ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF THE PLAINTIFF

IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2021] NZEmpC 195
EMPC 286/2021

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER OF	an application for non-publication order
BETWEEN	KAQ by his litigation guardian, Joshua Shaw Plaintiff
AND	THE ATTORNEY-GENERAL sued on behalf of the Ministry of Business, Innovation and Employment, Labour Inspectorate First Defendant
AND	HOWARD TEMPLE, FERVENT STEDFAST, ENOCH UPRIGHT, SAMUEL VALOR, FAITHFUL PILGRIM, NOAH HOPEFUL AND STEPHEN STANDFAST Second Defendants
AND	FOREST GOLD HONEY LIMITED AND HARVEST HONEY LIMITED Third Defendants

Hearing: On the papers

Appearances: J L Shaw, counsel (litigation guardian) for plaintiff
J Catran and A Piaggi, counsel for first defendant
S G Wilson, counsel for second and third defendants

Judgment: 10 November 2021

INTERLOCUTORY JUDGMENT (NO 3)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application for non-publication order)

Background

[1] The plaintiff, by their litigation guardian, seeks permanent orders of non-publication. The application arises against the backdrop of a claim for a declaration of employment status brought under s 6 of the Employment Relations Act 2000, in relation to which a notice of discontinuance has been filed.

[2] While the defendants support the making of permanent non-publication orders in respect of the plaintiff's name and identifying details, it is the Court which must decide whether such orders are appropriate in the circumstances.

Approach

[3] The Court has a broad power under sch 3 cl 12 of the Employment Relations Act to 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that "all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published," subject to such conditions as the Court thinks fit. While the discretion is broad, it must be exercised consistently with applicable principles. The principle of open justice is a principle of fundamental importance. It forms the starting point for determining whether the circumstances of a particular case justify an order for non-publication.[1]

[4] A party applying for an order of non-publication must establish that sound reasons exist for the making of an order of non-publication, displacing the presumption in favour of open justice.[2] The discretionary exercise involves the Court balancing other interests with the fundamental principle of open justice.

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1 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.
2 At [13].

[5] Of particular relevance in this specialist jurisdiction is the requirement for the discretion to be exercised consistently with the objectives of the applicable legislative framework. These objectives include the need to support successful employment relationships and to address the inherent inequality of bargaining power between employers and employees.[3] As has been observed in a number of cases, the significant detrimental impact that publication of the names of parties, or even witnesses, can have on their ongoing prospects of employment, regardless of the outcome of the case, is a factor which has become increasingly well recognised in this jurisdiction as relevant to the weighing exercise the Court is required to undertake.[4]

[6] The plaintiff is a minor. The proceeding traversed matters of a sensitive nature. While I accept that the there is a public interest in the proceeding, that interest is likely diminished given that the plaintiff has now discontinued their claim. In any event, I do not consider that there is any real public interest in knowing the plaintiff's name. I accept that there is a public interest in the defendants' identity (and none of the defendants have sought orders of non-publication in their favour). I have considered whether making the order sought would be futile given that the plaintiff's name is in the public domain,[5] and invited (and received) further submissions on that.

[7] I agree with the submission made by Mr Shaw, the plaintiff's litigation guardian, that the mere fact that the plaintiff's name has been included in interlocutory judgments should not, of itself, preclude the making of a non-publication order if it might otherwise be warranted and of value. As has been observed by the High Court:[6]

> [12] … while prior publicity is relevant, it need not be determinative. Sometimes it will be decisive simply because the prior publicity is so extensive that the horse has bolted. Other times, while one cannot undo that which has happened, there is still value in preventing further publicity (if suppression is otherwise justified). … The reality is that some people,

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3 Section 3.

4 See, for example, *GF v New Zealand Customs Service* [2021] NZEmpC 162; *FVB v XEY* [2020] NZEmpC 189, [2020] ERNZ 441 at [12]; *WN v Auckland International Airport Ltd* [2021] NZEmpC 153 at [43]-[44]; and *JGD v MBC* [2020] NZEmpC 193, [2020] ERNZ 447 at [8].

5 See *AJH v Fonterra Co-operative Group Ltd* [2021] NZEmpC 111; and *Zanzoul v Removal Review Authority* HC Wellington CIV-2007-485-1333, 9 June 2009 for a discussion of the general principles relating to futility.

6 *R v X (No 2)* [2015] NZHC 1245 at [12]. See also *W v R* [2019] NZCA 192 where the Court of Appeal granted permanent name suppression, noting that previous publication of the appellant's name was neutral given the absence of notoriety and that such publication would not undermine the effectiveness of a permanent suppression order.

> interested enough to work away at it, may make an educated guess from that which has been published at the defendant's identity. But that is no reason to allow general publication and does not undermine its possible future effectiveness. Suppression will be respected by responsible news organisations.

[8] In the present case the horse has not yet fully bolted. There has been limited identification of the plaintiff and (Mr Shaw submits) limited publicity. A media application now before the Court suggests that the landscape may be about to change. In the circumstances, including the fact that the plaintiff is a minor, I am satisfied that it is in the interests of justice that a permanent order be made prohibiting publication of the plaintiff's name and identifying details.

Result

[9] There is a permanent order, under sch 3 cl 12 of the Employment Relations Act, of non-publication of the plaintiff's name and identifying details.

[10] No issue of costs arises.

Christina Inglis
Chief Judge

Judgment signed at 4.20 pm on 10 November 2021