Attention is drawn to the order for non-publication referred to at paragraph [36] of this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE

[2023] NZERA 767
3266200

	BETWEEN	TE WHATU ORA – HEALTH NEW ZEALAND Applicant
	AND	BARRY YOUNG First Respondent
	AND	SIP Second Respondent
	AND	SXY Third Respondent
	AND	Unknown Respondents Fourth Respondents
Member of Authority:		Shane Kinley
Representatives:		Rebecca Rendle, counsel for the Applicant Matthew Hague, counsel for the First Respondent
Investigation Meeting:		18 December 2023 in Wellington and by AVL
Further Information received:		Up to 19 December 2023
Date of Determination:		20 December 2023

FOURTH PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Te Whatu Ora – Health New Zealand (TWO) applied to the Authority ex parte in the afternoon of 1 December 2023 for an interim injunction restraining Barry Young (at the time identified as ZCM[1]) from disclosing to third parties and/or releasing publicly information held including but not limited to confidential personal health and other information contained on TWO's National Vaccination Database (The Database). An urgent order was also sought requiring Mr Young to comply with cl 6.4 of his employment agreement with TWO, as well as other orders dealt with in this determination.

[2] Three prior determinations have been issued in relation to this matter:

(i) *ISV v ZCM and Ors* [2023] NZERA 718 (First Preliminary Determination of the Authority);

(ii) *Te Whatu Ora – Health New Zealand v ZCM and Ors* [2023] NZERA 719 (Second Preliminary Determination of the Authority); and

(iii) *Te Whatu Ora – Health New Zealand v ZCM and Ors* [2023] NZERA 728 (Third Preliminary Determination of the Authority).

[3] TWO now apply for a compliance order in relation to Mr Young (seeking an order that he comply with the orders in paragraph [14] of the First Preliminary Determination of the Authority (the Orders)).

[4] TWO also requested that I make three further orders:

(a) An order requiring Mr Young to comply with the lawful and reasonable instruction issued by TWO on 6 December 2023 that he refrain from public statements about his employment or TWO's information until TWO has been able to meet with him to further discuss its concerns (Instruction).

(b) An order requiring Mr Young to comply with the lawful and reasonable instruction issued by TWO that he refrain from making any public comments

[1] In Directions of the Authority issued on 11 December 2023 I varied an earlier non-publication order to allow for Mr Young to be identified.

about these proceedings and the related employment investigation (Non-comment Order[2]).

(c) An order requiring Mr Young to file and serve an affidavit (Disclosure Order):

(i) containing a complete list of all people, entities and locations that he has sent, shared or stored any confidential information held by TWO; and

(ii) containing full details of the methods used by Mr Young to obtain/export from TWO and disclose this information.

[5] Mr Young is opposed to the granting[3] of all orders sought by TWO, for reasons summarised in this determination.

The Authority's investigation

[6] For the Authority's investigation submissions were presented by counsel for TWO and Mr Young, with written submissions provided by counsel for TWO. TWO's application was accompanied by an affidavit [redacted text by Direction of the Authority]. Counsel answered questions from me when presenting submissions. TWO provided further information by email following the presentation of submissions, which comment was made on behalf of Mr Young on 19 December 2023.

[7] TWO have provided evidence of personal service on SIP and service on SXY by virtue of personal service on SIP, who is the sole shareholder and Director of SXY of documents related to these proceedings, as directed by the Authority. SIP and SXY have not engaged with the Authority in relation to these proceedings and did not contact the Authority Officer to make arrangements to attend the presentation of submissions, however, I am satisfied that it was appropriate to proceed in their absence given this determination is focused on orders that TWO seeks against Mr Young.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary

[2] TWO described this as the "Non-publication Order". For the purposes of this determination I have adopted the term "Non-comment Order" to avoid any confusion with the non-publication orders that are currently in place in relation to these proceedings.
[3] Section 137(1)(b).

to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[9] In separate proceedings involving Mr Young and TWO I have issued a preliminary determination[4] declining Mr Young's application for an interim order restraining TWO and all its contractors, employees, or agents from continuing with an investigation and/or finalising a decision regarding potential disciplinary action against Mr Young.

