IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 105
5526107

	BETWEEN	TGP Applicant
	A N D	TFE First Respondent
	A N D	SDI Second Respondent
	A N D	TDI Third Respondent
Member of Authority:	T G Tetitaha	
Representatives:	A Twaddle, Counsel for the Applicant K Radich, Counsel for the Respondents	
Submissions received:	24 and 27 March 2015 from Applicant 27 March 2015 from Respondents	
Date of Determination:	9 April 2015 on the papers	

INTERIM DETERMINATION OF THE AUTHORITY

A. I decline to make any non-publication orders. This determination and the determination [2015] NZERA Auckland 60 will be released in the usual way after the expiry of 28 days from the date of this determination.

B. Costs are reserved.

Employment Relationship Problem

[1] I issued an interim determination about a number of matters on 24 February 2015. At the time the applicant had foreshadowed an application for non-publication but had made no formal application nor provided evidence in support. I granted an interim non-publication order for 28 days to allow time for the applicant to make his application.[1] The non-publication order lapsed on 25 March 2015. The applicant

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[1] *TGP v TFE & Ors* [2015] NZERA Auckland 60

applied on 24 March for a further non-publication order up to and including substantive hearing.

[2] The non-publication order sought is in respect of:

(a) The parties' identities; and

(b) All identifying particulars of parties including but not limited to:

(i) The location of the place of work;

(ii) The place of the High Court proceedings;

(iii) The nature of work and industry; and

(iv) The specific allegations contained in the correspondence published by the first and second defendants.

[3] The applicant submits there is a 'real risk of adverse consequences' to the applicant if his name and identifying details were published because:

(a) Failure of the Ministry of Business, Innovation and Employment to ratify the Record of Settlement was through no fault of the applicant, but a result of an administrative oversight by MBIE. It is contrary to the equitable jurisdiction of the Authority that the applicant may face a real and ongoing impediment to his professional and personal wellbeing as a result of publication of his identity, where this arises in part from a question of the enforceability of the Record, given any issue as to enforceability (which is denied) is not of his making;

(b) The applicant has been seeking medical assistance, including treatment for mental health issues since leaving his employment with the respondent. Given the facts of this case the recent public focus on privacy following the release of a significant Human Rights Review Tribunal decision there is likely to be media/publicity attached to the Authority's determination. This would increase the risks to the applicant's overall emotional distress and further compromise his health;

(c) The allegations published by the respondents relate to matters that the applicant believed to have been settled in a confidential record of settlement between the parties. Publication of the parties, or any other identifying features about them, will inevitably draw attention to the initial allegations within the industry and broader job market. These will repeat the breach and damage caused to the applicant which arose from the initial breaches of the agreement by the respondents;

(d) The applicant has a young family and wife. Some of the allegations published by the respondents are of a criminal nature. No criminal proceedings have been issued by the Police. To publish the identifying particulars of the individual in the interim determination, and/or publication of the allegations would serve to exacerbate the harm already caused to the applicant. It would also cause distress to the applicant's family, and in turn distress to him in supporting them;

(e) Publication would create irrevocable reputational damage to the applicant. The applicant's association with an employment dispute of this nature would be likely to cause further harm to the applicant's prospects of future employment, including employment outside his profession, should he continue to be unable to obtain work in his chosen field of expertise;

(f) Breaches of records of settlement should be treated seriously. However, such a stance will not be weakened by prohibiting publication of the applicant's identity.

[4] The respondents consent to the making of an order suppressing all parties' names and the above identifying particulars, but submit sub-paras.2(b)(i) and (ii) go further than is necessary to protect the parties' names by such an order. They further submit the Authority has no power to make a non-publication order in respect of any matter pertaining to the High Court proceedings, including its location, even though it concerns mostly the same parties and substantially similar content. It further notes there were letters from the applicant's solicitor on 8 August 2014 asking that there be a 'hold' on the Record of Settlement being certified.

[5] The applicant made further submission asserting the instructions to place certification on hold were given subsequent to alleged breaches by the respondent's and six weeks after the record had been sent to the Ministry for ratification where it was not processed due to error.

Determination

[6] The Court of Appeal has repeatedly stated that the principle of open justice is the appropriate starting point in cases involving non-publication orders and that this applies in both civil and criminal proceedings[2]. The principle of open justice includes the public identification of all involved in proceedings[3].

