

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 107
3135300

BETWEEN	SKY STONE CONSULTING LIMITED Applicant
AND	LI XU Respondent

Member of Authority:	Marija Urlich
Representatives:	Simon Mitchell, for the Applicant Stephen Langton and Rebecca White, for the Respondent
Investigation Meeting:	1 July 2022
Submissions and information received:	Up to and including at the investigation
Determination:	6 March 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Xu seeks an order for rescission of an interim injunction issued in favour of Sky Stone Consulting Limited (SSCL) which required him to deliver up to the Authority SSCL's information in his possession and not to communicate that information to any third party without SSCL's consent.¹ The injunction he seeks rescinded was issued on 25 March 2021, varied on 26 and 29 March and discharged by consent on 17 March 2022.²

¹ *Sky Stone Consulting Limited v Xu* [2021] NZERA 119.

² *Sky Stone Consulting Limited v Xu* 3135300 Directions of the Authority 17 March 2022.

[2] He also seeks to enforce an undertaking as to damages provided by SSCL when it applied for the injunction and seeks an award of damages arising from losses suffered consequent to the injunction including legal costs and emotional harm. Mr Xu seeks a costs order in respect of SSCL's withdrawn substantive application and his application for rescission and undertaking enforcement.

[3] SSCL is a property development company trading in Auckland and is part of a group of companies which will be referred to as the Sky Stone Group. It says it had a genuine business concern that it was entitled to address by way of application for the injunction. It says there is no reasonable basis for the Authority to rescind the injunction or exercise its discretion to make an award of damages following from its undertaking particularly, it says, given there is no evidence of any damage arising as a result of the injunction.

The Authority's investigation

[4] On 25 March 2021 SSCL lodged an application seeking orders against Mr Xu relating to alleged breaches by him of the parties' terms of employment by disclosing confidential information obtained through the course of his employment to third parties. The orders sought included an interim injunction restraining Mr Xu from:³

Accessing confidential information other than in the terms of his work;

Requiring Mr Xu to keep confidential all information about SSCL, its shareholders, directors and related companies including financial information, information about the structure of the entities, and all financial information about the directors and shareholders or any trust in which they are a trustee or beneficiary;

An order requiring Mr Xu to return to SSCL all confidential information about SSCL, its shareholders or directors or associated businesses, including information held electronically; and

An order requiring Mr Xu to advise SSCL of all confidential information that has been disclosed and to whom it has been disclosed.

[5] The interim injunction was sought on an *ex parte* basis and was accompanied by a memorandum of counsel seeking urgency dated 24 March 2021, a signed

³ Statement of problem 25 March 2021 para 3.4.

undertaking as to damages dated 23 March 2021 and an affidavit in support affirmed by Xin Zhou, a director and shareholder of SSCL on 23 March 2021.

[6] The following documents were annexed to Mr Zhou's affidavit:

- (i) an affidavit of Mr Xu affirmed 10 December 2020 filed in support of High Court proceedings brought against the Sky Stone Group and its directors by a third party (the High Court proceedings);
- (ii) a letter dated 15 February 2021 by counsel for SSCL to Mr Xu's then barrister referring to Mr Xu's affidavit, that it set out financial information about SSCL and its directors obtained through his employment, that the use was inappropriate and in breach of Mr Xu's employment agreement and raised an issue as to conflict for the barrister who was acting of the third party and Mr Xu in his employment matter;⁴
- (iii) a reply from the barrister dated 23 February which included given SSCL's indication of an alleged breach of employment agreement by Mr Xu their intention was to withdraw as representative;
- (iv) a reply affidavit of Mr Xu filed in relation to the third-party High Court proceedings affirmed 12 March 2021 and filed without the annexures; and
- (v) the parties' individual employment agreement.

[7] Service of the application was accepted by Mr Xu's representative and made that day. The following message was then sent to the parties at my direction:

This application has been granted urgency.

Though lodged on an ex parte basis the application has been served on Li Xu through his representative Ms Moncur.

A case management conference is to be held preferably at 3pm today to discuss progressing this matter including:

- the status and relevance of the related High Court proceedings;
- parties' progress on undertakings;
- specificity as to the confidential information for which orders are sought;

⁴ The employment matter referred to is Mr Xu's personal grievance application lodged in the Authority on 28 October 2020.

