

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 98
3051312 and 3051372

BETWEEN ANGELA NEIL
Applicant in 3051312

AND NEW ZEALAND NURSES
ORGANISATION
Respondent

BETWEEN TINA WEST
Applicant in 3051372

AND NEW ZEALAND NURSES
ORGANISATION
Respondent

Member of Authority: Robin Arthur

Representatives: Allan Halse, advocate for the Applicant
Susan Hornsby-Geluk, counsel for the Respondent

Investigation: On the papers

Determination: 25 February 2019

DETERMINATION OF THE AUTHORITY

- A. Under s 137 of the Employment Relations Act 2000 Allan Halse and Culturesafe NZ Limited are ordered to comply with the Authority's earlier orders prohibiting publication of the names, work position and location of three identified individuals referred to in pleadings and evidence lodged in this proceeding. By no later 24 hours from the time of issue of this determination, Mr Halse and Culturesafe must remove the prohibited information unlawfully published in breach of those orders from Culturesafe's Facebook page and from other Facebook pages or social media forums.**

B. NZNO's application for orders prohibiting publication of the names, work position and work location of two other individuals involved in this proceeding is declined.

C. Costs are reserved.

[1] The New Zealand Nurses Organisation (NZNO) applied for an order requiring compliance with earlier orders of the Authority prohibiting publication of certain information in these proceedings and for orders prohibiting publication of further information. Its application has been considered under urgency.

Employment relationship problem

[2] Angela Neil and Tina West have raised personal grievances against their employer, the New Zealand Nurses Organisation (NZNO), and lodged applications for investigation of their grievances by the Authority. They are represented by Allan Halse through his advocacy business, Culturesafe NZ Limited.

[3] An investigation meeting about their applications is scheduled for 19, 20 and 21 June 2019. Mr Halse opposed earlier dates for an investigation meeting that were available in mid-March and early April. Timetable directions are in place for the parties to lodge amended pleadings and witness statements.

[4] The grievances raised by Ms West and Ms Neil each allege they were subjected to bullying by three other employees of NZNO and allege NZNO managers did not properly investigate complaints made by Ms West and Ms Neil. NZNO denies their claims and says it took reasonable steps to address the concerns raised by Ms West and Ms Neil.

[5] At a case management conference held on 13 February 2019 I considered, among other things, an application from NZNO for orders prohibiting publication of names, the pleading and evidence. The application referred to postings made by Mr Halse, on the Facebook page of his business, Culturesafe. The postings made allegations about an NZNO employee, who was the primary subject of the Applicants' grievances, and accusations about NZNO managers and its legal representative in relation to their dealings with Ms West and Ms Neil.

[6] The Authority has a discretionary power to prohibit publication of certain information under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act):

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

- [7] After hearing from the representatives, orders were issued on 14 February:
- (i) prohibiting publication of the names, positions and work locations of three identified NZNO employees in relation to this proceeding, from now until the issue of an Authority determination or until the Authority otherwise directs, whichever is the sooner;
 - (ii) allowing the identities of those three employees to be referred to in communication from the applicants or their representative/s to relevant regulatory authorities (such as WorkSafe); and
 - (iii) declining to make an order regarding the publication of the identity of the parties or the pleadings or other evidence.

[8] In considering NZNO's application on 13 February I had suggested Ms West and Ms Neil might also wish to have their names and identity protected but Mr Halse opposed that proposition. In declining its application for wider orders I noted NZNO had the ability to make public statements contradicting criticisms by Mr Halse and to appeal to fair-minded people to await the outcome of the Authority proceedings before drawing any conclusions.

