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IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 94
EMPC 48/2017
EMPC 88/2017
EMPC 150/2017

IN THE MATTER OF	challenges to determinations of the Employment Relations Authority
BETWEEN	CRIMSON CONSULTING LIMITED & UNITUTOR LIMITED Plaintiffs
AND	SAMANTHA BERRY First Defendant
AND	TALENTWIRE LIMITED Second Defendant

Hearing:	1 and 2 June 2017 (heard at Auckland) (and on pleadings filed on 12 and 19 July 2017)
Appearances:	R Harrison QC and R Bryant, counsel for the plaintiffs B O'Callahan and D Yan, counsel for the first defendant R Milne, representative for the second defendant K M Wilson, counsel for NZME Publishing Ltd D Bridgeman, representative for Fourth Estate Holdings (2012) Ltd
Judgment:	3 August 2017

JUDGMENT OF JUDGE B A CORKILL

The issues

[1] Two issues arise in these proceedings. The primary one is whether comprehensive non-publication orders should be made until the hearing of a claim brought by the joint plaintiffs against the two defendants; a related matter is whether that hearing should be heard *in camera*.

[2] That primary issue came before the Court, initially, by way of a challenge to a determination of the Employment Relations Authority (the Authority).[1]

[3] The second issue is whether a costs order by the Authority was correct in law and/or in fact. It too is the subject of a challenge to a determination of the Authority.[2]

The procedural background

[4] The proceeding has already been the subject of a somewhat protracted history, the essential steps of which I summarise briefly. I will elaborate where necessary later.

[5] Ms Samantha Berry established a tutoring company known as UniTutor Ltd (UniTutor) on 8 July 2011. Subsequently, in November 2015, she agreed to sell her shares in it to Crimson Consulting Ltd (Crimson), a company which operated in the same field. It was also agreed that she would become an employee of Crimson/UniTutor. On 19 May 2016, Ms Berry resigned from that role, giving two weeks' notice.

[6] Subsequently, lawyers for Crimson/UniTutor wrote to Ms Berry asserting that she was in breach of both the relevant deed of sale and purchase of shares and the employment agreement she had entered into, when she promoted her services as a tutor with TutorConnect Ltd (TutorConnect). It was asserted that she was wrongfully using the UniTutor database so as to divert its business to TutorConnect, and that she was thereby also infringing a 12-month restraint of trade provision.

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1 *Crimson Consulting Ltd & UniTutor Ltd v Berry* [2017] NZERA Auckland 83.
2 *CCL v SB* [2017] NZERA Auckland 34.

Throughout this litigation, the party with whom Ms Berry was associated was named as TalentWire Ltd (TalentWire), an entity which was said to be related to TutorConnect. No details were provided as to the nature of the relationship between the two entities but nothing turns on that for present purposes.

[7] On 20 October 2016, Crimson/UniTutor filed and served an application for an interim injunction restraining Ms Berry from acting in breach of the restrictive covenants she had entered into up until 1 June 2017, which was when the restraint would expire. Urgency was sought for this application. The plaintiffs also filed a statement of problem seeking a permanent order to similar effect, together with damages and penalties.

[8] Ms Berry filed a statement in reply disputing liability for these claims, and counter-claiming for amounts to which she said she was entitled but had not been paid: these were alleged repudiatory breaches of her employment agreement giving rise to claims for commission, a bonus and a share of gross revenue that should have been achieved if the alleged breaches had not occurred.

[9] On 11 November 2016, Ms Berry filed proceedings in the High Court against Crimson, alleging that it was in breach of the deed of sale and purchase of shares by failing to deliver certain shares to her, so that she had an entitlement to damages. She also sought an enquiry into damages because it was alleged Crimson had breached gross revenue obligations. These claims are resisted by Crimson.

[10] Returning to the proceedings filed in the Authority, on 17 November 2016, the parties participated in a conference call with the Authority, when a timetable was established to deal with Crimson/UniTutor's application for interim relief. It was set down for hearing on 8 February 2017.

[11] For the purpose of that application, Ms Berry filed a comprehensive affidavit on 15 December 2016; it gave an extensive history of events leading up to the sale of shares to Crimson, and of the events which occurred when she was its employee.

[12] Crimson/UniTutor contend that they became very concerned about the contents of the affidavit, and its exhibits. They say that it contained significant irrelevant, commercially sensitive, confidential and disparaging and/or defamatory information. As a result, on 24 January 2017, they filed in the Authority a memorandum which sought comprehensive non-publication orders, and an order that the investigation meeting be held in private.

[13] For her part, Ms Berry filed a memorandum opposing those applications.

[14] At the investigation meeting on 8 February 2017 an issue arose as to whether evidence should have been filed in support of the applications for non-publication and private investigation meetings. As a result, the Authority adjourned the fixture. It also ordered the plaintiffs to pay the defendants $2,250 as a contribution towards their costs. Finally, the Authority made an interim non-publication order suppressing the parties' names and restricting access to the file until further order of the Authority.

[15] The next investigation meeting was held on 17 March 2017. After receiving and considering submissions, the Authority was not satisfied that a non-publication order in respect of the parties' names and identifying details should be continued on the asserted ground that the information produced by affidavit was so commercially sensitive as to justify such a course and/or that there was irrelevant information in that affidavit – save only for one part of a paragraph which the parties agreed should be redacted. Nor was the Authority persuaded that there was an evidential basis for ordering that the investigation meeting be held in private, given the declinature of the application for non-publication orders. The determination was issued on 24 March 2017.[3]

[16] At the same time, the Authority went on to consider the application for interim injunction; that matter is not before the Court so I record only that it was declined, with costs reserved.[4]

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3 *Crimson Consulting Ltd & UniTutor Ltd v Berry*, above n 1.

4 At [33].

[17] In the course of these events, media articles about Crimson were published. Two should be mentioned. The first was an article was published in the New Zealand Herald,[5] on 21 March 2017 entitled "Crimson Consulting in liquidation bid". It referred to the fact that an application to liquidate that entity had been advertised that day, with the relevant application to be heard on 11 April 2017; the article stated that Ms Berry claimed she was owed $2,250. I infer that Ms Berry was enforcing the costs order which had been obtained from the Authority.

[18] On 30 March 2017, an article was published in the National Business Review (NBR)[6] entitled "ERA rejects Crimson Consulting's bid to suppress employment dispute". Reference was made to the content of the Authority's determination of 24 March 2017.

The filing of challenges by the plaintiffs in this Court

[19] On 9 March 2016, Crimson/UniTutor filed a non de novo challenge to the costs order which had been made by the Authority (EMPC 48/2017). It was alleged that there were errors of fact and of law so that the costs determination should be set aside. The challenge related, of course, to the oral determination of the Authority of 9 February 2017.[7]

[20] On 21 April 2017, the plaintiffs filed a second non de novo challenge, this time in respect to the Authority's determination of 24 March 2017 (EMPC 88/2017). Again it was asserted that there were errors of fact and law.

[21] The statement of claim stated that Crimson/UniTutor sought non-publication orders and an order of "closure of the investigation meeting", on both "an interim and permanent basis".

[22] By way of elaboration, it was stated that non-publication orders should extend to the proceedings before the Authority, with the effect that the Authority would remove the substantive determination from any of its databases, replacing it with a substitute determination reflecting any non-publication orders made by the

5 Published by NZME Publishing Ltd, (NZME).
6 Published by Fourth Estate Holdings (2012) Ltd, (Fourth Estate).
7 *CCL v SB*, above n 2.

Court. Also sought was an order that any person who had referred to the determination publically should "remove" that material if it would otherwise amount to a failure to comply with the non-publication orders made by the Court; specific reference was made to the New Zealand Herald and the NBR.

[23] It was proposed that the non-publication order would extend to the names of the parties, various staff members and employees of Crimson and/or UniTutor, the nature of the work and industry involved, and any information or documentation that might lead to the identification of those persons; it was stated that the order should also extend to what was described as commercially sensitive information as set out in Ms Berry's affidavit, along with evidence in the same affidavit which was said to be irrelevant and inadmissible.

