

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

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

[2019] NZERA 124
3046315

BETWEEN XUG
 Applicant

AND DJV
 Respondent

Member of Authority: Rachel Larmer

Representatives: Don McKinnon and Tim Oldfield, counsel for the
 Applicant
 Susan Hornsby-Geluk and Alistair Espie, counsel for the
 Respondent

Investigation Meeting: On the papers

Submissions and Further
Information Received: 15 February 2019 from the Applicant
 15 February 2019 from Interested Media Entities
 21 February 2019 from the Respondent

Date of Determination: 06 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 23 November 2018 the applicant XUG filed a Statement of Problem with the Authority. XUG claimed he had been unjustifiably disadvantaged because his then employer, DJV had suspended him on pay while it investigated complaints it had received about him.

[2] The applicant sought interim reinstatement to end his suspension, permanent reinstatement as his remedy for the unjustified disadvantage grievance and damages for the humiliation he claimed had been caused by DJV's actions. XUG also sought urgency and an interim non-publication order.

[3] The reasons XUG wanted a non-publication order were set out in his affidavit dated 22 November 2018.

[4] Briefly, XUG believed it would be unfair to him if he was publicly identified:

- (a) The complaints about him had not been fully investigated by his employer DJV;
- (b) When DJV had not had an opportunity to reach conclusions about the complaints it had received;
- (c) In circumstances where XUG claimed that publicity about these proceedings would damage his reputation and credibility with staff, undermining his ability to effectively lead the organisation.

[5] DJV agreed that an interim non-publication order was appropriate given that XUG was still employed, the investigation into the complaints about him was ongoing and that he was seeking reinstatement to the workplace.

[6] The Authority in its interim reinstatement determination dated 17 December 2018 exercised its discretion in favour of non-publication. It therefore issued an interim non-publication order pending further order of the Authority.¹ At the point the non-publication order was issued the Authority believed there would be a public substantive investigation into XUG's claims in January 2019.

[7] During a telephone conference in December 2018 the Authority scheduled, by agreement, a substantive investigation into XUG's unjustified disadvantage grievance to be held on 22 and 23 January 2019. The Authority also indicated to the parties it expected a substantive determination on the unjustified disadvantage (regarding the suspension) claim would be issued before the end of that month.

¹ *XUG v DJV* [2018] NZERA Auckland 403.

[8] At that point, DJV expected to meet with XUG before Christmas to discuss his feedback on the information it had obtained as a result of its employment investigation into the complaints that had been raised with it about him.

[9] However XUG subsequently advised DJV that he was unavailable from 18 December 2018 to 14 January 2019, so could not provide his feedback over that period.

[10] Mr McKinnon emailed the Authority on 18 December 2018, after discussion with DJV's counsel. Mr McKinnon advised the Authority that both parties wanted the substantive investigation meeting that had been scheduled for 22 and 23 January to be adjourned *sine die*, because the earliest the parties could meet to discuss XUG's response to the employment investigation DJV had been conducting was 22 January 2019.

[11] The parties both expected that at or after that meeting on 22 January 2019 DJV would be in a position to make its final decision on the employment investigation involving XUG. After that had occurred, then both parties would be in a position to review whether the unjustified disadvantage claim should proceed to a substantive investigation meeting or not.

[12] The parties therefore requested an adjournment of the substantive disadvantage grievance to help ensure that they did not unnecessarily incur legal costs, pending the outcome of DJV's employment investigation into the issues involving XUG.

[13] Accordingly the substantive investigation was adjourned *sine die*, at the parties' request.

[14] On 18 January 2019 XUG resigned his employment with DJV, without notice.

[15] XUG used a public relations firm to publicly (and very briefly) announce his resignation. XUG says he was approached by media about his resignation but declined all requests to provide further information about it, other than what had already been announced in the public relations press release.

[16] On 28 January 2019 Mr A, who was the decision maker who was investigating the employment issues involving XUG, issued a media statement. XUG believes Mr A's press release breached his (XUG's) privacy.

