

[3] To avoid the parties incurring additional time and therefore legal costs, the Authority has elected to determine that application ‘on the papers’, without the need for an investigation meeting.

[4] The Authority’s jurisdiction to issue a non-publication order arises from clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act). The Authority’s power to make a non-publication order is discretionary. This discretion is to be exercised on a principled basis.

[5] The usual principle of open justice is a strong one. That means that justice must not just be done, but that it must also be seen to be done by the public.

[6] Kids Count therefore bears the onus of establishing, on the balance of probabilities, that failing to issue a non-publication order in this case will defeat the overall interests of justice.

[7] It has failed to discharge that onus.

[8] Kids Count’s application for a non-publication order refers to the fact that it disputes allegations Ms van Altvorst made in her Statement of Problem and affidavit that she filed with the Authority. However, none of the disputed evidence was included in the Authority’s substantive determination, so it has not been made publicly available.

[9] Kids Count claims that these Authority proceedings allow Ms van Altvorst to repeat allegations against Kids Count that its says have been dismissed following investigation, by the Ministry of Education, the Ministry of Primary Industry, the Teaching Council and that were dismissed without investigation by WorkSafe New Zealand, Auckland Council and Oranga Tamariki.

[10] The Authority does not accept that submission.

[11] None of the evidence produced to the Authority has been made publicly available by the Authority.

[12] The parties have confined their ability to speak freely about the each other in clause 7 of the Settlement Agreement. Clause 8 provides that breaches of clause 7 may result in penalty action.

[13] The Settlement Agreement therefore provides a sufficient basis for addressing the various concerns Kids Count has raised in support of this application for a non-publication order.

[14] If in future either party considers that the other party has breached clauses 6 and/or 7 of the Settlement Agreement then they can elect to file Authority proceedings to address any such alleged breaches.

[15] The Authority confirms if a party makes negative, false, misleading, deceptive or otherwise disparaging comments about the other then, on the face of it, such comments would appear to breach the Settlement Agreement.

[16] The parties are strongly encouraged by the Authority to put their differences and employment related problems behind them, which is the intention that underlies mediated settlements.

[17] The Authority's determination has already been made publicly available via its website, in the usual way. Issuing a non-publication order now would potentially put anyone who has downloaded a copy of that determination in breach, even inadvertently. That is unnecessary and undesirable.

[18] Kids Count's claim that publication of the parties' names and information identifying them, in this matter would cause distress and harm to its employees and irreversible damage to its business reputation was unsupported by any evidence.

[19] The fact that Ms van Altvorst has allegedly sought to publicise her issues with Kids Count via the New Zealand Herald and/or "various industry websites" does not mean a non-publication order must be issued. If that (as yet untested) allegation is correct then it could be addressed under clause 8 of the Settlement Agreement.

[20] Kids Count's claims there is little public interest in identifying the parties to these proceedings. The Authority does not agree with that view. Kids Count has been held to have engaged in two breaches of a Settlement Agreement, for which penalties were imposed.

[21] Penalties act to punish and deter wrongdoing, so there is clearly a legitimate public interest in naming a party that has failed to comply with its legal obligations.

[22] The Authority does not accept Kids Count's submissions that failing to issue a non-publication order means the terms of the Settlement Agreement the parties entered into under s 149 of the Act is now publicly available.

[23] Clause 6 of the Settlement Agreement still applies, and binds the parties, so anyone who breaches subjects themselves to a potential penalty claim.

[24] The Authority only published the parts of the Settlement Agreement that were necessary to set out in its substantive determination. It has not published the other clauses that were not material to its determination.

[25] It is not a breach of a s 149 Settlement Agreement for a party/parties to file enforcement and/or associated penalty claims with the Authority, arising from alleged breaches of it. The acknowledgment clause in the Settlement Agreement expressly recognises that.

[26] Kids Count has failed to establish any evidential basis that favours the exercise of the Authority's discretion to issue a non-publication order in this matter. Accordingly, Kids Count's application for a non-publication order does not succeed.

[27] This non-publication order application was determined without the need for Ms van Altvorst to incur legal costs, so Kids Count's application is declined, without there being any issue as to costs.

Rachel Larmer
Member of the Employment Relations Authority