

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2026] NZERA 153
3321680

BETWEEN	NIX Applicant
AND	XHO Limited First Respondent
AND	FPT Second Respondent

Member of Authority: David G Beck

Representatives: Amy Keir, counsel for the Applicant
No appearance by the respondents

Investigation Meeting: 6 March 2026, in Christchurch

Submissions Received: 13 February and 6 March 2026 from the Applicant
5 March from the Respondent

Date of Determination: 11 March 2026

DETERMINATION OF THE AUTHORITY

Application for non-publication order

[1] This determination resolves an application for enforcement and penalties by the applicant pertaining to an admitted breach of a settlement agreement made pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[2] As a preliminary matter the second respondent asked the Authority pursuant to s 10(1) Schedule 2 of the Act, to impose a non-publication order to protect their identity and the identity

of the first respondent company. The application is made primarily on the basis that the confidentiality provisions of a s 149 settlement agreement support the notion of ongoing confidentiality to reinforce the public interest in encouraging parties to view confidential settlement options as a means of enforcing their rights, without the sanctity of confidentiality being broken. In submissions, the second respondent asserted that a “as long as I have a liability for the settlement, I have a corresponding benefit” of confidentiality and a mutual non-disparagement provision.

[3] The applicant opposes the non-publication order being granted generally suggesting the respondents have not met the high standard required to depart from the concept of open justice and suggests that the second respondent has failed to produce evidence to support a submission that publication would be detrimental.¹ The applicant has asked the Authority to consider that the second respondent has aggressively placed their reputation and alleged good standing and the solvency of the first respondent, in the public arena and that the second respondent’s actions of non-compliance in this matter are essentially of a wider public interest. In submissions during the investigation meeting, the applicant indicated they would on reflection prefer to have non-publication extended to themselves but are comfortable with the respondents being named.

[4] I need to be satisfied that a sound basis for the exercise of the discretion the statute provides is apparent as non-publication does depart from the important principle of open justice.

[5] The full Employment Court in *MW v Spiga Ltd*² held that the existing presumption of open justice should only be departed from where sound reasons exist. This affirms the existing leading authority of the Supreme Court in *Erceg v Erceg*.³ The majority in *Spiga* set out a twofold test:

- (1) Firstly, there must be “reason to believe that the specific adverse consequences could reasonably be expected to occur”.
- (2) Secondly, the “Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case”. The Court said this part is a weighing exercise and that equity and good conscience may be involved.⁴

¹ *Erceg v Erceg* [2016] NZSC 135.

² *MW v Spiga Ltd* [2024] NZEmpC 147.

³ Above n 1 at [13].

⁴ Above n 1 at [88] and [89].

[6] As a result, I must be convinced of specific adverse consequences pertaining to the parties that would allow me to depart from the open justice principle as the standard for such a departure is a high one.⁵ Further, in terms of viewing the role of the Authority broadly as resolving employment relationship problems, I normally struggle to see compelling public interest in a narrow dispute over the enforceability of a settlement agreement. However, I must balance that against the nature of the breach at issue and, the circumstances surrounding the entering of the settlement agreement that it is not appropriate to traverse in anything but generalised reference in this determination.

[7] Given the breach at issue is admitted by the second respondent, the only legal consideration is whether it is appropriate to order penalties against the respondent parties for non-compliance. I also observe that there is a possibility in publishing the parties' names that it may lead to unhelpful speculation as to what their dispute was about and thus negatively impact upon the applicant's future career prospects. The Employment Court in considering how the interest in open justice should be weighed, has noted that:

The reality is that the routine online publication of decisions of the Employment Relations Authority and the Employment Court creates a search mechanism for those who wish to use it, for example, to screen applicants for employment. It has become increasingly well recognised that the spectre of publication puts many employees off pursuing their claims, which in turn raises important access to justice issues.⁶

[8] In assessing brief submissions, I observe both parties have chosen a path to settle by compromise and on a strictly confidential basis, this pathway normally has mutual benefits worth preserving. However, I am persuaded that in view of the employment relationship breakdown and the factual matrix preceding it, there is no compelling reason to provide the ongoing cloak of confidentiality to the respondent parties but there is a corresponding compelling reason to protect the identity of the applicant on an ongoing basis.