Subsequent procedural steps

[24] Soon after the filing and serving of the substantive challenge I convened a telephone directions conference to consider the plaintiffs' application for urgency. Representatives for the defendants confirmed that the primary challenge would be opposed, as would the costs challenge. Accordingly, a timetable for the prompt disposition of both challenges was established.

[25] Because takedown orders were being sought against two particular media organisations, it was necessary to consider whether they should be given the opportunity to be heard on that topic. There was a divergence of opinion between the parties, so that it was necessary to receive submissions. After considering these, I concluded that any takedown order if made would affect the interests of the media organisations involved; there was accordingly a potential natural justice issue. I therefore directed that NZME and Fourth Estate could indicate whether they wished to appear and be heard. If they expressed such an interest, they were then to file written submissions solely on the question of whether a takedown order should be made; and I directed further that if they did file such submissions, they would be able to address them at the hearing itself only with leave of the Court. Both such entities subsequently advised the Court that they wished to participate in this way, and filed submissions accordingly.

[26] Affidavit evidence was filed by Mr Benjamin Thomas for the plaintiffs, for the purposes of the hearing. Following the appropriate application, I granted leave to Ms Berry's lawyer to cross-examine that witness. I will summarise his evidence shortly. No affidavit evidence was filed for either defendant.

[27] I also record that on 3 May 2017, I made an interim order of non-publication of the names of the parties and any identifying details, until 4.00 pm on the hearing date, an order which I extended at the hearing to the expiration of three working days after the delivery of this judgment, or until further order of the Court. That order is varied at the end of this judgment. I have also directed that the Court's files may not be searched by any non party without leave of a Judge.

Updating developments

[28] At the hearing, Mr Harrison QC, counsel for the plaintiffs, stated that he had recently become involved in the proceeding and had advised that an application for removal of the proceedings from the Authority to the Court should be made. He said this was because, as matters stood, there would be a common issue as to the circumstances of Ms Berry's resignation which would arise in both the High Court proceeding and the Authority's investigation meeting. The main ground for the application for removal was that it would therefore be preferable for that issue, an employment issue, to be resolved in the Employment Court rather than the Authority and/or the High Court.

[29] Mr Harrison also informed the Court that the plaintiffs now sought interim relief on a more limited basis than had originally been requested. They would seek only interim orders of non-publication until the hearing of the substantive proceedings in the Authority, or until the substantive hearing in the Employment Court if the case was removed to it.

[30] At the hearing, it was clarified that the plaintiffs sought these orders:

(a) Prohibition of publication of the names of the parties to the proceeding, and of the parties in the matter before the Authority, and any

information leading to the identification of them, until further order of the Authority, or the Court if an order for removal was made.

(b) Prohibition of publication of certain allegations made by the first defendant and/or of documents appended to her affidavit, until further order of the Authority, or if the proceeding were to be removed, the Court.

(c) An order directing the Authority to amend its substantive determination to reflect any non-publication orders the Court saw fit to make, including but not limited to an amendment of any earlier version of the determination as published by the Authority online.

[31] This meant that the plaintiffs were no longer seeking takedown orders against the media entities. They were granted leave to withdraw, with any issues as to costs being reserved.

[32] Turning to the application that the substantive hearing be conducted in private, the position was somewhat complex for these reasons:

(a) Were the matter to remain in the Authority, there would be a preliminary issue as to whether this Court had jurisdiction to consider a challenge to the determination not to hold the investigation meeting in private, it being arguable that the issue was one of procedure so that the statutory bar under s 179(5)(b) of the Employment Relations Act 2000 (the Act) would apply. If there was jurisdiction to hear the challenge, the issue would require consideration of s 160(1)(e) of the Act, which permits the Authority to decide if an investigation meeting would not be heard in public.

(b) Were the relationship problem to be removed to the Court, the Court would determine its own procedure, including whether some or all of the hearing might be conducted *in camera*. In those circumstances, it would be unnecessary to consider the challenge brought on that topic.

[33] After the hearing, I issued a minute indicating that it would be preferable for the issue of removal to be resolved before the Court issued its judgment. That would enable all issues to be considered in a cohesive way at the same time, rather than on a piecemeal basis.

[34] On 4 July 2017, the Authority made an order removing the proceedings which was before it to this Court for hearing and determination.[8]

[35] The parties have now filed pleadings for the purposes of the substantive proceedings (EMPC 150/2017).

[36] Accordingly, the private hearing issue has now become more straightforward, and centres on whether a direction should be made that the substantive hearing of the removed proceeding be heard by this Court *in camera*.

The hearing

[37] At the hearing of the challenges, the parties first presented their respective cases on the various non-publication/private hearing issues. Submissions as to the costs challenge were presented separately and subsequently. I shall deal with these issues in the same sequence.

Evidence as to non-publication issues

[38] As mentioned earlier, the plaintiffs called Mr Thomas as their sole witness. He is the Senior Academic Adviser for Crimson and Chief Executive Officer of Play Atlantic, a subsidiary of Crimson. He outlined the background circumstances of the two plaintiffs, the sale by Ms Berry of her shares in UniTutor to Crimson, and the terms of her employment with that company. Then he described the background of the proceedings as previously summarised. Mr Thomas set out the plaintiffs' concerns as to the contents of Ms Berry's affidavit.

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[8] *XZZ v RNH* [2017] NZERA Auckland 197.

[39] Mr Thomas' key point was that the parties had reached agreement in the deed of sale and purchase of shares, and in Ms Berry's individual employment agreement, that information pertaining to Crimson's operation would be strictly confidential. He said the fact Ms Berry had now placed commercially sensitive information before the Authority could harm Crimson's interests if negotiations were to take place between that entity and any other party with regard to a potential business acquisition. Reference was also made to what Mr Thomas described as potentially damaging allegations pertaining to matters that were not relevant to the issues which would require consideration at the substantive hearing.

[40] Mr Thomas said that Crimson's concerns had to be considered in the context that there were two to four competitors in the Otago area, and an undefined number of competitors, elsewhere in New Zealand.

[41] Mr Thomas went on to give evidence as to Crimson's media profile. He said that although Crimson, and its Chief Executive Officer, Mr Jamie Beaton, had not for the most part sought out media attention this had occurred, predominantly as a consequence of Mr Beaton's success in establishing Crimson. The company wished to ensure that any published stories reflected positively on Crimson and its subsidiaries, because reputation within the market was important for ongoing development, particularly when the organisation was young. He said that Crimson and Mr Beaton tended to be linked in published articles. Publicity relating to commercially sensitive information and to unfair criticisms of Crimson/UniTutor and to Mr Beaton should therefore be prohibited from publication. Not to do so would significantly tarnish relationships with investors and clients.

Legal issues

[42] The first question is whether there is jurisdiction for this Court to deal with the interim non-publication issues by way of challenge. Section 179(5) of the Act imposes a jurisdictional limit on challenges to certain Authority determinations, namely those "about the procedure that the Authority has followed, is following, or is intending to follow". It was not disputed that the Court has jurisdiction to deal with such matters. In any event, that this was the position was confirmed by the full

Court in *H v A Ltd*, which found that there was jurisdiction for the Court to consider a challenge in respect of an interim non-publication order.[9]

[43] However, there is another issue arising from *H v A Ltd*, which is controversial between the parties. The question raised is whether the conclusions reached in that decision as to the test for non-publication may now have to be revisited in light of the conclusions reached by the Supreme Court in the judgment of *Erceg v Erceg*, which was issued subsequently.[10]

[44] Mr Harrison submitted that dicta of this Court in *H v A Ltd* contained the applicable legal test. He argued that the majority of the full Court had held that an applicant did not need to establish exceptional circumstances when making such an application.

[45] Anticipating an argument which was to be raised for Ms Berry, Mr Harrison said it was neither necessary nor appropriate to apply the dicta of the Supreme Court in *Erceg*, since it was decided under inherent jurisdiction principles which did not necessarily apply to the exercise of the discretion given under the statutory powers conferred on the Authority and the Court. In any event, he argued, the Court in *Erceg* had accepted that in an appropriate case, considerations of confidentiality could support the making of non-publication orders. Furthermore, a distinction should be drawn between interim non-publication orders relating to potentially harmful matters which were disputed, and permanent orders following adjudication on those matters.

