(1) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON.

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 34**

	Reference No. HRRT 068/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**SIMON COOPER**
	PLAINTIFF
AND	**HAMILTON PHARMACY 2011 LIMITED**
	FIRST DEFENDANT
AND	**GRAHAM BURNETT**
	SECOND DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson

REPRESENTATION:
Ms AV Twaddle and Ms AJH Shadbolt for plaintiff
Ms J Forrest and Ms E Wilson for defendants

DATE OF NAME SUPPRESSION HEARING: **Heard on the papers**

DATE OF DECISION ON APPLICATION FOR NAME SUPPRESSION: **8 September 2017**

DECISION OF CHAIRPERSON ON APPLICATION BY PLAINTIFF FOR INTERIM NAME SUPPRESSION[1]

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[1] [This decision is to be cited as *Cooper v Hamilton Pharmacy 2011 Ltd (Application for Non-Publication Orders)* [2017] NZHRRT 34.]

Introduction

[1] Mr Cooper was employed by Hamilton Pharmacy 2011 Ltd (Hamilton Pharmacy) as a pharmacist for about 18 months until approximately late June 2014 when he resigned after attending a disciplinary meeting. Mr Burnett is one of the four directors of Hamilton Pharmacy.

[2] In his proceedings before this Tribunal, Mr Cooper alleges Hamilton Pharmacy and Mr Burnett disclosed to various third parties personal information relating to his (Mr Cooper's) alleged fitness to be employed as a pharmacist. It is said the disclosures have been the direct cause of Mr Cooper being unable to obtain employment within the pharmacy profession. This has resulted in illness, stress and financial loss. Mr Cooper has had to retrain to find employment outside the pharmacy field.

[3] On filing his proceedings Mr Cooper applied for interim name suppression. That application is opposed by the defendants. In this decision I explain my reasons for declining the application.

Background

[4] As the application for interim name suppression has been dealt with on the papers and as the information presently before the Tribunal is necessarily incomplete and untested, the summary of events which follows is framed in broad and general terms though the essential facts do not appear to be in substantial dispute.

[5] As mentioned, after Mr Cooper had been employed by Hamilton Pharmacy for about 18 months he attended a disciplinary meeting on 27 June 2014 at which allegations of misconduct were made. It was alleged (inter alia) that Mr Cooper had been untruthful and dishonest. Either then or shortly thereafter it was also alleged he had acted unprofessionally and unethically in his practise as a pharmacist. The meeting resulted in the parties agreeing to various terms, those terms being recorded in a Record of Settlement. The provisions of that agreement included the immediate resignation of Mr Cooper and the end of his employment. There were obligations of confidentiality on both parties.

[6] Mr Cooper then sought new employment and on 22 July 2014 applied for a position at an Auckland pharmacy. It transpired that one of the directors of Hamilton Pharmacy was also a director of the prospective employer and on the advice of that director, Mr Cooper withdraw his application. It is alleged that at about the same time other directors of Hamilton Pharmacy (including Mr Burnett) contacted other pharmacies (particularly in the Waikato and Bay of Plenty districts) warning them against employing Mr Cooper and providing them with details of the allegations which had formed the basis of the disciplinary meeting held on 27 June 2014. Mr Cooper says that this unauthorised disclosure of his personal information has caused significant emotional harm and severely damaged his reputation and employment prospects in the industry. In an affidavit sworn on 6 October 2016 he makes the point that the pharmacy community is not a large one and many businesses are owned by groups of pharmacists with connections to other pharmacies. Down to the present time he has been unable to find employment as a pharmacist and even gets nervous about physically going into a pharmacy, each time wondering what the pharmacist behind the counter might think of him. Because his original doctor was located next to a pharmacy he had to change doctors.

[7] Mr Cooper has produced two letters (dated 30 September 2016 and 5 July 2017 respectively) from a specialist psychiatrist in Hamilton who confirms Mr Cooper has experienced significant psychological distress and the situation has had a profound effect on his self-esteem, mood, anxiety level and general sense of well-being. His relationship with his wife and two young children has been affected. He has been receiving treatment for low mood and anxiety-related issues since August 2014. In the opinion of the specialist the continued protection of Mr Cooper's privacy as well as that of his family is very important.

