IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 107
EMPC 11/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JKL Plaintiff
AND	STIRLING ANDERSEN LIMITED Defendant

Hearing: On the papers

Appearances: A Fechney, advocate for plaintiff
No appearance for defendant

Judgment: 20 June 2022

JUDGMENT OF JUDGE KATHRYN BECK

Background

[1] In a determination issued on 8 October 2021, the Employment Relations Authority declined the plaintiff's application for findings that Stirling Andersen Ltd had breached her terms of employment and unjustifiably dismissed and disadvantaged her in 2019.[1]

[2] Subsequently, the plaintiff applied to the Authority for recall of the decision in order to remove some details of the evidence recorded in it under r 11.9 of the High Court Rules 2016. The defendant took no steps in the proceeding. In a second determination, the Authority rejected the application because it found none of the

[1] *JKL v Stirling Andersen Ltd* [2021] NZERA 440 (Member Arthur).

grounds for recall was made out.[2] It went on to state that even if the decision had been recalled, a non-publication order would not have been made.[3]

[3] The plaintiff challenges the second determination and seeks the following relief:

(a) a finding that the Authority erred in declining to recall its determination;

(b) replacement of the Authority's determination with an order that the determination be recalled; and

(c) orders for non-publication of the plaintiff's identity.

[4] The defendant has chosen to take no steps in this proceeding and has advised it will abide the decision of the Court.

[5] Interim non-publication orders in relation to the plaintiff's identity are currently in place pending this decision

The issues

[6] In determining this application, it will be necessary to consider:

(a) whether the Authority erred in declining to recall the first determination;

(b) whether the Court has jurisdiction to consider the non-publication issue; and

(c) if it does have jurisdiction, whether a non-publication order should be made.

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2 *JKL v Stirling Andersen Ltd* [2021] NZERA 551 (Member Arthur).
3 At [17]–[27].

Did the Authority Member err in declining to recall the first determination?

The Authority's determination concerning recall

[7] The Authority considered that it had jurisdiction to recall a determination.[4] However, the Member considered that a determination could only be recalled under one of the three grounds set out in *Horowhenua County v Nash (No 2)*, which are:[5]

> ... first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

[8] The Authority found that only the third ground was relevant in this case, namely whether some "very special reason" required that the judgment be recalled. I agree that was the appropriate basis on which to consider the application.

[9] The Authority considered that three submissions made on behalf of the plaintiff required particular attention. First, that the requirement that there be a "very special reason" was a lower threshold in the Authority than in other adjudicative forums. Secondly, that the plaintiff's advocate had been experiencing health problems and a heavy workload at the time of the hearing that resulted in her overlooking whether or not a non-publication order of some of the evidence should have been sought. Thirdly, that non-publication orders would likely have been granted if they had been asked for at the time.

[10] In relation to whether there is a "very special reason" that warranted recall, the Authority held that it was not an issue of whether the threshold was said to be low or high. It was a question of whether there was some particular factor or circumstance that was so "very" special that it outweighed the "great inconvenience and uncertainty" that would result if determinations generally do not stand as issued.[6] The Authority accepted that the plaintiff's advocate was experiencing health concerns and

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4 *Carrothers v Jasons Travel Media Ltd* NZERA Auckland AA30A/07, 21 March 2007) at [23]–[28].

5 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (HC) at 633.

6 Subject to the safeguard of challenge to the Employment Court.

professional pressures but noted that both the advocate and the plaintiff were astutely involved in the investigation, heard the introductory remarks at the opening of the meeting (which included drawing the parties' attention to the fact that the Authority's determinations are published) and then, even after two full days of investigation, did not raise any concern about what evidence would be referred to in the determination. It held that not having used that opportunity weighed heavily against finding that the omission was a very special reason sufficient to recall the determination. It also held that it could not be said with any certainty that, even if asked for at the time, orders would have been made so that the determination did not refer to evidence about the allegation against the plaintiff.

[11] It went on to hold that it would not have made an order prohibiting publication of particular paragraphs or the plaintiff's name, whether considered earlier during the investigation meeting, or during the recall application.

[12] On that basis, the Authority found that the plaintiff had not established that there was a very special reason that justice required the determination be recalled for the purpose of considering whether some of its content should be prohibited from publication.

Applicant's submissions to the Court

[13] The plaintiff submitted that although her recall application was made under r 11.9 of the High Court Rules, cl 4 of sch 2 to the Employment Relations Act 2000 (the Act) also allows the reopening of an investigation by the Authority in some circumstances. She submitted that an application for recall is an application to reopen the investigation.

[14] Further, she submitted that the Authority's jurisdiction of equity and good conscience is a factor which weighs in favour of a differential approach to recall/reopening applications. In particular, she submitted that the Authority had overlooked its power to prohibit publication.

