

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 302
3014671

BETWEEN	X First Applicant
A N D	Y Second Applicant
A N D	Z Respondent

Member of Authority: Rachel Larmer

Representatives: Susan Hornsby-Geluk, Counsel for Applicants
Respondent in person

Investigation Meeting: On the papers

Date of Determination: 02 October 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] The Authority issued an interim non-publication order in a determination dated 27 July 2017.¹ The Applicants seek a final non-publication order. The Respondent wants it rescinded.

[2] The issuing of a non-publication order is discretionary and arises under Clause 10(1) of Schedule 2 of the Employment Relations Act 2000.

¹ [2017] NZERA Auckland 208.

[3] The starting point for determining whether or not the discretion should be exercised in any given case is the fundamental principle of open justice. So the issue to be assessed in this case is whether there should be a departure from that fundamental principle.

[4] The applicant bears the onus of justifying on the balance of probabilities from the evidence that has been filed that there are specific adverse consequences to justify a final non-publication order being made. This requires the applicant to point to factual material to justify a departure from the presumption of open justice.

[5] In this case I find that was done by way of the documentary evidence filed in support of the applicant's application and from the information given to the Authority during the telephone conference which was held on 26 July 2017.

[6] There is a need to strike a balance between open justice considerations and the interests of justice that are served by the issuing of the Authority's discretion to suppress specified information in any particular case. There is no requirement for an applicant to establish exceptional circumstances although the justification for departing from the normal principle of open justice is high.

[7] In weighing up the exercise of the Authority's discretion I have regard to the Employment Court decisions in *Crimson Consulting Limited v Unitutor Ltd*, *Berry v Talentwire Ltd*², *H v A Ltd*³, *XYZ v ABC*⁴, the High Court decision of *ASB Bank v AB*,⁵ the Court of Appeal case of *Jay v Jay*⁶, and the Supreme Court decision in *Erceg v Erceg*.⁷

[8] I consider that suitably high standard has been met in this case. I am satisfied that the applicant has demonstrated that the interests of justice require a final non-publication order regarding the names of the parties, of the non-parties referred to in the evidence and pleadings, the geographical location of the first applicant and any other details that would cause the identifies of the parties or the non-parties who have been referred to during the course of the Authority's investigation to be publically known.

[9] I am satisfied to the required standard that there may be adverse consequences for non-party individuals. These individuals are minors. They have not had an opportunity to

² [2017] NZEmpC 94.

³ [2014] ERNZ 38.

⁴ [2017] NZEmpC 40.

⁵ [2010] 3 NZLR 427 (HC).

⁶ [2014] NZCA 445.

⁷ [2017] 1 NZLR 310.

be heard. I consider they are entitled in the circumstances to a reasonable expectation of privacy.

[10] I also consider that the nature of the claims and the evidence in support of the applicants' claims would render part of the Record of Settlement entered into by the parties nugatory if the non-publication orders were not granted.

[11] I consider these are sound reasons for displacing the usual presumption which falls in favour of publication.

[12] I therefore order that the interim orders in paragraph [10](a)–(d) of the Authority's determination dated 27 July 2017⁸ now become final orders of the Authority.

[13] I consider that costs should lie where they fall in respects of this application.

Rachel Larmer
Member of the Employment Relations Authority

⁸ Ibid 1.