

**NOTE: This determination contains
an order prohibiting publication of
certain information at [22] – [23]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 314
3093872
3140141

BETWEEN	UXK Applicant
AND	TALENT PROPELLER LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Ashleigh Fechny, advocate for the Applicant Richard Upton, counsel for the Respondent
Submissions:	12 April and 20 April 2022 from the Applicant 19 April 2022 from the Respondent
Investigation Meeting:	On the papers
Date of Determination:	11 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The parties have both raised employment relationship problems with each other. Those proceedings have commenced but are not yet concluded and are being heard by Member Urlich.

[2] Prior to the substantive matter being heard, the Authority was asked to determine whether a full unredacted decision of a District Court judgment (“the judgment”) was relevant to the substantive investigation (“the proceedings”), and therefore admissible. Talent

Propeller, the respondent, was seeking to have the judgment included in the Authority's substantive investigation and UXK, the applicant, opposed that request.

[3] In the course of the proceeding, and in order to resolve the dispute that had arisen between the parties as to admissibility of the judgment, the Employment Court directed counsel for Talent Propeller, Mr Upton, to provide a written undertaking on a counsel to representative basis. The undertaking was able to be varied by the Authority, if necessary, following its ruling on relevance.¹

[4] In my preliminary determination dealing with the question of relevance, dated 29 March 2022, I concluded that the full unredacted judgment was not relevant to the substantive Authority investigation, however, the redacted version was.²

[5] UXK now seeks an order for removal and destruction of the full unredacted version of the judgment held by counsel for the respondent and the Employment Relations Authority records. Talent Propeller opposes such an order (in relation to the copy held by Mr Upton) because the judgment is subject to undertakings given by counsel and the proceedings have not concluded. It makes no submissions on the copy held by the Authority.

Background

[6] The undertaking was provided by Mr Upton as follows:

1. I have been provided with a copy of the Employment Court's judgment in *UXK v Talent Propeller and Others*. In that judgment Judge Corkill directed that I should provide an undertaking to the Employment Relations Authority for the purposes of then enabling the Authority to consider the relevance of a District Court judgment.
2. I hereby undertake that when the unredacted District Court judgment is provided to me I will utilise that document only for the purposes of the investigation into relevance, which is now scheduled to occur on 9 November 2021.

¹ *UXK and Talent Propeller Limited* [2021] NZEmpC 167 [5 October 2021] at 169.

² *UXK v Talent Propeller Limited* [2022] NZERA 115

3. I undertake that I will not provide a copy of the judgment or any aspects of the contents of it to any third party (including but not limited to my client), unless I am authorised by the Authority or Employment Court to do so.

[7] On receipt of the undertaking, Ms Fechny, UXK's representative, contacted Mr Upton asking him to add a short statement to the undertaking to the effect that he would dispose of the judgment if the Authority deemed it was not relevant and to specify the form of protection to be applied to ensure any submissions he made to the Authority quoting the judgment, would not be disclosed to his client.

[8] Mr Upton objected to the disposal aspect of the proposal. He did not believe he could do that because he had an obligation to keep client files for at least six years and in any event, this was unnecessary because the judgment would continue to be subject to the undertaking. Unless it was authorised by the Authority or the Court, he would not be able to disclose it without breaching the undertaking.

[9] Further, Mr Upton noted that removing the document from his client file would mean there would not be a complete record when he had a professional obligation to keep such a record and in circumstances where he could not take full instructions on the document (because his client was not able to see the document) but, nevertheless, he had to act in his client's best interests and provide submissions to the Authority.

[10] In relation to any protection for any quotes from the judgment in submissions, Mr Upton said that was already addressed in his undertakings when he stated that he would not disclose "any aspects of the contents of it to any third party".

[11] Ms Fechny then proposed that she would courier a hardcopy of the judgment to him and sought his agreement that within 28 days of the conclusion of the proceedings he would post that same copy back to her. The proposal was based on Employment Court procedure, under r 51 of the Employment Court Regulations 2000, which makes it a condition of disclosure between parties that after proceedings or any related appeal are concluded, the documents must be returned to the party who made them available.

[12] The parties sought an urgent case management conference (CMC) with the Authority to resolve the issue Ms Fechny raised about the undertaking. Both parties provided memoranda and emails ahead of the CMC about retention of the judgment. The position at

that stage was that the applicant was concerned about her privacy and was not going to provide the document to the Authority unless retention of the document by opposing counsel was addressed in the undertaking.

[13] Bearing in mind, the substantive investigation meeting was set down to commence on 7 December 2021, and the preliminary determination on relevance needed to be heard and issued before that date, the parties agreed that the judgment would be provided as timetabled in accordance with the existing undertaking. However, to address the applicant's concerns about privacy, the parties would have an opportunity to be heard on retention and/or destruction of the document within 28 days of the preliminary determination being issued. Ms Fechny took instructions, and the judgment was disclosed on that basis and in accordance with the existing timetable.

Submissions

[14] The Applicant now submits that as the determination on relevance has been issued, the judgment should not be retained by either the respondent's counsel or the Authority and seeks orders for immediate destruction.

[15] Principles 1 and 9 in s 22 of the Privacy Act 2020 are relied on to seek these orders. Under that Act agencies must only collect personal information if it is for a lawful purpose connected with the functions or activities of that agency, and the information must be necessary for that purpose. An agency is also not to keep personal information for longer than necessary.

[16] Ms Fechny submits that as there is no lawful purpose permitting the Authority to retain information connected with the functions and activities of the Authority, it would be unlawful for either the respondent's counsel or the Authority to continue to retain the judgment.

[17] Mr Upton submitted the judgment should be retained on his client file because the undertaking remained in place meaning that he could not disclose it to any third party, including to his client, without breaching his undertaking and his obligations under the Lawyers and Conveyancers Act 2006.³ He referred the Authority to the requirement on lawyers to keep client records for at least six years and the NZLS guidance on ownership and retention of client records.⁴

³ Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008, schedule, clause 10.5.

⁴ <https://www.lawsociety.org.nz/glines-ret-rcrds-ab>

[18] Mr Upton also noted the preliminary determination recognised that the judgment may be relevant in the future and submits that the judgment should not be removed or destroyed, rather it should and must be retained by counsel at this time, in accordance with the undertaking already given.

[19] Ms Fechny lodged submissions in reply assuring the Authority and the respondent that should the document be considered relevant in the future, the applicant would be willing to provide it.

Conclusion

[20] I am mindful of the applicant's privacy, however, in order to resolve this matter, the extent to which the Privacy Act 2020 or the Employment Court Regulations 2000 apply in these circumstances would need to be determined. If the Privacy Act does apply the next question would be whether retention of the judgment is for a lawful purpose, but it is not necessary to address those issues while the proceedings are still in motion.

[21] I decline to make the orders sought because the judgment may be relevant to the substantive proceedings which have not yet concluded. The existing undertaking remains in place, and I do not consider it necessary and nor was the Authority asked, to vary the undertaking.

Name Suppression and non-publication

[22] Suppression orders are in force under s 200 of the Criminal Proceedings Act 2011 in relation to the District Court judgment.

[23] An order of interim non-publication of the name, address and identifying details of UXK and as to the contents of the District Court judgment also remains until further order of the Authority or Court.⁵

[24] Costs are reserved.

Sarah Kennedy
Member of the Employment Relations Authority

⁵ Above n2 at 169.