

Attention is drawn to the order for non-publication at paragraph 18 of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 718
3266200

BETWEEN	ISV Applicant
AND	ZCM 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
Investigation Meeting:	1 December 2023 at Wellington
Date of Determination:	1 December 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] ISV has applied to the Authority ex parte in the afternoon of 1 December 2023 for an interim injunction restraining ZCM from disclosing to third parties and/or releasing

publicly information held including but not limited to confidential personal health and other information contained on ISV's National Vaccination Database (The Database). An urgent order was also sought requiring ZCM to comply with cl 6.4 of their employment agreement with ISV, as well as other orders dealt with in this determination.

[2] ISV say that ZCM has breached cl 6.4 of their employment agreement, which requires they keep all information acquired by them through their employment confidential and prohibits them from disclosing ISV's information to any other person except in the proper performance of their employment or as required by law. ISV say that ZCM has declared an intent to disclose confidential information to third parties.

[3] The application proceeded on the basis of affidavit evidence provided by an authorised representative of ISV. An undertaking as to damages was also provided by ISV.

[4] The application for an interim injunction was made on an urgent ex parte (without notice) basis. Due to the particular circumstances of the matter, I resolved to deal with the application ex parte and on an urgent basis. This is one of those very rare cases where I have been persuaded by the affidavit evidence that urgent intervention was necessary. If ZCM, SIP or SXY were given notice of the application, the consequent delay must be weighed against threats to disclose confidential information by ZCM, SIP or SKY, and their clear knowledge disclosure (which I am satisfied has been threatened will occur) may have far reaching consequences for ISV and individuals whose personal and private medical information is contained in the Database.

[5] ZCM was employed by ISV (and its predecessor organisations) by way of a letter of offer dated 8 February 2019, signed by ZCM on 13 February 2019. Their employment agreement contains a confidentiality clause which provides:

6.4. Confidentiality and Intellectual Property

All information acquired by you, through your employment with [ISV], must be kept confidential and must not be disclosed to any other person except in the proper performance of your employment or as required by law.

All material produced in the course of your employment remains the property of [ISV], including any copyright and intellectual property rights.

[6] In the affidavit evidence the authorised representative of ISV says:

[ISV] is concerned that [ZCM] intends to imminently release [ISV's] information, including sensitive and confidential information about individuals, to a worldwide audience. This would likely have significant and irreparable adverse consequences for individuals and their whanau.

Jurisdiction

[8] The Authority is required to consider and apply the tests for an interim injunction.¹ I am satisfied the jurisdiction exists under s 161 of the Employment Relations Act 2000 (the Act) for the Authority to make the orders sought.

Arguable case

[9] I am satisfied from the affidavit evidence, untested as it is, that there is an arguable case that ZCM has breached cl 6.4 of their employment agreement in that they have possession of ISV's confidential information. I am also satisfied that there is an arguable case that they have threatened to disclose that information.

[10] I am further satisfied that there is an arguable case that SIP and SXY are persons who are or intend to incite, instigate, aid or abet ZCM to breach their employment agreement with ISV, in terms of s 134(2) of the Act.

Balance of convenience

[11] I find that the balance of convenience weighs strongly in favour of granting the interim orders sought by ISV. Based on affidavit evidence, there is a risk of significant damage if the orders sought are not made and the confidential information is disclosed.

Other remedies

[12] I am not satisfied that damages would be sufficient to remedy the breaches.

Overall justice

[13] Standing back and looking at the totality of the matter, I am satisfied that overall justice favours the making of orders for a reasonably limited period until the Authority can hear from all parties and determine matters. I am satisfied that the release of the Database and

¹ See, *American Cyanamid Co v Ethicon Limited* [1975] AC 396 and *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights Union* [1991] 1 ERNZ 886.

any copies, extracts or information derived from it (the Information) may cause individuals, their whanau and the wider community to suffer stress, anxiety or harm.

Orders

[14] I make the following orders taking into account the undertaking as to damages:

- (a) An urgent interim injunction is issued to restrain the Respondents from disclosing to any third party or publicly releasing any information held by ISV on the Database (as defined in the statement of problem filed with the Application) or the Information;
- (b) An urgent interim injunction is issued requiring ZCM to immediately return to ISV the Information and any other information they have obtained via their employment with ISV and/or access to ISV's systems together with any electronic devices belonging to ISV;
- (c) An urgent interim injunction is issued to restrain the Respondents from accessing or performing 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) The Respondents are ordered to permanently delete any and all copies of the Database, any versions of the Information and any other unlawfully obtained information in their possession or control;
- (e) SIP and SXY and any Unknown Respondents are ordered to permanently delete and not publish the Database, the Information or any other unlawfully obtained information, including, but not limited to extracts referred to at the following URLs:
 - [Redacted]

- [Redacted]
- [Redacted]

(f) ZCM is ordered to comply with cl 6.4 of their employment agreement.

[15] Leave is reserved for person affected by these orders to apply to the Authority for variation on 72 hours' notice.

[16] The orders that the Authority has made are to take effect immediately and will remain in force until further order.

Interim non-publication orders

[17] Ms Rendle requested I issue an interim non-publication order in relation to “the pleadings, parties’ names and documents filed with the Authority.”

[18] 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 names of the parties and all or any identifying information, the pleadings and all documents filed with the Authority, until further order of the Authority. I also prohibit publication of the Database and the Information by the Respondents.

Case management conference to be scheduled

[19] Given this determination has been issued on an urgent ex parte (without notice) basis, the next steps of this matter require an urgent case management conference. An Authority Officer will contact the parties to arrange this. The parties are to address whether further non-publication orders are necessary at the conference.

[20] The Authority directs ISV to serve ZCM, SIP and SXY personally and by email with this Determination, a copy of the application and all other documents including the Affidavit lodged in the Authority on 1 December 2023.

[21] The parties may contact the Authority Officer via phone on 03 964 7850 or via email on christchurchera@era.govt.nz to arrange the conference or if further advice is required about the orders made.

[22] If any other person applies to view the Authority file, then the parties will be provided with an opportunity to comment before any such application is granted.

Costs

[23] Costs are reserved.

Shane Kinley
Member of the Employment Relations Authority