[17] As a result of that, XUG believed he “*had absolutely no choice but to tell my side of the story*”. XUG therefore prepared a press statement which was released publicly. XUG also conducted a series of interviews over the next 2 – 3 days before issuing a note to the media confirming that he was not available for further comment.

[18] It subsequently came to the Authority’s attention that the circumstances which had led to the exercise of the discretion in favour of granting an interim non-publication order, regarding the names of the parties and information leading to their identification until further order of the Authority, had changed.

[19] The Authority therefore advised the parties that it considered a review of the interim non-publication order was appropriate, and invited their feedback on the suggestion that the interim non-publication order should be varied or rescinded.

[20] DJV agreed that the interim non-publication order should be lifted but asked for a new interim non-publication order for the names of, and information identifying, the complainants who had provided information to DJV about XUG.

[21] XUG said the interim non-publication order should remain in force and that if it did, then he did not object to it being extended to the complainants. However XUG said that if the interim non-publication order was lifted then he objected to the complainants being given an interim non-publication order. He felt that if he was named then they should also be publicly identifiable.

[22] Subsequent to the Authority’s advice to the parties that it considered the interim non-publication order should be reviewed, the interested media entities applied to the Authority to “*challenge*” the interim non-publication order in this matter, which they wanted rescinded.

[23] The Authority advised the interested media entities that they were not parties, so had no right of challenge, which had by then expired anyway.

[24] The Authority invited interested media entities to provide information to the Ministry of Innovation Business and Employment (MBIE) communications department that they wanted to be considered as part of the Authority’s (by then current) review of the interim non-publication order.

[25] The interested media entities accepted that offer and provided information to the Authority. The information they provided was also copied to the parties, so that they had the opportunity to respond to it. The Authority has not had any private communications with any of the interested media parties. Everything the Member has seen has been disclosed to the parties, in case they wished to comment on it.

[26] Because the interested media entities are not parties to these proceedings, the submissions and information filed by the parties was not disclosed to them.

[27] Mr Stewart, counsel for Television New Zealand Limited, Radio New Zealand Limited, and Stuff Limited (together referred to as “*the media entities*”), pointed out that both parties had made “*numerous public statements concerning the dispute between them*”, that the employment relationship had ended and XUG no longer sought to be reinstated.

[28] Mr Stewart submitted that continuing the existing non-publication order would “*no longer serve any legitimate purpose and amounts to an unjustified imposition on the media entities’ freedom of expression.*”

[29] DJV advised the Authority, via its counsel Ms Hornsby-Geluk, that it had changed its position regarding the appropriateness of an interim non-publication order as a result of the changed circumstances that had occurred since that original position had been adopted. In particular DJV relied on the fact that:

- (a) There was no longer an ongoing employment relationship between the parties;
- (b) The absence of an ongoing employment relationship meant there were no issues regarding XUG’s ability to continue leading the organisation and the need to maintain his credibility with staff and others;
- (c) XUG’s resignation with immediate effect pre-empted any conclusions being reached by DJV regarding the allegations that had been made against XUG;
- (d) XUG’s concern that public scrutiny of the issues could make DJV more likely to continue his suspension or eventually dismiss him because of public pressure was no longer applicable;

- (e) XUG's claim that non-publication should not occur prior to him having an opportunity to rebut or comment on the concerns is no longer valid because he has taken the opportunity to comment publicly on his employment issues;
- (f) XUG's claim that there is a risk that the media would not in effect "*fairly or accurately*" report these matters if the interim non-publication order was rescinded was not accepted by DJV. From DJV's perspective public naming of the parties would enable the matters to be more accurately reported because the media would be able to refer to the Authority's interim reinstatement determination.²

[30] DJV says that XUG's concern about his reputational damage arising from his interim reinstatement determination being made public is not a valid basis for departure from the general principle of open justice.

