

Attention is drawn to the  
orders prohibiting publication  
of certain information in this  
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 26  
3154162

BETWEEN

SUSAN KENNEDY  
Applicant

A N D

FIRST SECURITY GUARD  
SERVICES LIMITED  
Respondent

Member of Authority: Nicola Craig

Representatives: Allan Halse, advocate for the applicant  
Mark Lawlor and Caitlin Sargison, counsel for the  
respondent

Investigation Meeting: On the papers

Submissions Received: 21, 24 and 25 January 2022 for the applicant  
21, 24 and 25 January 2022 for the respondent

Date of Determination: 26 January 2022

**PRELIMINARY DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] Susan Kennedy works as a national operations centre operator for First Security Guard Service Limited (First Security or the company). Ms Kennedy claims that she was subject to unjustified actions by her employer to her disadvantage, including bullying. First Security denies that it took unjustified actions.

[2] I dealt with two matters on this file as Duty Member previously. The parties were in discussions with the Mediation Services about attending mediation. On behalf of Ms Kennedy an urgent direction to mediation was sought. However, it became apparent that the parties had agreed on a suitable date of 27 January 2022 and so there was no purpose in making an urgent direction.

[3] Allan Halse, Ms Kennedy's representative then sought a case management conference regarding a check by the Police on Ms Kennedy which First Security appears to have sought. As the Duty Member I commented by email on 18 January 2022 that clarity regarding the purpose of the conference would assist. There was no claim before the Authority regarding that event although Ms Kennedy may have wished to amend her statement of problem to incorporate. No interim orders had been sought.

[4] Shortly prior to the mediation set for 27 January 2022 First Security lodged an application for urgent non-publication and related orders, along with an affidavit from a First Security employee relations staff member. Additional documents in support of the application were later filed. Both parties provided emails including material I am treating as submissions.

[5] A case management conference was held by telephone with the representatives and the employee relations staff member on 25 January 2022. Further submissions were heard. An email containing additional documents was received from Ms Kennedy's representative later that day.

[6] Permanent orders were sought although in the event the Authority was unable to determine such an application before mediation, interim orders were sought. Alternatively, a variation to the direction to mediation was sought to put off the mediation until a determination could be issued.

[7] I was reluctant to defer the mediation when the parties are in an on-going employment relationship and a disciplinary process is in place. Given the timing of the application and the relevance of the orders sought to the period before the Authority has determined Ms Kennedy's claims, it is appropriate to consider interim orders only at this stage.

[1] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties but has

stated findings of fact and law, expressed conclusions and specified orders made as a result.

### **The application and evidence**

[8] There are several components to the orders sought. The application is based on the conduct of Allan Halse, Ms Kennedy's representative. First Security asserts that Ms Halse has made several threats against it that if it does not settle with Ms Kennedy, then he will publish negative comments about the company and/or its management in the media and/or on his social media platforms. These are contained in emails sent by Mr Halse.

#### *Public comment*

[9] First Security seeks orders/directions prohibiting Ms Kennedy, her representative Mr Halse or his company CultureSafe NZ Limited (CultureSafe) from making public comments about the company and/or its management or the Authority's investigation. Although the concern is about negative comments the order sought covers any public comment.

[10] Emails to the company and their representatives include comments such as:

- "If you don't engage, it will be you two [management personnel] who will be the people being exposed".
- "...it will be your names ... [management personnel] that are made public..."
- "...imagine the headlines that this story will make."
- "CultureSafe NZ Limited will certainly be speaking about you [Duncan Cotterill] publicly"
- "I have already put this matter into the public arena without first naming First Security and Mark Lawlor [Duncan Cotterill]. That will probably happen over the weekend."

[11] Such comments continued after the company's lawyers sent a cease and desist letter to Mr Halse.

[12] Several posts have been made to the CultureSafe page discussing what appear to be the actions of the company and its lawyers. In order to avoid further publicising these matters I do not repeat the content but summarise them as being highly critical of the company and its lawyers.

[13] Emails, from the proceeding and a document filed in the Authority have been put up on CultureSafe's page. An attempt was made to redact the parties' names however, in one instance, the company's name remained unredacted. Potentially that could have been linked by readers to the previous posts not naming the company. The document was later removed from the page.

#### *Take down orders*

[14] The company seeks that Mr Halse and CultureSafe take down all and any posts that they have made on the CultureSafe website and/or on their social media platforms touching on the employment relationship between the parties and/or the Authority's investigation.

#### *Direct contact with First Security*

[15] First Security also seeks to have Mr Halse and CultureSafe prevented from contacting the company and its management directly and that communications on behalf of Ms Kennedy be sent to Duncan Cotterill (Mark Lawlor) only on behalf of First Security. This includes not copying First Security or its management in communications with Duncan Cotterill.