Finding on respondents' application for non-publication

[9] I decline to order non-publication as requested by the second respondent. However, given they have a right to challenge this decision I must necessarily order interim non-publication of the identities of both the respondent parties and specific facts of this matter that would lead to the identification of either party; not doing so would render any challenge

⁵ Ibid.

⁶ *Chief of Defence Force v Darnley* [2021] NZEmpC 40 at [3].

moot. So, pursuant to Clause 10 of schedule 2 of the Act, I grant an interim non-publication order prohibiting the publication of the identity of all the parties to this employment relationship problem and this determination will not discuss in detail any features of the dispute that could lead to the parties being identified.

[10] The terms of the interim order are:

- (a) This interim order is to stay in place for 28 days commencing from the day after the date of this determination, to allow the respondents to file a challenge to this aspect of the determination if they so wish.
- (b) If the respondents file a challenge, this interim non-publication order will be extended to remain in place until the Employment Court makes any order that renders it unnecessary.
- (c) If the respondents do not file a challenge to the non-publication order in this determination, then the interim order will lapse pertaining to their identity being protected, but an ongoing permanent order will prevail protecting the identity of the applicant.

[11] I use the following random identifiers for the parties:

- NIX the applicant
- XHO Limited the first respondent
- FPT the second respondent.

The Authority's investigation

[12] At the Authority meeting I heard evidence and submissions from NIX and their counsel based upon NIX's affidavit of 2 February 2026. FPT did not appear but agreed prior to the investigation meeting that their written submission of 5 March 2026 and earlier statement of 13 February, constituted their evidence. I am satisfied that FPT was provided with an ample opportunity to appear before the Authority but has chosen not to do so.

[13] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders, but I do not record all evidence.

The employment relationship problem

[14] NIX has made an application for a compliance order and penalties pertaining to a conceded breach of a settlement agreement, made pursuant to s 149 of the Act.

[15] The disputed settlement agreement was executed by all parties and an MBIE mediator pursuant to s 149 of the Act on 16 December 2025. It provides that NIX be paid compensatory payments and a contribution to legal costs within 7 days of the settlement agreement being certified by a mediator.

What caused the employment relationship problem?

[16] NIX was employed by XHO Limited up until August 2024 when they resigned and then pursued a personal grievance alleging a constructive dismissal citing alleged breaches directly instigated by FPT.

[17] The matter was lodged in the Authority in September 2024, and NIX adhered to an initial direction of the Authority, by lodging evidential statements on 2 October 2025. An initial investigation meeting was set down for 2-5 December 2025.

[18] NIX says they became aware of FPT and their company XHD Limited and other entities, being under scrutiny in late October 2025 with a potential that they may have to stop trading.

[19] After some significant delay that objectively can be attributed to FPT and which included an inexplicable failure to meet exchange of evidence deadlines, an Authority directions conference of 11 November 2025 adjourned the investigation meeting to 3-6 March 2026.

[20] In the interim, NIX says (and provided correspondence evidencing this) that in mid-November, FPT initiated through their lawyer, significant overtures to settle NIX's personal grievance on a without prejudice basis. NIX says negotiations progressed to the point they instructed their lawyer to accept a settlement offer on 25 November, and on that day a draft settlement agreement was forwarded to FPT's lawyer. No timely response was provided until 3 December, when FPT's lawyer sought amendments to the settlement agreement. NIX demonstrated that the changes were assented to and their lawyer sent a signed settlement agreement to FPT's lawyer on 4 December.

[21] On 9 December, FPT's lawyer returned a signed settlement agreement to NIX's lawyer with some minor formatting amendments that necessitated NIX re-sign the agreement. Then, on FPT's lawyer's instruction the completed agreement was forwarded to the Mediation Service for a mediator's certification under s 149(1) of the Act on 9 December.

[22] FPT says on 10 December they became aware of business difficulties and the likelihood of intervention by an external agency seeking to control finances. FPT says from 10 December they (XHO Limited) ceased employing anyone.

[23] Evidence then shows the confirmation step required by the mediator occurred with NIX on 12 December and later 16 December FPT concurred. This step requires the parties to confirm in a discussion with the mediator pursuant to s149 of the Act, that they "fully understand that once the mediator signs the agreed terms of settlement" it (in summary):

1. Is final, binding and enforceable.
2. Unable to be brought before the Authority or Employment Court except for enforcement purposes.
3. Can not legally be cancelled.
4. Provides that a breaching party is liable to a penalty imposed by the Authority

[24] On 17 December, FPT's lawyer emailed the Authority confirming all matters had been concluded and the March 2026 investigation meeting was to be vacated.