[31] Ms Hornsby-Galuk referred to the Court of Appeal decision in *White v Auckland District Health Board* in which the Court of Appeal stated:³

Open justice considerations are always extremely important and the reality is that those who litigate necessarily put themselves and their affairs in the public domain.

[32] Ms Hornsby-Galuk submitted that this was even more important in the present case because XUG has not only commenced proceedings, but he also publicly announced his resignation through a privately engaged media relations company and also personally gave media interviews regarding his resignation, and in response to information that DJV put into the public domain.

[33] DJV, while seeking that the interim non-publication order regarding the parties' names and information identifying them be rescinded, has also sought from the Authority a new interim non-publication order regarding the names and identifying information of those who made complaints to DJV, which were the basis of its employment investigation in XUG.

[34] DJV claims there is no public interest in the identities of the complainants being made public and that doing so could have a potentially chilling effect on other employees in the public or private sector being discouraged from making complaints, out of concern that their

² Above n1.
³ [2007] NZCA 227.

identities will be publicised in the media if issues arose between the employer and the person being complained about.

[35] Mr McKinnon on behalf of XUG emphasised that XUG was seeking a limited and time restricted non-publication order, which only related to the names of the parties and information identifying them, until the merits of his personal grievance could be decided.

[36] Mr McKinnon acknowledged that a public determination containing information relevant to the interim reinstatement application is on the public record, so he submitted that adequately met the public interest in these matters.

[37] Mr McKinnon submitted that the public interest favoured the continuation of the non-publication order. He pointed out that while XUG bears the onus of showing that the non-publication order was in the interests of justice he did not have to establish “*exceptional circumstances*” to warrant a continuation of the non-publication order.

[38] XUG filed an affidavit dated 14 February 2019 in support of continuing the current interim non-publication order. XUG said that there had been almost no media interest in his situation over the previous two weeks and he was concerned that would change if the current interim non-publication order was rescinded.

[39] XUG stated in his affidavit that he believed his brand and reputation would be irreparably damaged if the non-publication order was rescinded at this stage. XUG said that although the Authority’s factual conclusions in the interim reinstatement determination were based on untested affidavit evidence, they would likely attract a lot of adverse publicity for him.

[40] Mr McKinnon submitted that XUG should not have to risk his brand and reputation simply to exercise his statutory right to pursue a personal grievance at an interim stage. He pointed out that there is a “*very real imbalance of power*” by virtue of XUG’s employer being the Government.

[41] Mr McKinnon submitted that the risk of irreparable damage to XUG's brand and reputation, and adverse publicity about him, outweighed the public interest in the reporting of the names of the parties in the Authority's *XUG v DJV* determination.⁴

[42] Mr McKinnon submitted that DJV had courted media interest by publicly commenting on XUG's resignation. Mr McKinnon submitted that media interest is not a ground for rescission of the order and media interest does not equate to "*public interest*". He further stated that the fact that the media was interested in the identity of parties to litigation does not mean that a non-publication order should be rescinded.

[43] Mr McKinnon further submitted that publicity could make it difficult for the parties to settle the matter by agreement so would undermine the objects of the Employment Relations Act 2000 (the Act). Mr McKinnon therefore submitted that the general objects of the Act would be furthered by continuing the current non-publication order.

[44] Mr McKinnon admitted that it may be appropriate to protect the identities of the complainants because they have not had an opportunity to have their evidence tested by cross-examination, but that they should not be entitled to a non-publication order if XUG was not.

[45] Mr McKinnon stated that if there was a public interest in identifying XUG then there should be a similar public interest in disclosing the identities of senior public servant witnesses whose complaints had led, from XUG's perspective, to his employment ending.

[46] Mr McKinnon stated that granting a non-publication order over the complainant's identities without granting such an order over XUG's name would create significant unfairness because anonymous accusers would have the allegations taken at face value without any witness giving oral evidence or being subject to cross-examination.

