

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 432
5434883**

BETWEEN X
Applicant
AND Y
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in Person
Blair Edwards, Counsel for Respondent
Determination: 21 October 2014

DETERMINATION OF THE AUTHORITY

The Applications

[1] On 4 July 2014 the Authority issued an interim determination ordering an interim non-publication order in this matter pending further consideration of whether or not this order should be made permanent in nature.

[2] The Respondent has applied for a permanent non-publication order in respect of:

- a) The names of the parties in the application before the Authority;
- b) The name of the Respondent's CEO;
- c) Any information that might lead to the identification of the parties and/or of the CEO; and/or
- d) The claims made by the Applicant in respect of allegedly inappropriate behaviour on the part of the Respondent's CEO and employees

[3] The Applicant by submissions dated 25 July 2014 opposes the application for a permanent non-publication order.



The Principles

[4] The Authority has a broad discretion to make non-publication orders pursuant to cl10 (1) of Schedule 2 to the Employment Relations Act 2000 (the Act) which states:

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order that all or any part of the evidence given or pleadings filed or the name of any party or witness or other person not to be published, and any such order may be subject to such conditions as the Authority thinks fit.

[5] However the broad discretion conferred by cl 10 of Schedule 2 to the Act is not to be exercised arbitrarily, but according to principle. The starting point for any consideration of the issuing of a non-publication order is the principle of open justice. As observed by the Law Commission, the principles of open justice and the right to freedom of expression are rights which go to the very existence and vigour of our political and legal institutions¹

[6] Lord Hewart in *R v Sussex Justices, Ex parte McCarthy*² observed that it is fundamental to our legal system that justice is not only done, but that it is also seen to be done. This is the principle of open justice, which serves a wider purpose than the interest represented in the particular case. It is critical to the maintenance of public confidence in the system of justice³

[7] The *New Zealand Bill of Rights Act 1990* recognises freedom of expression as a democratic and civil right:

*14 Freedom of expression
Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form*

[8] Departure from the general rule of public justice is generally held to be accepted as not being lightly granted, and moreover that public justice requires the identification of all aspects of the litigation. In *Clark v Attorney-General*⁴ the Court of Appeal said:⁵

[T]he principles of open justice and the related freedom of expression create a presumption in favour of disclosure of all aspects of Court

¹ *Suppressing Names and Evidence*, New Zealand Law Commission, Report 109, October 2009 at page 7.

² [1924] 1 KB 256 at 259

³ *Lewis v Wilson & Horton Ltd v Others*, CA 131/00, 29 August 2000, para [79]

⁴ [2005] NZAR 481 (CA)

⁵ *Ibid* at para [42]

proceedings which can be overcome only in exceptional circumstances

[9] These fundamental principles are well established in New Zealand, and there is a presumption in courts and tribunals that all evidence should be given in public and be reported freely⁶.

[10] However the Authority is not like other courts and tribunals. It has unique powers of investigation, which the Employment Court has recognised in *Davis v BNZ* as making the formal principles less applicable:⁷

While the principles in Anderson certainly apply to hearings in conventional Courts and tribunals, the flexibility accorded to the Authority to run an investigation and make its own inquiries rather than conducting a formal hearing make these formal principles less applicable. The presumption that all evidence should be given in public and freely reportable may therefore not have the force that it had in relation to the Employment Tribunal.

[11] Significantly, in the recent full Employment Court judgment in *H v A Limited*⁸ the majority of the Court noted that it considered that:⁹

Parliament, by enacting broad discretionary powers in the employment field, intended that the same considerations would not apply as in criminal cases or even in public law civil cases in the courts of ordinary jurisdiction.

[12] The majority of the Court further observed that Parliament had left the Employment Court (and the Authority) with:¹⁰ “a broad discretion to do justice on a case by case basis although in a principled way and from a starting point of ‘open justice’.

[13] However as regards whether the non-publication of names or other identifying particulars in employment cases would be ‘exceptional’ the majority of the Court observed that ‘exceptional’ applied in the sense that they would be made only in a very small minority of cases, but did not agree:¹¹

⁶ *Anderson v The Employment Tribunal* [1992] 1 ERNZ 500

⁷ [2004] 2 ERNZ at para [16] per Shaw J

⁸ [2014] NZEmpC 92

⁹ *H v A* at para [66]

¹⁰ *H v A* at para [76]

¹¹ *Ibid* at para [78]

... that an applicant for such an order must make out, to a high standard, that there are such exceptional circumstances that a non-publication order is warranted.

[14] As derived from the Employment Court's decision in *A v H*, a consideration of the overall interests of justice requires a balancing of the respective interests and concerns of the parties, and consideration of whether there are persuasive considerations in the case under consideration to displace the presumption in favour of open justice.

Determination

[15] During the disciplinary process undertaken by the Respondent, the Applicant made allegedly vexatious and unsubstantiated claims against the CEO of a highly personal and targeted nature which were duly investigated by the Respondent. A finding of the Respondent's disciplinary process was that the Applicant had disparaged and undermined the CEO and the Respondent during her employment.

[16] The Respondent is a charity which relies on donors and sponsors to fulfil its charitable goals of assisting disadvantaged New Zealanders.

[17] The Applicant has confirmed that the CEO's profile is entirely linked to her position. As a consequence I find that any unsubstantiated claims against her would negatively affect the Respondent.

[18] I further find that any negative publicity in terms and the management of the charity would have the effect of donors withdrawing their support, which would have an adverse effect, not only on the charity in question, but on the very vulnerable members of New Zealand society it exists to benefit.

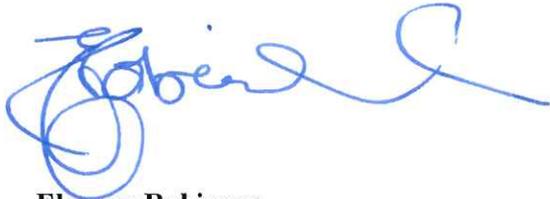
[19] It is this aspect and the Respondent's particular vulnerability as a charity which persuades me that the presumption of open justice should be displaced in the interests of both parties.

[20] In so deciding I have considered whether or not the granting of a non-publication order would prevent the Applicant from having a fair hearing and being awarded the remedies sought. I conclude that it would not do so.

[21] **Accordingly, pursuant to clause 10 (1) of Schedule 2 of the Act, I order that the names of the parties and that of the CEO in the application before the Authority, any information which may lead to the identification of the parties and/or the CEO, and the**

information which may lead to the identification of the parties and/or the CEO, and the claims of allegedly inappropriate behaviour by the CEO and employees of the Respondent are all subject to a permanent non-publication order.

[22] Pursuant to Schedule 2 clause 10(1) of the Act the names of the Respondent, and the CEO, and the Applicant referred to in this matter are not be published. They are to be referred to by letters bearing no relationship to their actual names.



Eleanor Robinson
Member of the Employment Relations Authority