[8] In his most recent affidavit sworn on 6 July 2017 Mr Cooper says he remains concerned that if identifying details of these proceedings are allowed to be published in the public arena this will compound the harm and damage he has already suffered. He hopes to start work in a different industry in the coming months. His financial situation has deteriorated substantially and he is still reliant on medical assistance, taking prescribed medication to manage ongoing stress and anxiety. He constantly wonders what people in the pharmacy industry still think of him and he does not want general members of the public to learn about his situation. He remains nervous about going into pharmacies and believes any publication of identifying particulars is likely to start gossip all over again, causing him further stress and harm. In the second report of the specialist psychiatrist it is said that the impact of events on Mr Cooper remains unchanged and that continued protection of his privacy remains very important. Mr Cooper would suffer significant adverse effects if he was publicly identified in these proceedings.

The terms of the order sought

[9] The order sought by Mr Cooper is in the widest of terms. The application is for an interim order for non-publication of:

> **[9.1]** The identities of all parties.
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> **[9.2]** All identifying particulars of the parties including but not limited to:
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> > **[9.2.1]** The location of the place of work.
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> > **[9.2.2]** The nature of work and industry.
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> > **[9.2.3]** The content and detail of the disclosures made by the first and second defendants which are the subject of these proceedings.

[10] The grounds of the application are first, that the damage caused by the publication of the identities of the parties and of any identifying details would outweigh any genuine public interest in the proceedings. And second, the order is necessary in the interests of justice to preserve the position of the parties pending a final determination of the proceedings.

The related proceedings

[11] Mr Cooper currently has three sets of proceedings in train.

[12] First in time are proceedings filed in the Employment Relations Authority (ERA) on 23 October 2014 in which Mr Cooper seeks penalties against Hamilton Pharmacy for its alleged breach of the Record of Settlement. It is alleged that the disclosures referred to were in breach of an express term of confidentiality. When the ERA dismissed his

application for name suppression Mr Cooper appealed to the Employment Court. In that court an unopposed interim order was made by Chief Judge Colgan on 8 May 2015. That order was continued by Judge Perkins on 16 July 2015. It is apparent from the latter judgment that the continuation occurred without opposition by the defendants but at the same time the limited reach of the orders was emphasised at para [20]:

> Obviously the Court has no jurisdiction in respect of the other proceedings before the High Court and professional tribunal. The orders now made cannot extend to those proceedings.

[13] Since obtaining interim name suppression Mr Cooper has taken no further steps in the employment proceedings and does not intend taking such steps:

> **[13.1]** When by letter dated 10 July 2015 Mr Cooper's lawyers lodged a complaint with the Privacy Commissioner, the Commissioner was advised Mr Cooper did not intend progressing the ERA claim "until this privacy complaint has been resolved".
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> **[13.2]** Four days later, on 14 July 2015 counsel for Mr Cooper confirmed in an email that Mr Cooper did not intend to progress matters in the ERA "at this time".
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> **[13.3]** At the teleconference convened by me on 9 June 2017 counsel for Mr Cooper advised that he (Mr Cooper) wished to pursue his claim before the Human Rights Review Tribunal in preference to the claim still before the ERA.

[14] The second set of related proceedings is a civil action brought by Mr Cooper under the Defamation Act 1992. Those proceedings were filed in the High Court at Tauranga on 15 January 2015. The High Court proceedings and the present Privacy Act proceedings require some of the same disputed facts to be resolved as both proceedings arise out of the same circumstances. Mr Cooper has not sought name suppression from the High Court.

[15] The third set of proceedings are the current proceedings before the Human Rights Review Tribunal which were filed on 11 October 2016.

Other matters and potential proceedings

[16] Two additional matters have been set in train by the preceding events.

[17] First, Mr Burnett forwarded to the Pharmacy Council a copy of the Record of Settlement. In so doing he relied (inter alia) on the Health Practitioners Competence Assurance Act 2003, s 34 which provides:

> **34 Notification that practice below required standard of competence**
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> (1) If a health practitioner (*health practitioner A*) has reason to believe that another health practitioner (*health practitioner B*) may pose a risk of harm to the public by practising below the required standard of competence, health practitioner A may give the Registrar of the authority that health practitioner B is registered with written notice of the reasons on which that belief is based.
> (2) If a person holding office as Health and Disability Commissioner or as Director of Proceedings under the Health and Disability Commissioner Act 1994 has reason to believe that a health practitioner may pose a risk of harm to the public by practising below the required standard of competence, the person must promptly give the Registrar of the responsible authority written notice of the circumstances on which that belief is based.
> (3) Whenever an employee employed as a health practitioner resigns or is dismissed from his or her employment for reasons relating to competence, the person who employed the employee immediately before that resignation or dismissal must promptly give the

Registrar of the responsible authority written notice of the reasons for that resignation or dismissal.