[46] Mr O'Callaghan, counsel for Ms Berry, submitted that there was nothing special about the Court's jurisdiction, and the test with regard to non-publication orders was now as described by the Supreme Court in *Erceg*: that Court confirmed that the standard is a high one.

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[9] *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [14], and [25] – [29].

[10] *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.

[47] Mr O'Callaghan went on to say that the difficulty with the majority decision in *H v A Ltd* was that it did not tackle what the Supreme Court appeared to regard as being central, namely whether the making of a non-publication order was really necessary to secure the proper administration of justice.

[48] He argued that commercially sensitive information should be protected only if publication would cause obvious commercial harm; the evidence did not cross that threshold in the present case. Embarrassment was not enough.

[49] If the Court considered there were potentially damaging allegations in Ms Berry's affidavit, the answer would lie in not referring to them in the Court's judgment; and there would be the safeguard of the filter which existed because the files of the Authority and the Court could not be searched without leave.

[50] To resolve these issues, it is necessary to describe the conclusions reached in the *H v A Ltd* litigation, both in this Court and in the Court of Appeal, and also in several subsequent cases, not only in *Erceg* but in a number of other decisions, all of which I will endeavour to summarise as succinctly as possible.

The Authority's determination

[51] Before doing so, I summarise what the Authority said on this topic, since this is a non de novo challenge which requires this Court to determine whether there was an error in the approach of the Authority to this topic.

[52] The Authority's conclusions must be considered in light of the discretion which it possessed. Clause 10 of sch 2 to the Act states:

> **10 Power to prohibit publication**
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> (1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.
>
> …

[53] In its determination, the Authority said that the starting point in determining whether or not an order for non-publication should be made was the principle of

open justice, albeit there was a broad discretion to do justice on a case by case basis. The Authority went on to state that non-publication of names and other identifying particulars in employment cases would be "exceptional"; they would be made in a very small minority of cases. Then the Authority stated that an applicant must make out to a high standard that there are exceptional circumstances warranting a non-publication order.

[54] These statements were sourced to the dicta of the majority in *H v A Ltd*, the judgments of which I will now describe.

H v A Ltd

[55] The difficulty which this Court was required to consider was due to differing statements in the Court of Appeal as to the appropriate threshold. A full Court had been convened to consider this issue, for the purposes of an interlocutory issue as to whether an interim order of non-publication of names should be granted.

[56] Judge Inglis, as she then was, referred to a trio of civil cases where the Court of Appeal had referred to a need to establish exceptional circumstances, albeit that it was acknowledged that this was a term which was not defined.[11] The Judge also noted that such an approach had not been universally adopted, referring specifically to *ASB Bank v AB*, where Harrison J rejected the proposition that an applicant must discharge the onus of proving exceptional circumstances to displace the principle of open justice.[12]

[57] Then she stated:[13]

> It seems to me that if the circumstances justify an exception to the fundamental principle of open justice then it is likely that the circumstances will be exceptional. More than a simple balancing exercise is required. If it were otherwise the starting point would be neutral. The starting point cannot be neutral because there is a strong presumption in favour of open justice. In order to overcome the presumption the opposing factors will need to be weighted enough to tip the scales in an applicant's favour.

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11 *Clark v Attorney-General (No 1)* (2004) 17 PRNZ 554 (CA) at [40] – [42]; *Brown v Attorney-General* (2005) 22 CRNZ 339 (CA) and *Peters v Birnie* [2010] NZAR 494 (HC).

12 *ASB Bank v AB* [2010] 3 NZLR 427 (HC).

13 *H v A Ltd*, above n 9, at [44].

[58] By contrast, the majority, Chief Judge Colgan and Judge Perkins, referred to the fact that both the Court of Appeal and the Supreme Court had addressed non-publication of parties' identities in employment cases in recent years, and these should be given more weight than judgments of the same courts in criminal cases or even in other civil cases having different statutory provisions. They stated that Parliament, by enacting broad discretionary powers in the employment field, intended that the same considerations would not apply as in criminal cases or even in public law civil cases in the courts of ordinary jurisdiction.[14]

[59] They went on to state that the case before them was not only a civil proceeding, but was also private litigation as distinct from a public law case. The combined civil and public law categorisation was important, because it distinguished a number of authoritative judgments of the Court of Appeal in both criminal proceedings and civil law proceedings.[15]

[60] Their conclusion was encapsulated in this passage:

> [78] We agree that non-publication of names or other identifying particulars in employment cases will be "exceptional" in the sense that such orders are and will be made in a very small minority of cases. However we do not agree that an applicant for such an order must make out, to a high standard, that there are such exceptional circumstances that a non-publication order is warranted. That is not the standard that Parliament has prescribed for such orders in this Court or the Authority.

[61] The majority went on to grant an interim order. Subsequently, I heard the substantive hearing of the challenge brought by H, and his application for a permanent order of non-publication. In that context, A Ltd advanced legal submissions which relied on the reasoning of the minority decision to the effect that exceptional circumstances were required before a non-publication order could be made.[16]

[62] In considering the legal principles involved, I agreed with the view of the majority in the interlocutory decision.

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[14] At [66].
[15] At [74].
[16] *H v A Ltd* [2014] NZEmpC 189 at [135].

[63] First, I compared provisions relating to non-publication or suppression orders in other instances where either a high threshold was specifically provided,[17] or which required particular criteria to be considered.[18] I noted that Parliament had not prescribed specific criteria in the Act, as it had in those instances.

[64] Then I considered whether particular classes of civil cases where the High Court had relied on its inherent jurisdiction could provide a guide to the proper interpretation of cl 12 of sch 3 of the Act. I agreed with the observation of the majority that proceedings such as *H v A Ltd* should not be regarded as private litigation rather than public law litigation. The discretion bestowed on the Court had to be construed in the context of the objects of the Act and other relevant instruments. Then I stated:[19]

> The principles of open justice, as articulated in many cases to the highest level[20] will also warrant very careful consideration, along with any other factors pointing to publication. But factors against publication must also be carefully assessed so that a proper balancing exercise is undertaken. It will often be necessary for reliable evidence to be produced in relation to relevant factors especially where an application for a non-publication order is opposed.[21] Whilst the weighing of all factors must be undertaken carefully the Court or Authority must determine what outcome in all the circumstances is in the interests of justice; it does not have to find that there are exceptional circumstances. This was recently confirmed by the Court of Appeal with regards to civil cases in *Jay v Jay*.[22]

[65] In *Jay v Jay* a question had arisen as to whether extraordinary circumstances needed to be established before the principle of open justice could be displaced.[23] The Court of Appeal found that unlike in the criminal context, extraordinary circumstances were not required to justify suppression in a civil case having regard

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17 As in criminal matters under s 200 of the Criminal Procedure Act 2011.

18 Section 74 of the Coroners Act 2006, ss 11B – 11D of the Family Court Act 1980 and s 95 of the Health Practitioners Competence Assurance Act 2003.

19 At [141].

20 The decision of the Court of Appeal in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) is one such authoritative expression; others are *Scott v Scott* [1913] AC 417 (HL) at 476 and 482; and *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at [42]. In *Scott* it was stated that the courts should conduct their business publically unless this would result in injustice. Open justice is regarded as an important safeguard against judicial bias, unfairness and incompetence ensuring that judges are accountable in the performance of their judicial duties: *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 (HL) at 449-450 per Lord Diplock.

21 The requirements for proper proof were emphasised in *C v Air Nelson Ltd* [2010] NZEmpC 18 at [16].

22 *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [118].

