IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2016] NZHRRT 19**

	Reference No. HRRT 002/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**MOIRA EDWARDS**
	FIRST PLAINTIFF
	JASON EDWARDS
	SECOND PLAINTIFF
AND	**CAPITAL AND COAST DISTRICT HEALTH BOARD**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms LJ Alaeinia, Member
Ms GJ Goodwin, Member

REPRESENTATION:
Miss M Edwards in person as agent for second plaintiff
Mr PN White for defendant

DATE OF HEARING: **17 May 2016**

DATE OF DECISION: **8 June 2016**

DECISION OF TRIBUNAL ON APPLICATION BY SECOND PLAINTIFF FOR NON-PUBLICATION ORDERS[1]

Background

[1] By decision dated 22 April 2016 (*Edwards v Capital and Coast DHB (Litigation guardian)* [2016] NZHRRT 16) the Tribunal granted an application by the second plaintiff (presently 16 years of age) to conduct this proceeding without a litigation guardian.

[1] [This decision is to be cited as: *Edwards v Capital and Coast DHB (Application for Non-Publication Orders)* [2016] NZHRRT 19. Note publication restrictions. Those restrictions require this decision to be anonymised by the redaction of the true names of the plaintiffs. In substitution the plaintiffs are to be referred to as "Moira Edwards" and "Jason Edwards" (not their true names).]

[2] On release of the decision the parties were notified the ordinary expectation was that the decision would be published on the Tribunal's website as well as on the website of the New Zealand Legal Information Institute (NZLii) unless a non-publication order was sought. If application for such order was intended the decision would be withheld and not released to the public or published by the Tribunal on any website pending determination of the application.

[3] By email dated 22 April 2016 the first plaintiff gave notice she and the second plaintiff would be seeking suppression orders and a formal application would follow. Such application was filed on 3 May 2016.

[4] The Capital and Coast District Health Board (CCDHB) does not itself seek a non-publication order and abides the decision of the Tribunal in respect of the plaintiffs' application.

The application for non-publication orders

[5] The first and second plaintiffs seek orders prohibiting publication of the name, address or identifying particulars of the second plaintiff and of his two sisters. Because publication of the identity of the first plaintiff (the mother of the second plaintiff and of his sisters) would lead to the identification of all family members, application is also made for the prohibition of the publication of the first plaintiff's details as well.

[6] The grounds of the application are:

> **[6.1]** A decision publishing the identity of any one of the plaintiffs would identify all family members.
>
> **[6.2]** Publication would result in the disclosure of sensitive personal health information about the second plaintiff and about his sisters.
>
> **[6.3]** The damage caused by such disclosure would outweigh any genuine public interest.

[7] In her affirmation filed in support of the application the first plaintiff has set out in some detail the medical history of the second plaintiff and of his sisters. The first plaintiff explains the concerns held by her as to the impact publication could have on their health. It is not appropriate that the information be repeated here in any detail.

[8] It is sufficient to note only the following:

> **[8.1]** The second plaintiff has been diagnosed with autistic spectrum disorders and learning disabilities. He suffers from related psychological conditions, including anxiety and depression, requiring ongoing medication. He has also been treated for obsessive compulsive disorder.
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> **[8.2]** His disorders and disabilities have led to him frequently encountering prejudice and discrimination from his peers. On more than one occasion he has been physically attacked at school.
>
> **[8.3]** A consequence of this bullying is that he finds school extremely stressful.
>
> **[8.4]** The first plaintiff is concerned that if the second plaintiff were identified the information about his behaviour, including his suicide attempt, would be disseminated among his peers and would likely trigger further bullying. Past experience demonstrates such outcome is likely.

[8.5] The damage likely to be caused to the second plaintiff by publicity would plainly outweigh any genuine public interest in knowing who he is.

[8.6] The first of the sisters is in a similar position to the second plaintiff. She too has been diagnosed with an autistic spectrum disorder, suffers from depression and has been bullied at school. Publication of her brother's name would cause significant embarrassment and stress, exacerbating her depression.

[8.7] The second sister experiences significant stress levels and is currently on strong medication for pain. The cause is as yet undiagnosed but thought to be stress related.

Jurisdiction

[9] The Tribunal is required by s 107(1) of the Human Rights Act 1993 (incorporated into proceedings under the Privacy Act 1993 by s 89 of the latter Act) to hold hearings in public. The Tribunal may, however, make non-publication orders under s 107(3) in the circumstances there identified:

> **107 Sittings to be held in public except in special circumstances**
>
> (1) Except as provided by subsections (2) and (3), every hearing of the Tribunal shall be held in public.
> (2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
> (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
> (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof:
> (b) make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
> (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.
> (4) Every person commits an offence and is liable on conviction to a fine not exceeding $3,000 who acts in contravention of any order made by the Tribunal under subsection (3)(b) or subsection (3)(c).