(4) No civil or disciplinary proceedings lie against any person in respect of a notice given under this section by that person, unless the person has acted in bad faith.

[18] The Pharmacy Council, in turn, on 10 September 2014 appointed a Professional Conduct Committee to investigate the alleged actions of Mr Cooper. That investigation has taken some time. The outcome, if there is one, has not been notified to the Tribunal. In the result it is not yet known whether charges will be laid before the Health Practitioners Disciplinary Tribunal. But the Pharmacy Council has placed conditions on Mr Cooper's annual practising certificate. Those conditions are that:

> **[18.1]** Mr Cooper must work under a Council-approved supervisor at all times.
>
> **[18.2]** Mr Cooper must disclose to any employer that he is under investigation by a Professional Conduct Committee.

The complaint to the Privacy Commissioner

[19] It is now appropriate to address the outcome of Mr Cooper's complaint to the Privacy Commissioner.

[20] As mentioned, it was by letter dated 10 July 2015 that Mr Cooper filed a complaint with the Privacy Commissioner, the letter of complaint recording Mr Cooper did not intend progressing the ERA claim until his privacy complaint had been resolved.

[21] The Commissioner gave notice of the complaint to the defendants and received submissions from them and from Mr Cooper. The outcome was that by letter dated 12 November 2015 the Commissioner advised he had reached a final view that because Mr Cooper had other adequate remedies available, further action by him (the Commissioner) was unnecessary and inappropriate. The file was accordingly closed. The decision was based on the Privacy Act 1993, s 71(1)(g) which provides:

> **71 Commissioner may decide to take no action on complaint**
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> (1) The Commissioner may in his or her discretion decide to take no action or, as the case may require, no further action, on any complaint if, in the Commissioner's opinion,—
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> …
>
> (g) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the individual alleged to be aggrieved to exercise.

[22] The present proceedings before the Tribunal were, as mentioned, filed on 11 October 2016.

[23] It is now possible to turn to the principles to be applied when non-publication orders are sought from the Tribunal. Separate consideration will be given to the principles which apply to the grant of interim orders.

NON-PUBLICATION ORDERS – GENERAL PRINCIPLES

[24] The jurisdiction of the Tribunal to make non-publication orders as well as the jurisdiction of the Chairperson to make interim orders relating to non-publication are found in Part 4 of the Human Rights Act 1993. It is this part of the Act which is applied to proceedings under the Privacy Act by virtue of s 89 of that latter Act.

[25] The principles applicable to non-publication orders were recently addressed in *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4. Summarising the correct approach to s 107 of the Human Rights Act the Tribunal stated:

> **[66]** In summary (and at the risk of some repetition) the following principle points (they are not intended to be exhaustive) should be kept in mind when interpreting and applying s 107(1) and (3) of the Human Rights Act. It is these points which will assist the determination whether the Tribunal is satisfied that it is "desirable" to make a suppression order:
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> > **[66.1]** The stipulation in s 107(1) that every hearing of the Tribunal be held in public is an express acknowledgement of the principle of open justice, a principle fundamental to the common law system of civil and criminal justice. The principle means not only that judicial proceedings should be held in open court, accessible to the public, but also media representatives should be free to provide fair and accurate reports of what occurs in court.
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> > **[66.2]** There are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. This is recognised by s 107(1), (2) and (3) of the Act.
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> > **[66.3]** 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.
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> > **[66.4]** In deciding whether it is satisfied that it is desirable to make a suppression order the Tribunal must consider:
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> > > **[66.4.1]** whether there is some material before the Tribunal to show specific adverse consequences that are sufficient to justify an exception to the fundamental rule.
> > >
> > > **[66.4.2]** whether the order is reasonably necessary to secure the proper administration of justice in proceedings before it. The phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of individual cases as well as considerations going to the broader public interest.
> > >
> > > **[66.4.3]** whether the suppression order sought is clear in its terms and does no more than is necessary to achieve the due administration of justice.