Discussion

[15] Generally speaking, a judgment, once delivered, must stand, for better or for worse. Recall is one of a small number of exceptions to this rule. The threshold is a high one.[7] It is to be approached cautiously given the important public interest consideration of the finality of litigation.[8]

[16] Ms Fechney submitted, and I accept, that the Authority must have special regard to the objects of the Act and its equity and good conscience jurisdiction in exercising its discretion. Those considerations inform and augment, but do not displace, the principles that have been established in the courts of general jurisdiction and which were relied on by the Authority in this case.

[17] The Authority's jurisdiction of equity and good conscience must include the important principle of the finality of litigation. The plaintiff had ample opportunity to seek non-publication of particular evidence or their identity during the investigation meeting but did not do so. The Authority did not overlook its power to prohibit such publication as evidenced by the steps it took to anonymise particular witnesses and individuals.

[18] I agree with the Authority that there was no very special reason that would justify recalling the determination. There are no equity and good conscience considerations that would override the public interest consideration of ensuring the finality of litigation.

[19] I do not consider that the Authority erred in declining to recall the determination.

[20] However, the Authority, along with the plaintiff, appears to have assumed that recall of the determination was necessary in order to make a non-publication order. I do not consider this to be the case. Such an order could be made without the determination being recalled.

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7 *Nottingham v The Real Estate Agents Authority* [2017] NZCA 145.
8 *AlKazaz v Enterprise IT Ltd (No 11)* [2022] NZEmpC 15 at [2].

[21] It is common ground that the Authority has jurisdiction to make non-publication orders in respect of determinations. 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.

[22] This provision does not indicate any temporal limit as to when the power can be exercised. I consider that this means that the Authority can exercise its power to prohibit publication at any time before or after proceedings have concluded. For the purposes of this case, even after the Authority had issued its first determination, it could have considered whether any of the details of the judgment or the names of the parties should not have been published. This could have been done without recalling the first determination or reopening the investigation.

[23] The determination does not address the distinction between referring to evidence and non-publication. A non-publication order relating to evidence or names of parties or witnesses would not prevent the Authority from referring to names or particular evidence; it merely means that, before a determination is published online, it is redacted as necessary to ensure that it complies with the non-publication order. This is a standard procedure in most courts and tribunals. Had the Authority considered it, I see no reason why such an approach could not have been taken here.

Does the Court have jurisdiction to make a non-publication order in this instance?

Did the Authority make a determination about non-publication?

[24] Before considering whether a non-publication order can be granted, it is necessary to consider whether a determination was made by the Authority Member which can be challenged.

[25] The plaintiff's original application for recall included the following:

> 11. The applicant seeks a recall of a determination, to make an application for non-publication. ...
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> 12. The [applicant] does not necessarily seek non-publication of her identity: however, she accepts that this is an option the Authority may consider.
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> 13. The applicant seeks non-publication of specific information relating to the allegations relating to drug use and to the domestic violence.

[26] It is not immediately clear whether the plaintiff sought recall so that they could make an application for non-publication after that had occurred or whether the application for recall included a parallel application for non-publication. Paragraph [11] of their application appears to indicate the former, but para [13] appears to indicate the latter. Overall, it appears that the plaintiff's advocate mistakenly believed that a non-publication order could only be made if the judgment was to be recalled.

[27] As noted above, the Authority appears to have accepted the plaintiff's mistaken assumption. In its second determination, it stated:[9]

> [17] As a cross check to this conclusion I have considered whether an order prohibiting publication of the information in those paragraphs would likely be made if the determinations were recalled.
> ...
> [19] For the following reasons, none of those grounds were sufficient to say an order prohibiting publication of particular paragraphs would have been warranted, whether considered earlier or now.

[28] However, the fact that the Authority did not consider itself to have jurisdiction to order non-publication does not mean that there is no reviewable determination concerning non-publication. The Authority Member essentially came to two conclusions. First, without a successful recall application, non-publication could not be considered. Secondly, even if the decision had been recalled, a non-publication order would not have been granted. I consider these conclusions can be treated as a determination on non-publication.

[29] Accordingly, I consider that the Authority Member made a challengeable determination about non-publication.

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9 *JKL v Stirling Andersen Ltd*, above n 2, at [17] and [19].

[30] I now turn to consider the substantive issue of whether a non-publication order should be granted.

Should a non-publication order have been made?

Determination of the Authority concerning non-publication

[31] The Authority noted that an application must show specific adverse consequences which would justify departing from the fundamental rule of open justice.

