

**Attention is drawn to
the order prohibiting
publication of certain
information in this
matter**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 113
3162442

BETWEEN VTK
Applicant
AND WAW
Respondent

Member of Authority: Eleanor Robinson
Representatives: May Moncur, advocate for the Applicant
Eva Ho, counsel for the Respondent
Investigation Meeting: 25 March 2022
Submissions and/or further evidence: 25 March 2022 from the Applicant and from the Respondent
Determination: 28 March 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] VTK lodged a Statement of Problem with the Authority received on 2 February 2022 in which she raised claims that WAW unjustifiably disadvantaged and dismissed her.

[2] WAW lodged a statement in reply on 23 February 2022 denying the claims made by VTK.

[3] WAW lodged a counterclaim against VTK on 16 March 2022. It claimed VTK has breached provisions in her employment agreement with WAW and sought orders prohibiting her from publishing WAW's confidential information or making disparaging comments about the company. WAW also lodged an urgent application for a non-publication order that same date.

[4] VTK responded to the counterclaim on 24 March 2022.

[5] The claim and counterclaim are currently before the Authority and will be allocated to a Member in due course.

[6] This determination considers only WAW's application for a non-publication order to be issued prior to the Authority determining the claims by the parties. WAW wants to prevent VTK making any public comment about the issues between them until the Authority's investigation into those issues is completed.

[7] VTK opposes the application.

The Authority's investigation

[8] A case management conference was convened with the parties on 18 March 2022 and a date for a submissions hearing on the urgency application set for 25 March 2022.

[9] Ms Moncur provided a voluntary undertaking on behalf of her client that no further public statements would be made until such time as the Authority issue its determination on the preliminary non-publication issue.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[11] On or about 10 March 2022 WAW was approached by a reporter for Stuff, a new website, in relation to the defamation case involving VTK and the matter before the Authority. WAW's response was that it was inappropriate to make a comment on the proceedings and the evidence filed given that the proceedings were before the Authority and unresolved.

[12] On 11 March 2022 Counsel for WAW wrote to Ms Moncur, VTK's representative, requesting that VTK desist from making any further comments. No response was received from VTK.

[13] On 15 March 2022 a news article was posted on the Stuff website which referred to the proceedings and the evidence filed by VTK and WAW.

[14] Since the publication of the news article on Stuff, VTK has been publishing materials on her 'WeChat Moments' (a social platform with wide usage amongst the Chinese population both in New Zealand and in China).

[15] On 17 March 2022 a further Stuff article was published about WAW. The article referred to the counterclaim and the application for a non-publication order.

[16] VTK's WeChat Moments posts referred to various legal proceedings in China and New Zealand, to matters before the Authority for investigation, and to personnel of WAW.

Issues

[17] The issue requiring investigation is whether or not the Authority should issue a non-publication order to prevent any further publication until after the Authority's investigation into the substantive claim and counterclaim issues has been concluded.

Should a non-publication order be issued?

[18] The Authority has a discretion to prohibit publication of evidence, pleadings, and names of parties and witnesses pursuant to Schedule 2 clause 10(1) of the Act. Such discretion is to be exercised on a principled basis.

[19] A key principle considered by the Authority is that of open justice. The importance of that concept has been emphasised by the courts on many occasions, noting the judgments in *H v A Limited*, *XYZ v ABC*, *Crimson Consulting Ltd v Berry*, and the Supreme Court decision in *Erceg v Erceg*, and more recently in *Courage v The Attorney-General*.¹

[20] In *Erceg v Erceg*, the Supreme Court noted that a high standard must be met before departing from the principle of open justice.² As a consequence there must be specific adverse consequences or other sound reasons to order non-publication.

¹ *H v A Ltd* [2014] ERNZ 38 at [78]; *XYZ v ABC* [2017]NZ EmpC 40; *Erceg v Erceg* [2016] NZSC 135; *Courage v The Attorney-General* [2022] NZEmpC 27

² *Erceg n1 above at [63] and [69]*

[21] VTK has made significant comment in the media. The *sub judice* rule, applying at least as a convention in respect of proceedings in the Authority, generally limits media and other public comment before or during an investigation meeting, and prior steps such as attending mediation.

[22] This is to prevent improper pressure on a party and the risk that such statements could pressure, or could be perceived to improperly influence, the Authority in reaching its decisions.

[23] It is submitted on behalf of VTK that she has freedom to make the comments she has based upon her rights as encapsulated in The New Zealand Bill of Rights Act 1990.

[24] In exercising its discretion under Schedule 2 clause 10(1) of the Act, the Authority recognises the freedom of expression. As set out in The New Zealand Bill of Rights Act 1990, this includes the freedom to impart information and opinions of any kind in any form.³ This right is not unlimited but is subject to: “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”⁴

[25] In this case there are the WeChat Moments posts, in addition to the Stuff articles.

[26] The effect of a social media communication platform such as WeChat Moments is similar to the effect of newspaper articles in that the comments made are widely available not only to family and friends, but by a process of dissemination, to the public at large.

[27] The newspaper articles make a number of comments about the integrity of WAW and refers to factual matters which the Authority will in due course need to investigate.

[28] The WeChat Moments posts contain adverse comments about events involving VTK during her employment at WAW and to personnel at WAW who are likely to be key witnesses in the Authority’s investigation.

[29] I am concerned some of the comments may have the effect of placing pressure on the witnesses about their evidence or risk being seen to do so.

[30] It is important that the Authority provides a fair hearing for all parties. Because the factual disputes between the parties and the credibility of the witnesses will need to be investigated and determined by the Authority, prior public comment on them may hinder that process.⁵

³ New Zealand Bill of Rights Act 1990 s. 14

⁴ Above n 2 at s 5

⁵ *Bay of Plenty District Health Board v Culturesafe New Zealand Limited* [2020] NZEmpC 149 at [129] and [135]

[31] On that basis, I consider that an interim non-publication order is appropriate in the circumstances of this case.

[32] It will be a matter for the Authority Member who will ultimately act in this matter to decide whether or not to continue the order.

[33] Accordingly, until the matter is heard by the Authority, **I order that the names of the parties and any information which might lead to their identification is prohibited from publication.**

Costs

[34] Costs will be reserved.

Eleanor Robinson
Member of the Employment Relations Authority