

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 483
3047333

BETWEEN	A Labour Inspector Applicant
A N D	ABC First Respondent
AND	RST Second Respondent
AND	WXY Third Respondent

Member of Authority: Rachel Larmer

Representatives: Catherine Milnes for Applicant
Werner van Harselaar for Respondents

Investigation Meeting: On the papers

Submissions: 15 August 2019 from Respondents
16 August 2019 from Applicant

Date of Determination: 16 August 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr van Harselaar has applied for a non-publication order for the first and third respondents, who are husband and wife. Although not specifically sought by Mr van Harslaar, from a practical perspective any non-publication order would need to cover the second respondent on the basis it was the first respondent's company, so if its name was published then the first and third respondents would likely be readily identifiable.

[2] The basis for the non-publication order being sought is set out in detail in a medical report.

[3] Ms Milnes advised the Authority that the Labour Inspector took a neutral position regarding an interim non-publication order but that it strongly opposed a permanent non-publication order because of the nature of the claims and the very serious nature of some of the evidence that has been put before the Authority.

[4] The starting point must always be the principle of open justice. It is important not just for justice to be done, but that the wider community to be able to see and understand what has occurred and why.

[5] In this case some of the most serious claims are strongly disputed, although it also appears that some of the adverse evidence has been admitted to by the first respondent.

[6] That said, there are many material conflicts in the evidence that cannot be resolved until the witnesses can be questioned about their evidence during the Authority's substantive investigation. The merits of the claims therefore cannot be adequately assessed at this preliminary stage.

[7] The Authority has power under clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) to make a non-publication order regarding some or all of the evidence, pleadings filed, names of parties or witnesses or other person. A non-publication order may be subject to such conditions as the Authority thinks fit.

[8] The Authority's power to make a non-publication order is discretionary. This discretion to be exercised on a principled basis, in accordance with established case law.

[9] The Respondents bear the onus of establishing on the balance of probabilities that failing to issue a non-publication order will defeat the interests of justice. That is a high standard to meet. Mere embarrassment or a desire to avoid unfavourable publicity will be insufficient.

[10] The presumption of open justice is such a fundamental one that limitations on it will necessarily be rare. However the Authority's statutory power to make a non-

publication order recognises that there may be exceptional circumstances which raise a real risk that the interests of justice will be frustrated if publication occurs.

[11] There are a number of competing interests that must be weighed and balanced with the overriding concern being an objective assessment by the Authority of what is in the overall interests of justice.

[12] It is important to recognise that the interests of a particular party or individual person cannot supersede the wider interest the public, community and employment institutions have in the overall administration of justice.

[13] Different considerations apply to the assessment of what is required in the interests of justice prior to substantive claims being determined, as is the case here, compared to after the Authority has expressed its final determination on the merits of the various claims.

[14] The medical evidence that has been filed with the Authority has tipped the balance in favour of a limited interim non-publication order prohibiting publication of the names of the respondents, until further order of the Authority.

[15] This interim non-publication order will be reviewed again after the evidence has been tested during the substantive investigation. By then the parties will have had the opportunity to address the Authority in person about whether or not a final non-publication order should be made, and if it is, then what if any conditions should be associated with it.

[16] This interim non-publication order has been made solely to preserve the position in the interim during the short period between now and the conclusion of the Authority's substantive investigation.

[17] At that point the Authority will be better placed to assess the merits of an on-going non-publication order because it would have had the opportunity to question the medical professional who provided the report that has resulted in this interim order being made.

[18] This interim non-publication order is made subject to the condition that it does not apply to potential/actual witnesses, the NZ Police, and any government agencies

that may be involved/contacted regarding matters that are currently under investigation by the Authority.

[19] That condition has been made to ensure that the interim non-publication order does not compromise the ability of the parties and/or the Authority to prepare for the substantive investigation meeting by allowing them to communicate freely in terms of undertaking any necessary preparation that may involve making inquiries with others.

[20] The Authority therefore orders that the names of the three respondents may not be published, subject to the condition (exemptions) above, until further order of the Authority.

[21] The Authority further specifically notes that this interim determination should not be seen by the parties as any indication about the likelihood of a final non-publication order being made.

[22] The Authority reiterates the view that it has previously expressed to the parties that, from the evidence currently available, there appears to be a strong public interest in the names of the respondents in this matter being made public. However whether or not that will occur will largely depend on the Authority's assessment of the evidence provided at the substantive investigation meeting.

Rachel Larmer
Member of the Employment Relations Authority