[32] The plaintiff submitted that the allegations of drug use referred to in the Authority's determination could subject them to further rumours and harm their employment prospects, even though the allegations had been rejected by their employer. The Authority determined that: "Inclusion of information and findings about such allegations is a necessary consequence of the open administration of justice." Further, the Authority determined that, while allegations of drug use may be of concern in some cases, it was not directly relevant in this case because the plaintiff had been able to continue their career by securing continuous employment elsewhere after being dismissed.

[33] The plaintiff also submitted that information about incidents involving their ex-partner, B, would hinder their rehabilitation from the negative effects of that relationship and B's conduct towards them after it ended. The Authority determined that, although the plaintiff was understandably concerned about the details of their relationship being published, the information was necessary background information to the disagreements between the plaintiff and their employer. Further, the Authority determined that, while the information was embarrassing and unwelcome to the plaintiff, embarrassment is not a specific adverse consequence sufficient to displace the fundamental principle of open justice.

[34] Finally, the Authority also rejected the plaintiff's request that their name not be published. It was determined that non-publication of their name was not an appropriate outcome for the same reasons given for not suppressing the information of concern identified by the plaintiff.

Submissions for the plaintiff

[35] The plaintiff submitted that the Authority is a problem-solving institution and that it should therefore consider name suppression in a more pragmatic manner than the Employment Court.

[36] They also submitted that a non-publication order in respect of their identity would not entail a departure from the general rule of open justice because the proceedings have been open to the public and non-publication of their name does not hinder the ability to provide fair and accurate reports of what happened.

[37] Further, they submitted that, when an applicant for non-publication is a victim of family violence, there is public interest in ensuring non-publication. This is because it is important that victims of domestic violence feel safe to bring their claims to the employment institutions. Ms Fechney said the plaintiff is genuinely concerned about their physical and mental wellbeing if their ex-partner, B, were made aware of these proceedings and that they chose not to apply for a protection order because they were afraid it would aggravate B further. If the plaintiff had applied for a protection order under the Family Violence Act 2018, they would have been entitled to name suppression under that Act. Ultimately, it is submitted that the plaintiff's name should not have been published because they were a vulnerable person.

[38] Finally, it was submitted that the Authority should have applied its own discretion to order non-publication of the plaintiff's name during the initial proceeding, even though an application had not been made. This is because the Authority had published the plaintiff's evidence about the abusive behaviour of B.

The law

[39] Judge Corkill held in *Crimson Consulting Ltd v Berry*:[10]

> [96] ... an applicant for a non-publication order under the Act is not required to establish exception 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

[10] *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96].

> which would justify a departure from the fundamental rule. A case-specific balancing of the competing factors is required.

[40] Chief Judge Inglis expanded on this approach more recently in *GF v Comptroller of the New Zealand Customs Service* where she held:[11]

> [2] The Court has a broad power under sch 3 cl 12 of the Employment Relations Act 2000 (the 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.[12]
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> [3] A party applying for such an order must establish that sound reasons exist for the making of an order of non-publication, displacing the presumption in favour of open justice.[13] The discretionary exercise involves the Court balancing other interests with the fundamental principle of open justice. The discretion must also, of course, be exercised consistently with the objectives of the legislative framework that applies in this specialist Court. These objectives include the need to support successful employment relationships and to address the inherent inequality of bargaining power between employers and employees.[14] As has previously been observed, 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.[15]

[41] I note that, when applying the test in *GF v Comptroller of the New Zealand Customs Service*, Chief Judge Inglis did not simply assess whether the party seeking the order could show specific adverse consequences which would justify a departure from the rule of open justice; rather, she assessed whether there was "a material risk of adverse consequences for the named witness".[16]

[42] I consider that Chief Judge Inglis's approach above should be followed in this case.

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11 *GF v Comptroller of the New Zealand Customs Service* [2022] NZEmpC 47.

12 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310; and *Crimson Consulting Ltd v Berry*, above n 10.

13 *Erceg*, above n 12, at [13].

14 Employment Relations Act 2000, s 3(a). See also *FMV v TZB* [2021] NZSC 102 at [54].

15 See for example *GF v Comptroller of New Zealand Customs Service* [2021] NZEmpC 162; *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441 at [12]; *WN v Auckland International Airport Ltd* [2021] NZEmpC 153 at [43]–[44]; *JGD v MBC* [2020] NZEmpC 193, [2020] ERNZ 447 at [8].

16 *GF v Comptroller of the New Zealand Customs Service,* above n 11, at [4].

Analysis

[43] The plaintiff submitted that there is public interest in a non-publication order in these proceedings because they are a victim of family violence and because they are genuinely concerned about their physical and mental wellbeing if the person who abused them, B, were made aware of these proceedings.

[44] In their affidavit, the plaintiff states that they are a victim of family violence and outlines the following details:

(a) Several incidents occurred where the Police were involved.

