

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 275
3033038

BETWEEN R
 Applicant

A N D Allan Halse
 First Respondent

A N D CultureSafe NZ Limited
 Second Respondent

Member of Authority: Rachel Larmer

Representatives: Samuel Hood, Counsel for Applicant
 Mr Halse in person as First Respondent and as Director
 of CultureSafe NZ Limited

Investigation Meeting: On the papers

Submissions Received: 27 August 2018 from Applicant

Date of Determination: 27 August 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Third non-publication order

[1] There is currently a non-publication order in place dated 13 August 2013 that prohibits publication of the Applicant’s name or information leading to the identification of the Applicant.¹ This is referred to in this determination as “*the third non-publication order*”.

¹ [2018] NZERA Auckland 250.

[2] The third non-publication order was stated to remain in force until further order of the Authority.

[3] The Applicant has therefore been identified as R in this determination. The first respondent Mr Halse is an employment advocate based in Hamilton. Mr Halse is the sole director and shareholder of CultureSafe NZ Ltd (CultureSafe), the second respondent.

First compliance order

[4] The Authority issued a first compliance order in respect of this matter on 16 August 2018 (*“the first compliance order”*).²

[5] The first compliance order required Mr Halse and his company CultureSafe to comply with a Record of Settlement dated 05 March 2018, certified by a mediator under s.148 of the Employment Relations Act 2000 (the Act). Mr Halse signed this certified settlement agreement to signify that he had agreed to be bound by it.

Employment relationship problem

[6] The Applicant urgently sought a second compliance order relating to the third non-publication order.

[7] The Applicant claimed Mr Halse made a number of publications on CultureSafe’s social media platform over the period 16 – 22 August 2018 that breached the third non-publication order.

[8] These posts were identified in the Applicant’s Third Amended Statement of Problem as *“the sixth ERA post”*, *“the eighth ERA post”*, *“the ninth ERA post”*, *“the eleventh ERA post”*, *“the twelfth ERA post”*. These publications are collectively referred to in this determination as *“the disputed communications.”*

Grant of urgency

[9] The Applicant’s claim for a second compliance order requiring Mr Halse and CultureSafe to comply with the third non-publication order was granted urgency.

² [2018] Auckland 253.

[10] The grounds for urgency were:

- (a) Documents filed by the Applicant established a strong evidential foundation for its claim;
- (b) The alleged multiple breaches of the third non-publication order were continuing;
- (c) No steps had been taken by Mr Halse and/or CultureSafe to preserve the integrity of the third non-publication order pending the Authority's determination of the second compliance order application;
- (d) Mr Halse had published an intention not to be bound by the third non-publication order;
- (e) The publications in issue were causing the Applicant on-going reputational damage and harm;
- (f) The on-going harm the Applicant said it was suffering as a result of the respondents' continuing alleged breaches of the third non-publication order cannot be adequately remedied if the publications continued until the substantive claims were determined.

Timetable directions and investigation of urgent compliance order application

[11] Timetable directions were made to enable the second compliance order application to be dealt with urgently, namely:

- (a) Time was abridged for filing a Statement in Reply responding to the second compliance order claim;
- (b) Information, evidence and any submissions on the second compliance order claim were timetabled to enable all parties to be heard;
- (c) A telephone conference was allocated for 27 August 2018 to give any party who wished to be heard on the second compliance order claim an opportunity to speak directly to the Authority Member before the claim was determined.

[12] Mr Halse and CultureSafe did not file any evidence or submissions in accordance with the timetable directions for the second compliance order application.

[13] The Applicant advised it did not wish to be heard at a telephone conference today.

[14] Mr Halse and CultureSafe emailed the Authority today but did not answer the question about whether or not they wanted to speak to the Authority Member about the second compliance order application.

[15] The opportunity for the parties to advise whether or not they wanted to be heard at a conference call today was advised to them via email early on the afternoon of Thursday 23 August 2018. No requests were made to the Authority to reschedule the offered telephone conference day or time.

[16] At around 12pm today Mr Halse emailed the Authority and said (among other things) that he was at mediation today on another matter. However Mr Halse did not advise that he wished to be heard on the second compliance order application. Nor did Mr Halse suggest an alternative day or time on which a telephone conference could occur.

[17] Given this matter has been accorded urgency, and having provided the parties with opportunities to be heard, I am satisfied I can now reasonably proceed to determine the second compliance order application on the basis of the information currently available (subject to one qualification mentioned below).

[18] The Applicant filed submissions today on the second compliance order application. These were served on Mr Halse and CultureSafe today. These submissions appended further social media posts and associated comments which I had not yet read (this is referred to in this determination as "*the new material*").