[10] Mr Young has been suspended from his employment by TWO pending an employment investigation [redacted text by Direction of the Authority]. An employment investigation meeting has been scheduled for 19 December 2023.

[11] Mr Young has also been charged under s 249(1) of the Crimes Act 1961 with "accessing computer system for dishonest purpose" (the criminal charge), which he says is based on the same alleged facts that were the basis of his suspension and the employment investigation.

[12] The other proceeding and the criminal charge form part of the context for the applications by TWO for orders that are the subject of this determination.

Jurisdiction

[13] In relation to the compliance order that TWO seeks, the Authority has the power to order compliance under s 137(2) of the Employment Relations Act 2000 (the Act) where any person has not observed or complied with any order made or given under the Act by the Authority.

[14] In relation to the Instruction and Non-comment Order sought by TWO, these were framed as being orders that Mr Young comply with a lawful and reasonable instruction of TWO issued under an implied term of his employment agreement. I have approached these applications as also being for compliance orders.

[15] I am satisfied the jurisdiction exists under s 161 of the Act for the Authority to make the compliance orders sought.

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[4] *Barry Young v Te Whatu Ora – Health New Zealand* [2023] NZERA 761.

[16] In relation to the Disclosure Order sought by TWO, I have considered this in the context of the Powers of the Authority under s 160 of the Act, including the Authority's ability to "call for evidence and information from the parties".

The compliance orders sought are granted, but not to the extent sought

[17] The Orders that TWO seeks compliance orders in relation to require that:[5]

(a) Mr Young does not disclose to any third party or publicly release any information held by TWO on the Database or the Information[6];

(b) Mr Young immediately return to TWO the Information and any other information he has obtained via his employment with TWO and/or access to TWO's systems together with any electronic devices belonging to TWO;

(c) Mr Young does not access or perform any set of operations on the Information or any copies, extracts of other sets of information derived from the Information, including using, accessing, searching, reviewing, copying, sharing, publishing, making available to any member of the public, transferring or disclosing the Information;

(d) Mr Young permanently delete any and all copies of the Database, any versions of the Information and any other unlawfully obtained information in his possession or control;

(e) [not relevant for this determination as order related to SIP and SXY and any Unknown Respondents]

(f) Mr Young comply with cl 6.4 of his employment agreement.

Submissions of the parties

[18] TWO submitted that in breach of the Orders Mr Young has given an interview with Alex Jones (the Jones interview) where he discusses the Information that is the subject of the Orders as well as these proceedings and the employment investigation. Following Mr Young's appearance at the District Court on 18 December 2023 in relation to the criminal charge, TWO says that Mr Young made further public statements, which further reinforced its submission that compliance and other orders are necessary and that its proposed

[5] *ISV v ZCM and Ors* [2023] NZERA 718 at [14]. The text of the Orders has been modified as appropriate for the purposes of this determination, reflecting the identification of Mr Young and edited for tense but not changing the substance of the Orders.

[6] The term Database is defined in the original statement of problem for this matter and the term Information is defined in the First Preliminary Determination of the Authority at [13].

employment process does not infringe upon Mr Young's right to silence and to not be required to incriminate himself. TWO say its proposed employment process does not give rise to an arguable case that his rights to a fair trial would be compromised given that "he has spoken publicly about the fact he would do it again and about his intended defence".

[19] TWO also says that it does not agree with Mr Young's position that the Jones interview does not breach the Orders and Mr Young is continuing to make statements which disclose Information within the scope of the Orders. TWO said in submissions that the undertakings that Mr Young has provided were unsatisfactory as they did not reflect clearly enough the Orders and were not witnessed.

[20] Finally TWO sought the Authority's clarification of whether the obligation for Mr Young to comply with cl 6.4 of his employment agreement would continue to apply once Mr Young's employment ends, which it argues it does. TWO says this matter needs clarification as the undertakings that Mr Young has provided say only that he will comply with cl 6.4 while his employment agreement exists.

[21] Mr Young submitted that there is nothing in the Orders that restrict him "generally from making public comment" and that "neither party has breached the [Orders] made by the Authority on 1 December 2023", Mr Young pointed to undertakings that he has provided (and updated following the presentation of submissions, which he says address the Orders to the extent that he is able to do so (given he is no longer in possession of TWO's electronic devices and cannot return them).