- parties' view on attending mediation and timeframe;
- parties' view on abridging time for filing a statement in reply;
- investigation meeting date for the interim injunction application.

[8] The case management conference duly proceeded and the following orders were made on 25 March:⁵

[1] Sky Stone Consulting Ltd (Sky Stone) seeks interim injunctive relief in respect of confidential information obtained by Mr Xu in his employment. Urgency was granted to the application which was lodged with an undertaking as to damages and supporting affidavit.

[2] This afternoon the representatives attended a case management conference with the Authority at short notice. Ms Moncur had limited instructions from Mr Xu. She was unable to consent to interim orders being made but accepted the matter was appropriately afforded urgency and that control of confidential information is a matter of importance to Sky Stone.

[3] Having heard from the parties the following interim order was made:

By **4pm Friday 26 March 2021** Mr Xu is to deliver up to the Authority all information in his possession and/or control which he has obtained in his employment with Sky Stone Consulting Limited and which belongs to Sky Stone Consulting Limited or other related entity.

Without the consent of Sky Stone Consulting Limited Mr Xu is not to distribute such information to any third party.

[4] By agreement the following directions are made:

(i) Sky Stone to propose draft undertakings to Mr Xu as soon as practicable;

(ii) By **10am Tuesday 30 March 2021** Mr Xu to file and serve a statement in reply and affidavit (if an affidavit is not possible he is file a statement to be affirmed at the hearing. Ms Moncur may lead viva voce evidence to supplement the statement. Sky Stone may provide reply viva voce evidence.)

(iii) At **2pm Wednesday 31 March 2021** the Authority will hold an investigation meeting to deal with the balance of the interim orders sought and the continuation of the orders at [3] above.

[9] As directed, a further case management conference was convened with the parties on 26 March during which the injunction was varied as follows:⁶

[1] The directions made yesterday in relation to this matter are varied as follows:

⁵ *Sky Stone Consulting Limited v Xu* [2021] NZERA 119.

⁶ *Sky Stone Consulting Limited v Xu* Minute of the Authority 26 March 2021.

- (i) Mr Xu to deliver to the Authority all confidential information in his possession and/or control he is able to be 4pm today;
- (ii) Delivery may be by email or USB stick;
- (iii) The case management conference is to be reconvened at 1.30pm Monday 29 March 2021;
- (iv) Mr Xu is to file before then a list of categories of confidential information in his possession and/or control and identify the information he seeks to retain for the purposes of his personal grievance.

[10] On 29 March, following the timetabled case management conference with the parties' representatives, the injunction was varied to make explicit Mr Xu's ability to distribute the information to his solicitors or as required by law.⁷ The full terms of the order made on 29 March 2021 are set out below:

[1] A case management conference was held with the parties' representatives today to progress this matter.

[2] The main issue for discussion today was how the order set out in the determination dated 25 March 2021 may be varied to allow Mr Xu to instruct his representative. There is some complexity around this issue because the Authority understands Mr Xu has disclosed information, which may fall within the definition of confidential information, to third parties and/or there are third parties who may seek to access that information.

[3] After hearing from the parties the order is varied as follows:

Without the consent of Sky Stone Consulting Ltd Mr Xu is not to distribute such information to any third party with the exception of solicitors at Langton Hudson Butcher who are working on this matter or as required by law.

[4] Mr Xu has delivered to the Authority information as directed in the determination dated 25 March 2021. The information is contained on a USB stick. The information is to be provided to the representatives on USB or other conveyance as soon as practicable.

[5] The balance of the timetable in the determination is suspended.

[6] The case management conference is to be reconvened at 2pm Wednesday 31 March 2021 to discuss progressing the application further including:

- (i) whether this matter should be removed to the Employment Court; and
- (ii) how the information may be accessed for the purposes of translation.

⁷ *Sky Stone Consulting Limited v Xu* Minute of the Authority 30 March 2021.

[7] Variation to these orders may be sought.

[11] As timetabled a further case management conference was held on 31 March and a minute issued setting out timetabling directions for the parties to raise issues concerning privilege over the documents which Mr Xu had delivered up. Also timetabled was the resumption of the case management conference on 15 April 2021 and a date for Mr Xu to file his statement in reply to the substantive application being 13 May 2021.

[12] On 14 April 2021 the parties jointly sought to vacate the timetabled resumption of the case management conference on grounds they were progressing outstanding issues regarding privilege and confidentiality themselves. Mr Xu made clear the request was made without prejudice to any application he may make to discharge or vary the current order or challenge the 25 March determination. The request was granted.

