

**Attention is drawn to the order for
non-publication at paragraph [28]
of this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 728
3266200

BETWEEN	TE WHATU ORA – HEALTH NEW ZEALAND Applicant
AND	ZCM First Respondent
AND	SIP Second Respondent
AND	SXY Third Respondent
AND	Unknown Respondents Fourth Respondents

Member of Authority:	Shane Kinley
Representatives:	Rebecca Rendle, counsel for the Applicant
Investigation Meeting:	6 December 2023 at Wellington and by AVL
Date of Determination:	6 December 2023

THIRD PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Te Whatu Ora – Health New Zealand (TWO) applied to the Authority ex parte in the afternoon of 1 December 2023 for an interim injunction restraining ZCM from disclosing

to third parties and/or releasing publicly information held including but not limited to confidential personal health and other information contained on TWO's National Vaccination Database (The Database). An urgent order was also sought requiring ZCM to comply with cl 6.4 of their employment agreement with TWO, as well as other orders dealt with in this determination.

[2] Orders were made at that time against the Respondents in the First Preliminary Determination of the Authority.¹

[3] TWO now apply for a compliance order in relation to the Second and Third Respondents (seeking an order that they comply with the orders in the First Preliminary Determination of the Authority), which this Third Preliminary Determination addresses.

[4] TWO also requested that I interpret the order at paragraph [14](e) of the First Preliminary Determination of the Authority as including a number of additional URLs. For reasons discussed further at paragraphs [17] to [26] below, I have approached that as an application for further orders.

[5] This application proceeded on the basis of affidavit evidence provided by an authorised representative of TWO. An undertaking as to damages was also provided by TWO when seeking the orders that were made in the First Preliminary Determination of the Authority.

[6] The application was made on an urgent ex parte (without notice) basis. Due to the particular circumstances of the matter, I resolved to deal with the application ex parte and on an urgent basis. This continues to be one of those very rare cases where I have been persuaded by the affidavit evidence that urgent intervention was necessary. If ZCM, SIP or SXY were given notice of the application, the consequent delay must be weighed against threats to disclose confidential information by ZCM, SIP or SXY, and their clear knowledge disclosure (which I am satisfied has been threatened will occur) may have far reaching consequences for TWO and individuals whose personal and private medical information is contained in the Database.

¹ *ISV v ZCM and Ors* [2023] NZERA 718.

Background

[7] TWO have provided evidence of personal service on SIP and service on SXY by virtue of personal service on SIP, who is the sole shareholder and Director of SXY. This service related to the First Preliminary Determination of the Authority, a copy of the application and all other documents including the Affidavit lodged in the Authority on 1 December 2023, and the Second Preliminary Determination of the Authority.² TWO has also provided evidence of service by email on SIP and SXY, which was directed by me.³

[8] TWO say that SIP and SXY have not taken the actions required under the orders in the First Preliminary Determination of the Authority, specifically those orders at paragraph [14](a), (c), (d) and (e).⁴ TWO further say that SIP and SXY are aware of the orders (due to service on them personally and by email) and have not responded or advised of any actions taken to comply with the orders.

[9] TWO also pointed to additional URLs where information that I have ordered not be published appears to have been re-published.

Jurisdiction

[10] In relation to the compliance order that TWO seeks, the Authority has the power to order compliance under s 137(2) of the Employment Relations Act 2000 (the Act) where any person has not observed or complied with any order made or given under the Act by the Authority (s 137(1)(b)). In relation to SIP and SXY I have previously found that there is an arguable case that SIP and SXY are persons who are or intend to incite, instigate, aid or abet ZCM to breach their employment agreement with TWO, in terms of s 134(2) of the Act.⁵

[11] In relation to the additional URLs, the Authority is required to consider and apply the tests for an interim injunction.⁶ I am satisfied the jurisdiction exists under s 161 of the Act for the Authority to make the orders sought.

² *Te Whatu Ora – Health New Zealand v ZCM and Ors* [2023] NZERA 719.

³ Note [1] above at [20].

⁴ The orders at paragraphs [14](b) and (f) were issued in relation to ZCM personally, rather than SIP and SXY.

⁵ Note [1] above at [10].

⁶ See, *American Cyanamid Co v Ethicon Limited* [1975] AC 396 and *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights Union* [1991] 1 ERNZ 886.

The compliance orders sought are granted

[12] I am satisfied that SIP and SXY are aware of the orders that apply to them in the First Preliminary Determination of the Authority, specifically those orders at paragraph [14](a), (c), (d) and (e). I am further satisfied that SIP and SXY have provided no evidence of actions to comply with those orders, and the time that they were to do so has passed.