23 At [117].

to previous authorities, including a decision of the Supreme Court.[24] In that particular case, the Court of Appeal had been satisfied that there were "compelling … reasons" for making a permanent suppression order – which indicated a high standard.[25]

[66] An application was made to the Court of Appeal for leave to appeal my judgment. One of the proposed grounds of appeal related to whether the Court had approached the question of the making of a non-publication order correctly. In its judgment declining leave on this point, the Court of Appeal said this:[26]

> [8] The third matter relates to a permanent non-publication order made by Judge Corkill prohibiting publication of the names of the parties and the complainant as well as any identifying particulars. A Ltd submits such an order should only be made in exceptional circumstances and there were none. However, the Judge's approach is supported by the recent decision of this court in *Jay v Jay*. We therefore decline to grant leave on that issue.

[67] For present purposes, two conclusions can be reached. The first is that the Court of Appeal in declining leave to appeal thereby approved the approach which had been adopted in both the interlocutory judgment by the majority, and in the substantive judgment. In those judgments it was concluded that the appropriate test was not one requiring exceptional circumstances to be established, having regard to the fact that the relevant discretion arose under a statute having a particular focus. Furthermore, it considered that the approach which I adopted in the substantive judgment was supported by the approach of the Court of Appeal itself in *Jay v Jay*, which involved the exercise of the Court's inherent, discretionary jurisdiction; this conclusion affirmed the alignment between this Court's view of the correct approach under the Employment Relations Act, and its view of the correct approach under the inherent jurisdiction.

Other relevant Court of Appeal decisions

[68] In 2016, there was a succession of cases involving this issue. Three were issued on the same day by the Court of Appeal.

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24 At [118].
25 At [119].
26 *A Ltd v H* [2015] NZCA 99.

[69] The first and main judgment was *Y v Attorney-General*.[27] It was one of a series of appeals relating to interim orders made in historic abuse cases. There, the Court of Appeal undertook a comprehensive review of the law and principles relating to name suppression in civil cases.

[70] The Court accepted that divergent views had been expressed, even in the Court of Appeal itself, as to whether or not exceptional circumstances were required before name suppression could be granted in civil cases. It said that clarification was needed, which it endeavoured to give.

[71] The Court went on to state that previous judgments of the Court of Appeal stating that the threshold was "exceptional circumstances" or "extraordinary circumstances" had incorrectly stated the law, or no longer correctly stated the law. The Court stated:[28]

> … We endorse this Court's judgment in *Jay v Jay*, that "extraordinary circumstances" are not required to justify suppression in a civil case. However, as this Court explained in *McIntosh v Fisk*, "[t]he threshold is high because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression". The aim of that passage was not to set any particular threshold.

[72] Relying on dicta in *Hart v Standards Committee (No 1) of the New Zealand Law Society*[29]and *Rowley v Commissioner of Inland Revenue,*[30] it was observed the Supreme Court had earlier supported the same balancing approach. It said that the balancing exercise must necessarily be case dependent. Sometimes the legitimate public interest in knowing the names of those involved in a case, either as parties or as witnesses or both, or in knowing the detail of the case would be high; but in others there may be little or no legitimate public interest in knowing this information.[31]

[73] This case was heard on 26 April 2016, and the judgment was issued on 4 October 2016. The same court heard another interlocutory appeal relating to

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27 *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911.
28 At [30].
29 *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4.
30 *Rowley v Commissioner of Inland Revenue* [2011] NZSC 76 (2011) NZTC 20 – 052.
31 At [32] and [33].

historical abuse: *X v Attorney-General.*[32] It was heard on the same date, and the judgment was also issued on 4 October 2016. The Court proceeded on the basis of the same principles which it had outlined in *Y v Attorney-General*. A third judgment was issued on the same date, which had been heard by a differently constituted Court of Appeal: *Greig v Hutchison.*[33] It too referred to the principles in *Y v Attorney-General*. However, since the case fell for the determination under the detailed name suppression provisions of the Family Court Act 1980, the Court emphasised that this statutory jurisdiction was distinct from the court's inherent discretionary jurisdiction to grant suppression in a civil proceeding.

Erceg v Erceg

[74] On 1 September 2016, the Supreme Court heard a civil appeal. In the course of the hearing the respondents applied for an order to prevent publication of certain matters, when referred to in oral argument. The Court declined to grant such an order, subsequently giving its reasons for reaching this conclusion in its judgment of 14 October 2016.

[75] Although this judgment was delivered some 10 days after the judgments which had been issued in the above three Court of Appeal decisions, the first of which set out in some detail that Court's views as to the applicable principles as to name suppression under the Court's inherent jurisdiction, they were not referred to by the Supreme Court.

[76] After underlining the constitutional importance of open justice, the Supreme Court recognised that there were "very limited exceptions" to that principle at common law.[34] It also acknowledged that certain statutes contained relevant provisions.[35]

[77] Then the Court stated:[36]

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32 *Y v Attorney-General,* above n 27, at [32] – [33].
33 *Greig v Hutchison* [2016] NZCA 479, [2016] NZFLR 905.
34 *Erceg v Erceg*, above n 10, at [2].
35 At [3] and [5].
36 At [13].

> … We accept that the courts are able to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers.[37] The need to protect trade secrets or commercially sensitive information, the value of which would be significantly reduced or lost if publicised, are obvious examples of situations where such orders may be justified. However, the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what is seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those just mentioned do not meet this standard.[38] We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule,[39] but agree that the standard is a high one.

[78] The Court went on to cite dicta from the New South Wales Court of Appeal judgment in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales,* including the following passage:[40]

> Moreover an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary …

[79] The Supreme Court emphasised that the phrase "the proper administration of justice" must be construed broadly so that it was capable of accommodating the varied circumstances of particular cases.[41]

[80] The Court concluded that the party seeking the non-publication order had not "… demonstrated to the requisite high standard that the interests of justice required a departure from the usual principle of open justice".[42]

Post Erceg statements

[81] Relevant to the submissions advanced by counsel in this case is whether there is a divergence between the statement of principles articulated in the Court of

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37 See *Peters v Birnie*, above n 11, at [17] – [20].
38 At [25]. See also *Ridge v Parore* [2013] NZHC 2335, [2013] NZAR 1355 at [22], [27] and [35].
39 *ASB Bank Ltd v AB*, above n 12, at [12] – [14].
40 *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (NSWCA) at 476 – 477 per McHugh JA.
41 *Erceg v Erceg*, above n 10, at [18].
42 At [21].

Appeal, and those given by the Supreme Court in *Erceg*. For the purposes of considering this question, it is worth reviewing judgments and comments which have subsequently referred to *Erceg*.

[82] I refer first to judgments of the Supreme Court. That court dealt with an application for leave to appeal the Court of Appeal decision of *X v Attorney-General*, to which I have already referred. The ground of appeal was that it conflicted with that court's decision of *Y v Attorney-General*. In its judgment of 7 March 2017, the Supreme Court stated it had recently dealt with issues relating to non-publication orders in civil proceedings in *Erceg*. It summarised those briefly, and concluded that it was not necessary to revisit the topic. It did not state that the conclusions in *Erceg* diverged from those relied on in either *X v Attorney-General*, or in *Y v Attorney-General*.

[83] Later, in *Z v Z,* the Court dealt with an application for leave to appeal a decision of the Court of Appeal to rescind a non-publication order in a case concerning the interests of a family business.[43] The Court stated it had recently given judgment in such a case, referring to *Erceg*, and did not see that there was any need to revisit it.[44] Again, there was no reference to differing opinions. The judgment was issued on 3 July 2017.

[84] It is worth noting that in the judgment of the Court of Appeal from which leave to appeal had been sought under the same name, reference had been made to *Erceg*, with that court noting that the standard for making non-publication or confidentiality orders was a high one.[45] No reference was made to *Y v Attorney-General*, from which it may be inferred that the Court of Appeal did not consider there was a material divergence of views.

[85] There was one other post *Erceg* judgment of the Court of Appeal to which reference should be made. In *Joint Action Funding Ltd v Eichelbaum,* the Court when fixing a timetable as to whether a suppression order should be made, directed the parties to explain "… why a suppression order is warranted in light of the

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[43] *Z v Z* [2017] NZSC 102.
[44] At [6].
[45] *Z v Z* [2017] NZCA 94, [2017] NZAR 660 at [17].

decisions of this Court in *Y v Attorney-Genera*l and the Supreme Court in *Erceg v Erceg*".[46] That statement appears to suggest that the Court regarded the two decisions as being congruent.