[13] On 13 May 2021 Mr Xu filed a statement in reply denying, in broad terms, that he had breached employment obligations owed to SSCL and, in relation to disclosure of confidential information to third parties that the information disclosed was not confidential or, if it was:

- (i) the disclosure was made with the applicant's knowledge and authorisation; and/or
- (ii) a protected disclosure pursuant to the Protected Disclosure Act 2000; and/or
- (iii) otherwise protected by the witness immunity rule in *Balfour v Chief Executive of Department of Corrections* [2007] ERNZ 808.

[14] On 20 July the Authority sought an update from the parties regarding the matter.

[15] Counsel for Mr Xu replied the following day including the privilege and confidentiality issues remained outstanding between the parties and SSCL was yet to confirm if it consented to the discharge of the current orders against Mr Xu on the grounds they were contrary to the doctrine of witness immunity. SSCL did not provide a response.

[16] On 28 August Mr Xu's personal grievance application was allocated to me. A case management conference was convened on 2 September to timetable the investigation of Mr Xu's personal grievance and to progress SSCL's claim. Mr Xu indicated an intention to seek rescission of the injunction and a timetable set for filing a memorandum to that effect. An investigation meeting for Mr Xu's personal grievance was scheduled for 15 and 16 February 2022.⁸

[17] On 30 September Mr Xu filed the application for rescission along with a memorandum of counsel setting out the grounds on which the application was made and proposed a timetable for filing which was duly directed. SSCL filed a notice of opposition to the rescission application on 14 October. Mr Xu filed an affidavit in support affirmed on 29 October and submissions. SSCL filed an unsworn affidavit of Xin Zhou and submissions on 10 November.⁹ Mr Xu then filed an affidavit in reply affirmed 17 November.

[18] An investigation meeting for SSCL's claim was scheduled for 30 and 31 March 2022. On 10 March by way of memorandum of counsel SSCL sought discharge of the March injunction on grounds that there was no longer any need for the order, the documents were now at least twelve months old and it considered any damage would have been done by now. By reply memorandum dated 11 March counsel for Mr Xu indicated he consented to SSCL's discharge of the injunction, he sought determination of the application for rescission of the injunction, applied to enforce SSCL's undertaking as to damages and asked for a timetable be set for that issue to also be determined.

[19] On 1 April 2022, by way of memorandum of counsel Mr Xu applied to enforce the undertaking as to damages. Mr Xu filed an affidavit in support of the damages claim affirmed 4 April 2022.

[20] An investigation meeting was held on 1 July 2022 at which Mr Xu provided further evidence under affirmation in respect of the damages claim and counsel presented submissions.

⁸ *Li Xu v Sky Stone Consulting Limited* [2022] NZERA 288.

⁹ Mr Zhou affirmed the affidavit before the Authority on 16 February 2021.

[21] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exists to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Background to the employment relationship problem

[22] The background is set out in some detail to provide context for the applications before the Authority for consideration. With respect to the recission application, while there are key areas of conflict in the affidavit evidence, there is a significant amount not in dispute.

[23] SSCL's property development business operates a syndicate model to develop particular properties under the umbrella of the Sky Stone Group. Shareholdings in the syndicates can change and separate limited partnerships are set up for each project. At the time SSCL applied for the injunction in the Authority a company (the third party) which had invested money in one of SSCL's property developments had commenced proceedings against it in the High Court (the High Court proceedings).

[24] Mr Xu was employed by SSCL as its financial manager from 16 March 2020 having contracted these services to it from September 2019. He is a chartered accountant. How his employment ended and the circumstances of which are set out in an earlier determination of the Authority.¹⁰

[25] During 2020 there was a dispute within Sky Stone Group which resulted in Mr Zhou being side-lined from the day-to-day management of the business. Mr Xu also faced difficulties with SSCL including conflict with the same person within the Sky Stone Group with whom Mr Zhou appeared to be in conflict. On 25 September Mr Xu's access to SSCL systems was revoked. Later that day he contacted Mr Zhou and they spoke about the situation concerning Mr Xu's employment and Mr Zhou's control of the Sky Stone Group. They discussed a plan to re-establish their relationship with SSCL. A large focus of their plan appears to be to expose the conduct of the person with whom they were in conflict. Mr Xu recorded his conversation with Mr Zhou and the conversation they had the following day. Mr Xu does not say whether he told Mr Zhou he was recording their conversations. Transcripts of those conversations and

¹⁰ *Li (Leo) Xu v Sky Stone Consulting Limited* [2022] NZERA 288.

translations of the relevant passages were provided to the Authority in Mr Xu's reply affidavit 17 November 2021. They next met in October to further this discussion. There is no evidence Mr Xu and Mr Zhou communicated after this date.

