact are known. Halting the employer's inquiry at this stage, to carry out a warrant of fitness check in respect of various aspects of it which may or may not be remedied prior to any decision ultimately being made, is a significant step which should not be lightly taken. It runs a risk of derailing a process which an employer is obliged to undertake, and of fixing a problem that may not exist, which may

[2] *Russell v Wanganui City College* [1998] 3 ERNZ 1076 at 1082.

not ultimately need fixing, or which may have no substantial impact. [3]

[37] As a threshold issue, I also need to determine if OZ's claim is frivolous or vexatious but assessing that is not an exercise of bare discretion – I must make a judicial and principled assessment of the evidence before the Authority (despite it being untested) and legal submissions advanced.[4] I record on the latter, that counsel provided helpful and well considered submissions.

**Assessment**

[38] In answer to the first consideration, without traversing detail, OZ's counsel drew to my attention the timing of the alleged misrepresentation and submitted such was not coincidental (claiming that illegitimate pressure was being exercised for an ulterior motive).

[39] From the untested affidavit evidence and contextual correspondence, I consider that an arguable case has been made out for consideration of an interim injunction restraining XVZ from proceeding with a disciplinary process seeking further disclosure of pre-employment information. This is not because of the risk of an "unlawful dismissal" as suggested by OZ's counsel (a designation that I assume refers to an unjustified dismissal) but because I assess XVZ's legal position in pursuing the information for a disciplinary purpose is potentially lacking in supporting jurisprudence.

[40] Where there is case law in this context, it is predominantly concerned with disclosure obligations of criminal convictions (*Hariwera v Presbyterian Support Services*) [5] or pending charges (*Murray v A-G*) and OZ's situation falls outside both categories. [6] I could find no comparable case that traversed the obligation to disclose the specific or contextual circumstances of a resignation such as requested of OZ by XVZ.

[41] The requested information is arguably contrary to the general common law disclosure obligations as re-stated in a recent case, *Senate Investment Trust Through Crown Lease Trustees v Cooper*, where Judge Beck noted there was "no proactive obligation on a

[3] *Ports of Auckland Limited v Findlay* [2017] NZEmpC 45 at [41].
[4] *Western Bay of Plenty District Council and NZ Tax Refunds v Brook Homes Limited* [2013] NZCA 90.
[5] See for example *Harawira v Presbyterian Support Services* AEC 20A/94.
[6] *Murray v Attorney-General* [2002] 1 ERNZ 184.

prospective employee to disclose information … unless asked to do so". [7] On the limited evidence available, I cannot determine whether or not OZ was asked to disclose the specific circumstances of OZ's departure from the previous employer during the pre-employment stage.

[42] Further, no good faith duty exists prior to the formation of an employment relationship. I however, acknowledge that good faith 'runs both ways' - a reciprocal duty exits that parties be active and constructive in maintaining the employment relationship when 'on foot' and neither party should engage in conduct that is likely to mislead or deceive. [8] On the latter, I note the Court in *B v Virgin Australia (NZ) Employment and Crewing Ltd*, has held albeit in the context of disclosing details of a police investigation (which is not the case here), that good faith obligations are couched in "mandatory, not discretionary" terms where the disclosure of relevant information in a disciplinary context is at stake. [9] In *Alatipi v Chief Executive of the Department of Corrections* Judge Ford opined that the duty to be responsive and communicative included an obligation to answer questions advanced in disciplinary proceedings. [10]

[43] Balanced against the above, OZ's counsel raised concerns on how the information pertaining to OZ was obtained, validated and then initially withheld from OZ. I observe this may prove problematic for XVZ advancing the disciplinary process and more thought may need to be put into whether the information available is simply opinion that is overly prejudicial to OZ and unable to be verified. Further, counsel has made a valid contextual point that OZ has adequately addressed the questions put by reasonably maintaining that resignation from the previous employer was for undisclosed personal reasons.

[44] In concluding that an arguable case threshold has been met that the employer is potentially disentitled to put further questions to OZ and/or to rely upon existing disparaging comment obtained, I have not formed a fixed view on the substantive merits or otherwise of XVZ's position. I observe that the Employment Court in *Murray* departed from the general disclosure rule when persuaded that exceptional circumstances existed to justify deploying its

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[7] *Senate Investment Trust Through Crown Lease Trustee v Cooper* [2021] NZEmpC 45 at [56].
[8] Section 4(1) and 4(1A)(b) Employment Relations Act 2000.
[9] *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 40 at [158].
[10] *Alapiti v Chief Executive of the Department of Corrections* [2015] NZEmpC 7, (2015) 13 NZELR 95 at [106].

equity and good conscience jurisdiction to uphold a dismissal based on the non-disclosure of information pertinent to a decision to appoint. [11]

[45] I was asked by OZ's counsel to consider that this case involves serious questions of law that needed in the public interest to be dealt with "as a matter of urgency" as it has widespread implications. I find that this significantly overstates the issue and whilst conceding some novel aspects of this case exist, I disagree with the premise advanced.