Jurisprudence

[10] The most recent decision of the Tribunal which addresses the principles which apply to an application for non-publication orders is *Scarborough v Kelly Services (NZ) Ltd (Application for Non-Publication Orders)* [2015] NZHRRT 43 (11 September 2015) at [15] to [26]. The most recent High Court decision is that delivered by Asher J in *H v S (Interim Anonymisation)* [2016] NZHC 433, [2016] NZAR 405. The analysis in *Scarborough* is in accord with the principles identified in *H v S (Interim Anonymisation)*. In the interests of brevity we refer only to the following points noted by Asher J at [7], [11] and [13]:

[10.1] As a general rule, the principle of open justice works against anonymisation of minutes or rulings in civil proceedings. It requires that the parties' true names be used in a judgment and that the general nature of a proceeding be known.

[10.2] Exceptional or extraordinary circumstances compelling the displacement of this principle are required before suppression orders, including for anonymisation, are granted. In this context Asher J made approving reference to the following

passage from *X v Dartford & Gravesham NHS Trust* [2015] EWCA Civ96, [2015] 1 WLR 3647:

> [17] The identities of the parties are an integral part of civil proceedings and the principle of open justice requires that they be available to anyone who may wish to attend the proceedings or who wishes to provide or receive a report of them. Inevitably, therefore, any order which prevents or restricts publication of a party's name or other information which may enable him to be identified involves a derogation from the principle of open justice and the right to freedom of expression. Whenever the court is asked to make an order of that kind, therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary, and if so what is the minimum required for that purpose.

[10.3] The need to protect the particular interests of children can be an exceptional circumstance in civil proceedings. Generally, persons under the age of 18 years can expect non-publication orders. See for example ss 11B to 11D of the Family Courts Act 1980 and ss 437A and 438 of the Children, Young Persons, and their Families Act 1989.

Discussion

[11] When the Tribunal met with the second plaintiff on 18 April 2016 he was asked whether he had given consideration to the publicity his case might potentially attract. He replied such publicity would not trouble him. We do not intend attaching weight to this response. While the second plaintiff was entirely sincere in expressing his opinion, it is plain from the evidence now tendered by the first plaintiff that the view expressed was not an informed view. It was also an opinion expressed in passing and was not the subject of discussion or further exploration.

[12] On the evidence given by the first plaintiff we are persuaded non-publication orders of the kind sought should be made for the following reasons:

[12.1] At 16 years of age the second plaintiff has complex health conditions. Publication of information relating to those conditions is likely to cause him substantial embarrassment and stress.

[12.2] There is a high risk publicity will lead to further stigmatisation at school, including bullying.

[12.3] His studies will be jeopardised.

[12.4] The second plaintiff is presently under the age of 18 years.

[12.5] For similar reasons publication of details relating to the second plaintiff's two sisters is likely to cause the sisters harm and a deterioration in their health.

[12.6] Identification of one member of the family will inevitably lead to disclosure of the identity of all members. It is well established that the impact on family members can be a reason for name suppression. See for example *Dr X v Director of Proceedings* [2014] NZHC 1798, [2014] NZAR 1055 at [15].

[12.7] No public interest will be served by publication of the intimate details of the second plaintiff's health and those of his close family members.

[13] In these circumstances we conclude on the facts that derogation from the principle of open justice is necessary. The application for non-publication orders is granted.

Form of anonymisation

[14] The Tribunal was told the first and second plaintiffs do not object to the publication of any decision of the Tribunal relating to their case. They seek only anonymity. In these circumstances we direct that while the suppression orders operate any Tribunal decision released for publication is to refer to the first plaintiff as "Moira Edwards" and to the second plaintiff as "Jason Edwards". The publication version of the 22 April 2016 decision is to be anonymised. The anonymised version is to be published as *Edwards v Capital and Coast DHB (Litigation guardian)* [2016] NZHRRT 16. The anonymised version of this present decision is to be published as *Edwards v Capital and Coast DHB (Application for Non-Publication Orders)* [2016] NZHRRT 19

ORDERS

[15] The following orders are made pursuant to s 107 of the Human Rights Act 1993:

> **[15.1]** Publication of the true names or of any details which could lead to the identification of the first and second plaintiffs to these proceedings is prohibited. This prohibition extends to publication of the names or of any details which could lead to the identification of the second plaintiff's sisters.
>
> **[15.2]** There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson. The plaintiffs and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.
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> **[15.3]** Leave is reserved to all parties to make further application should the need arise.

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Mr RPG Haines QC	**Ms LJ Alaeinia**	**Ms GJ Goodwin**
Chairperson	**Member**	**Member**