[26] A key dispute arises between Mr Xu and Mr Zhou as to the nature of these discussions. Mr Xu avers he understood Mr Zhou authorised him to use his judgment to raise concerns about wrong-doing within Sky Stone Group including to relevant Government agencies for the purpose of investigating that wrongdoing and with the third party who ultimately brought the High Court proceedings. Mr Zhou denies giving any such authorisation or such specific authorisation which would result in Mr Zhou providing SSCL's confidential information to the third party.

[27] On 5 October 2020 Mr Xu laid a compliance notification with Immigration New Zealand concerning the person within SSCL he had discussed with Mr Zhou in late September. On the face of the notification, it is not clear if Mr Xu was laying the complaint in his capacity as a SSCL employee or his personal capacity. He copied his then barrister into the email. There is no information before the Authority of any consequence of this notification including any requirement for Mr Xu to provide further information to Immigration New Zealand or other agency.

[28] In late October Mr Xu was introduced to the director of the company which subsequently brought the High Court proceedings. Through the discussions with this person Mr Xu's concerns developed to include Sky Stone Group's conduct towards investors and the conduct of Mr Zhou. His concerns, along with supporting documentation are outlined in detail in the affidavits Mr Xu filed in support of the High Court proceeding.

[29] Also, in late November Mr Xu lodged a personal grievance application in the Authority against SSCL.

[30] On 29 October the barrister then acting for Mr Xu made a notification to the Serious Fraud Office as to concerns of wrongdoing within the Sky Stone Group. A copy of the notification has not been provided to the Authority. There is no information before the Authority of any consequence of this notification including any requirement for Mr Xu to provide further information to the Serious Fraud Office or other agency.

[31] The subsequent events leading up to SSCL's lodging of the *ex parte* interim injunction are outlined earlier in this determination.

Rescission of the interim injunction

(i) *The parties' positions*

[32] It is the series of orders set at [8] – [10] above, the injunction, for which Mr Xu seeks rescission. In his affidavit affirmed 29 October 2021 Mr Xu said he applied for rescission because at that date SSCL had not replied to a letter dated 31 March 2021 which his lawyers had written to SSCL setting out his issues with the injunction and what it prevented him doing. He summarised his concerns as follows:¹¹

...the injunction prevents me from giving evidence in the High Court about matters within my knowledge. It also prevents me from speaking to the authorities I have reported my concerns to, unless they compel me to give an interview.

I believe that SSCL only sought the injunction to stop me from giving evidence in the High Court, and from reported my concerns to the authorities. I do not believe this is fair.

[33] Mr Xu filed an affidavit, affirmed 29 October 2021 in support of his application to rescind the injunction and an affidavit in reply, affirmed on 17 November 2021. In broad terms he avers:

- (i) the SSCL information he gave to the third party and attached to the affidavits filed in support of the High Court proceedings was not confidential because he has evidence of serious wrong-doing on the part of SSCL and Mr Zhou authorised him to provide that information;
- (ii) the injunction was sought to stop him giving evidence in the High Court and speaking to authorities such as Immigration New Zealand and the Serious Fraud office unless they compelled him to do so; and
- (iii) he is concerned the injunction stops him giving evidence in the High Court and reporting his concerns to those authorities. The rescission application Mr Xu brings is not to roll back *ab initio* the obligation imposed on him by the injunction requiring him to 'deliver up' SSCL's

¹¹ Affidavit of Li Xu in support of an application to rescind injunction 29 October 2021.

information - he asserts no proprietary right to that information. What Mr Xu seeks to roll back is the effect of the injunction on his ability to communicate with third parties. This is the window between 25 March and 29 March 2021 after which the order was varied to allow such communications.