**Balance of convenience**

[46] Assessing the balance of convenience between the parties claims requires an analysis of the impact on each party and any third parties if interim orders sought are either granted or not. I must also assess what happens if the interim position is reversed in any substantive determination. For XVZ, this means assessing the consequences of pausing a disciplinary process and the disruption to workplace relationships this may entail until the substantive matter is resolved.

[47] For OZ, I must assess whether allowing XVZ to complete its disciplinary proceedings with a potential for summary dismissal is appropriate in the circumstances. The latter part of the balancing equation has to weigh the fact that should dismissal be the outcome of the process, OZ has the option of challenging a negative conclusion on both an interim or substantive basis.

[48] OZ's counsel has pointed to the nature of OZ's position and recent re-location with family and partner, to an area were few comparative opportunities exist for alternative employment should dismissal occur and that these factors warrant interim intervention. OZ's affidavit also pointed to OZ's potential for at least two decades of working life yet fulfilled, the specific nature of the employment and perceived difficulty in changing career tack.

[49] By contrast, XVZ's counsel emphasised that no decision had been made, the need to complete what they see as a legitimate disciplinary investigation and the high degree of trust required in the position OZ occupies.

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[11] At [42] – [49].

**Assessment of where the balance of convenience falls**

[50] Whilst I can accept that XVZ is in a dominant position and that its pursuit of concerns has arisen in an unusual context, the concerns do raise issues of trust between the parties and unfortunately this has descended into 'legal jockeying' which has perhaps distracted the parties from seeking to work constructively on their differences.

[51] On a practical basis, were I to grant the injunctions sought all it would lead to would be a pause in proceedings and both parties engaging in a litigation forum with the employer being unable, in the interim, to pursue identified matters of concern.

[52] I am also not persuaded that dismissal is imminent. An opportunity exists for OZ to further clarify the situation with XVZ and seek to resolve the employer's concerns.

[53] The Authority is primarily an investigative body and this type of application sits uneasily within that framework as I must have regard to the objects of the Act that aims to, where appropriate, promote the reduction of "the need for judicial intervention". [12]

[54] I am guided by the decision in *Findlay* that whilst leaving the 'door open' in extraordinary circumstances, makes the strong point that it is not normally in the wider interests of a functioning employment law framework to prevent employers from advancing disciplinary proceedings.

[55] In assessing all factors albeit on untested affidavit evidence, I could find no extraordinary features in this case that would trigger the step of preventing XVZ pursuing their concerns in a disciplinary context. If dismissal is the result of the extant disciplinary process, OZ has the option of challenging the decision and seeking compensatory remedies, penalties and/or reinstatement (on an interim and permanent basis).

[56] XVZ's counsel made it clear that the client is committed to approaching this matter with an open mind and that should any dismissal be initially proposed, OZ will have a further opportunity to make a submission before any final decision is reached. That is an appropriate approach.

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[12] Section 3(a)(vi) Employment Relations Act 2000.

[57] I do not have jurisdiction as was acknowledged, to rule on whether damages are available for an alleged breach of OZ's privacy or confidentiality in how XVZ obtained personal information from the previous employer without consent and that matter can be pursued with the Privacy Commissioner. I accept that this was also an action that could be categorised as unreasonable and may give rise to a personal grievance claim of disadvantage should OZ establish detriment occurred in the employment relationship.

[58] A further factor I have to weigh is the overall state of the employment relationship and the nature of the position OZ occupies, which given OZ is currently suspended on an unrelated matter and is pursuing a separate personal grievance, is best described as fragile.

[59] Weighing all factors including merit in OZ's perspective of the situation, I nevertheless find that the balance of convenience does not favour the granting of the restraining orders sought as XVZ should not ordinarily be restrained from continuing a process to cautiously explore their concerns.

**Overall justice**

[60] An overall justice assessment is a 'reality' check on the position which has been reached after the analysis of the serious question to be tried and the balance of convenience has been weighed. As I have said, there is a serious question to be assessed in regard to the manner by which XVZ has presented allegations to OZ and the interim conclusion that OZ has so far failed to fully address the employer's concerns. I am not however persuaded by the notion advanced by OZ's counsel that the questions put to OZ lack legitimacy or were unreasonable given OZ occupies a senior management position.

[61] I have observed that the disciplinary process is not so far advanced as to be a 'fait accompli' and note that XVZ has significant barriers to overcome to establish their allegation that OZ has an obligation to disclose all of the circumstances of a resignation from the previous employer and to not do so, is as alleged, failing to observe a lawful and reasonable instruction.

[62] However, standing back and looking at all factors I find that the balance of convenience does not favour granting the interim orders sought. A substantive investigation meeting is a better forum to hear and test evidence and more detailed submissions should this

matter not be resolved between the parties and/or the employment relationship ends.

**Outcome**

[63] **The interim injunctions sought are not granted and a case management conference will be convened as soon as practicable to timetable this matter for a substantive hearing.**

**Costs**

[64] Costs are reserved.

David G Beck
Member of the Employment Relations Authority