[19] This new material has been put to one side for now, so has not been reviewed or read by me, prior to determining this second compliance order application. I did that because Mr Halse and CultureSafe have not yet had a sufficient opportunity to respond to the new material. I therefore do not want to consider the new material at this time.

[20] Accordingly, the new material filed by the Applicant this morning is not part of the Authority's investigation for this second compliance order application.

[21] Instead the new material will form part of the evidence the Authority can consider in support of the Applicant's other claims during the substantive investigation meeting on 31 August 2018. In particular, claims that Mr Halse and/or CultureSafe:

- (a) breached the Record of Settlement dated 05 March 2018,
- (b) breached the third non-publication order dated 13 August 2018,
- (c) should have a penalty imposed on them under s.134A of the Act for, without sufficient cause, obstructing an Authority investigation.

[22] This second compliance order application has therefore been determined on the papers, based on the information that was served on Mr Halse and CultureSafe last week and on the Applicant's submissions (excluding the supporting documentation attached to those submissions) that were filed and served this morning.

Respondents' position

[23] When considering Mr Halse's and CultureSafe's likely position regarding the second compliance order application, I have had regard to their previous communications with the Applicant and Authority (see the exception explained below).

[24] My reference to "*previous communications*" in the above paragraph referred solely to relevant communications that have been passed on to me. By way of background, I am aware that the respondents have been sending other email communications to the Authority that contained irrelevant, intemperate or potentially prejudicial comments. I have not seen those emails.

[25] After seeing emails from the respondents sent to the Authority at 9.28am and 11.59am on 16 August 2018, I instructed the Authority Officers to only send me communications that were relevant to matters I was determining, because I wanted to avoid unnecessary distractions.

[26] From the afternoon of 16 August 2018 all irrelevant communications received by the Authority in respect of this matter have been sent to another Member to deal with, to enable me to focus solely on the various claims that needed to be determined.

[27] I have taken into account that Mr Halse and CultureSafe were strongly opposed to any non-publication orders being made in this case. It follows that they would be just as strongly opposed to a second compliance order being made that would require them to comply with the third non-publication order.

[28] I have therefore assessed this second compliance order application in light of the respondents' anticipated opposition to it.

Does the Authority have jurisdiction over the Applicant's second compliance order claim?

Power to make non-publication order

[29] The Authority exercised the power it had under clause 10(1) of Schedule 2 of the Employment Relations Act 2000 (the Act) to issue the third non-publication on 13 August 2018.

[30] The third non-publication order must be observed unless it is varied, set aside or stayed by the Authority or stayed or overturned on challenge by the Employment Court.

[31] As at the date of this determination, I am advised that no challenge has been filed. Accordingly, the third non-publication order remains in effect and is therefore enforceable.

Power to make compliance order

[32] The Applicant has the right (among other things) to seek a compliance order from the Authority to enforce compliance with the third non-publication order.

[33] The Authority's compliance order jurisdiction is contained in s.137 of the Act.

[34] A compliance order requiring compliance with the non-publication order may be made under s.137(1)(b) of the Act. Section 137(2) of the Act enables the Authority to impose conditions on a person to do a specified thing or cease any specified activity to prevent non-compliance with an Authority order, determination, direction, or requirement.

[35] It is clear that the Authority has jurisdiction to issue a compliance order in response to a breach or breaches of the third non-publication order.

Issues

[36] The following issues are to be determined:

- (a) Has the third non-publication order been breached?
- (b) If so, who was responsible for the breach(es)?
- (c) Have any breaches that may have occurred been remedied or are breaches continuing?
- (d) Should a compliance order be issued?
- (e) What if any costs should be awarded?

Has the third non-publication order been breached?

[37] The third non-publication order prohibited publication of the Applicant's name and information leading to the identification of the Applicant until further order of the Authority.

[38] The eighth ERA post, the ninth ERA post, the eleventh ERA post, and the twelfth ERA post all named the Applicant. These four disputed communications therefore clearly breached the third non-publication order by naming the Applicant.

[39] The sixth ERA post does not name the Applicant but it included information that allowed the Applicant to be identified. The sixth ERA post has to be read together with the eighth ERA post that was posted on the same social media platform less than five hours later.

[40] The eighth ERA post named the Applicant and it also contained information that correlated to the sixth ERA post. The naming of the Applicant in the eighth ERA post meant that people who read it could easily identify that it was the Applicant who had been referred to in the sixth ERA post.

[41] The sixth post therefore breached the third non-publication order because it contained information leading to the identification of the Applicant.