[34] Mr Xu submits the effect of the order was to stop him from giving evidence in the High Court proceedings or otherwise cooperating with the High Court proceedings or a government agency which may be investigating the action of SSCL or a related company, person or entity. He submits the injunction is a 'gagging order' which infringes the principles of judicial and jurisdictional comity and witness immunity.

[35] SSCL submits the order is entirely unremarkable. The injunction was not issued on an *ex parte* basis and was partially on notice. It submits the injunction does not prevent Mr Xu speaking to anybody or from giving evidence and that the only action the order prevents is the provision of confidential information to third parties. SSCL accepts Mr Xu has professional obligations as a chartered accountant and takes no issue with information being provided to the appropriate authorities. It submits there can be little doubt the information provided to the third party in support of the High Court proceedings was SSCL's confidential information within the terms of the parties' employment agreement and any factual dispute as to whether Mr Zhou was authorised to provide that information by Mr Xu is best resolved at a substantive hearing. SSCL submits there is a public interest in employers being able to provide information to employees which they can be confident will remain confidential and confidential information cannot be disclosed in court proceedings. It refers to s 69 of the Evidence Act 2006 which provides protection for confidential relationships and information as considered in *ANZ National Bank Limited* where the court noted a witness could be called by the court to determine admissibility of confidential information in those proceedings.¹² SSCL submits, in the same way Mr Xu could have given evidence that was not confidential in nature, the confidentiality of that information being an interest SSCL is entitled to protect.

¹² *ANZ National Bank Limited & Anor v Tower Insurance Limited* CIV 2008-4040-007271, 30 January 2009.

[36] With respect to witness comity SSCL submits that principle is not applicable in this matter because Mr Xu is not exposed to any claim of damages from SSCL by giving evidence disclosing information obtained through his employment. It submits further there is nothing preventing the third party seeking discovery of relevant documents and if this occurred they would be before the High Court and Mr Xu would breach no obligation of confidentiality by giving evidence about those documents.

(ii) *The Authority's approach to the rescission application*

[37] Where an interim injunction has been granted on an *ex parte* basis, the respondent may apply to rescind the injunction and the applicant carries the onus of justifying the injunction.¹³ The inquiry is whether the injunction ought to have been granted, applying the usual tests applicable in an interim injunction setting.¹⁴ The assessment is based on the evidence filed in support of the *ex parte* application and the evidence filed in support of and in opposition to the application to rescind.

[38] This matter has factors which require a modification to that approach to that described in *Sky Holdings* that is, an on notice interim injunction. The key factor requiring the different approach is the effluxion of time from when the injunction was issued, when the rescission application was made and the discharge of the interim injunction.¹⁵

[39] The discharge of the interim injunction raises the question of whether factors which may vitiate it can now be considered when the vehicle no longer exists. That said, rescission is an equitable remedy and a flexible and practical approach is necessary to appropriately calibrate the circumstances of the parties in order to do justice between them.¹⁶ In other words, if rescission is the only vehicle available to Mr Xu to seek to enforce the undertaking as to damages, which appears to be the case, and factors outside his control have prevented that consideration continuing as it ordinarily might be expected, the Authority can adapt the necessary process. This is consistent with the

¹³ *Sky Holdings Limited v Rockfield Land Ltd* 18/12/03, Heath J, HC Auckland CIV-2003-404-6939.

¹⁴ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.

¹⁵ *Sky Stone Consulting Limited v Xu* Minute of the Authority 17 March 2022.

¹⁶ *Scales Trading Ltd v Far Eastern Shipping Co Ltd* [1999] 3 NZLR 26 at p 41.

Authority's jurisdiction to act as it thinks fit in equity and good conscience and its exclusive jurisdiction to resolve employment relationship problems generally.¹⁷

(iii) *Should the injunction be rescinded?*

[40] Clause 15 of the parties' written employment agreement deals with confidential information and provides:

15.1 The employer requires you to respect the confidentiality of the Employer's confidential information at all times during and after your employment and you may not divulge it to any person or entity, without first obtaining the Employer's agreement. So that there can be no misunderstanding, confidential information includes but is not limited to: pricing structure, supplier and customer lists, databases, supplier and customer status reports marketing plans, financial reports, business processes, training materials and other commercially sensitive information.

15.2 Reference materials and other data such as those listed above are provided to you for the sole purpose of you performing the duties described in your job description and remain the property of the Employer at all times. They must be returned to the Employer at the time of termination of your employment. This includes all hard and soft copies.