[47] Mr McKinnon submits that it is intrinsically unfair for XUG's identity to be disclosed but for his accusers to not be identified at the same time.

[48] XUG filed an affidavit in support of continuation of the current interim non-publication orders which recorded his view that it was "*extremely unfair*" to him if his name was published but the names of the complainants were not. He further stated:

⁴ Above n1.

I believe it would be extremely unfair to allow the media to publish extracts from an interim decision that does not deal with the substantive merits of my case, and which could cause extraordinary damage to my brand and reputation unless put in the context of a full decision.

I strongly believe there is a high risk that if the interim decision is released it will not be fairly or accurately reported and that damage to my reputation will be irrecoverable.

[49] Neither party has asked for the unjustified disadvantage claim to proceed to a substantive investigation meeting. That is currently the only claim involving these parties that the Authority currently has before it.

[50] Although XUG said he intended to file a constructive dismissal claim that has not (as yet) occurred.

[51] The Authority's discretion to grant non-publication orders is contained in clause 10 of the second schedule of the Employment Relations Act 2000. Clause 10(1) second schedule of the Act states:

The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[52] This discretion must be exercised on a principled basis.

[53] The employment institutions have recognised that the position regarding non-publication orders prior to the resolution of substantive claims may be different than after those claims have been publicly determined.

[54] This matter involves an assessment of the interests of justice in the light of claims that have not yet been substantively investigated or determined. There is therefore a stronger case at this early interim stage to continue with the existing non-publication orders than there would be after the evidence has been tested during a public substantive investigation meeting.

[55] In terms of factual findings, the Authority's interim reinstatement determination proceeded on the basis that XUG was legally entitled to the benefit of any doubt regarding disputed evidence.

[56] That meant that, for the purposes of assessing interim reinstatement, the Authority proceeded on the basis that XUG at a substantive investigation would be able to prove all of

the disputed matters he had deposed to in the two affidavits he filed in support of his interim reinstatement claim.

[57] The Authority also expressly recorded in the interim reinstatement determination that there were unresolved disputes between the parties regarding:

- (a) the seriousness of the complaints that had been made about XUG;
- (b) the contractual right DJV had to suspend XUG;
- (c) the existence of any implied right of suspension, in the absence of a contractual right to suspend.

[58] Those remain as yet unresolved issues that are strongly disputed by the parties. The interim reinstatement determination did not form a concluded view about any of those matters, other than indicating that XUG had met the relatively low threshold of establishing that he had an “*arguable case*” regarding each of those issues.

[59] The Employment Court in *Crimson Consulting Limited v Berry* reviewed and summarised the recent authorities regarding non-publication in the employment jurisdiction.⁵

[60] The Court recognised that the general principle that justice should be administered openly was a strong one and that a party seeking to depart from that fundamental principle of open justice was required to provide evidence identifying specific adverse consequences that should result in a non-publication order being issued.

[61] The Court recognised that each case would be very fact specific and that the employment institutions had to weigh and assess all of the competing factors carefully.

[62] The Court also indicated that an assessment of the public interest relating to an interim non-publication order could be different than the public interest in a non-publication order after the substantive matters had been determined.

[63] XUG relies on his belief that publication of his name in connection with the interim reinstatement determination “*could cause extraordinary damage to my brand and reputation unless put in the context of a full decision.*”

⁵ [2017] NZEmpC 94.

[64] This bare assertion of brand and reputational damage was not backed by evidence, so the Authority considers is insufficient to establish that non-publication orders should be implemented or maintained.

[65] The Supreme Court in *Erceg v Erceg* stated that:⁶

...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 or unwelcome.

[66] The publicity that has occurred about the employment issues between XUG and DJV means that the public should not just have access to the Authority's determination on the interim reinstatement application but they should know the names of the parties it involved.

[67] There is no default position that an interim determination will be suppressed pending a substantive determination. XUG was given the benefit of the doubt in terms of the disputed material facts in the interim reinstatement determination.

