

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 405
3044951

BETWEEN DR NIGEL MURRAY
Applicant

AND THE WAIKATO DISTRICT
HEALTH BOARD
Respondent

Member of Authority: TG Tetitaha

Representatives: M McClelland QC, C Cartwright, P Cullen and D
Burton, counsel for the Applicant

P Muir and C Blake, counsel for the Respondent

Investigation Meeting: 12 December 2019

Submissions Received: 12 December 2018, and 10 April 2019 from the
Applicant
21 November 2018, 31 January 2019 and 9 April 2019
from the Respondent

Date of Determination: 18 July 2019

DETERMINATION OF THE AUTHORITY

- A. There is an order that no one other than the parties may access the Authority's file on this matter other than by order of Authority.**
- B. The application for a permanent non-publication order is dismissed.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] This application arises out of an application for compliance orders due to the alleged breach of a settlement agreement between the parties dated 5 October 2017. The application has been withdrawn but the applicant now seeks a permanent non-publication order.

Relevant Facts

[2] The applicant applied for non-publication, urgent hearing and compliance orders on 12 November 2018. The matter was granted urgency by the Duty Member.

[3] At a teleconference on 20 November 2018 the applicant sought and was granted by consent a non-publication order to preserve his position until hearing. The non-publication order was in respect of the parties' names, pleadings and evidence until further order of the Authority. A hearing was set down for 12 December 2018.

[4] At the conclusion of a hearing on 12 December 2018 the parties were encouraged to attempt to resolve their claims by agreement. The parties subsequently reached agreement and filed a joint memorandum on 31 January 2019.

[5] The joint memorandum notified the applicant had withdrawn his substantive claim. It sought variation of the publication orders to allow the DHB to release parts of a draft employment investigation report by Maria Dew to the media.

[6] A minute was issued on 1 February 2019 which varied the non-publication to no longer cover the draft investigation report completed by Maria Dew. The varied order did:

- (a) Not prevent the respondent providing copy of the draft report in response to the New Zealand Herald, or any future request(s) under the Official Information Act 1982 (OIA) or any other statutory request(s); and
- (b) Not prevent the respondent providing a copy of the annexures to the witness statements and/or briefs of evidence filed by either party with the Authority, as those annexures would still potentially be subject to any future disclosure requirements (including requests under the OIA or other statutory request) independently of the fact that they have been provided and produced in evidence.

[7] The non-publication order made on 20 November 2018 relating to information or documents not covered above (such as the body of the witness statements) remained in place until the Authority gave its determination on permanent publication orders.

[8] In respect of the media request under the OIA from the New Zealand Herald the respondents provided a redacted copy of Ms Dew's report. A further media request was made by the Waikato Times. A similar agreed version was provided by the respondent and is available on the respondent's website.

[9] The parties provided an un-redacted copy of Ms Dew's report to the State Services Commission and the Ombudsman. The Ombudsman has also disclosed Ms Dew's report to the Serious Fraud Office.

Permanent Name Suppression

[10] The applicant submits it can be inferred from the joint memorandum that:

- (a) The applicant, through extensive discussions with the respondent, was able to reach a satisfactory resolution to his claim, and thus withdrew his substantive claim.
- (b) The subsequent release of the draft report showed that the parties had reached agreement on what could appropriately be released.
- (c) That the parties, despite reaching agreement on substantive matters, could not reach agreement on the issues of costs and publication orders.

[11] The applicant now seeks permanent non-publication orders for the following:

- (a) The identities of the parties to the proceedings and any identifying information including:
 - (i) reference to the Maria Dew draft report; and
 - (ii) information identifying the applicant as being the Chief Executive of the respondent.

Law

[12] The Employment Court has reviewed the granting of non-publication orders¹ in light of the Supreme Court decision of *Erceg v Erceg*.²

[13] The Court noted the starting point is the principle of open justice. A high standard must be met before that principle can be appropriately departed from. A “stringent” approach to applications for non-publication is required because of the fundamental importance of the principle of open justice. Parties seeking the order “must show specific adverse consequences that are significant to justify an exception to the fundamental rule [of open justice] ... the standard is a high one.”³

Should a permanent non-publication order be granted?

[14] The applicant submits that this is required because:

- (a) The publication orders sought relate not to his actions whilst employed but to the fact of those proceedings and the orders sought, which are not public;
- (b) The applicant’s right to a fair trial is a critical consideration and ought to be given substantial weight by the Authority;
- (c) The applicant’s right to a fair trial has already been put at risk by adverse publicity by the media. Publication of the details sought to be prohibited would almost certainly lead to further publications and further imperil his right to a fair trial.
- (d) Had Dr Murray not applied to the Authority, the existence of the terms of settlement, the orders he was seeking would not have become public. If publication orders are not granted by the Authority, this information will become public.
- (e) The record of settlement provides the terms of settlement will be confidential. It would be a frustration to the interests of justice that the terms of the record of settlement would also become public.

¹ *XYZ v ABC* [2017] NZEmpC 40 at [66] and following.

² [2016] NZSC 135.

³ *XYZ* at [65], [68] to [70].

- (f) If the non-publication orders are not granted this could serve as a chilling effect on those seeking to enforce their rights under a record of settlement.

[15] The respondent believes the non-publication order should be set aside.

Are there adverse consequences of publication?

[16] At the time of this determination, there is no evidence of any proceedings being brought against the applicant. The Serious Fraud Office has recently announced it shall not be pursuing criminal charges against the applicant.⁴

[17] A redacted version of Ms Dew's report was released publically on or about 11 February 2019. This provides substantial detail about the applicant's activities whilst employed by the respondent. There cannot be any adverse effect to the applicant by references to the redacted version of this document as a consequence.

[18] The parties' settlement agreement is contained in a s149 Record of Settlement (ROS). There cannot be any breach of the ROS by the reference to the existence of this document in my determination. Further the parties are no longer seeking to enforce its terms so there is no need to refer to the ROS other than the fact compliance orders were being sought and are no longer.

[19] There is public interest in the fact of this application given the respondent is a publically funded organisation and many of the facts giving rise to it have been publicised. The publication of this determination will not have any of the adverse consequences submitted by the applicant.

[20] However to ensure there is no inadvertent publication of the terms of the ROS or other material that the parties have not already released publically by any request to view the Authority's files, I will restrict access to the file. There is an order that no one other than the parties may access the Authority's file on this matter other than by order of Authority.

[21] On the above basis I can see no adverse consequences of publication of the parties' names and the fact of this application having been settled. The application for a permanent

⁴ Stuff online <https://www.stuff.co.nz/national/health/114004939/no-criminal-charges-for-former-waikato-dhb-boss-nigel-murray>.

non-publication order is dismissed. As a consequence the interim non-publication order is also set aside.

[22] Costs are reserved. Parties are encouraged to resolve the costs by agreement. If not, parties are to apply within seven days of this determination in order for costs. The other party has seven days thereafter to reply.

TG Tetitaha
Member of the Employment Relations Authority