

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2019] NZERA 106
3038056

BETWEEN	KAREN CURRIE Applicant
AND	BAY OF PLENTY SEXUAL ASSAULT SUPPORT SERVICES TRUST Respondent

Member of Authority: Michele Ryan

Representatives: Allan Halse, advocate for the Applicant
Jeremy Sparrow, counsel for Respondent

Investigation Meeting: On the papers before the Authority

Submissions [and further Information] Received: 20 February 2019 from the Applicant
21 February 2019 from the Respondent

Date of Determination: 27 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 5 December 2018 the Authority determined a preliminary matter concerning the applicant's claims. It found that the applicant had not raised personal grievance claims based on allegations of bullying within the statutory timeframe pursuant to s 114(1) Employment Relations Act 2000 (the Act). The Authority declined leave to allow the applicant to pursue those matters.¹

[2] A meeting for the Authority to investigate whether the applicant was constructively dismissed due to excessive hours and stress is scheduled to occur on 12 and 13 June 2019.

¹ *Currie v Bay of Plenty Sexual Assault Services Trust* [2018] NZERA Auckland 388

[3] On 29 and 30 January 2019, and 8 February 2019 the applicant's representative Mr Allan Halse, Director of CultureSafe NZ Ltd (CultureSafe), posted separate written items on CultureSafe's Facebook page. I have not replicated the particular statements that are at issue. By way of summation, in each or several of the posts CultureSafe stated, in very critical terms, that the respondent and its counsel condone workplace bullying. Additional disparaging statements were made concerning the findings of the preliminary determination and the Authority Member who issued it.

[4] It is not clear whether the posts placed on Facebook were placed there with the applicant's agreement.

[5] In a memorandum dated 14 February 2019, counsel for the respondent says the posts have caused significant damage to the respondent, and to its staff. He says the posts cast the Authority and its processes into disrepute.

[6] The respondent asks the Authority to:

- (a) Make a direction that Allan Halse and CultureSafe New Zealand Limited make no reference whatsoever to the respondent, its legal representatives or this employment relationship problem in any publication including social media, whilst the Authority's investigation is ongoing;
- (b) Make an urgent take down order in relation to the three social media posts dated 29 and 30 January, and 8 February 2019 made by CultureSafe New Zealand, in relation to the respondent and the solicitor's law firm.

[7] The respondent refers to the Authority's powers to: prohibit publication of particular material;² and follow whatever procedure it considers appropriate when investigating a matter,³ as a means to regulate Mr Halse or CultureSafe's conduct regarding the Facebook posts. Reference is also made to the Authority's powers concerning contempt.⁴

[8] Mr Halse's response to this application is brief. He says he has obligations to expose bullying as illegal conduct, and the statements made on Facebook are true.

² Employment Relations Act 2000, Schedule 2, clause 10

³ Employment Relations Act 2000, s 160(f)

⁴ Employment Relations Act 2000, s 196

[9] There is no evidence between the parties of a prior agreement to maintain confidentiality regarding the employment relationship problem. Nor are there existing orders requiring non-publication in relation to the whole or part of it.

Issues

[10] The issues to be decided are:

- (i) whether the Authority should order the applicant's representative to remove the existing Facebook posts;
- (ii) whether the Authority should make, in effect, a non-publication order prohibiting the applicant's representative from referring to the respondent, its legal representative or the employment relationship problem in any publication whilst the Authority's investigation is ongoing;
- (iii) whether s 196, which sets out the circumstances in which contempt of the Authority may arise, applies to this matter.

Should the Authority order the applicant's representative to take down the posts?

[11] The respondent seeks an order that CultureSafe and/or Mr Halse take down the publications on Facebook which disparage it and its advisers while the Authority carries out its investigation. The request is said to "ensure the parties treat each other with respect and professionalism".

[12] The Authority's jurisdiction is limited to those expressly provided to it by the Employment Relations Act 2000 (the Act). As observed by the Full Court in *South Tranz Ltd v Strait Freight Ltd*.⁵

The Employment Relations Authority is a statutory tribunal. It has no inherent jurisdiction and can only carry out the functions and exercise powers to the extent they are conferred on it by the statute.

[13] The respondent refers to the Authority's powers at s 160(f) which states; "*The Authority may, in investigating a matter, follow whatever procedure the Authority considers appropriate*" as being relevant to this application, and to Schedule 2, Clause 10 which provides:

⁵ [2007] ERNZ 704

10. Power to Prohibit Publication

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

[14] Counsel suggests the Authority's power at s 160(f) suffices as a means to have the respondent remove the posts. I am not persuaded.