[25] However, FPT took no steps to meet the agreed payments as they say on 19 December, the external agency imposed a freeze on their company banking and severe restrictions on their personal finances. FPT says XHO Limited may well be caught up in subsequent liquidation proceedings.

[26] On 23 December an email exchange between NIX's lawyer and FPT's lawyer in which clarification was sought as to why the settlement terms had not been actioned revealed the latter had no further instructions and assumed their retainer had come to an end.

[27] On 24 December NIX's lawyer in a direct communication with FPT sought payment of the amounts due and indicated enforcement proceedings were in contemplation against the company and FPT.

[28] In a response of 26 December FPT indicated "Your client appears to be in breach of the settlement agreement" but despite a request by return email from NIX's lawyer no further details were supplied of any alleged breach on Nix's part, and the non-settlement issue was not addressed.

[29] On 7 January 2026, counsel for NIX indicated to the Authority that the unjustified dismissal claim could not be withdrawn as the terms of the s 149 settlement agreement had not been met and an application was subsequently made to the Authority seeking compliance orders, penalties and costs against XHO Limited and FPT.

[30] FPT in reply, initially conceded the settlement agreement had been breached but risibly suggested they were not a liable party for enforcement purposes. I held a directions teleconference on 9 February attended by NIX's counsel. FPT initially took part but then abruptly left the call after being apprised of its purpose (to timetable exchange of written evidence and an investigation meeting). After the call, I issued a Directions Notice that observed FPT had signed the s 149 settlement agreement in two places, one on behalf of XHD Limited and another in a personal capacity.

[31] In FPT's submissions of 5 March for the investigation meeting, they did not pursue further their contention of liability on a personal basis being at issue, and FPT's submissions were rightly centred around both XHD Limited's corporate liability and FPT's personal liability for the admitted breaches. FPT outlined the reasons why they and XHD limited were unable to meet the terms of the settlement agreement due to externally imposed constraining court orders (copies supplied), but FPT did not provide a detailed exposition of his personal assets and liabilities.

[32] FPT suggested the Authority allow them a pause of 12 months to get their affairs in order to enable meeting the settlement terms.

[33] NIX's submission essentially contended that FPT knew of the likelihood the company's financial difficulties would prevent them from fulfilling the agreed terms and FPT should have been aware that their personal financial situation would also be compromised.

Imposition of penalties and how they should be apportioned?

[34] Failure to fulfil the terms of a settlement agreement is a serious breach of the Act. The Authority, under s 133 of the Act has the jurisdiction to award a penalty against a defaulting party. In the situation of a company, the maximum penalty is \$20,000 for each breach and for an individual \$10,000 for each breach. I must consider matters set out in s 133A of the Act in determining what if any, amount I should impose including whether the penalty should be paid to the Crown or apportioned. This is a discretionary exercise.

[35] Generally, the approach the Authority takes is guided by the full Employment Court decision of *Borsboom v Preet PVT Limited*⁷. *Preet* identified a four-step framework to fixing penalties:

- Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
- Step 2: Assess the severity of the breach in each case to establish a provisional penalty starting point. Consider both aggravating and mitigating features.
- Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
- Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.⁸

The nature and extent of the breaches

[36] It is evident that the breaches of the settlement agreement are fundamental and FPT has, as discussed below, failed to wholly convince they were not part of a strategy to avoid an Authority investigation of the circumstances of FPT's sole contribution to the circumstances that led to the employment relationship ending.

⁷ *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

⁸ At [151].

[37] It is not trite to observe that agreements made under s 149 of the Act are compromises in which each party gives up something. For the employee this usually involves in return for compensation, a commitment to give up personal grievance options. On the other side of the ledger, the employer and/or individuals involved, crucially gain finality of the matter and have no exposure to potentially reputation damaging, inevitably costly, and sometimes lengthy litigation.

[38] In this context, XHO Limited and FPT after some deliberation and while legally represented by senior counsel, entered a settlement agreement with an envisaged immediate payment of settlement funds to NIX that presumably, at the time of signing, suited the company's financial circumstances. Further it is evident in personally guaranteeing the settlement funds that FPT, who professes to be an experienced business operator, was confident in their own financial resources being sufficient to meet the liability involved. I find there is some evidence to show that FPT at least knew the company was in serious strife and should not have undertaken the liability of the settlement agreement when he should have known of the extent of the company's difficulties.