[86] There have been several judgments in the High Court which have referred to the dicta in *Erceg*, with little further comment, for example, *Sellman v Slater (No 2);*[47] *Jolly v Television New Zealand Ltd;*[48] and *H v S*.[49]

[87] In this Court, Judge Inglis was required in *XYZ v ABC* to consider an urgent de novo challenge in respect of an Authority's determination where there had been a refusal to grant interim non-publication orders.[50] An issue which arose was whether the dicta in *Erceg* had effectively overtaken the Employment Court's approach in *H v A Ltd*. After summarising the conclusions in *Erceg*, Judge Inglis said it was appropriate to adopt that approach although she also considered the evidence under the *H v A Ltd* approach. On the facts before her, both approaches led to the same result: an interim order should be made.

[88] Finally, in this brief survey of post *Erceg* responses, I refer to an academic article *Litigation and Privacy*, authored by Mr Andrew Beck, Barrister.[51] He summarised the trio of Court of Appeal judgments, and *Erceg*; then he commented that the decision of the Court of Appeal in *Y v Attorney-General* had the benefit of being an express review of the law for a specific purpose of resolving divergent approaches; it intended that its judgment would provide guidelines for future purposes. On the other hand, the Court in *Erceg* had been required to consider the making of an order on an *ex tempore* basis; and in circumstances where the principles were essentially regarded by the parties as settled. Although statements as to principle were made, he said the context inevitably meant that the issues were not considered in the same depth as had been the case in *Y v Attorney-General*, so that this judgment should still be accorded considerable weight. That said, he expressed the view that some of the statements made by the Supreme Court in *Erceg* might

46 *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249 at [79] (footnotes omitted).
47 *Sellman v Slater (No 2)* [2016] NZHC 2542, (2016) 23 PRNZ 299 at [5].
48 *Jolly v Television New Zealand Ltd* [2017] NZHC 334 at [18].
49 *H v S* [2017] NZHC 945 at [21].
50 *XYZ v ABC* [2017] NZEmpC 40.
51 Andrew Beck *Litigation and Privacy* [2016] NZLJ 40.

give rise to questions regarding some of the points enunciated in *Y v Attorney-General*. Mr Beck specifically referred to the apparent debate as to whether it was or was not appropriate to impose an epithet as to threshold, such as "exceptional" or "extraordinary".

Analysis

[89] I deal first with the issue of whether there is in fact a divergence between the Supreme Court and Court of Appeal dicta on the issues as to whether exceptional circumstances have to be established. I refer first to the final two sentences of the passage cited earlier from *Erceg*.[52] In the penultimate sentence, the Supreme Court referred to statements which had been made in a number of instances, to the effect that an applicant did have to show exceptional circumstances. In the final sentence, however, the court preferred not to adopt that formulation, but to confirm that an applicant "must show that there were specific adverse consequences sufficient to justify an exception to the fundamental rule". The case relied on for this proposition was the *ASB Bank* case.[53] I have already indicated that the Court of Appeal in *Y v Attorney-General* also preferred the views expressed in the *ASB Bank* decision.[54]

[90] Second, the Supreme Court affirmed that it is necessary to establish justification for departure from the fundamental principle of open justice, to a high standard.[55] That too, was the conclusion of the Court of Appeal in *Y v Attorney-General*, when it stated there must be sound reasons for finding that the presumption favouring publication was displaced; and that the threshold is high because a suppression order necessarily derogates from the principle of open justice and the right to freedom of expression.[56]

[91] Third, both the statements just reviewed also explain that the point which is in issue is whether there should be a departure from the fundamental principle of open justice.

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52 At para [77] above.
53 *ASB Bank Ltd*, above n 12, at [12] – [14].
54 *Y v Attorney-General,* above n 27, at [29].
55 *Erceg v Erceg*, above n 10, at [13] and [21].
56 *Y v Attorney-General*, above n 27, at [29] – [30].

[92] Finally, the Supreme Court made it clear that the party seeking to justify the appropriate order must show that there are specific adverse consequences.[57] Similarly, the Court of Appeal in *Y v Attorney-General* stated that an applicant needs to "point to factual material justifying the court departing from the presumption. That may require, but does not necessitate, the applicant adducing evidence".[58] The Court of Appeal emphasised that in reaching a conclusion, it was necessary to strike a balance between open justice considerations and the interests of the party seeking suppression.[59] In effect, this was the approach adopted by the Supreme Court.[60]

[93] Having regard to each of these factors, I consider that there is a significant alignment between the analyses adopted in the Supreme Court and in the Court of Appeal.

[94] This conclusion is reinforced by the fact that no post *Erceg* decision of any Senior Court has suggested that there is in fact a divergence in the respective analysis in *Erceg*, and in *Y v Attorney-General*. That approach is also consistent with the analysis adopted by this Court in *H v A Ltd*, in both the interlocutory and substantive judgments; as was affirmed in the Court of Appeal's leave decision.

[95] Mr O'Callahan submitted that a difficulty with the majority decision in the interlocutory judgment of *H v A Ltd* was that it did not tackle the question of whether it was necessary to make a non-publication order so as to secure the proper administration of justice. It was common ground between the Court of Appeal and *Y v Attorney-General*[61] and the Supreme Court in *Erceg*[62] that the open administration of justice is central. But it was also central to all judgments of this Court in *H v A Ltd*. Whilst the language used in this Court was perhaps not as elaborate as that used in the analyses of the Court of Appeal and Supreme Court, I consider that the approaches of the three courts are consistent. There is no material dfference between them.

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57 *Erceg v Erceg*, above n 10, at [13] and [21].
58 *Y v Attorney-General*, above n 27, at [36].
59 At [31] and [35].
60 *Erceg v Erceg*, above n 10, at [21].
61 *Y v Attorney-General*, above n 27, at [31].
62 *Erceg v Erceg*, above n 10, at [18].

[96] In short, an applicant for a non-publication order under the Act is not required to establish exceptional circumstances, though the standard for departing from the principle that justice should be administered openly is high. The party seeking such an order must show specific adverse consequences which would justify a departure from the fundamental rule. A case-specific balancing of the competing factors is required. The position may be different at the interim stage.

[97] I do not consider that the *H v A Ltd* approach as confirmed by the Court of Appeal in *A Ltd v H* has been overruled impliedly by the judgment in *Erceg*.

[98] I adopt these principles for the purposes of the non-publication applications made in this case. It follows that the Authority erred on a point of law, when it stated that the applicant had to establish exceptional circumstances. That is neither what was concluded by the majority in the interlocutory judgment, or in the substantive judgment in this Court in *H v A Ltd*, or in *A Ltd v H*. Nor is it the current position following the more recent cases I have reviewed. That being so, I must now reconsider the plaintiff's non-publication applications.

Application for non-publication of names and identifying details

[99] Mr Harrison submitted that the Court should make an order prohibiting publication of the names of the parties and identifying information on an interim basis, because it is likely the Court will have to consider the commercially sensitive information contained in the documents which are already before the Court; and because it appears Ms Berry proposes to raise numerous disputed and irrelevant accusations of wrongdoing and impropriety. He submits that whilst these matters may be traversed at the substantive hearing, the fairest solution in the meantime would be to suppress the parties' names and identifying details so as to preclude unfair prejudice.

[100] Mr O'Callahan responded to this submission by stating that there had already been a determination issued by the Authority which referred to the names of the parties, which had been reported. Thus, the horse had already bolted. He also submitted that if the material before the Court did not satisfy it that a permanent

non-publication order was likely to be made after the substantive hearing, then there is no reason why an interim order should be made now.

[101] I elaborate on the circumstances referred to by Mr O'Callahan. The Authority's determination was placed on the Employment Law Database on the Ministry of Business, Innovation and Employment's website. That resulted in media reports, as already summarised.