[68] The public should be in the position where they are able to form their own view of how well the content of the Authority's interim reinstatement determination aligns (or not as the case may be) with the public messaging both parties have engaged in to date.

[69] The concern raised by XUG that the Authority's determination will not be "*fairly or accurately reported*" is entirely speculative. The Authority's determination is already a matter of public record. It should be relatively easy for these particular parties, who obviously have strong media contacts, to correct the public record if the content of the interim reinstatement determination is misreported by the media.

[70] The Authority considers it is in the overall public interest and in the interests of open justice for the full picture regarding these parties and their employment issues to be able to be freely reported. If there are subsequent inaccuracies (from his perspective) with the media reporting, then XUG has shown himself well able to address those, as he did with DJV's communications, which XUG publicly addressed himself in the media.

[71] The Authority made it clear in its interim reinstatement determination, which bears repeating again now, that the interim reinstatement application was based on the legal tests for interim reinstatement only.

⁶ [2016] NZSC 135 at [13].

[72] The Authority did not assess the merits or motivations of the complaints that had been made, other than observing that they were such that a fair and reasonable employer would have to had to have investigated them.

[73] It is important to note that while DJV did investigate the complaints, it did not in fact complete its investigation. XUG resigned before he had provided his final feedback, that DJV had been waiting on before it finalised its investigation.

[74] It is therefore not known to the Authority, at this stage, what the outcome of the employment investigation into the complaints about XUG would have been if DJV had completed the process while XUG was still employed. No Authority findings have been made about that.

[75] The Authority's interim reinstatement determination should not be viewed as any indication of how the substantive issues will be determined by the Authority, should that become necessary.

[76] It is only in the course of a substantive investigation meeting, during which all of the disputed evidence will be tested, and where the parties will have an opportunity to fully address the Authority regarding their differing views of the applicable facts and law that final findings can be made by the Authority regarding the issues in dispute.

[77] XUG has not discharged the onus of establishing on the balance of probabilities that there are specific adverse consequences that would result from the current non-publication orders being lifted or which would justify a continued departure from the fundamental principle of open justice.

[78] The Authority does not accept that lifting the interim non-publication order regarding these parties would be likely to prevent them from settling their claims. The parties are represented by very experienced senior counsel. They are therefore both well positioned to be able to conduct settlement negotiations at any point prior to XUG's claim being determined by the Authority.

[79] XUG has indicated a wish to challenge this determination so the lifting of the current interim non-publication order will be time delayed to allow that to occur, so that a successful challenge is not rendered nugatory. A challenge does not operate as a stay.

[80] Accordingly, fourteen days after the date of this determination the interim non-publication order recorded in paragraphs [2] and [3] of the Authority's 17 December 2018 substantive determination will lapse.⁷

[81] This means that 14 days after the date of this determination the names of the parties and any information leading to the parties' identification may be published without restriction, unless the Employment Court imposes a stay on this determination pending the outcome of XUG's challenge.

[82] The Authority is satisfied that the interests of justice require a non-publication order regarding the names and positions and information leading to the identification of the persons named at paragraph 5.2(c) – (f) of Mr A's affidavit dated 4 December 2018.

[83] These four employees, who previously reported to XUG, made private complaints about him through appropriate internal channels. Because XUG was the most senior employee in the organisation, the investigation of issues involving XUG is being conducted by a decision maker who is outside of the organisation.

[84] The decision maker (Mr A) and the four employees are therefore employed by different organisations.

[85] The Authority considers that these four individuals have a reasonable expectation of privacy, particularly at this interim stage. It is by no means certain that these people will be called as witnesses in any subsequent proceedings between XUG and DJG.

[86] Employment issues between XUG will focus on DJV's actions and decision-making as an employer, which from what the Authority has seen so far appears to have occurred through the person of Mr A. XUG has spoken out in the media about Mr A.