[26] In formulating these principles the Tribunal drew not only on the statutory provisions referred to, but also the recent decision of the Supreme Court in *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310. There it was held that a party seeking a non-publication order must show to a high standard that the interests of justice require a departure from the fundamental rule of open justice. It is not sufficient merely that publicity associated with particular legal proceedings might be embarrassing or unwelcome. On the facts the Court concluded that the mere fact that the proceedings dealt with matters that some family members would prefer to be kept secret was insufficient to justify an order, even if there was a risk that relationships within the family would be strained as a result of disclosure. If unfounded allegations were made against trustees or beneficiaries in the course of the hearing, they would have opportunity to counter them. In the course of so concluding the Court at [14] referred with approval to the following passage from the judgment given by Kirby P in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 142-143:

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms: ... . A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to

think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

INTERIM ORDERS

[27] By virtue of s 95 of the Human Rights Act the Chairperson has jurisdiction to make an interim order if satisfied the order is necessary in the interests of justice to preserve the position of a party pending a final determination of the proceedings. The section provides:

> **95 Power to make interim order**
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> (1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.

[28] The relevant principles applicable to interim order applications under s 95 were summarised in *IDEA Services Ltd v Attorney-General (No. 4) – Interim Order Application* [2013] NZHRRT 24 (10 June 2013) at [50]. While that was a case under the Human Rights Act, for the reasons earlier explained s 95 applies also to proceedings under the Privacy Act:

> **[50]** As discussed in *Deliu v New Zealand Law Society* [2012] NZHRRT 1 (8 February 2012) there are similarities as well as differences between s 95 of the HRA and s 8 of the JAA 72. As the differences are significant, s 95 is to be interpreted in its own terms although the established case law under the JAA 72 is a useful point of reference:
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> > **[50.1]** Being "satisfied" in this context simply means that the Chairperson has made up his or her mind that the interim order is necessary in the interests of justice to preserve the position of one of the parties pending a final determination of the proceedings. The term "satisfied" does not require that the Chairperson should reach his or her judgment having been satisfied that the underlying facts have been proved to any particular standard. See by analogy *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [26] (Elias CJ) and [96] (Blanchard, Tipping and McGrath JJ).
> >
> > **[50.2]** The term "necessary" means reasonably necessary. See by analogy *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430 per Cooke J.
> >
> > **[50.3]** As to "the interests of justice" it was held in *X v Police* HC Auckland AP 253/91, 9 October 1991 by Barker J that the phrase "interests of justice" is a broad expression. There is no need in the present context for elaboration.
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> > **[50.4]** There is a clear distinction between preserving the position of a party on the one hand and improving it on the other. It is clear from s 95(1) of the HRA and from s 8(1) JAA 72 that the position of a plaintiff cannot be improved: *Movick v Attorney-General* [1978] 2 NZLR 545 (CA) at 551 line 35; *Nair v Minister of Immigration* [1982] 2 NZLR 571 at 575-576 (Davison CJ) and more recently *Squid Fishery Management Co Ltd v Minister of Fisheries* (2004) 17 PRNZ 97 at [29] (Ellen France J).]
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> > **[50.5]** The phrase "the position of the parties" must in this context be read as including the singular "party". See Interpretation Act 1999, s 33 and Burrows and Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 428. Were the position otherwise, an interim order could seldom, if ever be made, as it is difficult to envisage circumstances in which an interim order could be couched in terms which preserved, simultaneously, the position of both parties to the proceedings.
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> > **[50.6]** ….

[29] These principles will now be applied to the facts.

DISCUSSION

[30] In my view there are two principal reasons why the application for interim name suppression must be declined. The first is delay and the second is the public interest.

Delay

[31] The conduct of Mr Cooper's case has been characterised by delay.

[32] The first delay of 12 months is the gap between the admitted July and August 2014 disclosures of information by Mr Burnett (including disclosure of the Record of Settlement to the Pharmacy Council) and the lodging of the complaint with the Privacy Commissioner on 10 July 2015.

[33] The second delay, again of almost 12 months, relates to the period between the closure of the investigation by the Privacy Commissioner and the filing of the present proceedings in the Tribunal. The Certificate of Investigation was issued by the Commissioner on 18 November 2015 but the proceedings were not filed until 11 October 2016.

[34] In the result, the application for the interim order was filed in the present proceedings almost two years after the disclosures began.

[35] The third delay relates to Mr Cooper's failure to prosecute his claim in the Employment Relations Authority after securing the interim suppression order on 16 July 2015. By artificially keeping the proceedings "alive" over the past two years Mr Cooper has not only secured the benefit of name suppression, he has used the Employment Court order to bolster the present application to the Tribunal. In these circumstances I am of the view that no, or no real weight can be given to the existence of the order or to the fact that the order was made without opposition.