(b) B drove a car into a concrete wall at 120 kilometres per hour while the plaintiff was a passenger.

(c) After B was charged with careless driving, they threatened the plaintiff.

(d) B sent an explicit photo of the plaintiff to one of their colleagues.

(e) This all led to the plaintiff becoming depressed.

[45] The plaintiff also states that false rumours that they were using drugs were spread about them at their workplace. This led to an investigation by Child Protection Services in respect of their child. The rumours were subsequently proven to be untrue.

[46] Based on these events, the plaintiff states that they are concerned about three things if their name is published:

(a) that their ex-partner, B, will see the judgment and be angered by it;

(b) that publication of the facts in the judgment without name suppression feels "violating"; and

(c) that there may be professional repercussions if their name is published.

[47] I address each in turn.

[48] Given the violence inflicted on the plaintiff by B, I consider that there is a material risk that B will see the judgment and further harass or inflict violence on them. I also note the letter from Shine, an organisation providing services to victims of family violence, which confirms that the Police referred the plaintiff to it twice in 2019 as a result of family violence. Although there is no evidence of recent violence or harassment, the pattern of past abuse indicates a risk of further abuse.

[49] Further, the plaintiff's concern about their mental health is also reasonable. I consider that there is a material risk that their mental health will decline if their name is published or if details which they perceive as violating their privacy are published. Although embarrassment alone is not sufficient as an adverse consequence, if it can be shown that this embarrassment and shame will lead to poor mental health outcomes, this can be sufficient as an adverse consequence.

[50] Finally, I also consider that there is a material risk that publication of the plaintiff's name may lead to negative professional repercussions in the future. The plaintiff was particularly concerned about the drug use allegations. The Authority discounted this argument on the basis that the plaintiff currently has a good job which appears to be stable; however, it is not clear whether their current employer is aware of their dispute with their previous employer and the surrounding context. Therefore, their current employment status cannot be determinative of this issue. I consider that the drug use allegations may pose a risk to their future professional life if they do not receive name suppression.

[51] It is also relevant that, if the plaintiff had applied for a protection order under the Family Violence Act 2018, they would likely have received it. It appears that they did not apply for a protection order as they were concerned that it would only aggravate matters further with B. If they had received a protection order, they would have been entitled to name suppression and suppression of identifying information in the Family Court.[17] Consistent with the approach of the Family Court, name suppression will generally be in the interests of justice in this Court when an applicant is a victim of family violence, as in this case.

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[17] Family Violence Act 2018, s 182; Family Court Act 1980, ss 11B–11D.

[52] Accordingly, I consider that if the plaintiff's name is published, there is a material risk that they will be subjected to further abuse from B, their mental health will decline, and their professional life will be threatened. I find that this risk, along with the fact that the plaintiff is a victim of family violence, is sufficient to outweigh the principle of open justice in this case.

[53] This conclusion is not inconsistent with the Authority's conclusion in the second determination that the information cited in the first determination about the plaintiff was necessary background information about the dispute.[18] The question for the Authority to consider was not whether that information was relevant or necessary but, rather, whether the judgment should be published to the public with that information redacted. I consider that the Authority should not have published the unredacted determination. However, I have only been asked to make an order in relation to the plaintiff's identification.

Conclusion

[54] I have concluded that the Authority did not err in declining to recall the first determination.

[55] However, a non-publication order can be made in respect of a determination without first recalling that determination. Whether that is practicable or appropriate will depend on the timing of any application, as well as the substantive issues in relation to non-publication.

[56] In this case the Court was able to make an interim non-publication order in relation to the plaintiff's name and identifying details which preserved their position pending this decision.

[57] It is appropriate for a non-publication order in relation to the plaintiff's identity to be made due to the material risk that the plaintiff will be subjected to further abuse or that their mental health or future employment prospects will be put at risk if an order is not made. Further, as a victim of family violence, it is in the interests of justice

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18 *JKL v Stirling Andersen Ltd*, above n 2, at [26].

that such an order be made. The Authority erred in declining to make such an order. The determination is therefore set aside and this judgment stands in its place.

[58] Accordingly, I make a permanent order under cl 12 of sch 3 to the Employment Relations Act 2000 preventing publication of the name and identifying details of the plaintiff. The plaintiff's name has been anonymised accordingly. Further, the Court file is not to be inspected by any person without leave of a Judge.

[59] I also make an order for non-publication of the name and identifying details of the plaintiff in the Authority's determinations (file number 3108132).

[60] I direct the Registrar of this Court to draw these orders to the attention of the Authority.

[61] There is no order for costs as the application was unopposed.

Kathryn Beck
Judge

Judgment signed at 2.45 pm on 20 June 2022