[87] It will be up to Mr A (on behalf of DJV) to discharge the onus of justifying DJV's actions and (as the case may be) inactions. If this matter proceeds, then the Authority will therefore be focusing on whether the decisions Mr A made, and the actions he took were justified in all the circumstances, at the time they occurred, in accordance with the justification test in s 103A of the Act.

⁷ Above n1.

[88] The individuals who complained about XUG may not necessarily be witnesses in any subsequent litigation, because it is not the Authority's role to step into DJV's shoes to decide for itself what it (the Authority) would do in terms of the merits or otherwise of each individual's complaint. That was up to DJV, so it will be under scrutiny by the Authority, not the individuals who made the complaints about XUG.

[89] The Authority counsels against the parties putting conclusions regarding the complaints that were made about XUG into the public domain, when this is a situation where XUG's resignation occurred before DJV had made its final decision about what, if any, action was appropriate in response to the complaints it had received.

[90] If XUG wishes to pursue unresolved employment claims against DJV then he should bring those claims to the Authority to objectively investigate and determine.

[91] The parties should not simply be playing out their differences in the media, because the privacy concerns of the complainants mean that all relevant information cannot be publicly ventilated at this early stage in the proceedings.

[92] The Authority considers there is a public interest in protecting the privacy of the four individuals identified in this determination. As subordinate employees these individuals do not have the ability to independently engage with, or respond to, the media in the way that XUG, DJF, Mr A or the other two complainants are able to.

[93] The fact that the four individuals who have been granted this new interim non-publication order, preventing publication of their names and information leading to their identification, is not any indication that this new interim non-publication order would continue past a substantive investigation meeting and/or determination of any of the claims between XUG and DJV.

[94] The expectation of open justice is a strong one so it is likely that they would be able to be identified at that point and have their evidence challenged in public if that becomes necessary. The Authority would at that point be in a position to objectively determine the issues that are currently in dispute between the parties.

[95] A non-publication order is not made regarding individuals in paragraph 5.2(a) and (b) of Mr A's affidavit of 4 December 2018 on the basis that these people have the power and

status to be able to speak out to the media on their own behalf, or to have Mr A speak for them, if the information about their complaints about XUG ends up in the public domain.

[96] The Authority considers that there is a different power dynamic regarding the individuals named in paragraph 5.2(c) – (f) of Mr A’s 4 December 2018 affidavit from those named in paragraph 5.2(a) and (b).

[97] The Authority encourages the parties to not effectively ‘try this matter in the media’.

[98] Misleading information that is put into the public domain by the parties prior to a substantive investigation may adversely impact on the Authority’s assessment of that individual’s or organisation’s credibility, if credibility is a material issue to be determined.

[99] The Authority further reminds the parties that they are expected to conduct themselves in a manner that is consistent with the good faith objects of the Act.

Orders

[100] The interim non-publication order in XUG v DJV will expire at 18:00 pm, fourteen days after the date of this determination.⁸

[101] An interim non-publication order is made prohibiting the publication of the names of the four individuals named in paragraph 5.2(c)-(f) of Mr A’s affidavit dated 4 December 2018 parties, and of any information leading to their identification (other than the fact that they were in subordinate roles to XUG), until further order of the Authority.

[102] If any of these four individuals subsequently provide information to the media, or give media interviews, then the Authority is likely to review the non-publication order, on the basis they have voluntarily waived the privacy that this new interim non-publication order seeks to preserve.

[103] No non-publication orders are made regarding the two individuals named in paragraphs 5.2(a) and (b) of Mr A’s affidavit of 4 December 2018. The nature of the positions and public roles these two individuals hold mean they do not have the same expectation of privacy as the four individuals who have been granted an interim non-publication order have.

⁸ Above n1.

[104] The Authority considers it appropriate for costs to lie where they fall, because this review was initiated by the Authority in response to the change in circumstances which came to its attention.

Rachel Larmer
Member of the Employment Relations Authority