

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 140  
3121632

BETWEEN	JODEE DYBALL Applicant
AND	STEVIE DRAPER Applicant
AND	GLADSTONE RETAIL LIMITED t/a PAK'N SAVE MILL STREET Respondent

Member of Authority: Geoff O'Sullivan

Representatives: Allan Halse, advocate for the Applicants  
Samuel Hood, counsel for the Respondent

Investigation Meeting: On the papers

Submissions [and further Information] Received from the parties up to and including 19 March 2021

Date of Determination: 12 April 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] On 12 October 2020 Jodee Dyball and Stevie Draper filed a statement of problem through their representative, Allan Halse, with the Employment Relations Authority. Amongst other things, the statement of problem claims personal grievances of unjustified disadvantage and constructive dismissal together with allegations of breaches of good faith and failure to provide a safe working environment.

[2] The claims are rejected by Gladstone Retail Ltd (GR).

[3] The matter has yet to be investigated by the Employment Relations Authority. Posts concerning the case have appeared on the applicants' representative's Facebook page which GR says are disparaging and risk causing GR reputational damage.

### **Interim non-publication orders**

[4] GR seeks interim non-publication orders which it says are necessary to prevent ongoing reputational damage that the applicants' representative Allan Halse and Ms Draper are causing it.

[5] The applicants, through Mr Halse, strongly resist non-publication orders especially on an interim basis.

[6] I have not replicated the statements that are at issue however it is clear that at least some of the posts could be seen as disparaging of the respondent. They are highly critical. In the memorandum of counsel dated 10 March 2021 I am told:

the immediate priority is dealing with what appears to be a deliberate attempt by the applicants' representative to damage the respondent, obstruct the Authority's investigation and undermine the administration of justice.

...

### **Analysis**

[7] Counsel for GR says the posts have caused significant damage to the respondent and can cast the Authority and its processes into disrepute. Pursuant to Schedule 2, clause 10(1) and s 160(1)(f) of the Employment Relations Act 2000 (the Act) the respondent seeks urgent interim non-publication orders in respect of:

- (i) the names of the parties in this matter;
- (ii) the statement of problem and statement in reply and any amended statements of problem or statements in reply that may be filed in the matter;
- (iii) The evidence filed in this matter;
- (iv) the communications between the parties, the representatives and the Authority;

- (v) the nature of the claims in this matter;
- (vi) the evidence filed in support of this matter; and
- (vii) the names of proposed and actual witnesses to this matter.

[8] It seems implicit in the application that the Authority is also asked to consider a take-down order in relation to the current posts complained of by the respondent.

[9] GR's application faces some immediate obstacles. If indeed the statements posted are disparaging or defamatory, then they have already been made and they are in the public arena. If they are defamatory, GR could seek redress and or compensation in a different forum. There are no current orders or agreements in place in respect of this matter which prohibit publication. It is also noted that the posts are not on the applicants' website but on their representative's. There is no settlement agreement in place prohibiting the posts.

[10] The Authority has broad powers enabling it to make non-publication orders however in this present case, the point needs to be made that publication has already occurred.

[11] As the Court noted in *FBV v XEY and EBD (Intervener)* non-publication orders are a departure from the fundamental principle of open justice.<sup>1</sup> GR therefore must establish sound reasons for the presumption favouring publication to be displaced, showing that, if non-publication is not granted there would be specific adverse consequence sufficient to justify an exception to the rule.

[12] Whilst GR are understandably upset with the Facebook posts and may worry regarding future posting, that does not provide a sound basis for the issuing of interim non-publication orders. This is for the reasons given above, namely:

- (a) Publication has already occurred;
- (b) GR has other legal avenues it could pursue in a different forum should it believe the posts are defamatory.

[13] 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

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<sup>1</sup> *FBV v XEY and EBD (Intervener)* [2020] NZEmpC 182.

the time. The scope of any order should be limited to only those matters necessary to secure the proper administration of justice.<sup>2</sup>

[14] The submissions made on behalf of GR do not convince me there are good reasons to issue interim non-publication orders, especially when the matters complained of are already in the public arena. To order non-publication of the proceedings and/or witnesses would be a departure from the principles of open justice and I am not convinced that there are any specific adverse consequences sufficient to justify an exception to the rule. The posts on CultureSafe's website will not impact on either of the parties receiving a fair hearing before the Authority. The claims brought before the Authority by Jodee Dyball and Stevie Draper together with the defences raised by GR, will be dealt by the Authority in an impartial manner.

### **Conclusion**

[15] For the reasons given above, the application for interim non-publication orders fails.

### **Costs**

[16] Costs are reserved.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**

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<sup>2</sup> *Erceg v Erceg* [2016] NZSC 135.