The Authority's investigation

[9] On 18 and 20 February NZNO, through counsel, alerted the Authority to instances where the orders were breached by Mr Halse in postings he made on the Facebook pages of his Culturesafe business and another group. On 20 February NZNO, by email copied to Mr Halse, suggested the Authority could issue a compliance order on its motion.¹ I advised NZNO to make an application if it wished to have those concerns addressed. It has done so, providing evidence of breaches to date and seeking compliance orders. NZNO also sought wider orders prohibiting

¹ Employment Relations Act 2000, s 138(1)(a).

publication of the names, positions and work locations of two NZNO managers who have been involved in decisions about the employment of Ms West and Ms Neil and who have been subject of abusive comments by Mr Halse on the Culturesafe Facebook page and at least one other Facebook page.

[10] In emails sent to the Authority on 20 and 22 February Mr Halse set out his explanation for his undenied breaches of the orders. He was offered but declined a further opportunity to be heard, in person or in writing, about NZNO's application. In one of two emails he sent on 22 February Mr Halse wrote that he had a "moral, ethical and legal, obligation to speak out publicly" about his account of the facts of the applications made by Ms West and Ms Neil and that New Zealand was "a democracy where freedom of speak is a fundamental right". He also wrote that "the decision to name and shame the bully, NZNO, their lawyers and the Authority member is mine alone". He did not indicate whether he had consulted Ms Neil or Ms West about the comments he posted or had made them at their request.

[11] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Application for compliance order

[12] The NZNO application attached copies of postings on Facebook pages of Culturesafe and another group between 16 February and 20 February 2018. Each posting gave Mr Halse's view of the proceedings and the actions of NZNO managers, NZNO's lawyer and the Authority member.

[13] It was not necessary to set out all the content of Mr Halse's postings. Each included some information that breached the terms of the order – specifically referring to the work location, work position or name of the person primarily accused of bullying behaviour towards Ms West and Ms Neil. In the following example, from the 20 February posting, the prohibited information has been redacted for the purposes of this determination:

Officially worse [sic] bully in New Zealand is the [position] of the [location] NZNO branch, [name]. It is a matter of public record that [name] dismissed an employee who had complained of being bullied by him when he was a nurse manager at [a] DHB.

[14] There is no doubt that each of these breaches of the orders was made deliberately and in defiance of the non-publication orders. Mr Halse's email to the Authority on 20 February included the following statement:

I will go to jail before complying with any non-publication or compliance orders illegally raised by Authority members or Employment Court Judges who are deliberately condoning workplace bullying and the resultant serious financial, emotional, psychological and physiological harm.

...

There will be more Facebook posts and media releases at every stage of this process as NZNO, their lawyer and the Authority member/s continue to breach the employer's obligation under the Health and Safety at Work Act 2015 to provide a safe working environment for all employers.

[15] In a further posting to the Culturesafe Facebook page made on 23 February Mr Halse repeated his breach of the orders by using the name, position and work location prohibited from publication. He repeated his intention not to comply with any compliance orders made.

[16] Mr Halse's postings exhibit his idiosyncratic and incorrect view of the law, the interrelationship of various statutes and the procedures long developed in the common law for the fair treatment of parties and witnesses in proceedings, in the Courts and in tribunals like the Authority.

[17] It is not correct that the orders prohibiting publication of some information in this proceeding have been "illegally raised" or can be overridden solely on the basis of Mr Halse's personal interpretation of the Health and Safety at Work Act 2015 and the New Zealand Bill of Rights Act 1990 provisions about freedom of expression. Those Acts do not allow an individual, on their own whim or say so, to override the power expressly given to the Authority by Parliament under the Employment Relations Act to prohibit publication of some information during its proceedings. That power is an example of reasonable limits prescribed by law accepted in the NZBoRA as restricting the extent to which some rights, such as free speech, can be exercised.²

[18] Mr Halse has decided that he need not wait for any proper process to fairly examine and determine the allegations made about one of the people accused of

² New Zealand Bill of Rights Act 1990, s 4 and s 5.

bullying behaviour. Mr Halse appears to consider that because he, on the basis of what Ms West and Ms Neil have said happened, believes what they say is entirely correct, he can continue to say whatever he likes about that person. It is a disturbing and dangerous disregard for the rule of law, amounting to vigilante-like behaviour.

