

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 58  
3162425

BETWEEN                      WBP  
   Applicant

AND                                      HWX  
   Respondent

Member of Authority:            Nicola Craig

Representatives:                    Deep Purusram, counsel for the applicant  
   No appearance for the respondent

Investigation Meeting:            23 September 2021 by audio-visual link

Submissions and further  
information received:            At the investigation meeting and 1 July, 13 September, 7  
   October 2021 and 18 January 2022 from the applicant  
   No submissions received from the respondent

Date of determination:            25 February 2022

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**DETERMINATION OF THE AUTHORITY**

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- A.        The application for orders regarding earlier determinations is declined.**
- B.        A non-publication order is made regarding this determination.**
- C.        Costs are reserved.**

## **Employment relationship problem**

[1] The applicant, referred to as WBP, was involved in earlier proceedings in the Authority involving his former employer the respondent, referred to as HWX or the company.

[2] In 2021 WBP lodged an application seeking orders removing his name from Authority determinations or directing removal from on-line publications of those determinations. The application was originally made on a without notice basis, with WBP's representative indicating that HWX had previously not wished to be involved.

[3] The Authority directed HWX be served with the application. A joint memorandum of counsel was filed confirming that the company did not wish to be involved in the proceedings.

[4] An investigation meeting was held on 23 September 2021 by audio-visual link to hear submissions for WBP. Affidavits in support were provided by WBP and his partner, referred to as R. WBP sought an opportunity to provide further submissions, which was granted. In order to ensure this determination was not linked to the previous determinations a new file number had to be allocated.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

## **Issues**

[6] The issues for investigation and determination are:

- (i) Should WBP's name be removed or hidden from determinations issued by the Authority in WBP's earlier matters?
- (ii) Alternatively, should an order be made directing removal of all on-line publications of the previous determinations of the Authority?

## **The previous determinations and decision**

[7] The original substantive determination (the original determination) into WBP's claim against HWX and the company's claim against him was issued a few years ago

by another Member. A costs determination followed. No non-publication applications were made nor orders granted as part of the Authority's process.

[8] WBP then applied to the Employment Court to challenge those determinations. This resulted initially in an interlocutory judgment of the Court which is publicly available, identifying WBP and HWX by name.

[9] The matters between the parties were resolved. This included an agreement that WBP would apply to the Authority to take down the original determination and the costs determination. A joint memorandum of counsel was lodged seeking removal of the applicant's name from determinations and removal of determinations from online publications. The Member of the Authority at that point decided that in the absence of an application for non-publication and with no orders having been sought prior to the matter being finalised in the Authority, the matters referred to in the memorandum were no longer extant in the Authority and the request was declined.

[10] The settlement between the parties also changed the status of WBP's termination to resignation, with HWX providing WBP with a positive written reference.

[11] The current application was then lodged sometime later.

### **Evidence in support**

[12] The affidavits from WBP and R were untested but overall, I found their evidence credible.

[13] WBP considers that the original determination displays a picture of him as a bad employee who was dismissed. He believes that is a false and incorrect impression.

[14] WBP did not make an application about publication at the time the original determination was issued as he had lodged a de-novo challenge in the Court and was confident that a judgment would come out in his favour. That judgment would have been publicly available. When a settlement was reached, it meant no substantive Court decision was issued. What WBP sees as the contradictory picture, between the original determination and the settlement outcome, is creating problems for him.

[15] WBP stresses that he is not asking the Authority to revisit its decision but believes the presence of the Authority determination on-line prevents him getting other work. Submissions identify the determinations and judgment being available on five

sites. These include the Employment Law Database on the Employment New Zealand website, where Authority determinations are initially available, as well as legal publishers' sites.

### **Inability to obtain other work**

[16] WBP's CV from prior to his role with HWX shows management positions held in the public and private sector. WBP uses HWX's reference letter when applying for roles but believes that potential employers tend to believe what is in the original determination rather than the reference.

[17] WBP has applied for a multitude of jobs, many are in keeping with his previous work expertise and primary field of employment. Some are with previous employers for whom WBP worked for several years, where one could assume he would have an improved chance of appointment.

[18] In many instances WBP did not get an interview. His understanding is that the internet is always used by prospective employers to check on job applicants. There is no doubt in WBP's mind that it is the on-line information which he regards as incorrect which prevents him from getting the roles he deserves.

[19] WBP has progressed to the interview stage for some jobs but is asked about the on-line publication, gets a negative response and ends up not being offered the job. A number of examples are provided.

### **Other roles**

[20] WBP was able to obtain one seemingly reasonably comparable role shortly after his employment with HWX. His evidence is that once the employer found out on-line about the original determination, his manager showed him the determination and questioned him about it. With that employer contemplating disciplinary action against him, WBP elected to resign.

[21] The only other job WBP has been able to obtain is through a friend. The role appears to involve considerably less responsibility and income than his previous roles. The original determination has also been raised negatively with him in that workplace.

### **Negative effects on WBP**

[22] There is some evidence of WBP's financial position being weak as a result of periods of unemployment.

[23] WBP has found the situation he is in extremely stressful and has sought medical help. He was unfit for work for a couple of months in 2020. His partner R describes the serious state of WBP's physical and mental health, seeing him as a changed man as a result of his inability to find satisfactory work.