[41] The affidavits Mr Xu provided in the High Court proceedings contain or refer to information which is arguably confidential as defined at clause 15. The information refers to information about Sky Stone Group bank statements, dealings with solicitors, copies of consultancy agreements and information about managers of the Sky Stone Group and their immigration status. It is information Mr Xu received through the course of his employment. There is an arguable case Mr Xu has divulged confidential information to persons or entities outside SSCL and beyond the Sky Stone Group.

[42] The next consideration is whether it is arguable Mr Xu was authorised to divulge SSCL's confidential information either expressly by Mr Zhou or that his obligations to raise his concerns about wrongdoing within SSCL cut across the obligation he owed his employer with regard to its confidential information.

[43] In support of the interim injunction SSCL says it has a genuine concern that Mr Xu would take documents from the company and use them to damage the company and that he was not authorised to do so. While it accepts Mr Xu had ethical obligations as an accountant, and that this may require him to disclose information to relevant parties,

¹⁷ Employment Relations Act 2000 s 157 and s 161.

some of the information provided in his affidavits to the High Court was not accurate and which SSCL was required to respond to which was causing cost, inconvenience, management time and reputational damage to the Sky Stone Group.

[44] A further consideration is necessary - whether other factors cut across the obligations owed under the employment agreement and prevent restraint of breaches of the confidentiality provisions of the employment agreement.

[45] A significant argument Mr Xu makes is that the motivation for the *ex parte* injunction application was to stop him giving evidence in the High Court proceedings in which he had filed evidence in support. The evidence for this claim is unclear particularly given, on Mr Xu's evidence, he was not scheduled to be a witness in the hearing of the High Court proceedings. In the evidence filed in support of rescission Mr Xu avers the interim injunction may have or was likely to have prevented him from giving evidence in support of the High Court proceedings or to cooperate with any agency investigation. The evidence in support of this is not strong. Mr Xu did not seek release from the injunction on grounds he was required to give evidence in the High Court proceedings. The third party did not seek disclosure from the Authority of any document delivered up to the Authority or raise with the Authority any concern as to the impact on its proceedings of the injunction. At the date he filed this evidence in support of rescission almost a calendar year had passed since Mr Xu had raised a compliance concern with Immigration New Zealand and his then barrister filed a notification with the Serious Fraud Office without further contact from either or related agency. The evidence of a chance of his participating in any such investigation is not strong. There is an arguable that Mr Xu should have been restrained from disclosing SSCL's confidential information.

[46] Mr Xu says the balance of convenience favours him – he was authorised to provide information to the third party by Mr Zhou and he was compelled to do so because of his professional obligations as a chartered accountant. He has made disclosures to Immigration New Zealand and the Serious Fraud Office but has not been contacted subsequently. He was not required to give evidence in the 31 March 2021 hearing of the High Court matter or subsequently.

[47] Mr Xu also relies on the witness immunity rule. There is no evidence before the Authority that Mr Xu was required by Immigration New Zealand or the Serious Fraud Office to provide information or evidence or indeed to give further evidence in or assist with the High Court proceedings.

[48] The overall justice and balance of convenience favours SSCL that the injunction should have been granted. Mr Xu had in his possession and control information that was arguably confidential, he had used it to support an application by a third party who was in dispute with SSCL, this was damaging to SSCL and caused it cost and inconvenience.

[49] There was no information before the Authority which suggests Mr Xu needed to retain possession of some or all of the information for example for the purposes of being a witness in any ongoing proceedings with the third party or indeed engaging with any of the enforcement agencies to whom he made disclosure regarding his concerns about SSCL in October 2020. He does not assert a proprietary interest over the information.

[50] The application to rescind is unsuccessful.

Application to enforce undertaking as to damages

[51] SSCL's *ex parte* injunction application was supported by an undertaking as to damages signed by Mr Zhou in his capacity as director. The undertaking provides:

Sky Stone Consulting Limited, by an application lodged at the same time as this undertaking, applies for an order by way of interim injunction.

Sky Stone Consulting Limited agree that I will abide by any order of the Employment Relations Authority may make in respect of damages:

1. That are sustained by the Respondent through the granting of the order for Ex Parte Application for interim injunction; and
2. That the Employment Relations Authority decides that the company ought to pay.