[22] Oral submissions for Mr Young were that the ongoing application of cl 6.4 of Mr Young's employment agreement was a "red herring" as Mr Young does not have possession of the Database or Information, nor does he have possession of TWO's electronic devices, so he is no longer in a position to release the Database or Information, or to breach cl 6.4 of his employment agreement, should I find that that clause continue to apply once Mr Young's employment ends.

[23] Supplementary submissions for Mr Young by email, following the oral presentation of submissions, were that Mr Young's public comments after his appearance in relation the criminal charge were not breaches of the Orders as "All of the statements relate to the criminal charge. They were made outside Court, and the media reporting was in that context." It was

further submitted that "that if any part of the application made by TWO is accepted orders should be as narrow as possible and relate only to [Mr Young's] employment relationship. As this employment relationship ends on 5 January 2024, it is submitted that as far as possible, if any orders are made, they should expire on 5 January 2024."

Analysis and orders

[24] Having reviewed the undertakings provided by Mr Young, I am satisfied that the only matters where compliance orders should be considered further relate to Orders (a) and (f). As Mr Young no longer has possession of TWO's electronic devices, which is where he says the Database and Information are, then I do not consider that he is able to breach Orders (b), (c) or (d), and do not consider it appropriate in the circumstances to consider further compliance orders at this time. The undertakings that Mr Young has provided include the chapeau that he has and will continue to comply with the Orders for as long as the Orders are in place, which I consider are sufficient to protect TWO's interests should it identify facts that suggest that Mr Young is breaching those Orders. A compliance order to that effect is however premature.

[25] In relation to Order (a), I consider that Mr Young's interpretation of what this Order requires is narrower than what it does in fact require. Mr Young says that in disclosing his opinion about the COVID-19 vaccine causing excess mortality he is not disclosing any part of the Information. While he is not disclosing the Database, he clearly states in the Jones interview that his opinion is based on statistical analysis of the Database. I consider that analysis falls within the scope of the definition of Information covered by Order (a) and that Mr Young is breaching that Order. Mr Young is clearly aware of Order (a) and has chosen to continue to make comments of that nature.

[26] In relation to Order (f), Mr Young has provided an undertaking to comply with cl 6.4 of his employment agreement while it is in force, but the wording of his undertaking clearly suggests that he does not consider that cl 6.4 would survive the end of his employment agreement That wording could be interpreted to mean that he intends to breach cl 6.4 after the end of his employment with TWO, which is imminent as he has resigned effective 5 January 2024. Whether he is correct in his interpretation on that point is a matter for another day and a substantive determination, however, based on his position I consider that a compliance order is also appropriate in relation to Order (f). For the avoidance of doubt,

Order (f) remains in force until further order of the Authority. TWO has indicated that it may seek permanent Orders in relation to this matter, which could provide an opportunity for this issue to be substantively considered.

[27] For those reasons, I consider it is appropriate to issue a compliance order under s 137(2) of the Act requiring that Mr Young comply with the Orders at paragraph [14](a) and (f) of the First Preliminary Determination of the Authority.

[28] I am required under s 137(3) of the Act to specify a time within which this compliance order must be complied by. I consider that an appropriate timeframe is by no later than 12 midday on Thursday 21 December 2023 and specify this as the time under s 137(3) of the Act by which Mr Young comply with the Orders at paragraph [14](a) and (f) of the First Preliminary Determination of the Authority.

[29] There are very serious consequences where there is a failure to comply with a compliance order.

[30] Mr Young is advised that if he does not observe or comply with a compliance order the Employment Court may do one or more of the following pursuant to s 140 (6) of the Act:

> (d) order that the person in default be fined a sum not exceeding $40,000;
> (e) order that the property of the person in default be sequestered.

Instruction order and Non-comment order are not granted

[31] TWO submitted that Mr Young should be required to comply with lawful and reasonable instructions that he refrain from:

(a) public statements about his employment or TWO's information until TWO has been able to meet with him to further discuss its concerns (Instruction); and

(b) making any public comments about these proceedings and the related employment investigation (Non-comment Order).

