

**NOTE: An order prohibiting publication of certain information applies to this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 526  
3067092

BETWEEN CPL  
Applicant

AND CHIEF EXECUTIVE OF  
ORANGA TAMARIKI  
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person  
Sophie Clark, counsel for the Respondent

Investigation Meeting: On the papers

Determination: 11 September 2019

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**DETERMINATION OF THE AUTHORITY**

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**Order prohibiting publication of certain information**

[1] Some information provided by the parties in relation to this application is about a child who is the subject of Family Court proceedings and orders. The child is the granddaughter of the Applicant. In those circumstances it was appropriate to prohibit publication of certain information, in any reference to the Authority's determination on this matter, which could directly or indirectly identify the child. The information prohibited from publication in that regard is the name of the child, the name of the Applicant, the names of other members of the child's whānau (including the child's parents), the location of the Applicant's workplace, and the names of employees of Oranga Tamariki referred to in the statement of problem, the statement in reply and the documents that the parties lodged in the Authority with those

statements. This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[2] To give effect to that order the Applicant is referred to in this determination by the randomly allocated letters of CPL.

### **CPL's application to the Authority**

[3] CPL is an employee of Oranga Tamariki (OT). The Family Court had granted a custody order to the chief executive of OT for the care and protection of CPL's granddaughter.<sup>1</sup> From March 2016 to June 2018 CPL was an approved caregiver for her granddaughter.

[4] On 29 June 2018 two OT social workers travelled from their office in another town and visited CPL at her workplace in a different town to advise that her granddaughter was to be removed from CPL's care and placed in an OT family home. The child was picked up for her preschool later that day by the social workers.

[5] Without going into any unnecessary detail, the social workers' decision to have the child placed elsewhere related to wider whānau matters, not any concerns about her physical safety and care when living with her grandmother.

[6] CPL sought to pursue a personal grievance about OT social workers visiting her at her workplace on 29 June 2018 and what she described as subsequent issues of only being given supervised access to her granddaughter and "being put on a communication plan" by her managers. She sought orders requiring OT to apologise to her and to compensate her for humiliation and damage to her reputation and wellbeing within the workplace and her community.

[7] In reply OT said the issues CPL raised were about her relationship with OT in her capacity as a former caregiver and related to the actions of OT employees involved in decisions about the care of her granddaughter. While CPL happened to be an OT employee, OT said the concerns she raised had not arisen from, and were not related to, her employment relationship with OT. It said this meant the Authority did not have jurisdiction to deal with CPL's concerns.

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<sup>1</sup> Oranga Tamariki Act 1989, s 101.

[8] The parties agreed that the Authority should consider this preliminary issue of jurisdiction “on the papers”. Accordingly this determination has been prepared after reviewing the statements and documents referred to earlier and after considering what the legislation and case law says about what the Authority can investigate and determine.

### **The Authority’s jurisdiction**

[9] The Authority has exclusive jurisdiction to determine employment relationship problems.<sup>2</sup> Such problems are defined as including a personal grievance and any other problem “relating to or arising out of an employment relationship”.<sup>3</sup>

[10] In considering whether a problem lies within its jurisdiction to resolve, the Authority has to assess the essence or reality of the claims made. The assessment considers not merely the form of the claims but their substance.<sup>4</sup> The problem must be one that directly and essentially concerns the employment relationship.<sup>5</sup> Where the issue between the parties arises independently of that relationship, the essence of the claim does not arise from it, even if the factual setting for the claim occurs in a workplace or an employment relationship.<sup>6</sup>

### **CPL’s concerns and OT’s responses**

[11] The documents provided by the parties show CPL promptly complained to OT’s chief executive about the removal of her granddaughter from her care. She also, through a lawyer, raised a personal grievance in July 2018. OT’s subsequent inquiries and response to the complaint addressed a suggestion that CPL’s reputation in her own work, in a different sector of OT’s operations, was damaged by removing her granddaughter from her care. An OT representative said if there had been any reason to believe CPL was not safe to work with children, OT would have initiated an employment investigation of its own. It had not done so. However OT’s investigator did uphold some parts of CPL’s complaints about how the social workers carried out the removal of the child on the particular day. Additional training was recommended for some of the staff involved. A senior official of OT also met with CPL to

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<sup>2</sup> Employment Relations Act 2000, s 161.

<sup>3</sup> Employment Relations Act 2000, s 5 definition of “employment relationship problem”.

<sup>4</sup> *Performance Cleaners All Property Services Wellington Limited v Chinan* [2017] NZEmpC 152 at [85].

<sup>5</sup> *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255 at [95].

<sup>6</sup> *BDM Grange Ltd v Parker*[2006] 1 NZLR 353 (HC) at [66].

acknowledge aspects of the removal were not well managed. CPL was advised she could ask for an advisory panel to review the investigation and outcome. She was also offered, but had not taken up, an opportunity to meet with a professional practice group to discuss its review of what had happened.

[12] In March 2019 CPL sent an updated personal grievance to OT saying she was treated in a rude, disrespectful and humiliating way on 29 June 2018 “and ever since”.

[13] OT’s response said her concerns sat outside her employment relationship with it. They arose from her role as a caregiver of her granddaughter. Her concerns about the OT social workers were what they had done in their roles, including making decisions about her granddaughter’s care.

[14] It acknowledged that difficulties could and did arise for employees who were also caregivers or where their whānau were in some way involved with OT. It acknowledged CPL might feel uncomfortable about what some colleagues knew, through their work, about her and her whānau but the confidentiality and privacy of that information was protected by professional obligations and conduct standards that applied to those OT staff.

[15] In July 2019 an OT advisory panel report told CPL it did not have jurisdiction to consider her complaints. She had sought OT’s agreement to an immediate return of her granddaughter to her care, discharge of the Family Court’s custody order and OT’s support for a parenting order in her favour. The panel said it could not interfere with or undermine a judicial or statutory process. It noted that CPL could still pursue some of her concerns with the Social Workers’ Registration Board and ask the Ombudsman to review the panel’s decision.

[16] Against that background it was clear that the essence of CPL’s claims concerned her relationship with OT as a caregiver for her granddaughter, not as its employee. The actions and decisions of OT directly and essentially concerned her role as a caregiver, not as its employee. While she was an employee of OT, the same actions and decisions could have occurred if CPL was working and employed elsewhere on the day that social workers had come to visit her as part of what they did in acting under the custody order OT had for the child. Some of what occurred had happened in her workplace, and she knew some of the people involved because she

also worked for OT, but the concerns about the arrangements for future care of her granddaughter arose independently of that relationship.

[17] There was nothing to suggest that OT, as her employer, had subsequently acted towards her in a way that disadvantaged her as its employee.

[18] There was no doubt that CPL felt a great deal of distress about what was happening for her granddaughter and wanted to do everything she could to advance what she thought was the right thing for the child. However those deeply felt concerns were as a family member and caregiver. They were not matters within the jurisdiction of the Authority to address as an employment relationship problem.

[19] Accordingly the Authority cannot take any further steps to investigate and determine CPL's application.

Robin Arthur  
Member of the Employment Relations Authority