[52] In support of the application to enforce the undertaking as to damages Mr Xu filed an affidavit on 4 April 2022 and gave further evidence in support at the investigation meeting on 1 July 2022. The damages he seeks are in two categories:

- (i) special damages for legal fees incurred in relation to the interim injunction, the rescission application (translation fees sought were dealt with as part of Mr Xu's personal grievance application¹⁸); and
- (ii) damages for emotional distress.

[53] The undertaking is limited to any damages suffered by the other party through the granting of the interim injunction. It does not cover detriment arising from the litigation itself.¹⁹

[54] The legal fees are sought on a 'but for basis'. The invoices submitted in support relate to fees incurred from 26 March 2021. By that date the injunction had been varied to make explicit the material to be delivered up to the Authority was the confidential information of SSCL in Mr Xu's possession and control. The process that followed can be described as the Authority assisting the parties to progress the issue of identifying the confidential information within the totality of information Mr Xu had in his possession. As can be seen from the background narration the parties actively engaged in this process and then progressed it themselves, unfortunately without resolution. It needs to be noted Mr Xu did so without prejudice to his rights to seek further variation to the order, rescission or challenge the determination. No challenge or variation were sought and the rescission application was brought six months after the injunction was issued. Taking all relevant factors into account the claim for special damages in relation to legal fees is not successful.

[55] Involvement in litigation is inherently stressful and it is accepted events during the course of litigation will be stressful. In this and the related litigation, as can be seen from the background narration, there are a number of elements. On the information before the Authority, including Mr Xu's evidence, it is difficult to tease out the specific emotional harm he says he has suffered from the injunction as distinct from the underlying proceeding and his personal grievance. Added to this picture is his involvement in the High Court proceedings. On the information before the Authority those proceedings were not his to prosecute and he was not required to give evidence in those proceedings. It is accepted he has felt it his ethical and professional duty to take

¹⁸ The translation costs awarded to Mr Xu in *Li(Leo) Xu v Sky Stone Consulting Limited* [2022] NZERA 403.

¹⁹ *Civil Remedies in New Zealand*, Thomson Brookers, 2003, para 5.1.5.

the steps he has but the impact of the injunction on his ability to give evidence or further information is not strong and remains unclear.

[56] The Authority accepts the published determination means Mr Xu's name is publicly searchable. Rescission of the injunction will not cure that issue. No application for a non-publication order was made at an earlier time that could have dealt with his concerns. He also did not challenge the injunction determination. Mr Xu points to an unsatisfactory engagement with a recruitment agent where he says it was made clear to him his involvement in proceedings before the Authority would prevent his job application going ahead. He has already been awarded compensatory damage for that effect on him.²⁰ For these reasons Ms Xu's claim for damages for emotional distress is not successful.

Costs for withdrawal of SSCL's substantive claim

[57] Whether a costs award should be made is a matter of discretion and governed by well-established principles.²¹

[58] In *Data Group Limited v Gillespie* the court determined costs where a party withdrew proceedings prior to hearing.²² Factors the court took into account were the length of time between date of withdrawal and the intended hearing date and steps taken by the parties in preparation for the hearing. In this matter SSCL withdrew its claim 20 days before the scheduled investigation meeting on 30 and 31 March 2021. It is accepted by that date Mr Xu had incurred costs in preparation for the investigation meeting as well as taking steps to enforce timetabling directions which SSCL repeatedly breached. These factors weigh in favour of an award of a contribution to costs.

[59] Mr Xu's sought contribution to costs of \$3,500.00 against SSCL is fair and appropriate in the circumstances and is ordered.

Outcome

[60] Mr Xu's application to rescind the interim injunction is unsuccessful.

²⁰ N8 at [47].

²¹ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

²² *Data Group Limited v Gillespie* EmpC Auckland AC 16/04, 22 March 2004.

[61] Mr Xu's application to enforce the undertaking as to damages is unsuccessful.

[62] Within 21 days of the date of this determination Sky Stone Consulting Limited is ordered to pay Li Xu \$3,500.00 as a contribution to legal costs incurred in relation to the substantive claim it brought against him.

Costs

[63] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. At the end of the investigation meeting the parties requested the Authority determine costs in this determination. The information needed as to actual costs is not before the Authority.

[64] If parties are unable to resolve costs between them and an Authority determination on costs is needed Mr Xu may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Sky Stone Consulting Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[65] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[66] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²³

Marija Urlich
Member of the Employment Relations Authority

²³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.