[36] The delays by Mr Cooper have been substantial and systemic. This is contrary to the interests of justice.

Public interest

[37] The Pharmacy Council has placed conditions on Mr Cooper's participation in the pharmacy industry. No doubt this was done because the Council reached the view that it was in the public interest that health practitioners (here, pharmacists) be competent and fit to practise their professions. That public interest is explicitly recognised, for example, in the Health Practitioners Competence Assurance Act 2003, s 3. The two conditions imposed on Mr Cooper require him to disclose to any prospective employer that he is under investigation by the Professional Conduct Committee and in addition he must work under a Council-approved supervisor at all times. It would be unhelpful were the implementation of these conditions be hampered by a suppression order. The conditions require proper disclosure by Mr Cooper while a suppression order by the Tribunal would work in favour of the withholding of information. The public interest favours full, rather than economical, disclosure. In these circumstances there is a legitimate public interest in not suppressing Mr Cooper's name. See by analogy *Y v Attorney-General* [2016] NZCA 474 at [32].

[38] It must also be remembered that, on the evidence given by Mr Cooper, the pharmacy community is not a large one, with businesses often being interconnected. The allegations made by Hamilton Pharmacy have, on his evidence, been widely distributed in the Waikato and Bay of Plenty districts. It is futile for the Tribunal to pretend that information which has been in circulation for some three years (July-August 2014 to September 2017) can sensibly be made the subject of a suppression order particularly given the terms of the conditions imposed by the Pharmacy Council.

[39] Then there is the principle emphasised in *Erceg v Erceg* that the administration of justice must take place in open court accessible to the public and media representatives must be free to provide fair and accurate reports of what occurs in court. This rule can only be departed from where its observance would frustrate the administration of justice. It is within the administration of justice standard that the particular circumstances of individual cases are accommodated.

[40] Mr Cooper refers to adverse consequences relating to his mental health, his reputation, his ability to obtain alternative employment, his financial position and his relationship with his family. This evidence is supported by the two letters from the consultant psychiatrist.

[41] However, as stated by Kirby J in *John Fairfax Group v Local Court (NSW)* in the passage cited in *Erceg v Erceg*, it is an unfortunate incident of the open administration of justice that embarrassing and damaging facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts or the issue of suppression orders. Despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings, such interests must be sacrificed to the greater public interest in adhering to an open system of justice.

Conclusion

[42] My overall conclusion is that the interests of justice in the present case do not require that the general rule of open justice be departed from. The delays have been substantial and there is a real public interest in the pharmacy industry knowing of the allegations. Then there is the fact that no suppression order has been sought from the High Court notwithstanding the substantial overlap in the two proceedings. Mr Cooper will remain at risk of the adverse consequences spoken of by him and by the psychiatrist irrespective of any suppression order made by the Tribunal. That is, even were the Tribunal to make an interim order in the terms sought, it will not protect Mr Cooper from the public reporting of the facts of the case in the context of the High Court proceedings. The very nature of those proceedings and the allegations made both by Mr Cooper and the defendants create a real risk of publicity.

[43] In the final analysis I am not satisfied that it is necessary in the interests of justice to make the order to preserve Mr Cooper's position. The order would be made some three years after the events in question, after wide circulation of the allegations within the pharmacy industry and after the clear identification by the Pharmacy Council of a strong public interest in the thorough investigation of the serious allegations made against Mr Cooper by his previous employer, Hamilton Pharmacy. Mr Cooper is a person who has not applied for name suppression in the High Court and although he obtained such order in the Employment Court, he has done nothing to progress the ERA proceedings. In view of these factors it is my conclusion that the making by this Tribunal of a suppression order would be to improve, not preserve his position. Nor would the making of the order be in the interests of justice.

[44] The application for name suppression is accordingly dismissed.

[45] Because the letters from the special psychiatrist dated 30 September 2016 and 5 July 2017 contain sensitive information about Mr Cooper's health and related matters, an order is made that there is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. Mr Cooper and the defendants are to be notified of any request to search the file and given opportunity to be heard on that application.

[46] In view of the fact that Mr Cooper has review and appeal rights a direction is made that this decision not be released for publication until the time for appealing under s 123(1) of the Human Rights Act has expired.

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Mr RPG Haines QC
Chairperson