[42] The five disputed communications identified above have not observed or complied with the Authority's third non-publication order.

Who is responsible for the breaches?

[43] Mr Halse appeared to have written the disputed communications because they expressed his personal views and referred to matters he was personally involved in. The disputed communications were then published on CultureSafe's social media platform because they were publically visible to others, including the Applicant.

[44] Mr Halse, as the sole director and shareholder of CultureSafe, has complete control over it, so he is effectively the 'mind' of his company.

[45] Mr Halse provides representation to his clients via the CultureSafe entity, so CultureSafe's social media platforms reflect Mr Halse's voice and views. CultureSafe therefore represents Mr Halse's positions on issues they are interested in.

[46] There is no real distinction between Mr Halse's actions and CultureSafe's actions regarding the five disputed communications that breached the third non-publication order.

[47] Mr Halse and CultureSafe are therefore held jointly and severally liable for the five breaches of the third non-publication order that occurred as a result of the disputed communications being published on CultureSafe's social media platform.

Have these breaches been remedied or are they continuing?

[48] The five breaches of the third non-publication order that occurred (as identified in this determination) have not been remedied, so are continuing.

Should a compliance order be issued?

[49] The issuing of a compliance order is discretionary. The Authority's discretion must be exercised on a principled basis. Factors relevant to the exercise of the Authority's discretion are reviewed below.

Lack of undertakings

[50] No undertakings have been provided by Mr Halse or CultureSafe that they will comply with the third non-publication order.

[51] The lack of appropriate undertakings is a factor that weighs in favour of issuing a compliance order.

Are the current breaches likely to continue if a compliance order is not issued?

[52] There was no evidence to reasonably suggest that the current breaches of the third non-publication order would not continue if a compliance order was not issued.

[53] Quite the opposite. Mr Hood pointed out in his submissions that the respondents have stated there would be more postings leading up to and subsequent to the substantive investigation meeting.³

[54] The respondents have apparently not removed the publications that gave rise to this second compliance order application. The available evidence strongly indicated that the current breaches would be likely to continue unless a compliance order was issued.

[55] These factors weigh in favour of making a compliance order.

History of breaches

[56] Mr Halse and CultureSafe have a history of breaching the non-publication orders that have been made in this case. They breached the first non-publication order, the second non-publication order and now the third non-publication order.

[57] The history of breaches of non-publication orders is a factor that weighs in favour of a compliance order being issued.

Are further/future breaches likely if a compliance order is not issued?

[58] The multiple breaches of the third non-publication order that have occurred were not accidental or inadvertent. Mr Halse and CultureSafe were aware of the third non-publication order but decided not to observe or comply with it. The breaches of the third non-publication order identified in this determination are therefore deliberate.

³ 24 August 2018 email.

[59] Mr Halse stated in the eighth ERA post published on CultureSafe's social media platform that he did not intend to comply with the third non-publication order.⁴ There is nothing before the Authority to suggest that position has changed.

[60] The deliberate decision to breach a non-publication order is a factor that weighs strongly in favour of issuing a compliance order.

Alleged imposition on Mr Halse's legal rights?

[61] Mr Halse and CultureSafe have previously expressed the view that their legal rights have been unfairly or inappropriately imposed upon by the Applicant and/or the Authority, so that is a point I have considered when assessing whether the discretion should be exercised in favour of making a compliance order or not.

[62] It bears pointing out that Mr Halse and Culturesafe do not have an inherent or implied legal right to ignore a non-publication order because they disagree with it. Issues regarding the validity of a non-publication order that has been issued by the Authority need to be taken up with the Employment Court.

[63] All parties to an Authority determination have the right to elect to have their matter reheard by the Employment Court. Such election allows a case to be heard over again, in its entirety, from the beginning, by the Court. This right of challenge provides an important avenue of redress to a party that is unhappy with the outcome of an Authority matter or with an order the Authority has made.

[64] Mr Halse and CultureSafe have not, as at the date of this determination, challenged the third non-publication order. Nor have they applied to the Employment Court or Authority to stay it. Nothing in this determination affects the legal rights Mr Halse and CultureSafe have to take such steps.

[65] In the absence of the third non-publication order being stayed or overturned it remains in effect, so its terms must be observed and complied with.

[66] Enabling the Applicant to enforce the third non-publication order would not amount to an inappropriate imposition on Mr Halse's or CultureSafe's legal rights.

Consideration of good faith requirements in the Act

⁴ This is taken from the Third Amended Statement of Problem.

[67] Good faith is a fundamental object of the Act, so it is a relevant factor to consider when assessing whether the discretion should be exercised in favour of issuing a second compliance order.