[19] There is a clear example in the present case of the risk of acting as if one party's as-yet-untested allegations are already proven. Mr Halse had published two specific allegations about the person accused of bullying that appear to rely on Mr Halse's misdescription of a previous determination of the Authority about a situation investigated in another workplace where that person previously work.

[20] Firstly, Mr Halse has stated that "it is a matter of public record that [the person] dismissed an employee who had complained about being bullied by him". However that Authority determination records that the employee was dismissed by a more senior manager, not the person to whom Mr Halse has referred.

[21] Secondly, Mr Halse has, in earlier correspondence, relied on that Authority determination to describe that person as a "known bully". However the Authority member who determined that earlier case made the following finding about the employee's claim that appears to be directly at odds with Mr Halse's description of what was "known" and "a matter of public record":

Her complaint of harassment arose because [the person] regularly spoke to her about minor performance issues. His behaviour was appropriate and within his managerial functions. [The employee] simply did not agree with the method he used to manage her. That was not harassment. Criticism or feedback from an employer is not bullying and neither can it be harassment in my view.

[22] Instead of acting solely on Mr Halse's assertions and drawing firm conclusions entirely in favour of, or against, the allegations made by Ms West and Ms Neil at this stage of the proceedings, the Authority needs to allow for and prepare for a fair investigation. In this case, there were sound grounds to protect the identities of the three other employees until the Authority investigation meeting could be held to carefully test the evidence relevant to the present circumstances and claims made by Ms Neil and Ms West.

[23] Three points in NZNO's application aptly summarised why a compliance order should now be made.

[24] Firstly, there is a strong public interest in the Authority requiring parties' representatives to comply with its orders. If non-publication orders can be ignored willy-nilly the legitimate interests and sensitivities of many parties, witnesses and uninvolved third parties across many cases in the Authority are at risk.

[25] Secondly, the prohibition orders made in the present case are narrow and limited in scope and time. They do not prevent the Applicants and their representative vigorously pursuing their legal claims in the Authority or other investigatory or legal forums.

[26] Thirdly, the Applicants (and their representative) cannot, on the one hand, apply to the Authority to exercise its powers to investigate and then make orders about their personal grievance claims but then, on the other hand, deny the Authority's jurisdiction to issue orders about the conduct of those same proceedings.

[27] In that light it was appropriate, given Mr Halse's deliberate breach of those orders and his declaration that he intended continuing to do so, to make an order for compliance under s 137 of the Act. The order made is set out at paragraph A at the head of this determination.

[28] In the event that Mr Halse and Culturesafe do not comply with those orders, anyone affected by that failure may apply to the Employment Court to exercise its powers to order fines up to \$40,000, to sequester property of the person in default and to order a term of imprisonment.³

Application for further orders prohibiting publication of further information

[29] The NZNO application sought further orders prohibiting publication of the names, positions and work locations of the two NZNO managers who had been involved in making decisions about the future of the employment of Ms West and Ms Neil with NZNO.

[30] Both managers are necessary witnesses in the Authority's investigation of the applications of Ms West and Ms Neil. They are both the subject of derogatory allegations by Mr Halse in his 20 February posting on the Culturesafe Facebook page.

³ Employment Relations Act 2000, s s 138(6) and 140(6).

He alleges one is “happy” to condone bullying behaviour, lacks respect for the employer’s legal obligations and “doesn’t care” about harm suffered by Ms West and Ms Neil. The other is described as a “co-conspirator” who shares a support of bullies and a lack of respect for NZNO’s obligations to its employees.