### ***Erceg v Erceg***

[24] The starting point in considering the application is the Supreme Court's emphasis of the fundamental principle of open justice in *Erceg v Erceg*.<sup>1</sup> The Court did recognise that there are situations where the interests of justice require a departure from that general rule. However, unwelcome attention to private matters and embarrassment may well not be enough. What is needed are specific adverse consequences which are sufficient to justify an exception to the fundamental rule. The Court noted that it was a high standard.<sup>2</sup>

### **Other cases**

[25] WBP relies on a number of cases where orders were made suppressing evidence. However, those cases have different features to the present one:

- (a) some concerned to family disputes where there are statutory provisions restricting publication, even if the matter itself had proceeded beyond the Family Court. In addition, sometimes suppression orders were in place in other related proceedings;<sup>3</sup>
- (b) others were decisions of the Employment Court or other bodies, granting non-publication of names or other material, where a matter had settled

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<sup>1</sup> *Erceg v Erceg* [2016] NZSC 135.

<sup>2</sup> *Erceg v Erceg*, above at [13].

<sup>3</sup> *M v D* [2012] NZHC 1152 and *SM v LFDB* [2015] NZHC 2630.

during the Court process. By contrast, here the Authority fully decided WBP and HWX's claims;<sup>4</sup>

- (c) non-publication orders had been in place on an interim basis, so the names had not been published in the course of interlocutory judgments;<sup>5</sup> and
- (d) takedown decisions regarding material being put on websites in breach of obligations, such as in breach of court orders, sub judice situations or involving defamatory material.<sup>6</sup>

### ***AJH v Fonterra***

[26] In that case the applicant sought to have their name “removed from the internet” and suppressed some ten years after they were unsuccessful in an Authority claim and an Employment Court challenge.<sup>7</sup> Similar grounds to those of WBP were advanced, with difficulty gaining employment when potential employers did media or social media checks.

[27] Judge Holden noted that the Court had become increasingly aware of name publication resulting in significant detrimental impact to employment prospects.<sup>8</sup> Her Honour however, concluded that AJH faced an insurmountable hurdle due to the time that had elapsed since the decisions and the extent to which the judgments had been reported.

### **Conclusion on application**

[28] The Authority has a broad power to prohibit publication, including the names of the parties.<sup>9</sup>

[29] Evidence has been provided showing negative effects on the work prospects and health of WBP attributed to the identification of him in the determinations.

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<sup>4</sup> *ASB Bank Ltd v Nel* [2018] NZEmpC 64, *Davies v Rogers* [2020] NZHRRT 31 and *KAQ v AG* [2021] NZEmpC 196.

<sup>5</sup> *P v A (No 3)* [2018] NZEmp C 99.

<sup>6</sup> *ALA v ITE* [2017] NZEmpC 109, *Low Volume Vehicle Technical Association v Brett* [2017] NZHC 2846, *Staples v Freeman* [2018] NZHC 1604 and *Bay of Plenty District Health Board v CultureSafe NZ Ltd* [2020] NZEmpC 149,

<sup>7</sup> *AJH v Fonterra Co-operative Group Ltd* [2021] NZEmpC 111.

<sup>8</sup> *AJH v Fonterra Co-operative Group Ltd*, at [12].

<sup>9</sup> The Act, Schedule 2, clause 10(1).

[30] This case has the more unusual complication of the settlement terms involving resignation and a reference, no doubt designed to assist WBP's workforce involvement, creating a conflicting picture with the determinations and judgment.

[31] For WBP it was suggested that this determination could indicate that he is not what was depicted in the original determination. That is not something which can be done in a determination on a non-publication application.

[32] The anonymisation of the substantive determination in particular is not practicable. Removal of names alone would not be sufficient to prevent identification of WBP. Details of the work and work environment are important to the decision reached by the Member, so a re-publication with the sole change of the names being anonymised would not prevent identification particularly in light of the publications referred to below.

[33] Even if an order was made that the Authority determinations be removed from the Employment Law Database, that would not prevent the determinations from being available on other legal publisher' sites and the Court decision being available via its own website and other legal sites. A search of the Westlaw legal database shows the Employment Court decision in this matter having been cited in other cases.

[34] The focus of take down orders is material which was wrongfully put up, either in terms of the content of the material or the putting up of material being in breach of an order. Here publication in legal publishers' sites was made on a legitimate basis. There is no suggestion that the publishers were acting in breach of any order of the Authority or the Court.

[35] The Employment Court in *Crimson Consulting Ltd v Berry* noted that it is "well established that a Court should not make an order of non-publication if it would be futile to do so".<sup>10</sup> Earlier cases were to similar effect.<sup>11</sup>

[36] In conclusion, it is difficult to see a basis for a takedown order here and a non-publication order would be futile. I cannot be satisfied that the orders sought should be made in these circumstances. The application is declined.

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<sup>10</sup> *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94 at [105].

<sup>11</sup> *Timmins v Asurequality Ltd* [2011] NZEmpC 167 at [23] and *Q v W* [2012] NZEmpC 216 at [31-33].

### **Publication regarding this determination**

[37] This determination should be subject to a non-publication order. There is significant personal information about WBP contained in it and little public interest in connecting that with the earlier two determinations and the Court decision. HWX's position regarding its terms of settlement becoming public as a result of their relevance to this application is also a factor.

[38] I make a non-publication order regarding the parties' names and any details that may lead to their identification.

### **Costs**

[39] It seems unlikely that costs are appropriate in this matter. WBP wished to pursue this application and HWX did not stand in the way. In the event that either party wishes to pursue costs, costs are reserved.

**Nicola Craig**

**Member of the Employment Relations Authority**