[39] However, I am less convinced that FPT fully appreciated the personal difficulty they were about to be placed in resulting from their association with XHO Limited's finances and associated entities. I nevertheless find that FPT acted recklessly in luring NIX into a settlement agreement without any certainty of their ability to meet the terms to which they had given a personal guarantee.

Were the breaches intentional, inadvertent or negligent?

[40] While FPT's submission is it was not within their contemplation that XHO Ltd's finances would be the subject of control by a third party and constrained by court orders and these orders would extend to FPT's personal finances, I find FPT has not convinced the Authority that alternative personal fund raising was not possible. In all the circumstances, I do not find the breaches were inadvertent as they resulted from FPT engaging in giving a reckless guarantee over a significant sum of money while legally advised, when they should have anticipated otherwise and/or taken more cautious steps to ensure they could meet the obligations created. The situation came very close to a finding that FPT mislead NIX into entering a

settlement agreement that benefited FPT by avoiding the potentially damaging scrutiny of an Authority investigation.

What steps have been taken in mitigation?

[41] I acknowledge that the settlement amounts due fell within a very difficult period for FPT's businesses, but the fact remains, no steps have been taken to address matters and FPT has shown little to no contrition.

Severity of breaches

[42] On top of statutory considerations (the aims of the Act), I am obliged following *Preet*, to assess the extent of FPT and XHO Limited's culpability and take the public interest factor of using the penalty regime as a legitimate deterrent into account. The settlement amounts outstanding are significant and the impact on NIX in all the circumstances, is depriving NIX of funds during a difficult time in their life which is constraining their ability to move on and put behind them what they experienced as a significantly distressing episode. The situation is in contrast, aggravated by intense media publicity generated around FPT who is appearing to revel in the attention this brings.

Means and ability of the respondent to pay

[43] I was provided information that showed the company was effectively in a financial crisis and their ability meet obligations created was compromised but I was not provided with sufficient or compelling information to show FPT was unable to take any steps to rectify this situation.

Proportionality

[44] This step requires me to stand back and consider consistency with other comparable situations and to assess whether the final figure I determine is in proportion to the extent and severity of the breaches and the unusual context this situation presents. In considering similar cases of breaches of certified settlement agreements, a penalty in this matter would likely fall in the range of \$2,000 to \$3,000.⁹ Given the circumstances I have detailed above and

⁹ See, for example, *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 383 (\$2,000); *High v Mighty Rocket Properties Limited* [2018] NZERA Wellington 111 (\$6,000); *Mangos v Metrofloor Contracting*

aggravating factors I have identified I consider a penalty of \$2,000 be ordered against FPT. Given XHO Limited's circumstances, and likely ongoing viability I consider a penalty of \$1,000 to be appropriate. Both penalty amounts are to be paid to NIX.

Compliance order

[45] Given the nature of the admitted breaches a compliance order under s 137 of the Act is appropriate. It is to be noted that should this Authority order not be observed or complied with the Employment Court under s140(6) of the Act has further powers to that include a fine not exceeding \$40,000; the ability to sequester property and to order a prison sentence to a defaulting party not exceeding 3 months.

Orders

[46] I make the following orders of the Authority

- a) A compliance order pursuant to s 137(1)(ii) of the Employment Relations Act 2000 is granted on the terms that FPT is to ensure that within 28 days of the date of this determination being issued, NIX is to be paid the outstanding sums set out at paragraphs 2(a), 2(b) and 3 of the Record of Settlement (attached).
- b) Within 28 days of the date of this determination being issued, FPT must pay a penalty to NIX in the sum of \$2,000.00, and:
- c) XHO Limited must within 28 days of this determination being issued, pay a penalty to NIX in the sum of \$1,000.

Costs

[47] Costs are at the discretion of the Authority. I consider that a costs contribution is appropriate and find that within 28 days of this determination being issued, FPT is to pay NIX

Ltd [2018] NZERA Christchurch 46 (penalty \$1,500); and *Elliot v All Coat Painters Limited* [2019] NZERA 165 (\$3,000) and *Singh v Mega Civil Limited* [2020] NZERA 21 (\$3,000).

a contribution to their legal costs in the sum of \$2,000 plus GST and the Authority filing fee of \$71.55.

David G Beck
Member of the Employment Relations Authority