

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 789
3385443

BETWEEN YEX
 Applicant

AND ZEK
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 Emma Crowley, counsel for the Respondent

Investigation: On the papers

Submissions and Other 14 October 2025 from the Applicant
Information: 7 October and 5 December 2025 from the Respondent

Date of Determination: 5 December 2025

DETERMINATION OF THE AUTHORITY

The parties names'

[1] Three random letters have been used for each party's name in order to ensure any potential challenge they may want to make to this variation to the interim non-publication order dated 21 July 2025 was not rendered nugatory.

Interim non-publication order

[2] An interim non-publication order was issued on the joint application of the parties to preserve the position due to the sensitive nature of the allegations, given the applicant disputed the disciplinary allegations against them.

[3] The interim non-publication order that was recorded in the Authority's email to the parties dated 21 July 2025 was stated to remain in force until further order of the Authority. It was also made subject to the condition it did not apply to the employment institutions.

[4] This interim non-publication order is now under review. The applicant has asked that it be made final.

[5] The respondent wanted the interim non-publication order lifted and it opposed a final non-publication being made. It pointed out that the legal tests and principles that apply to non-publication had not been met by the applicant. The respondent was concerned that if the parties names were not published that could lead to unfair suspicion falling on other employees or the applicant's former colleagues.

What does the interim non-publication order cover?

[6] The interim-non-publication order dated 21 July 2025 prohibits publication of:

- (a) The parties' names and identifying information;
- (b) The information the parties have lodged with the Authority;
- (c) The parties' witnesses' names and identifying information about them;
- (d) Information identifying third parties referred to in the proceedings;
- (e) The applicant's personal health information;
- (f) Information about the disciplinary allegations and supporting evidence.

Variation to the interim non-publication order

[7] It is appropriate that the applicant's personal health information remains protected by a final non-publication order, as there is no legitimate public interest in having that information publicly disclosed.

Other information

[8] There is no need for the other information that was covered by the interim non-publication order to continue to be protected.

[9] At the parties' joint request, the interim non-publication order was widely drafted, but different evidential considerations apply to the assessment of whether a final non-publication order is in the public interest compared to an interim non-publication order that is made at an early stage of the proceedings.

[10] The applicant withdrew their interim reinstatement application and substantive claims on 8 September 2025. On 9 September 2025 the respondent sought a costs award against the applicant.

[11] The applicant withdrew their claims after the Authority witness summonsed, and were provided with, the results of the drug testing the applicant had been required to undergo in the workplace. The applicant had withheld consent to their drug testing results being disclosed to their employer, who had arranged for the drug testing to be done.

[12] The applicant had also failed to refer to the drug testing results, which they knew about, in the affidavit they lodged in support of their interim reinstatement application. The drug testing results was material information that the applicant deliberately withheld from the employer and Authority.

[13] The applicant had a safety sensitive role in which their alleged drug use could have potentially adversely affected others. The applicant had also been assigned a work vehicle that had tested positive for drugs' residue, which was in addition to the applicant's own positive drug testing results.

[14] These drug test results obviously fundamentally undermined the applicant's interim reinstatement and unjustified dismissal claims. That information should have been provided by the applicant to the Authority at the outset when the urgent interim reinstatement application was made. It was clearly material to an assessment about whether the applicant should be returned to the workplace pending the resolution of their dismissal grievance.

[15] The Authority should not have had to summons the applicant's drug testing results from the individual and company that had performed the workplace drug testing for the employer.

[16] No explanation was provided by the applicant for withdrawing their consent to the employer receiving a copy of their drug test results. The respondent had a legitimate interest in the outcome of the applicant's drug testing results. It therefore appeared that the applicant's decision to revoke consent after it had initially been given was made to prevent the employer from finding out what drugs the applicant had tested positive for.

[17] The applicant's actions regarding their drug testing fell short of the good faith obligations required under s 4 of the Employment Relations Act 2000 (the Act).

The parties' evidence

[18] The applicant wanted the interim non-publication order made final, as they said publication of their name or identifying information would harm their reputation. They said they only withdrew their claims because the proceedings had cost them too much in legal fees.

[19] The Authority made it clear that evidence was required in support of the final non-publication orders the applicant wanted. The specific evidence that was required was also identified to the applicant and a timetable was set for affidavits and submissions to be lodged.

[20] The applicant was given an opportunity to lodge affidavit evidence from themselves and their General Practitioner (GP) in support of their application for the current interim non-publication order to be made final. However, despite the applicant being given multiple extensions of time to facilitate that, it did not occur. No evidence has been lodged in support of the applicant's claim the interim non-publication order should be made final.

[21] The respondent's position was that the interim non-publication order should be rescinded, as there was no evidence to support continued restrictions on publication.

Finding

[22] The principle of open justice is an important one. A final non-publication order cannot be used to merely to prevent an individual from embarrassment or emotional distress arising from their own actions. Clear evidence is required to displace the starting proposition of open justice. However, no such evidence was provided to support the applicant's application for the interim non-publication order to be made final.

[23] The interim non-publication order was wide ranging, so it would prevent public discussion of matters involving these parties that are likely already known within the workplace and local community. It is undesirable for others to be restricted in this way when the issues involved are potentially of public interest.

[24] Although the applicant said their health would be adversely affected if the interim non-publication order was not made final, they failed to provide evidence to support that submission. The applicant was given multiple extensions of time in order to get an affidavit from their GP, but despite saying the GP would be lodging an affidavit in support of them, that did not occur.

[25] There was no evidence provided to the Authority to show the applicant would suffer specific adverse consequences if the interim non-publication order was not made final. Nor was there any evidence that specific adverse consequences could reasonably be expected to occur. Accordingly, the lack of currently available evidence fell short of establishing that the important principle of open justice should be departed from in this particular case.

Outcome

[26] The interim non-publication order will be rescinded 30 days from the date of this determination. A new final non-publication order will replace it, which states:

Any information or evidence the applicant has lodged with the Authority regarding their health must not be published, subject to the condition that this non-publication order does not apply to the applicant (who can decide what if any of their medical information they want to publish) or the employment institutions.

[27] The delay between the date of this determination and the date the interim non-publication order expires has been put in place to give the parties time to challenge this non-publication order determination.

[28] This time delay ensures any challenge to this final non-publication order by a party/the parties is not rendered nugatory by the Authority having already published the parties' names or identifying information. The 30-days delay allows time for an application to be made to the Employment Court for an alternative non-publication order.

What costs should be awarded?

[29] Both parties have had a measure of success because some elements (relating to medical information) of the interim non-publication order were made final so it is appropriate for costs to lie where they fall.

Rachel Larmer
Member of the Employment Relations Authority