

**Attention is drawn to the order
in this determination
prohibiting publication of
certain information.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 410
3111292

BETWEEN	PPA Applicant
AND	GHE LIMITED First Respondent
	YRA Second Respondent

Member of Authority: Vicki Campbell

Representatives: Matt McCarten, advocate for Applicant
Sanjay Sharma, counsel for Respondent

Investigation Meeting: On the papers

Determination: 9 October 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. Interim non-publication orders have been granted in favour of GHE Limited and YRA.**
- B. Costs are reserved.**

Parties names

[1] A random online letter selection tool had been used to select the letters used in this determination in place of the parties' names. These three letters do not bear any relation to the party's real names.

Employment relationship problem

[1] PPA lodged a statement of problem with the Authority on 7 July 2020 claiming GHE Limited has breached minimum employment standards, the employment agreement between the parties and that YRA is a person involved and/or aided and abetted in the breaches.

[2] In resolution of his claims PPA seeks payment of arrears of wages and the imposition of penalties against both GHE Limited and YRA.

[3] In their statement in reply lodged with the Authority on 24 July 2020 GHE Limited and YRA deny the claims.

[4] The parties have agreed to attend mediation and this has been scheduled to take place on 20 October 2020.

[5] On 2 October 2020 GHE Limited and YRA lodged an application with the Authority seeking urgent orders prohibiting publication of the following details on a without notice basis:

- a) The names of the parties to these proceedings and any details that would either directly or indirectly identify any of the parties;
- b) The name of the franchisor.

[6] PPA opposes the application.

Urgency

[7] The application for urgency was considered by the Authority and granted.

Without Notice application

[8] Subsections 173(2) and (3) of the Employment Relations Act 2000 stipulate that although the Authority may exercise its powers in the absence of one or more parties, if it chooses to do so it must provide an absent party with relevant materials. Section 173(4), however, states that for the avoidance of doubt, these provisions do not limit the powers of the Authority to make ex parte orders. As noted by the Court, this procedure may be appropriate, for instance, when the Authority is required to consider

whether an interim injunction should be issued against a party without notice in exceptional circumstances.¹

[9] On 2 October 2020 the application for the matter to be dealt with on a without notice basis was considered by the Authority and the application was declined.

Investigation

[10] During a case management call convened on 8 October 2020 the parties consented to this matter being dealt with on the papers currently before the Authority. This determination deals with the discreet issue as to whether non-publication orders should be granted.

The law

[11] The issuing of a non-publication order is discretionary and arises under with Clause 10(1) of Schedule 2 of the Act.

[12] In weighing up the exercise of the Authority's discretion I have had regard to the Employment Court decisions in *H v A Ltd*, *XYZ v ABC*, *Crimson Consulting Ltd v Berry*, and the Supreme Court decision in *Erceg v Erceg*.²

[13] In *Erceg*, the Supreme Court emphasised that the starting point is the principle of open justice, and that a high standard must be met before that principle can appropriately be departed from.³

[14] There is a need to strike a balance between open justice considerations and the interests of justice that are served by the exercising of the Authority's discretion to suppress specified information in any particular case.⁴

[15] The court confirmed in *Crimson Consulting* that an applicant for a non-publication order under the Act is not required to establish exceptional circumstances, although the standard for departing from the principle of open justice, as held by the Supreme Court, is high. The party seeking the order must show specific adverse consequences which would justify a departure from the fundamental rule.⁵

¹ *Bay of Plenty District Health Board v Culturesafe New Zealand Limited* [2020] NZEmpC 149.

² *H v A Ltd* [2014] ERNZ 38 at [78]; *XYZ v ABC* [2017] NZEmpC 40; *Erceg v Erceg* [2016] NZSC 135.

³ *Erceg v Erceg* [2016] NZSC 135 at [65] and [69].

⁴ *Crimson Consulting Ltd v Berry* [2017] ERNZ 511 at [92] footnotes excluded.

⁵ *Ibid* at [96].

Grounds for the application

[16] The grounds set out in the application by GHE Limited and YRA include:

- a) PPA, through his representative has threatened to make a public campaign against GHE Limited, YRA and the franchisor;
- b) Such threats are unhelpful to the mediation process and undermines the due process that is to be followed;
- c) If the names of the parties are published it would cause undue hardship to GHE Limited, YRA, YRA's daughter's wedding and the franchisor.

[17] In his untested affidavit YRA deposes:

- a) He has received a communication from PPA's representative seeking payment of a sum of money with threats to take this matter public and involve the franchisor if the sum is not paid;
- b) If PPA publishes the claim in the media it will destroy the reputation of both the business and himself personally. Further, the franchisor is not a party to the claims and should not be adversely affected by PPA's publicity;
- c) YRA was called to a meeting with the Chief Executive Officer of the franchisor and was informed PPA's representative had met with him and was advised of the claims between PPA and GHE Limited and YRA;
- d) YRA believes indirect threats have been made to the franchisor that if the matter is not settled the claims will be published in the media and the franchisor's name will be tarnished;
- e) As a result of the representatives discussion with the franchisor, YRA is being pressured to settle;
- f) YRA's daughter is getting married on 16 October 2020 and she and her in-laws are unaware of the claims made by PPA or the threats from his representative and he does not want to have her upset before the wedding;

- g) The parties have scheduled mediation and if the claims are resolved there, then any settlement will be confidential and any publicity before mediation will undermine that process and possibly impair the ability to reach an amicable resolution.

[18] In response to the application PPA through his representative states:

- a) His representative is a published columnist and writes regularly on cases taken by One Union on behalf of its members;
- b) When he writes articles he will always provide an advance copy to the employer and make amendments as necessary;
- c) The Union plans to picket GHE Limited's premises.

[19] Taking all factors into account I am satisfied it is in the interests of justice to grant the application, at least on a temporary basis pending a conclusion better informed by the substantive investigation. The parties are due in mediation within two weeks. If matters are able to be resolved with the assistance of an independent third party such resolution will be private and confidential. Granting the orders on an interim basis will preserve the position of the parties until a full and informed consideration of the merits of PPA's application can be undertaken.

Orders

[20] Until further order of the Authority the following information is subject to interim non-publication orders:

- a) The name of the applicant;
- b) The names of the respondents;
- c) The name of the franchisor; and
- d) Any details which might identify the parties or the franchisor.

Costs

[21] Costs on this application are reserved and should be dealt with by the presiding Member after the substantive investigation.

Vicki Campbell
Member of the Employment Relations Authority