[15] Section s 160(f) provides wide powers as to how the Authority may conduct an investigation. The use of that power to remove published material where the material at issue, in this instance claims of bullying, are no longer "a matter" that is relevant to the Authority's investigation, is, in my view, beyond what the provision intends. Should the applicant via her representative continue to publish, or pursue, claims of bullying to the extent it obstructs or delays the Authority's investigation, then a penalty pursuant to s 134A may be warranted, but neither s 160(f) nor s 134A provides the Authority with jurisdiction to make orders to take down the material of concern. Moreover, I am not satisfied that a takedown order will remedy the respondent's desire to have the parties treat each other with respect and professionalism.

[16] As noted, the respondent seeks a non-publication order, a matter I shall return to. Counsel says any such order can be made "*subject to such conditions as the Authority thinks fit*".⁶ It submits a condition of the order (if granted) should be a removal of the existing posts so as to prevent future reputational damage to the respondent. He says the order would be reasonable where the posts have formed the basis for damage.

[17] The Authority's power to order a non-publication order is discretionary. An application for a non-publication order must be assessed against the circumstances relevant at the time. The scope of any order should be limited to only those matters necessary to secure the proper administration of justice.⁷

[18] The opinions in the aforementioned posts, expressed by Mr Halse or CultureSafe, concern the respondent's approach to bullying. That is not an employment relationship problem the Authority is required to determine. I accept the respondent considers the various comments are unsubstantiated and abusive. It is open to the respondent to publish its own

⁶ Employment Relations Act 2000, Schedule 2, cl 10
⁷ *Erceg v Erceg* [2016] NZSC 135.

statements on those matters. But an order for removal of the posts (by way of a non-publication order) is, in my view, an unreasonable fetter on Mr Halse’s right to freedom of expression pursuant to s 14 New Zealand Bill of Rights Act 1990. I am not persuaded a non-publication order requiring the removal of the existing posts is a condition necessary to serve the ends of justice in this matter.

[19] I am unwilling to make orders pursuant to s 160(f) or cl 10 of Schedule 2 requiring Mr Halse or CultureSafe to remove the Facebook posts that refer to the respondent. There are no other provisions within the Act that provide the Authority with jurisdiction to make a take-down order per se. This aspect of the respondent’s application is declined.

Should the Authority make a non-publication order?

[20] The Supreme Court considered the use of non-publication orders in *Erceg v Erceg*⁸. It emphasised the importance of open justice noting, however, that there are circumstances where the principle may be departed from, “but only to the extent necessary to serve the ends of justice”.⁹

[21] A party seeking a non-publication order must show specific adverse consequences that are sufficient to justify an exception to the principle of the fundamental rule [of open justice]. The standard is a high one.¹⁰

[22] No basis for a prohibition order to prevent Mr Halse or CultureSafe from making reference to the respondent’s legal advisers was advanced and that matter can be taken no further.

[23] A letter to the Authority, signed on behalf of the respondent, says the respondent is the only service in the region that specialises solely in sexual assault and abuse. It says Mr Halse’s posts strike at the environment of trust and safety the respondent seeks to provide to clients. The respondent contends if there is any doubt about its ability to operate in a professional and safe manner clients may not come forward. I accept that is a concern for the respondent, but note there is no evidence that the apprehension has materialised. The respondent further says staff have lost confidence in their work as a consequence of Mr

⁸ *Erceg v Erceg*, above n 7

⁹ Above n 7 at [2] and [3]

¹⁰ Above n 7 at [13]

Halse's posts, but no individual staff member (or groups of staff) is identified, nor was I furnished with an accompanying affidavit from staff members to support the contention.

[24] On balance I am not satisfied the standard needed to justify an order prohibiting the identity of the respondent has been met. I consider it doubtful that a non-publication order is necessary to ensure the proper administration of justice where the subject matter of the posts published by Mr Halse or CultureSafe is not before the Authority. I accept that the respondent considers the statements have the potential to tarnish its reputation but as already noted, it is open to it to publish its own statements concerning those matters if it so chooses. The respondent's application for a non-publication order is declined.

Contempt

[25] Section 196(1)(a) sets out various actions that may demonstrate contempt of the Authority. It is clear from the wording of subsections (a) to (c) that the actions must, at the time they occur, be in very close proximity to the Authority, to establish contempt. The actions complained of by the respondent have occurred at a distance from the Authority. Section 196 is not relevant to this application.

Summary

[26] The respondent's application for non-publication orders, and for orders that Mr Halse or CultureSafe take down material posted on Facebook on 29 and 30 January 2019 and 8 February 2019, is declined.

Costs

[27] The issue of costs concerning this application are reserved.

Michele Ryan
Member of the Employment Relations Authority