[32] TWO say the Instruction meets the requirements of being a lawful and reasonable instruction[7] and that Mr Young has failed to confirm that he will comply with the Instruction.

[7] Referring to *New Zealand Central Region etc Local Government Officers' Union v Hastings District Council* [1991] ERNZ 630 at 632 and *The Wellington, Taranaki and Marlborough Clerical, Administrative and Related Workers Industrial Union of Workers v College Group Ltd* [1984] ACJ 315 at 316.

TWO say Mr Young's statements are disparaging and have the potential to bring TWO and other government agencies into disrepute.

[33] TWO say without the Non-publication Order Mr Young will continue to make public statements regarding these proceedings and the related employment investigation that will damage TWO and the integrity of these processes.

[34] Submissions for Mr Young are that the Instruction Order is unduly broad in scope and not in the interests of justice, and the proper course is for TWO to undertake an employment process. Mr Young also submitted the compliance orders are not available in relation to these orders sought by TWO and urged caution in this regard.

Analysis and outcome

[35] I am not persuaded that it is appropriate to issue the Instruction Order or Non-comment Order sought by TWO and decline to make those orders. While I accept that TWO are entitled to issue lawful and reasonable instructions to Mr Young, I prefer the submissions for Mr Young that the proper course in this case is for TWO to undertake an employment process, if it considers Mr Young is not following a lawful and reasonable instruction. Any actions that TWO then takes would need to meet the standard of actions of a fair and reasonable employer and, if Mr Young objects to TWO's actions, could be for substantive consideration at a later time.

[36] In relation the Non-comment Order, I have issued a non-publication order in the separate proceedings involving Mr Young and TWO as follows:[8]

> Under clause 10 of the second schedule of the Employment Relations Act 2000, and except where necessary for enforcement purposes, I prohibit publication of the outcomes of TWO's employment investigation into Mr Young (including the date of his employment ending if that is before 5 January 2024 and the reasons for his employment ending), the questions that TWO ask Mr Young and his responses, or any identifying information about the employment investigation, until further order of the Authority.

[37] That non-publication order applies to both TWO and Mr Young. Mr Young is cautioned that any public comments he makes in relation to these proceedings should not breach that non-publication order.

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[8] *Barry Young v Te Whatu Ora – Health New Zealand* [2023] NZERA 761 at [31].

Disclosure Order is not granted at this time

[38] TWO submitted that the Disclosure Order is necessary so it can prevent the further unlawful disclosure of the Information in breach of the Orders. TWO referred to the Court's judgment in *Wackrow v Fonterra Co-operative Group Limited*[9] that there is a need to balance justice between the parties taking into account all relevant factors and that an employee's right to silence and a fair trial will not necessarily prevail. In this case TWO says "the balance of justice lies in favour of requiring Mr Young to disclose where the information has been shared so that [TWO] can meet its obligations to take active steps to assess the impact of the privacy breach, the size of the breach, the potential harm" and take other appropriate steps.

[39] Mr Young submitted that the subject matter of the Disclosure Order directly relates to the criminal charge and he should not be required to incriminate himself by participating in an employment process where there are parallel criminal proceedings. He says that the Disclosure Order should not be granted until the conclusion of the criminal proceedings.

[40] I am not persuaded it is appropriate at this time to grant the Disclosure Order sought by TWO, due to the risk that this could require Mr Young to incriminate himself and undermine his right to a fair trial. In reaching this view, I have stood back and looked at the totality of the matter, including the submissions of the parties and the affidavit evidence lodged in these proceedings, I am satisfied that overall justice favours not making the request to make the order sought by TWO at this time.

Summary of Orders

[41] For the reasons set out above I have ordered under s 137(2) of the Employment Relations Act 2000 that Barry Young comply with the Orders at paragraph [14](a) and (f) in *ISV v ZCM and Ors* [2023] NZERA 718 by no later than 12 midday on Thursday 21 December 2023.

[42] The other orders sought by Te Whatu Ora – Health New Zealand are declined or not made at this time.

Costs

[9] [2004] 1 ERNZ 350. *Wackrow* is discussed in more detail in my determination in the separate related proceedings between Mr Young and TWO.

[43] Costs are reserved.

Shane Kinley
Member of the Employment Relations Authority