[13] For those reasons, I consider it is appropriate to issue a compliance order under s 137(2) of the Act requiring that SIP and SXY comply with the orders at paragraph [14](a), (c), (d) and (e) of the First Preliminary Determination of the Authority.

[14] I am required under s 137(3) of the Act to specify a time within which this compliance order must be complied by. I consider that an appropriate timeframe is by no later than 12 midday (NZ daylight time) on Thursday 7 December 2023 and specify this as the time under s 137(3) of the Act by which SIP and SXY comply with the orders at paragraph [14](a), (c), (d) and (e) of the First Preliminary Determination of the Authority.

[15] There are very serious consequences where there is a failure to comply with a compliance order.

[16] SIP and SXY are advised that if they do not observe or comply with a compliance order the Employment Court may do one or more of the following pursuant to s 140 (6) of the Act: ...

(d) order that the person in default be fined a sum not exceeding \$40,000;

(e) order that the property of the person in default be sequestered.

Further orders are made

[17] I turn now to the request by TWO that I treat the order at paragraph [14](e) of the First Preliminary Determination of the Authority as including a number of additional URLs where information that I have ordered not be published appears to have been re-published.

[18] I am not persuaded that it is appropriate to treat my earlier order in the way requested, in relation to the requested compliance order, as SIP and SXY are not unambiguously on notice to comply in relation to the additional URLs. I have therefore approached this request as a request for further orders.

Arguable case

[19] I am satisfied from the affidavit evidence, untested as it is, that there is an arguable case that SIP and SXY have published information that I have ordered not be published on a number of additional URLs.

[20] I remain satisfied that there is an arguable case that SIP and SXY are persons who are or intend to incite, instigate, aid or abet ZCM to breach their employment agreement with TWO, in terms of s 134(2) of the Act.

Balance of convenience

[21] I find that the balance of convenience weighs strongly in favour of granting the interim orders sought by TWO. Based on affidavit evidence, there is a risk of significant damage if the orders sought are not made and the confidential information is disclosed or republished.

Other remedies

[22] I am not satisfied that damages would be sufficient to remedy the breaches.

Overall justice

[23] Standing back and looking at the totality of the matter, I am satisfied that overall justice favours the making of orders for a reasonably limited period until the Authority can hear from all parties and determine matters. I am satisfied that the release of the Database and any copies, extracts or information derived from it (the Information) may cause individuals, their whanau and the wider community to suffer stress, anxiety or harm.

Orders

[24] I make the following further orders taking into account the undertaking as to damages:

- (a) SIP and SXY are ordered to not take any action which may be considered as inciting, instigating, aiding or abetting ZCM to breach their employment agreement with TWO (particularly cl 6.4), in terms of s 134(2) of the Act;

(b) SIP and SXY are to remove and make no further use of the Database, the Information or any other unlawfully obtained information, including, but not limited to publishing or re-publishing extracts referred to at the following URLs:

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]

- [Redacted]
- [Redacted]

[25] Leave is reserved for persons affected by these orders to apply to the Authority for variation on 72 hours' notice.

[26] The orders that the Authority has made in paragraph [24] above are to take effect immediately and will remain in force until further order.

Interim non-publication orders

[27] Ms Rendle requested I issue an interim non-publication order in relation to the URLs listed in paragraph [24](b) above. I am persuaded that is appropriate.

[28] Under clause 10 of the second schedule of the Act, and except where necessary for enforcement purposes, I prohibit publication of the URLs listed in paragraph [24](b) above, the pleadings and all documents filed with the Authority, until further order of the Authority.

[29] For the avoidance of doubt, earlier non-publication orders by the Authority remain in force until further order of the Authority.

Case management conference to be scheduled

[30] Given this determination has been issued on an urgent ex parte (without notice) basis, the next steps of this matter require an urgent case management conference. An Authority Officer will contact the parties to arrange this. The parties are to address whether further non-publication orders are necessary at the conference.

[31] The Authority directs TWO to serve ZCM, SIP and SXY by email with this Determination, a copy of the application and all other documents including the Affidavit lodged in the Authority on 6 December 2023.

[32] Service by email alone is directed under clause 16 of the second schedule of the Act on the basis that SIP and SXY have been personally served in relation to earlier determinations of the Authority in relation to this matter, and I am advised that TWO are in discussion with potential counsel for ZCM.

[33] The parties may contact the Authority Officer via phone on 03 964 7850 or via email on christchurchera@era.govt.nz to arrange the conference or if further advice is required about the orders made.

[34] If any other person applies to view the Authority file, then the parties will be provided with an opportunity to comment before any such application is granted.

Costs

[35] Costs are reserved.

Shane Kinley
Member of the Employment Relations Authority