[102] Although a takedown order was initially sought, Crimson/UniTutor withdrew that application. Mr Harrison also confirmed to the Court that it would not be contended by the plaintiffs that any non-publication order which this Court might be persuaded to make would have retrospective effect.

[103] That being the case, as Mr O'Callahan in effect submitted, this Court is not being asked to alter that which has already occurred, which obviously includes the publication of names and identifying details.

[104] A further consideration is that the High Court has not made non-publication orders in the proceedings before it. Those proceedings are based on the same set of facts as gives rise to the present proceeding. It would be simple enough for any individual to conclude, even were this Court to make non-publication orders, that the names mentioned in the High Court proceedings are those who are parties to this proceeding.

[105] In short, it would be futile now to make such orders. It is well established that a Court should not make an order of non-publication if it would be futile to do so.[63]

[106] These difficulties are catalysed by the fact that there was delay by the plaintiffs in bringing their challenge in respect of a non-publication order to this Court. The Authority's determination was issued on 24 March 2017, but for reasons that are not altogether clear, the challenge was not filed in this Court until

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63 *Timmins v Asurequality Ltd* [2011] NZEmpC 167 at [23]; *Q v W* [2012] NZEmpC 216 at [31]. Both of these decisions relied on dicta in the High Court decision of *Zanzoul v Removal Review Authority* HC Wellington CIV-2007-485-133, 9 June 2009.

21 April 2017. Moreover, no interim order of non-publication was sought in the Authority, on the basis that a challenge was to be brought, which would have been an obvious protective step to preserve the then status quo.

[107] Next, I am satisfied that the particular issues about which the plaintiffs are concerned can be dealt with by making non-publication orders that focus on any specific information which should indeed be protected. It is clear that the Court, when considering the making of non-publication orders should consider the least restrictive intervention to the fundamental principle of justice being administered in public. It would go too far to make orders as broad as those which are sought.

[108] In my view, the scope of the application which has been made amounts to an attempt to protect reputation. The evidence does not establish that it is reasonably necessary to do so.

[109] It is also the case that the driving force of Crimson/UniTutor is Mr Beaton. The evidence is that he has a prominent public profile, which it appears is relevant to his business interests. In my view, there is a legitimate public interest in knowing that he is involved in this litigation since it pertains to those interests.

[110] Mr Harrison was unable to refer the Court to any cases where a court had ordered non-publication of names of parties due to the existence of commercially sensitive information. Whilst it is relatively common for orders to be made to protect the details of such information, that factor is rarely, if ever, considered a ground for outright suppression of the name of the party or parties involved. Certainly, in this case, I do not consider that the circumstances warrant such a step.

[111] Balancing the factors raised by Mr Harrison against the open justice factors I have summarised, I am not persuaded that it is necessary for the proper administration of justice to make the order which is sought. For all these reasons, I dismiss the application for an interim order of non-publication of name and identifying details.

Non-publication orders in respect of particular evidence

[112] I turn now to consider whether orders should be made to protect two particular categories of information: first, the information which is alleged is commercially sensitive, and second, allegedly objectionable allegations either because the information is unfounded or it is objectionable. These orders are of course sought on an interim basis.

[113] The context within which the assessment of any commercially sensitive information includes two agreements into which the parties entered. They contained extensive confidentiality obligations. The first of these is the employment agreement between Crimson/UniTutor and Ms Berry. "Confidential information" was defined in very broad terms. It related to information concerning the employer and the employer's clients, generally, but it also included information about the employer's financial affairs, trade secrets, business and technical information, business methods and management systems, and information which could be reasonably regarded as confidential by the employee. The relevant provision went on to state that under no circumstances was any use of this information to be made public, except for furthering the employer's business objectives. That obligation was to continue beyond termination of employment.

[114] The deed of sale and purchase of shares in UniTutor also defined the term "[c]onfidential information" in broad terms. It included information relating to the business affairs of UniTutor, or either party to the deed, information which was disclosed by either party to the other or their respective advisors on the basis that such information was confidential, or which might reasonably be expected to be confidential in nature. The parties agreed that this information would remain confidential at all times. The obligation had no time limit. Although this document is not an employment agreement, the obligations in it are relevant to the context which must be considered for the purposes of the present applications for non-publication.

[115] A yet further relevant matter of context is provided by s 4(1B)(c) of the Act. That provision underscores the importance of confidential information: an employer

may be relieved from providing access to confidential information to an employee, where there is good reason for maintaining the confidentiality; the section gives a specific example, the possibility that disclosure would cause "unreasonable prejudice to the employer's commercial position." It is appropriate to take into account the fact that the statute itself ascribes importance to protection of information of this kind.

[116] As observed earlier, it is also the case that this category of information is commonly protected by non-publication orders both in this Court[64] and other courts.[65]

[117] However, the exercise of the discretion requires an assessment as to whether the information before the Court on this occasion is in fact commercially sensitive, and of such a nature that would justify an exception to the fundamental principle of open justice.

[118] In her affidavit, Ms Berry referred to aspects of the negotiations leading up to the acquisition of her shares in UniTutor. Her evidence refers to numerous documents, including financial summaries, which were apparently part and parcel of that process.

[119] Crimson/UniTutor contends that there is a risk of prospective sellers and buyers having access to this information, which it says could provide a strategic advantage to others.

[120] Also referred to is evidence and documents relating to the operational activities of Crimson and UniTutor. Again, it is asserted that this is commercially sensitive information, the release of which could provide an advantage to competitors.

[121] As already mentioned, Mr Thomas also said that shareholders and investors in Crimson and its associated entities need to have continued faith in their operations, and that there would likely be adverse consequences to the plaintiffs'

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64 *H v A Ltd*, above n 9, at [80].

65 *Y v Attorney-General*, above n 27 at [33]; *Erceg v Erceg*, above n 10, at [13].

business interests if commercially sensitive information were to be publicly released at this stage.

[122] The thrust of the case for Ms Berry, supported by TalentWire, was that the claims made are overstated; and that upon analysis each of the discreet assertions could not fall into that category since they are of relatively modest importance. It was also asserted that they are dated having regard to the lapse of time since the negotiations occurred.

[123] However, for present purposes, I consider that these items of information clearly fall within the parameters of confidential information as contained in Ms Berry's employment agreement, and in the deed as to sale and purchase of shares. Consequently, it is appropriate to regard this information as being commercially sensitive.

[124] Moreover, the various items of evidence referred to in Ms Berry's affidavit should be considered on a cumulative basis; the information is broad ranging, and there is a risk of significant adverse consequences if that information were to be released.

[125] This assessment, however, is necessarily one made on a preliminary basis, and needs to have regard to the way in which the issue has emerged. Initially, the employment relationship problem between the parties related to enforcement of a restraint of trade provision. Crimson/UniTutor says that it had not been anticipated that extensive information relating to negotiations which occurred with regard to the acquisition of UniTutor would become the subject of extensive evidence, which is what occurred when Ms Berry filed her affidavit in the Authority.

[126] On the information before the Court, Crimson/UniTutor has yet to file its evidence in reply. Ms Berry's evidence is untested. Crimson/UniTutor say they will resist the contentions which Ms Berry has made. No doubt they will elaborate in due course, following which the Court will be able to consider the merits of the employment dispute in an orderly way.

[127] Standing back and balancing the competing arguments, on the one hand I accept that the evidence in question will potentially be relevant, and to that extent the public may have a legitimate interest in knowing what the dispute is about; that factor points away from the making of a non-publication order. Against that, however, is the fact that this case is still at a preliminary stage where Ms Berry's evidence is untested, and Crimson/UniTutor have yet to file evidence; the evidence which is under consideration is of a nature which the parties have agreed should be protected; and there is a risk of commercial harm if the evidence were to be published at this stage.

[128] For these reasons I am satisfied that it is appropriate to make an interim order, the details of which I set out below.

[129] A similar conclusion should be reached in respect of the second category of information which is the subject of the present application. Mr Harrison submits that there are numerous examples of information which is likely to be held as being legally irrelevant and inadmissible, for the purposes of the disputes which must be resolved.