[16] First Security asserts that it has exhausted all reasonable efforts to require Ms Kennedy's representatives to cease and desist the threats and contact with First Security directly and so this seeks the Authority's assistance. It regards the continuing contact, along with threats of publication, as an attempt to apply improper pressure on the company to settle.

#### *Other orders*

[17] Additional orders were sought regarding Ms Kennedy's employment agreement and for provision of an audio tape made by Mr Halse. These are detailed below.

#### **The reply**

[18] Mr Halse strongly opposed the Authority making the orders sought. This included on the ground that the Authority has no jurisdiction to restrict for speech or to make orders against those who are not parties to the employment relationship. He emphasised the importance of free speech and the rights under the New Zealand Bill of Rights Act 1990, as well as of being able to speak up against bullying.

[19] Mr Halse describes his comments about going to the media or putting posts on his Facebook page as statements of his intention and his consistent position, rather than threats. He did not consider that the right to a fair hearing is prejudiced by his behaviour. There was no denial that the posts provided to the Authority by First Security related to that company.

[20] During the case management conference Mr Halse commented that:

- if the Authority made a non-publication order he would then post the names of the company and its manager
- he will publish if the Authority issues a non-publication order.

[21] In terms of the direct contact with First Security rather than its lawyers, Mr Halse claims that the contact with the company was necessary under the Health and Safety at Work Act 2015.

### **Discussion regarding non-publication**

[22] The principle of open justice of fundamental importance in New Zealand.<sup>1</sup>

[23] But where there are specific adverse consequences or other sound reasons to do so, the general principle may be departed from.<sup>2</sup>

[24] The Authority's jurisdiction regarding non-publication and confidentiality matters is set out in s 160(1)(e) of the Employment Relations Act 2000 (the Act) and clause 10 of Schedule 2 of the Act.<sup>3</sup> In addition the Authority has the power to regulate its own procedure.<sup>4</sup>

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<sup>1</sup> *Erceg v Erceg* [2016] NZSC 135, *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] NZEmpC 511.

<sup>2</sup> *Erceg v Erceg* [2016] NZSC 135, *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] NZEmpC 511, *FVB v XEY* [2020] NZEmpC 182.

<sup>3</sup> The Act, Sch 2, cl 10(1).

[25] In *Bay of Plenty District Health Board v CultureSafe New Zealand Limited* the Employment Court concluded that:

- The Authority has the power to issues directions to regulate its processes and ensure the fair conduct of proceedings before it
- Such directions can be issued against any person representing a party
- The right to freedom of expression must be subject to such reasonable limits as are prescribed by the right to natural justice
- Orders may be made against a representative if necessary or expedient to maintain the integrity of the Authority's process and ensure a fair investigation can be conducted
- The Authority may make takedown orders under s 160(1)(f) of the Act.<sup>5</sup>

[26] In that case the Court concluded that the threats made by Mr Halse in communications were an attempt to coerce the employer into settling the claim without it being heard by the Authority, thus amounting to improper threats of adverse publicity.<sup>6</sup>

[27] Mr Halse indicates that he has challenged the Employment Court's decision and it is also part of a judicial review proceeding. He provided documents regarding those matters. However, the judgment can be relied upon until such time as it is overturned.

#### **Orders regarding Mr Halse and CultureSafe**

[28] The parties' employment relationship is on-going with First Security working through a disciplinary investigation. Ms Kennedy and the company have good faith obligations to each other.

[29] Ms Kennedy and Mr Halse have a right to free speech but that right is not unlimited. The right to natural justice and a fair process in the Authority must be weighed.

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<sup>4</sup> The Act, s 160(1)(f).

<sup>5</sup> *Bay of Plenty District Health Board v CultureSafe New Zealand Limited* [2020] NZEmpC 149.

<sup>6</sup> As above, at [109].

[30] On the basis of the evidence before the Authority, there have been repeated threats to take the matter into the public arena. Albeit without what appears to be any deliberate public specification of the employer's name, there here have been strong adverse comments against First Security, its employees and its lawyer along with the use of what can be described as aggressive and threatening language. To use the language of Judge Corkill, the comments go well beyond what could be described as fair and temperate.<sup>7</sup>

[31] There are grounds on which to restrict the publication of material in this matter.

[32] I have given serious consideration to whether a more restrictive order limited for example, to the making of fair and temperate comment, would be practicable. First Security is concerned that the chances of that being an effective order are not high and that concern is understandable. There is little or no evidence of moderation of tone or approach or compliance with the request to only communicate with Duncan Cotterill. If anything, the posts appear to be ramping up. A limited order seems likely to result in on-going conflict about what comes within that description and repeated requests for the Authority's intervention.

[33] An order restricting public comment should be made regarding Mr Halse and CultureSafe.

[34] First Security also seeks an order preventing contact with the company and/or its management directly. Attempts over months by Duncan Cotterill to direct Mr Halse to correspond with it have not prevented such contact.

[35] Mr Halse is entitled to raise concerns about the Health and Safety at Work Act and further personal grievances on Ms Kennedy's behalf but has not explained why these cannot be raised with First Security's authorised lawyers.

[36] On the evidence before the Authority there has been improper pressure and an attempt to interfere with First Security's right to representation. In the absence of any satisfactory explanation, an order should be made requiring communication through First Security's lawyers.

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<sup>7</sup> *Bay of Plenty District Health Board v CultureSafe New Zealand Limited*, above at n 5, at [133].

[37] Regarding the service of the orders, no information has been provided about the internet service provider. Given the time restraints under which this determination is issued, the better approach is to allow First Security the opportunity to serve this determination and provide proof of that if it is required.

#### **Orders sought regarding Ms Kennedy**

[38] In addition to the inclusion of Ms Kennedy in the orders sought regarding public comment, First Security seeks order that Ms Kennedy complies with clauses 22 (internet and social media use) and 29 (confidentiality of her employment agreement). In addition extended orders were sought directed at Mr Halse and CultureSafe not aiding and abetting any breaches of those provisions.

[39] Compliance orders cannot be sought on an interim basis.<sup>8</sup> Any order sought would therefore need to be made on a substantive basis.

[40] The Authority received no evidence of Ms Kennedy making any public statements about this matter, let alone ones which First Security had particular objection to. On that basis orders currently are unnecessary.

[41] No orders are made against Ms Kennedy. She remains covered by the express and implied duties in her employment agreement along with her good faith obligations.

#### **Audio recording**

[42] First Security seeks the provision from Ms Kennedy or her representative a copy of an audio recording of a disciplinary meeting it held with her and her representative.

[43] Ms Kennedy has introduced to the Authority concerns she has about recent events concerning the police and First Security's role in them, although her claim was lodged before those events. It is not uncommon for matters involving on-going employment relationships to be amended to incorporate events which occurred after the matter began in the Authority.

[44] On Ms Kennedy's behalf it is asserted that the audio-recording demonstrates that there was no basis for First Security's recent actions and that it acted improperly.

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<sup>8</sup> *AFFCO New Zealand Limited v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZEmpC 154 at [33].

There appears to be a factual dispute between the parties as to what was said at the meeting and therefore whether the employer was justified in taking the actions it did.

[45] First Security is only seeking one recording. Thus the application has a narrow focus. Given the nature of the allegations made on Ms Kennedy's behalf regarding recent events, that recording is likely to be useful for discussion at mediation of resolving the matters between the parties.

[46] The Act recognises mediation as the primary problem-solving mechanism for employment relationship problems.<sup>9</sup> The Authority has a role in ensuring that problems can be effectively discussed and resolved at mediation.

[47] An order should be made requiring the provision of this recording to ensure that it can properly be discussed at mediation.

### **Orders**

[48] Interim orders are made, which are to remain in place, unless varied or revoked by further order of the Authority, until the Authority has concluded its investigation meeting. At the meeting consideration will be given to whether any further orders are necessary or the interim orders may lapse.

[49] The Authority makes the following interim orders:

(a) Allan Halse and CultureSafe NZ Limited are:

- (i) not to make or threaten to make any public comment about First Security Guard Services Limited and its management or the Authority's investigation; and
- (ii) are to take down any public postings made on their website and social media platforms touching on the employment relationship between the parties or the Authority's investigation;

(b) Mr Halse and CultureSafe NZ Limited are to cease and desist from contacting First Security Guard Services Limited and its management directly regarding Ms Kennedy, with communications regarding her only to

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<sup>9</sup> The Act, s3(a)(v).

be sent to Duncan Cotterill (Mark Lawlor). This includes not copying First Security Guard Services Limited and its management into communications with Duncan Cotterill;

(c) Ms Kennedy is directed to provide Duncan Cotterill (Mark Lawlor) with a copy of the audio recording from her disciplinary meeting by **8pm on 26 January 2022**; and

(d) Leave is reserved for the parties to come back to the Authority in the event of any issues arising regarding these orders.

**Costs**

[50] Costs are reserved.

**Nicola Craig**  
**Member of the Employment Relations Authority**