

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 237
3188179

BETWEEN	VCS Applicant
AND	SIH Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michael O'Brien, counsel for Applicant
William Fotherby and Lizzie Thomas, counsel for
Respondent

Determination on papers: 11 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] VCS applied to the Authority for an order of interim reinstatement, alleging they were unjustifiably dismissed by their employer SIH.

[2] The Authority granted the application urgency and held a case management conference on 9 September 2022. The parties had already agreed to attend mediation and a timetable was confirmed by the Authority in preparation for an investigation and determination on papers of the interim application, if still needed after mediation.

Non-publication order

[3] An interim non-publication order was made by the Authority on 9 September 2022.

[4] It prevented publication of the parties' names until further order of the Authority and was expressed to be subject to conditions.

[5] The Authority is given the power to make an order prohibiting publication under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the ER Act), and an order under clause 10 may be made subject to such conditions as the Authority thinks fit. The name of any party, or evidence given, or the statements of problem and reply filed, may be the subject of such an order.

Investigation meeting and oral indication

[6] The application for interim reinstatement did not proceed and the parties prepared instead for an investigation of the substantive claims.

[7] The non-publication order remained in force without variation.

[8] An investigation meeting was held from 21 to 23 March 2023. On 27 March the Authority met again with the parties and counsel, to give an oral indication of its preliminary finding of fact as to whether the employment of VCS had ended by resignation or dismissal or in some other way.

[9] It was anticipated the parties would then consider the Authority's indication and decide whether they wished to renew attempts to resolve the proceedings consensually. Having received no advice to the contrary from the parties, the Authority has assumed they are presently considering or are engaged in discussions with a view to settlement of the claims. If that cannot be achieved the Authority intends to complete its investigation and formally determine the claims of VCS.

Application to vary the order

[10] On 5 May 2023, on notice, VCS applied to vary the 9 September 2023 order of the Authority, to allow complaints to be made to two agencies

- a complaints and disciplinary body presiding over a profession in which SIH is in practice, and
- the Privacy Commissioner.

[11] SIH opposes the application on the grounds that

- the variation is unnecessary, and
- the proposed complaints that the variation would purportedly facilitate are unmeritorious and would be an abuse of process.

Whether the communication of complaints will amount to publication

[12] SIH relies on the judgment of the Supreme Court in *ASG v Hayne*¹ in submitting that variation of the Authority's order is unnecessary.

[13] The non-publication order before the Court was made under the Criminal Procedure Act 2011, to prevent publication of the name and other details of a person who had been charged with an offence but was subsequently discharged without conviction.

[14] The Court concluded that the Criminal Procedure Act provision

..... did not encompass the dissemination of information to persons with a genuine need to know, or as the Court of Appeal put it, "a genuine interest in knowing"

[15] The relevant provisions of the Criminal Procedure Act and the ER Act allowing for non-publication orders to be made, are not materially different.

[16] The Authority concludes that the communication of complaints, if made by VCS without relevant details being withheld such as names and information provided to the Authority about VCS and SIH, will not amount to 'publication'. The Authority's

¹ [2017] NZSC 59

present order will not therefore be infringed by such communication and does not require variation.

[17] There can be no question that the agencies VCS wishes to complain to are properly established, with statutory recognition, as bodies having a genuine interest in knowing about conduct alleged of SIH or its staff, from which complaints may arise. Part of the function for which both bodies have been set up, is to receive and consider complaints.

[18] As to the second ground on which SIH opposes the application, if it could readily be seen by the Authority that a complaint was vexatious or an abuse of process, it could make that finding. In this case there is nothing to show that and in deference to the other agencies and their role, the Authority should not embark on an investigation into the merits of complaints or the motives of a complainant in making a complaint to another independent agency.

[19] Those agencies will have well developed procedures and processes of their own for assessing complaints and protecting any information that they think should not be published.

Conclusion

[20] The Authority declines to make any order varying its non-publication order of 9 September 2022. That order is to continue in force until further order.

[21] Both parties have sought costs. On the face of the Authority's non-publication order and limited exceptions expressed, a cautious approach by VCS in bringing this application before making any complaints, does seem justified.

[22] It is appropriate for the question of costs to be reserved, rather than risk upsetting the balance in settlement discussions which may proceed.

Alastair Dumbleton
Member of the Employment Relations Authority