[130] The Court is in no position to resolve that debate at present, particularly in the absence of evidence filed on behalf of Crimson/UniTutor which would enable a more focused and informed assessment of these problems. The possibility of publication could result in unfair prejudice, because there would be a lack of balance in the material if it were to be published.

[131] If it transpires at the hearing that the particular allegations are indeed relevant, then the issues can be traversed in a balanced way; and whether information pertaining to those assertions should be published is a matter that can be determined at that time if need be.

[132] I have also considered the question of whether adequate protection can be achieved by the current order which prevents a search of the Court's file without leave of a judge. Such an order serves to preserve the parties' rights in most cases at the pre-hearing stage. However, in this instance, the hearing of the present

applications occurred in public; and there was cross-examination of Mr Thomas in which he was questioned about various aspects of the information for which protection is sought. The oral submissions of counsel referred to these matters of concern in some detail. Members of the public were present during the hearing. An order that the files not be searched would not protect the oral information which was discussed in the context of the interlocutory hearing which was heard in public.

[133] Balancing the competing arguments as to open justice on the one hand, and as to non-publication on the other, I am satisfied that an interim order should be made also in respect of the allegedly irrelevant evidence.

Form of order

[134] At the Court's request, Mr Harrison drafted and provided a form of interim order, designed to preclude publication of information contained in particular paragraphs of Ms Berry's affidavit, and in particular exhibits.

[135] An order referring to that material would be appropriate if reference could be made to a copy of the affidavit in order to identify the information which may not be published. Whether an individual could do so would turn on whether they could access the affidavit. If that person is a member of the public, she or he would need to obtain leave and search the Court's file.

[136] Whilst these protections are appropriate on an interim basis, the proposed form of order does not deal with the issue of the oral evidence or submissions as given at the interlocutory hearing which was held in public.

[137] I am prepared to make an order in terms of the draft but it will need to go further so as to protect that category of information. Otherwise an order made with reference to the protected aspects of Ms Berry's evidence could be compromised. It may well be that there should be additional statements in the order which refer generically to the commercially sensitive information, and to the disputed objectionable material.

[138] Counsel are to confer as to the appropriate form of order. A joint memorandum is to be filed within five working days. If agreement cannot be reached, individual memoranda are to be filed and served within the same time limit.

[139] For completeness, I record that having regard to the conclusions reached on this issue, I am not persuaded that the Court should direct the Authority to amend its substantive determination, even assuming that it has the power to do so.

In camera hearing?

[140] Mr Harrison submitted that the various factors relied on by the plaintiffs for the purposes of the non-publication orders, also supported their application that the substantive hearing take place *in camera*. In short, it was submitted that the nature of the commercially sensitive information, and the contested objectionable evidence, meant that it was in the interests of justice for such an order to be made.

[141] Mr O'Callahan submitted that "[c]losing the Court" was the most extreme measure which would be available to a Court or Tribunal. He submitted that it would offend fundamentally against the principles of open justice and ought to be limited to the most extreme cases.

[142] I considered the applicable principles for such a hearing in *Q v Commissioner of Police*.[66] I concluded that although there was no specific statutory provision to direct such a hearing, as is by contrast bestowed on the Authority under s 160(1)(e) of the Act, the Court does have the ability as a Court of Record to do so. I also concluded that r 9.51 of the High Court Rules 2016 should apply via reg 6 of the Employment Court Regulations 2000.

[143] Rule 9.51 of the High Court Rules provides:

> **Evidence to be given orally**
>
> Unless otherwise directed by the court or required or authorised by these rules or by an Act, disputed questions of fact arising at the trial of any proceeding must be determined on evidence given by means of witnesses examined orally in open court.

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[66] *Q v Commissioner of Police* [2015] NZEmpC 8.

[144] It is well established that on rare occasions the Court can take the quite exceptional step of closing the Court.[67]

[145] In *Q v Commissioner of Police*, I was satisfied that the evidence established there were exceptional circumstances that required the Court to be closed when details of a particular unit of the Police was to be discussed, and when names of members of those units were referred to.[68]

[146] This issue must be considered in light of the pleadings which have now been filed with regard to the removed proceeding, and such other information as the parties have chosen to provide to the Court.

[147] It is clear from the pleadings that the issues for resolution will focus on whether there has been a breach of a restraint of trade provision in Ms Berry's employment agreement; and the Court will have to consider a counter-claim by her that her resignation was the result of a repudiation and breaches of that agreement which entitled her to cancel the employment agreement and to claim unpaid monies.

[148] I have found that commercially sensitive information and information relating to objectionable material should be protected in the meantime; but those orders will need to be reviewed by the trial Judge in light of all information which is placed before the Court, at the commencement of the hearing.

[149] At this stage, I am not persuaded that the exceptional step of directing an *in camera* hearing should be ordered now. That said, the parties should have the opportunity of revisiting this issue at the commencement of the hearing, and in light of such information as has been placed before the Court by that time. This will be an issue for resolution by the trial Judge.

[150] Accordingly, I adjourn this application for consideration by the Court at that time.

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[67] *Broadcasting Corp of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 123.
[68] *Q v Commissioner of Police*, above n 66, at [23].

Costs challenge

[151] The costs challenge was argued by Mr Bryant on behalf of Crimson/UniTutor, and Ms Yan, on behalf of Ms Berry.

[152] Mr Bryant confirmed that Crimson/UnitTutor brought its challenge on a non de novo basis. That means that the challenger must establish that the Authority erred either in fact or in law. Both such errors are asserted.

[153] The costs determination arose from an aborted investigation meeting in respect of Crimson/UniTutor's application for an interim injunction restraining Ms Berry from working for UniTutor. As already recorded, the investigation meeting was set down for 8 February 2017, but was adjourned.

[154] It is necessary to refer to the Authority's summary of the relevant events. The applicants had sought a non-publication order. The Authority Member indicated at the investigation meeting, orally, that such an order could not be granted in its totality without evidence. Later, it was recorded that Crimson/UniTutor then sought an adjournment of the interim injunction investigation meeting, so as to file evidence in support of their application for non-publication orders.

[155] The application for the adjournment was not opposed, but Ms Berry and TalentWire sought an interim order for costs, which was described as being necessary to reflect the preparation and appearance which had resulted in adjournment. Costs were sought at the rate of half the applicable daily notional tariff. Crimson/UniTutor opposed the application, submitting that costs should be dealt with at the end of the substantive investigation meeting.

[156] The Authority accepted that the respondents had incurred costs in preparing and attending the investigation meeting. It went on to record the chronology. After the filing of a statement of problem on 20 October 2016, a telephone directions conference had been held on 17 November 2016. The Authority was not told that an application for a non-publication order would be made. A half-day investigation meeting was scheduled when the application for an interim injunction would be heard.

[157] However, the Authority said that on 24 January 2017, such an application had been filed by way of memorandum; it was alleged that an order should be made because of potential reputational damage. There was no evidence filed in support. The application was strongly opposed by the respondents. The Authority recorded that since the delays in filing the application for the non-publication order was attributable to Crimson/UniTutor only, the granting of an adjournment was an indulgence in the circumstances.

[158] The Authority accepted that legal costs had been incurred, and that the respondents would have to meet those in the interim, whilst awaiting both the interim and substantive investigation meetings which were then scheduled to follow. They should not, the Authority said, be put to the expense of further delay.[69] Accordingly, it was appropriate to make an interim costs order. Taking the daily tariff and acknowledging that the matter had been set down for a half-day hearing, the starting point was $2,250. There were no factors warranting an adjustment.

[159] The Authority ordered that Crimson and UniTutor were to pay Ms Berry and TalentWire the total sum of $2,250 as a contribution towards their costs.