[7] There is a presumption that all evidence should be given in public and freely reportable[4] subject to my ability to determine whether an investigation meeting *"should not be in public or should not be open to certain persons"* and to *"follow whatever procedure the Authority considers appropriate"*[5] and my discretion 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"*.[6]

[8] The non-publication of names or other identifying particulars in employment cases will be *"exceptional"* in the sense that such orders are and will be made in a very small minority of cases. The making of a non-publication order must be in the interests of justice.[7]

[9] The consent of both parties to the making of a non-publication order will not be determinative. The Authority itself must be satisfied that the proposed order will be in the interests of justice and has regard to the principle of openness of justice.[8]

[10] I do not accept the error in the processing of the Record of Settlement wholly contributed to the enforcement problems. Part of the enforceability problem must also

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2 See for example *X v. Standards Committee* (2011) NZCA 676; *Muir v. Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA) at [29]; *Clark v Attorney-General (No 1)* (2004) PRNZ 554 (CA) at 562 et al

3 *Clark* at [36]

4 *Davis v. Bank of New Zealand* [2004] 2 ERNZ 511

5 s.160(1)(e) and (f) Employment Relations Act 2000

6 Clause 10 Schedule 2 Employment Relations Act 2000

7 *H v A Ltd* [2014] NZEmpC 92 at [78]

8 *Q v W* [2013] NZ EmpC 143 at [4]

be laid at the applicants feet given the failure to follow up the processing and his instruction execution of the agreement be placed upon hold.

[11] The fact the Record of Settlement refers to confidentiality does not necessitate a non-publication order being granted. The Applicant seeks to enforce the terms of the settlement set out therein. The Record provides for the waiver of confidentiality for enforcement purposes. The Record does not reveal any confidential information other than the fact of settlement.

[12] The Courts have granted non-publication orders in cases involving the risk of medical harm to others.[9] In those cases expert evidence and sworn testimony was provided. I have an unsigned and unsworn statement of TGP filed in support of this application. There is no expert medical evidence about the risk of harm to the applicant or his family of publication.

[13] TGP's unsworn statement refers to his wife's complicated pregnancy in June 2014. I have no current information about her state of health. The applicant also submits he is consulting doctors about managing stress and anxiety. There is no evidence from medical professionals of any diagnosis or about the effects of publication upon the applicant or his family. Mere assertion of risks is insufficient to justify the granting of a non-publication order.

[14] While there is a risk prospective employers may refuse employment, I have no evidence this has in fact occurred or is likely to other than mere assertion. I also do not know what TGP's current employment status is. He refers to having to work in a new field and retrain.[10] This infers he has current employment. There is no evidence what this employment is or that he may lose this employment as a consequence of publication. I have little information about the difficulties in obtaining employment in his chosen field other than an assertion others may not employ him if they knew about the allegations. Given he appears to have obtained employment this assertion does not carry much weight.

[15] I understand TGP's professional body is now involved due to a complaint from one or more of the Respondents. Neither party has revealed the status of that

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9 See above n 7 *H v A Ltd*

10 Para 14 Witness Statement S Cooper

matter. There is no indication whether that matter is subject to any non-publication issues.

[16] I do not have the jurisdiction in the Employment Relations Act 2000 to order non-publication of details about another Court's proceeding. Clause 10 limits the information and evidence I may suppress to evidence, pleadings or the names of the parties or other person's. It does not include the location of another Court where defamation pleadings have been filed.

[17] There are also obvious legal and practical difficulties for the High Court dealing with the defamation proceeding if I was to make such an order and they did not. I assume the High Court has not made any non-publication order because there is no evidence. This does not favour the grant of a non-publication order in this jurisdiction.

[18] If the High Court finds defamatory conduct has occurred, any consequences can be dealt with by way of the remedy of damages in that jurisdiction. Similarly the remedies in this jurisdiction include compensatory damages. There is no evidence damages will not adequately compensate TGP.

[19] The allegations have already been published to several employers and other persons within the area the Applicant works. A non-publication order may be refused where it is futile.[11] Any damage from publication may have already been done in the area TGP works. Publication of my determination may be a remedy providing 'vindication' for prospective employers.

[20] Given the above I determine it is not in the interests of justice to grant a non-publication order. I decline to make any non-publication orders. This determination and the determination [2015] NZERA Auckland 60 will be released in the usual way after the expiry of 28 days from the date of this determination.

[21] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

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[11] *Timmins v Asurequality (formerly known as Asure New Zealand Ltd)* [2011] NZEmpC 167