[68] Section 3(a)(i) of the Act expressly recognises that productive employment relationships are built through the promotion of good faith in all aspects of the employment relationship and on the legislative requirement for good faith behaviour.

[69] Section 157(2)(b) of the Act requires the Authority when carrying out its role to aim to promote good faith behaviour.

[70] Section 4(1) of the Act requires parties to an employment relationship to deal with each other in good faith. Section 4(1)(b)(ii) of the Act states that parties must not do anything to mislead or deceive each other or which is likely to mislead or deceive each other.

[71] Section 4(1A) of the Act provides that the mutual good faith obligations are wider than the implied mutual obligations of trust and confidence.

[72] Section 4(1A)(b) of the Act requires parties to an employment relationship to be “*active and constructive in maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*”

[73] Although Mr Halse and CultureSafe are not themselves in an employment relationship with the Applicant, their interactions with the Applicant have occurred because CultureSafe (through Mr Halse) is representing some of the Applicant’s employees.

[74] That close connection to ongoing employment relationships suggests good faith is a relevant factor for the Authority to consider when assessing whether or not to exercise its discretion to grant a second compliance order.

[75] There is no evidence that CultureSafe’s clients instructed Mr Halse or CultureSafe to breach the third non-publication order and/or have supported and thereby condoned such breaches.

[76] However, it is appropriate to acknowledge that the disputed communications that have breached the third non-publication order are the antithesis of the good faith behaviour that is encouraged and promoted in the Act.

[77] The issuing of a compliance order in such circumstances would be consistent with the overriding good faith obligations that are outlined in the Act, whilst failing to do so is inconsistent with that.

[78] Good faith considerations therefore favour issuing a compliance order.

Public interest considerations

[79] Mr Halse and CultureSafe appear to believe that it was in the public interest for them to continue to engage in publications that breach the third non-publication order. I do not agree.

[80] Non-publication orders must be complied with. There is a strong public interest in the Authority acting to dispel the notion that someone who does not agree with a non-publication order is entitled to breach it.

[81] The interests of justice requires that everyone, and in particular users of the employment institutions, have confidence that breaches of non-publication orders will be addressed and that non-publication orders issued by the Authority are enforceable.

[82] For the Authority to find otherwise would undermine the overall administration of justice.

[83] The failure of the Authority to allow a party to a non-publication order to enforce it could have an undesirable chilling effect on justice. It could result in parties becoming more reluctant to provide sensitive or confidential information to the Authority during the course of its investigations.

[84] It could also encourage others who are subject to non-publication orders to breach them, if there is a public perception that can be done with impunity.

[85] Public interest considerations favour the issuing of a compliance order to make it clear that the Authority's non-publication orders can and will be enforced by the employment institutions.

Legitimacy of third non-publication order

[86] Mr Halse and CultureSafe appear to believe that because they view the third non-publication order as illegitimate or unlawful they do not have to comply with it.

[87] That demonstrates a fundamental misunderstanding of how the law relating to non-publication orders works. People have to comply with all non-publication orders, not just the non-publication orders they agreed with.

[88] In this case the third non-publication order was issued in accordance with the Authority's relevant discretionary statutory power. The Authority is also bound to follow Employment Court precedents.

[89] The issuing of the third non-publication order was consistent with established case law because it followed the Employment Court's reasoning and decision in *Auckland DHB v X (No 1)*.⁵

[90] In *X (No 1)* the Court held that the risk of reputational damage to a party outweighed the public interest in publishing that party's name until the matter could be determined substantively. That is the same situation that applied in this case, and it is exactly what the third non-publication order was intended to address.

[91] Mr Halse's concerns about the legitimacy of the third non-publication order are not upheld, so it is not factor that weighs against the issuing of a compliance order.

New Zealand Bill of Rights Act 1990

[92] Mr Halse and CultureSafe appear to believe that the third non-publication order breached the freedom of expression contained in the New Zealand Bill of Rights Act 1990 (NZBOR). However these rights are not absolute and may be subject to reasonable limitations, as prescribed by law.

[93] Section 5 of the NZBOR expressly allows "*reasonable limits*" to be imposed on freedom of expressions rights contained in s.14 of NZBOR.⁶

⁵ [2005] ERNZ 487.

[94] The issuing of a non-publication order in accordance with the statutory power given to the Authority in clause 10(1) of Schedule 2 of the Act is a justifiable limitation in terms of s.5 of the NZBOR.

[95] That meant that the issuing of a compliance order would not be a breach of the NZBOR freedoms, because the third non-publication order was a lawful and permitted reasonable limitation on that right of freedom of expression.