[160] In summary, Mr Bryant submitted the following errors of fact and law:

a) There should not have been a criticism that Crimson/UniTutor did not flag the possibility of an application for non-publication orders at the initial telephone directions conference on 17 November 2016. That is because Ms Berry's affidavit had not by then been filed, and it was the document that prompted the application. Consequently the issue could not have been anticipated.

b) It was incorrect to say there was delay in filing the application for non-publication orders. Reliance was placed on a statement made by an Authority support officer to the effect that the application for non-publication order, and a private investigation meeting, would be passed on to the Authority Member "for instructions". It was

[69] *CCL v SB*, above n 2, at [10].

contended that no further "instructions" were issued, and that it was incumbent on the Authority to provide these if there was a difficulty as to evidence.

c) There was no proof that Ms Berry and TalentWire had in fact incurred legal costs.

d) TalentWire was a "lay-litigant" who was not entitled to an award of costs.

e) While it was accepted costs should follow the event, there was no "event" where either one party succeeded or the other lost. There was merely an adjournment.

f) There was no opportunity for the parties to provide legal submissions on the issue of costs. In various respects, there was a failure to adhere to Practice Note requirements of the Authority.

[161] Ms Yan relevantly submitted that:

a) Some of the material for which the applicants ultimately sought orders of non-publication were initially included in the statement of problem and supporting affidavit. Issues of commercial sensitivity should have been raised at the outset, if there was such a concern.

b) The plaintiffs chose not to present evidence in support of their applications for non-publication orders – even when the fact that there was an absence of evidence was pointed out by counsel for Ms Berry in her submissions filed on 1 February 2017. The investigation meeting was not held until 8 February 2017, and supporting evidence could and should have been filed before then.

c) It was not incumbent on the Authority to notify an applicant of requirements of this kind.

d) It was clear to the Authority that Ms Berry had been represented by lawyers who would have incurred costs, and it was appropriate for the Authority to acknowledge this.

c) It was not accepted that there was any relevant breach of the process indicated by the relevant Practice Note of the Authority.

Analysis

[162] I deal first with the sequence of events which followed the filing of the notice of application for non-publication orders on 24 January 2017.

[163] Although the Authority support officer said that the application would be passed to the Authority Member "for instructions", the same email indicated that the defendants should make their comments with regard to the orders sought.

[164] That occurred, when legal submissions were filed by counsel for Ms Berry on 1 February 2017. Those made reference to the fact that no evidence had been filed in support of the application.

[165] At that point, it was obvious that consideration needed to be given to the fact that an application for a contested order should be supported by evidence. That did not occur.

[166] I do not consider that it was incumbent in these circumstances for the Authority to tell the applicant party that evidence should be provided. Any contested application must meet the appropriate evidential threshold.

[167] Then, it is necessary to discuss what occurred at the investigation meeting itself. The Authority Member pointed out the problem. This appears to have led to a discussion as to the possibility of an adjournment. It was for counsel for Crimson/UniTutor to decide whether such an application should be made; Mr Bryant did so. It was not opposed and was granted. It was, as the Authority stated, an indulgence to have allowed this to occur.

[168] The "event" was the fact that the investigation meeting could not proceed to consider the matter for which it had been convened. That an adjournment was necessary was entirely due to the failure to file supporting evidence. There was no error of law on the part of the Authority in determining that costs should follow this event.

[169] Unsurprisingly the defendants then sought an order for costs. Although counsel for Crimson/UniTutor submitted that these should be dealt with at the ultimate investigation meeting, the substantive issues did not need to be determined before costs with regard to the aborted hearing could be fixed.

[170] There was no error on the part of the Authority in determining that the costs issue should be resolved then and there for the reasons which were given. As the Authority stated, Ms Berry would otherwise have been out of pocket in the meantime – I will return to the position of TalentWire shortly. Although Practice Note 2 states that "[t]ypically the Authority will not deal with costs until the substantive determination has been made …", the Practice Note also makes it clear that this is not a universal practice: this is what is to happen typically not universally. In any event, issues as to costs must finally fall for consideration under the overarching discretion bestowed by cl 15 of sch 2 to the Act which provides that the Authority "may order any party to a matter to pay to any other party such costs and expenses … as the Authority thinks reasonable." That is a discretion which must be exercised in a judicial and principled fashion. If the interests of justice require costs to be dealt with immediately, the Authority may do so.

[171] Mr Bryant also referred to the Practice Note for another reason: he referred to its guidance that "[p]arties will always be encouraged to try to resolve costs on their own terms …". He said that no such opportunity was given.

[172] If counsel for Crimson/UniTutor considered that direct dialogue with other counsel would assist, counsel could no doubt have raised that possibility with the Authority; it is likely that an opportunity for such dialogue would have been given. But more to the point, there is simply no evidence that such dialogue would have led to an agreement as to costs. All the evidence, including that filed in this Court,

suggests that the parties are not *ad idem* on many issues at all; and there is nothing to suggest that an accommodation on costs could have been reached. I do not consider that a challengeable error occurred on this point.

[173] Next, Mr Bryant submitted that there was no opportunity for legal submissions to be advanced. I do not consider that there was such an error. The issue was narrow; counsel should have been able to deal with the matter immediately, since all that was required was submissions as to the relevant chronology. The submissions which were ultimately made to the Court on the costs challenge does not suggest that any relevant matter was not able to be raised.

[174] Finally, reference was made to para 11 of the Practice Note, which states that if a party is seeking an award of costs, then it is important that supporting material is provided. Again, that requirement must be subject to the overarching discretion as to costs which are provided for in cl 15 of sch 2 of the Act. The Practice Note also makes it clear that, consistent with the exercise of that discretion, a tariff approach will be adopted, and that has been approved by this Court.[70] If there are no issues as to whether professional services have in fact been rendered, or as to whether there should be an increase or decrease from the tariff, it is open to the Authority to conclude that supporting material is not required. It was obvious that Ms Berry was represented by a senior practitioner, and that legal costs would have been incurred in all probability in excess of the notional daily rate.

[175] It would have been open to counsel for Crimson/UniTutor to request the filing of this material, so that it could indeed be assessed, but no such request was made. Nor was there an issue as to an increase above or decrease from the notional daily rate.

[176] Mr Bryant also submitted that, in effect, Crimson/UniTutor was "punished" because potential issues as to non-publication had not been raised at the initial telephone directions conference. There is no evidence that this occurred. The

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[70] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (NZEmpC); and see *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15, [2014] ERNZ 1 at [6] – [7].

reasoning process of the Authority was entirely orthodox, save for one respect to which I shall now turn.

[177] It is the case that TalentWire was not entitled to costs in respect of the hearing; it was not represented by legal counsel: *Clifford Lamar Ltd v Gyenge*[71] and *Evolution E Business Ltd v Smith.*[72]

[178] It follows that the Authority erred when it directed that the costs be paid to both defendants in a total amount.

[179] Having regard to the circumstances to which I have referred, the appropriate order would have been to direct that the sum of $2,250 be paid by Crimson/UniTutor to Ms Berry only. To that extent I allow the costs challenge, and this judgment replaces the determination of the Authority in that regard.

Conclusion

[180] The challenge regarding non-publication orders is allowed in part. Counsel are to confer as to the appropriate form of the Court's order. A joint memorandum on that topic is to be filed within five working days. If agreement cannot be reached, individual memoranda are to be filed and served within the same time limit. I will then issue a supplementary judgment which will record the making of the order.

[181] The interim order as to non-publication of names and identifying details will continue until the issuing of the supplementary judgment.

[182] I make an order directing that this judgment is not to be published until the supplementary judgment is issued.

[183] The application for an *in camera* hearing is adjourned until the commencement of the substantive hearing, when it may be reviewed by the trial Judge.

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71 *Clifford Lamar Ltd v Gyenge* [2011] NZCA 208 at [12].

72 *Evolution E Business Ltd v Smith* [2011] NZEmpC 109, [2011] ERNZ 105 at [69].

[184] The challenge as to costs is allowed in part; the sum of $2,250 is to be paid by Crimson/UniTutor to Ms Berry only.

[185] This judgment replaces the determinations of the Authority.

[186] A telephone directions conference is to be arranged by the Registrar for the purpose of establishing a timetable for the advancing of the proceeding which has been removed to the Court. Each party is to file and serve a memorandum as to the directions they seek, seven days before that conference.

[187] For the purposes of the matters considered by the Court in this judgment, costs are reserved.

B A Corkill
Judge

Judgment signed on 3 August 2017 at 3.45 pm