IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2021] NZERA 254
3061172

BETWEEN		ADRIAANUS WILFRED STRAAYER
		Applicant
AND		WORKSAFE NEW ZEALAND
		Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Applicant in person Greg Cain and Katie Alexander, counsel for the Respondent
Investigation Meeting:	On the papers
Correspondence from the parties:	17 & 18 May 2021 from the Applicant 18 May 2021 from the Respondent
Date of Determination:	15 June 2021

FURTHER PRELIMINARY DETERMINATION OF THE AUTHORITY

[1]   On 12 May 2021 I issued a preliminary determination in relation to Mr Straayer's various claims before the Authority.[1] Mr Straayer asked that the publication of the preliminary determination be delayed until such time as the Authority issued its determination of the substantive claims he has brought against his former employer, WorkSafe New Zealand (WorkSafe).

[2]   After considering Mr Straayer's application and WorkSafe's comments on it, I declined to delay publication of the determination, which was posted on the Employment Law Database

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[1] [2021] NZERA 202.

(the database), in line with the Authority's normal practice, some days after its release to the parties. The database, which is administered by the Ministry of Business, Innovation and Employment, contains Authority determinations from November 2000 and is publically accessible. This determination will set out my reasons for rejecting Mr Straayer's application and is issued at his request.

Context

[3]   Mr Straayer has brought a number of claims against his former employer, WorkSafe New Zealand, to the Authority for investigation. He seeks permanent reinstatement among other remedies. As yet, no date has been set for the investigation of those claims.

[4]   In January 2021 Mr Straayer's application for interim reinstatement was heard in the Authority. That investigation meeting was open to the public and there was no request made for non-publication either before, or during, the investigation. Interim reinstatement was declined in an Authority determination of 9 February 2021.[2]

[5]   Ten days after that determination had been issued to the parties, and subsequently posted on the database, Mr Straayer asked the Authority to suppress the determination until his substantive claims against WorkSafe were determined. The reason he gave was the effect the interim determination of his application for reinstatement would be likely to have on his prospects for obtaining employment if it remained on the publicly searchable database.

[6]   Following consideration of the request, and of WorkSafe's comments, I declined Mr Straayer's application and the parties were notified of this by the Authority by email. No determination was requested or issued.

[7]   The Authority's 12 May 2021 preliminary determination, which is the subject of Mr Straayer's current non-publication request, followed a meeting with the parties in February 2021. The purpose of the meeting was to define the scope of the matters to be investigated, and the admissibility of some evidence, in the substantive investigation meeting when it is set down. The preliminary investigation meeting was open to the public and no non-publication orders were sought at the time.

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[2] [2021] NZERA 45.

Parties' positions

[8]   One of the reasons Mr Straayer has given for requesting a delay in the publication of the determination is natural justice. He asserts he will be denied natural justice if a determination that is able to be challenged by either party within 28 days is published within that timeframe. He says the decision contains factual inaccuracies, which he has not identified, that can now only be corrected through a challenge to the Employment Court.

[9]   Mr Straayer also asserts that "posting the information causes a significant imbalance through having no negative effect on the employer, also it does alert the media to an ERA investigation into bullying by senior managers at WorkSafe." He contends the negative effect that posting the determination before the full facts are made public would be highly likely to adversely affect his chance of obtaining employment.

[10]   Open justice is inapplicable in this situation, in Mr Straayer's view, as he is not seeking a suppression order, in that he is not seeking the suppression of his name or of the facts. He is seeking a delay in the posting of the determination until his substantive employment relationship problems are determined.

[11]   Mr Straayer refers to other "quasi-judicial bodies" that do not follow the principle of open justice by publishing their decisions, such as the Victims' Special Claims Tribunal.

[12]   WorkSafe had the opportunity to comment on the application for non-publication of the determination relating to interim reinstatement and on the current application. In each instance it has advised it neither supports nor opposes Mr Straayer's application but has provided a number of observations on it and on the principles of open justice.

Non-publication

[13]   The Authority has broad discretionary powers regarding non-publication. The powers derive from clause 10 of Schedule 2 to the Employment Relations Act 2000 (the Act). They permit the Authority, in respect of any matter, to order that "all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit."

Discussion

[14]   The Supreme Court in *Erceg v Erceg* described the principle of open justice as "fundamental to the common law system of civil and criminal justice" and as a "principle of constitutional importance".[3]   The court recognised that there are circumstances in which the interests of justice require the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice.

[15]   The court in that case referred to a high standard being required for a departure from the principle of open justice and stated that "…the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule…".   I have found Mr Straayer's reasons for seeking suppression of the determination did not meet that high standard.

[16]   Among the factors I have considered, in arriving at that conclusion, is that Mr Straayer did not seek the exclusion of the public from the March 2021 investigation meeting.   While normally open to the public, the Authority has the discretion to decide that an investigation meeting should not be held in public, or should not be open to certain persons.[4]   Nor did Mr Straayer seek the non-publication, or suppression, of the Authority's determination at the time of that investigation meeting, or at any later time, until after he had received the determination.

[17]   Mr Straayer's argument that his right to natural justice has been denied by the 12 May 2021 determination being published within the statutory timeframe for challenging it, is unconvincing.   Publication of a decision does not impact on a party's ability to challenge that decision.

[18]   Mr Straayer has said he is not asking for suppression, but for a delay in posting the 12 May 2021 determination until his substantive claims have been determined.   I regard that request, made after the 12 May 2021 determination was issued, as entailing the suppression of the determination for an indeterminate period.   As already noted, the substantive matter has not yet been scheduled for investigation: it is unlikely to be heard for several months.

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[3] *Erceg v Erceg* [2016] NZSC 135 at [2].
[4] Employment Relations Act 2000, s160(1)(e).

[19]   The determination of 12 May 2021 concerned procedural matters and was not concerned with the merits of the matters Mr Straayer has brought to the Authority for determination. As such, it is unlikely to impact negatively on him.

[20]   Mr Straayer argues that publishing the determination will affect his ability to obtain employment.   His employment with WorkSafe terminated in October 2018.   The first determination was posted on the database two years and four months later in February 2021. The lapse of time makes it problematic to attribute lack of success in obtaining employment to the publication of an Authority decision.

[21]   I do not find it useful to compare the Authority with other "quasi-judicial bodies" such as the Victims' Special Claims Tribunal which, according to Mr Straayer, do not follow the principle of open justice by publishing their decisions. There is such a difference in the work undertaken by the Tribunal Mr Straayer has cited, and the Authority, that no reasonable comparison can be made between their respective stances on publication of their decisions.

Conclusion

[22]   Mr Straayer has not shown specific adverse consequences sufficient to justify an exception to the fundamental rule of open justice. For the reasons given above Mr Straayer's application for suppression of the determination resolving his application for interim reinstatement was dismissed.

Trish MacKinnon
Member of the Employment Relations Authority