[31] NZNO submitted that Mr Halse’s public naming of those two managers, along with his derogatory comments about them, was potentially intimidating or threatening witnesses who are intending to give evidence in the Authority investigation and could influence or deter them from participating freely in that process. It referred to a previous determination of the Authority that had considered the risk of witness intimidation as a ground for prohibiting publication of some information.⁴

[32] I doubt the circumstances of the present case yet exhibit likely severe adverse consequences sufficient to justify an exception to the fundamental rule of open justice and that would warrant an order prohibiting publication of the identities of the two responsible decision-makers in NZNO.⁵ This conclusion, in no way, suggests any support or agreement with the nature, tone or content of the allegations Mr Halse has made about them. Conclusions on those points must await the testing of evidence in the Authority investigation. However, for the meanwhile and on the narrow point regarding publication of their identities, their roles put them in a different position and a different degree of vulnerability in the proceedings than the three employees whose identities are intended to be protected for a certain period by the non-publication orders already made.

[33] Mr Halse has, earlier in the course of this matter, used the threat of naming one of those managers and “going public” as a means of attempting to have NZNO change the course of its decisions about the employment of Ms West and Ms Neil. However there was, in the realities of the situation, little likelihood that Mr Halse’s act of having publicly named the two managers, and making various allegations about them, would actually intimidate either person or dissuade either from giving evidence that they might otherwise have given.

[34] As noted in the Authority’s Minute issued following the 13 February case management conference, NZNO and its senior managers are in the same position as any employer, and their decision makers, who consider they have been subject to unfair and unfounded criticism. They have the ability, should they choose to exercise it, to make

⁴ *Burrows v Moore* [2016] NZERA Christchurch 93.

⁵ *Erceg v Erceg* [2016] NZSC 135 at [13] and *XYZ v ABC* [2017] NZEmpC 40 at [69].

public statements denying Mr Halse's accusations and to appeal to fair-minded people to await the outcome of the Authority proceeding before drawing any conclusions.

[35] On the present evidence NZNO's application for orders prohibiting publication of the names, positions and work locations of the two identified managers has been declined.

Right of challenge

[36] As with any determination of the Authority on a substantive right, including publication orders, there is a right of challenge to the Employment Court if either or both parties are dissatisfied with the balance struck by the Authority on this issue at present.⁶ That is the appropriate measure rather than ignoring or continuing to breach orders lawfully made by the Authority in exercise of its jurisdiction. If a challenge is filed, such an election does not operate as a stay of the determination, meanwhile, unless the Court or the Authority so orders.⁷

Further observations

[37] Mr Halse's conduct to date in the present proceedings has repeated his pattern of behaviour in other cases of making extreme allegations about Authority members. In the present case this had included him describing the Authority member as "condoning workplace abuse" because Mr Halse did not agree with the non-publication orders made. In another case presently before the Authority Mr Halse has published an allegation that an Authority member seemed to be "determined to push ... [an applicant] ... to suicide".

[38] Commenting on similar behaviour in a previous case a judge of the Employment Court has observed that:

the modus adopted by [Mr Halse and Culturesafe] in their attacks on the Authority Member and the Court seems to be that, when there is any development in the proceedings which is disadvantageous to [them], disparaging comments are made.

[39] In that case the judge recommended Mr Halse cease making postings of that type if he wished to continue acting as an advocate and remove "disparaging"

⁶ Employment Relations Act 2000, s 179.

⁷ Employment Relations Act 2000, s 180.

comments about the particular employer and “disgraceful” comments about the Authority member in that case.

[40] In his 20 February Facebook posting Mr Halse said there was an urgent need to have the present case moved to the Court. He has made no application for such a removal. He is aware, and was reminded in the case management conference on 13 February, of the set statutory process for seeking removal to the Court. If he considered this case met the criteria to do so, it was in his hands to lodge the necessary application for assessment by the Authority. And, if removal were declined, the Court could be asked to consider granting special leave.

[41] Mr Halse has also been advised of deficiencies in the statements of problem he lodged on behalf of Ms West and Ms Neil. Their circumstances have changed since then. Timetable directions have been made allowing for amended statements of problem to be lodged, fully and correctly putting their claims before the Authority for investigation. Again, doing so lies in the hands of their representative.

Costs

[42] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority