

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 275
3211919

BETWEEN	EDWARDS & HARDY HAWKES BAY LIMITED Applicant
AND	LEON THOMPSON Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Dave Cain, advocate for the Applicant
Murray Grant, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 3 February 2023 from Applicant
2 March 2023 from Respondent

Determination: 29 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination issued to the parties on 31 January 2023, the Authority declined an application from Leon Thompson for findings that Edwards and Hardy Hawkes Bay Ltd (E&H) had unjustifiably dismissed him.

[2] After the determination was issued E&H made an application for re-opening of the investigation so that an application for non-publication of information set out in the determination could be considered. The application for non-publication proceeded on the basis information about salary, commission structure and pricing were commercially sensitive, would damage E&H's reputation and it was confidential to E&H. E&H also asked for a stay.

[3] Mr Thompson does not oppose the reopening application but notes it is not uncommon for the Authority to include remuneration and other details that are relevant to the dispute the Authority has been asked to investigate. He also notes the issue should have been raised if not at the investigation meeting, then in final submissions, and it was not.

The reopening application

[4] In these circumstances I have considered the legal framework for reopening, and I consider in this case special circumstances exist given the amount of information E&H seeks to prevent from publication, the fact there was no application for non-publication at the investigation meeting, and the submissions and the new evidence and submissions lodged in the Authority seeking non-publication on the grounds of confidentiality and commercial sensitivity.

[5] In the event I am wrong, I note the decision in *JKL v Stirling Andersen Ltd*¹ where it was held that recall of a determination was not necessary in order to make a non-publication order.

Non-publication

[6] The information E&H seeks to have redacted is the following:

- (a) Leon Thompson's base salary;
- (b) certain details of E&H's commission structure;
- (c) Mr Thompson's jobs sold, his cancellations and his cancellation rate;
- (d) the value of the sales logged in December 2020; and
- (e) E&H's pricing policy.

[10] E&H submits rules 12 and 13 of the Senior Courts (Access to Court Documents) Rules 2017, provide factors the Authority needs to consider and balance in determining this matter. In summary it is submitted the public

¹ *JKL v Stirling Andersen Ltd* [2022] NZEmpC 107.

interest in publication of this information is outweighed by E&H's private interests such as confidentiality, commercial sensitivity, and reputation.

[11] Christopher Lucas, managing director, says E&H provided confidential information to the Authority in order to respond to Mr Thompson's personal grievance claim that his dismissal was unjustified. He set out his concern that a monthly breakdown of sales for one sales representative could allow a competitor to work out the average dollar value and then extrapolate that out to monthly and annual sales for an individual sales representative. Accurate estimates could then be made for individual branch turnover by calculating the number of sales representatives.

[12] It was also said E&H has never made this type of information public before. The fact the industry E&H is involved in is highly competitive and competitors will always be looking for a competitive edge was recorded as a ground, together with the fact details of Mr Thompson's conduct could bring E&H further reputational damage. E&H could be portrayed as a high-pressure door to door seller using the information regarding sales and the cancellation rates recorded in the determination.

[13] Mr Lucas also says E&H have had serious issues over the years with competitors passing off, stealing intellectual property, and looking to gain a commercial advantage dishonestly. Some of these have resulted in legal action and one involved the Police executing search warrants. E&H also say the information it is concerned about was not essential to understanding the Authority's decision.

Grounds for non-publication

[14] The starting point is the principle of open justice, and this is not to be departed from lightly.² The Authority does, however, have discretion to order that all or any part of any evidence be given, or pleadings filed or the name of any party or witness or other person not be published.³ The test for commercial

² *Erceg v Erceg* [2016] NZSC 135 at [13].

³ Employment Relations Act 2000, schedule 2, clause 10

sensitivity was recently restated by the Employment Court in *Wiles v Vice-Chancellor of the University of Auckland*:⁴

Where commercial sensitivity is claimed, the Court will need to assess whether the information before it is, in fact, commercially sensitive, and of such a nature that would justify an exception to the fundamental principle of open justice. In *Erceg v Erceg*, the Supreme Court noted that simply because the publicity associated with particular legal proceedings may, from the perspective of one or the other party, be embarrassing or unwelcome is not sufficient. The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule; the standard is a high one.

[15] The employment relationship problem arose because of concerns about irregularities in commission payments concerning sales as compared with cancellations, at a certain time of the year. The Authority was required to look at how E&H operations were structured and administered and how commission was calculated to identify those irregularities because they were disputed by Mr Thompson.

[16] This was commercial information but that does not automatically lead to the conclusion it is sensitive. Nor does the fact it is currently private justify non-publication because unwelcome attention E&H may wish to avoid will not be enough to displace the principle of open justice.

[17] It is submitted non-publication orders are necessary because release of the information highlighted would provide a factual basis for competitors to calculate branch turnover. Given E&H have had to take legal action in the past against competitors I am satisfied E&H can show specific adverse consequences if sufficient information is provided for such calculations to be made.

[18] However, the general rule of open justice can only be departed from to the extent necessary to serve the ends of justice. I am not satisfied all the redactions requested sought are therefore necessary. I consider removing reference to the numbers of jobs sold and cancellations in specified time periods but leaving the percentages in, will prevent the adverse consequences but allow

⁴ *Wiles v Vice-Chancellor of the University of Auckland* [2023] NZEmpC 45 at [54].

for the determination to accurately record the factual basis on which the determination was made.

[19] I do not agree publication of Mr Thompson's base salary amounts to an adverse consequence on its own with reference to the test set out above, nor do I agree that reputational damage or the fact the information is currently private is sufficient. Publication in this case also shows E&H acted when it was concerned irregular sales practices could not be adequately explained. That could equally enhance E&H's reputation.

Limited non-publication order is granted

[20] I order that:

- (a) A non-publication order is made prohibiting the publication of Mr Thompson's sales and cancellations where they relate to a specified time period. For clarity this order does not prevent publication of percentages of sales cancelled.

[21] The determination will be amended accordingly and posted on the public database of Authority determinations. The pause or stay has continued while the reopening application was considered.

Costs

[22] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, E&H may lodge, and then should serve, a reply memorandum on costs within 14 days of the date of issue of this determination. Mr Thompson has already lodged an application seeking costs from the reopening application. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[23] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Sarah Kennedy
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1