[96] NZBOR considerations are not a factor that would weigh against the issuing of a compliance order.

Deterrence

[97] A compliance order could deter Mr Halse and CultureSafe from continuing to breach the third non-publication order. It would also act to deter others who may be inclined to want to breach a non-publication order.

[98] Deterrence is a factor that favours the issuing of a second compliance order.

Lack of understanding of legal obligations

[99] Neither Mr Halse nor CultureSafe demonstrated any understanding that the third non-publication order had to be observed regardless of whether or not they agreed with it.

[100] That is a factor that weighs in favour of issuing a compliance order.

Would a compliance order unduly restrict the respondents' ability to represent clients who are employees of the applicant?

[101] The issuing of compliance order regarding the third non-publication order can be made subject to a condition that would ensure it would not unduly restrict CultureSafe's and Mr Halse's ability to appropriately represent clients, who are also employed by the Applicant.

Exercise of discretion

⁶ See Employment Court's discussion of NZBOR in the *ALA v ITE* line of cases including *ALA v ITE* [2017] NZEmpC 39.

[102] After standing back and carefully weighing and balancing all relevant factors I am satisfied on the balance of probabilities that it is necessary and appropriate to exercise the Authority's discretion in favour of issuing the second compliance order sought by the Applicant.

[103] Exercising the discretion in favour of making a compliance order is in the overall interests of justice. Breaches have occurred and are continuing. Further breaches are likely if a compliance order is not issued.

[104] A compliance order is necessary to emphasise to Mr Halse and CultureSafe that they are required to comply with the third non-publication order, whether they agree with it or not.

Second compliance order issued

Timing of this compliance order

[105] This second compliance order is to take effect immediately.

Duration of second compliance order

[106] This second compliance order remains in force as long as the third non-publication order remains in force.

Terms of compliance order

[107] Mr Halse and CultureSafe are ordered to comply with the Authority's third non-publication order dated 13 August 2018, subject to the special condition recorded below.

[108] The third non-publication order prohibits publication of the Applicant's name and information leading to the identification of the Applicant.

Special condition of this second compliance order

[109] This second compliance order does not prevent Mr Halse and/or CultureSafe from naming the Applicant or providing information leading to its identification in communications that their (CultureSafe's) clients specifically instruct them (CultureSafe and Mr Halse) to have with the following organisations about the client's/clients' employment issues and/or health and safety concerns:

- (a) Mediation Services;
- (b) The Authority;
- (c) The Employment Court;
- (d) The Court of Appeal;
- (e) WorkSafe New Zealand - only in relation to the making of a formal health and safety complaint or in the course of facilitating WorkSafe's investigation of any such formal complaint;
- (f) The Applicant's external independent investigator's business.

[110] This special condition has been included as part of the second compliance order to ensure that it does not unduly restrict Mr Halse's and CultureSafe's representation of its clients, in terms of their particular clients who are also employed by the Applicant.

[111] This condition will enable Mr Halse and CultureSafe to pursue their clients' legitimate employment related concerns with the named authorities without fear of breaching this second compliance order.

[112] The requirement that CultureSafe's client/clients specifically instruct Mr Halse and CultureSafe to raise employment and/or health and safety concerns with a named organisation will ensure that CultureSafe's clients are clear about, and therefore have an opportunity to approve, the communications and information that CultureSafe is disseminating on their behalf.

Breach of this compliance order

[113] The legal consequences of breaching this second compliance order are potentially serious.

[114] Any breach of this second compliance order may result in the Applicant applying to the Employment Court to exercise its powers under s.140(6) of the Act.

[115] Naming the Applicant, or posting information leading to the identification of the Applicant, on social media is a breach of the third non-publication order so would also breach this second compliance order.

[116] That is but one example of conduct that would breach this compliance order, so it should not be viewed as an exhaustive list of all actions by Mr Halse and/or CultureSafe that would amount to a breach of this second compliance order.

[117] To be clear and to minimise the likelihood of this second compliance order being breached, Mr Halse and CultureSafe are on notice that the disputed communications that breached the third non-publication order will need to be addressed by them to ensure they do not also breach this second compliance order. That is an issue that Mr Halse and CultureSafe may wish to take legal advice on.

[118] Finally, whether or not a breach of this second compliance order has in fact occurred will be a matter for the Employment Court to decide, based on the evidence produced to it at the appropriate time, should that become necessary.

What, if any, costs should be awarded?

[119] Costs are reserved sine die.

Rachel Larmer
Member of the Employment Relations Authority