

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 180
3082176

| | |
|---------|--------------------------|
| BETWEEN | XRR Applicant |
| AND | EBD First Respondent |
| AND | FVB Second Respondent |

Member of Authority: Jenni-Maree Trotman

Representatives: Michael O'Brien, counsel on behalf of the Applicant
Kathryn Beck & Tim Oldfield, counsel on behalf of the
First Respondent
David Fleming, counsel on behalf of the Second
Respondent

Investigation Meeting: On the papers

Submissions and further Information Received: 23 April 2020 from the First Respondent
12 March 2020 from the Second Respondent

Date of Determination: 04 May 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 6 December 2019 the Authority issued a preliminary determination wherein it made interim orders preventing the publication of the names of all parties in the proceedings lodged under matter numbers 3082176 and 3082693, details of FVB's current position or previously held positions; any other details that would identify FVB,

details of the historic sexual harassment allegations, and information about FVB contained in an investigation report.

[2] This determination reviews and makes final the interim non-publication orders that were issued in respect of this matter.

Parties' names

[3] This determination identifies the parties in the same way as the Authority's preliminary determination. For the avoidance of doubt, the letters used in place of the parties' names were selected using a random online letter selection tool. These letters do not bear any relation to the parties' real names.

The application

[4] Subsequent to the issue of the interim non-publication orders, the parties have settled the present proceedings lodged under matter number 3082176. The proceedings under 3082693 remain on foot.

[5] On 12 March 2020, FVB applied to the Authority to have the interim non-publication orders made final save that the final order would only apply to the proceedings lodged under matter number 3082176. Submissions filed on FVB's behalf made three key points:

- a. The issues between the applicant and the second respondent will not be the subject of an investigation by the Authority due to the parties' settlement of the issues.
- b. There has been media interest in the case and FVB is concerned that there may be publicity about the allegations if permanent non-publication orders are not granted.
- c. If permanent non-publication orders are not granted in respect of this matter, the interim orders that are presently in place in respect of matter number 3082693 may be undermined.

[6] Additional grounds were particularised in an affidavit sworn by FVB on 12 March 2020. FVB also relied upon the evidence provided in an affidavit sworn 5 December 2019. In these affidavits FVB provided details as to why publication of the

allegations would likely cause irreparable harm to FVB's reputation, both professionally and personally. FVB also provided particulars of the harm publication would likely cause to FVB's family, the charities and community organisations FVB is involved with, and to EBD in the event that publication occurred.

[7] EBD notified the Authority on 23 April 2020 that it consented to the non-publication orders being made permanent. It referred to the fact that the parties had entered into a confidential settlement and expressed its concern that publication could undermine the parties' agreement.

[8] No response to the application was received from XRR despite the Authority providing XRR with an opportunity to do so.

[9] 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 but has not recorded all evidence and submissions received.

Power to grant the orders sought

[10] The Authority may, in any proceedings, make non-publication orders in accordance with Clause 10(1) of Schedule 2 of the Act. The scope of this discretion has been traversed by a full Court in *H v A*¹ and again by the Court in *XYZ v ABC*². In the later case the Court considered and applied the approach taken by the Supreme Court in *Erceg v Erceg*³

[11] In *Erceg* the Supreme Court emphasised that the starting point is the principle of open justice, and that a high standard must be met before that principle can appropriately be departed from. The Supreme Court said:⁴

... the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those just mentioned do not meet this standard. We prefer to say that the party seeking the

¹ *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78].

² [2017] NZEmpC 40, EMPC 69/2017.

³ *Erceg v Erceg* [2016] NZSC 135.

order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one.

[12] I am satisfied, on balance, that the requisite high standard has been met and that the interests of justice require a final non-publication order on the basis sought by FVB.

Outcome

[13] The overall outcome that I have reached is:

- a. A final non-publication order is issued under Clause 10(1) of the Second Schedule of the Employment Relations Act 2000 that prevents publication of:
 - i. The names of all parties in the proceedings lodged under matter number 3082176;
 - ii. Details of FVB's current position or previously held positions;
 - iii. Any other details that would identify FVB;
 - iv. Details of the historic sexual harassment allegations;
 - v. Information about FVB contained in the investigation report.
- b. The interim non-publication order prohibiting the publication of the names of all parties in the proceedings lodged under matter number 3082693 remains unaffected by this determination. That interim order will remain in place pending further order of the Authority.

Jenni-Maree Trotman
Member of the Employment Relations Authority