

**ORDER FOR NON-PUBLICATION OF INFORMATION CONTAINED
AT [21] OF THIS JUDGMENT**

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 159
EMPC 446/2021**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for non-publication orders
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	BAC Plaintiff
AND	TRS Defendant

Hearing: On the papers

Appearances: J S Hall, counsel for plaintiff
K Dunn, counsel for defendant

Judgment: 30 August 2022

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for non-publication orders; application for stay of proceedings)**

[1] The plaintiff has challenged a determination of the Employment Relations Authority that, inter alia, found their dismissal by the defendant was justifiable. They seek interim non-publication orders until this matter is finally heard and determined by the Court and that is the focus of this judgment.

[2] In that context, the plaintiff has applied for leave to file additional evidence, being an affidavit from a psychologist said to concern the effect of the orders applied for on the plaintiff.

[3] The defendant does not oppose the late filing of the additional evidence, but they make submissions as to its relevance. The affidavit is accepted for filing.

Application for non-publication orders extends over the Authority's determination

[4] The situation before the Court is confused. The plaintiff has filed a de novo challenge to the Authority's determination. That determination dealt with the plaintiff's application to the Authority for a permanent non-publication order to protect their identity, with the Authority finding the interests of justice did not require non-publication of the plaintiff's name. However, despite the challenge being de novo, the statement of claim does not raise concerns about that aspect of the determination. The plaintiff has expressly said they are not seeking permanent non-publication orders from the Court.

[5] They do, however, apply to the Court for interim non-publication orders over their name and over the name of the defendant, covering both the Authority and the Court. The plaintiff also has applied for a stay of proceedings, but it transpired that the focus of that application was the publication of their name in the Authority's determination.

[6] Although there is no application to the Authority for interim non-publication orders, it seems that, in the face of the plaintiff's applications to the Court, the Authority has simply not published its determination. That course of action is one that is open to the Authority although, of course, it is not a non-publication order.

[7] In essence, the ground on which the plaintiff seeks non-publication is that publication of the determination with their name in it may have a detrimental impact on their ongoing prospects of employment in New Zealand and overseas. They do not want prospective employers to know of the findings of the Authority. They say that the evidence in the Court will be different from that heard in the Authority and that allowing publication of their name on the basis of the evidence in the Authority would not be equitable.

[8] In their affidavit in support of the applications, the plaintiff says that the comments in the Authority's determination would lead prospective employers to assume that the plaintiff's actions constituted either wilful misconduct or gross negligence. They dispute that the investigation into their conduct that preceded their dismissal made such a finding. They also express concern that future colleagues may be uncomfortable working with them.

[9] There are two specific consequences the plaintiff says they face. First, the plaintiff says they have had difficulties in finding new employment once they advise prospective employers of the reason they are no longer employed by the defendant. Second, they speak of the impact on their social life caused by feelings of shame arising from the determination.

[10] The plaintiff also submitted that if the Authority's decision is published, there will be a safety risk in the industry in which they work as people will fear retribution if they acknowledge making mistakes.

[11] In his affidavit, the psychologist says he was asked to offer his assessment on the ability of the plaintiff to discharge their duties and perform effectively in their professional role. That is not the issue presently before the Court. He gives some evidence of how reputational matters might impact on the plaintiff's performance and on how their potential colleagues might view them, but overall, the affidavit is of very limited assistance.

The Court may make non-publication orders

[12] The Court has the power to make non-publication orders over all or any part of any evidence given before the Court or pleadings filed in the Court, or with respect to the name of any party or witness or other person. The Court's orders may be subject to such conditions as the Court thinks fit.¹

¹ Employment Relations Act 2000, sch 3 cl 12.

[13] The Court's discretion must be exercised on a principled basis.² The starting point in considering applications for non-publication is the principle of open justice.³ The party seeking non-publication orders must show specific adverse consequences that will justify a departure from this fundamental rule.⁴ It is not enough that matters before the Court are embarrassing or unwelcome.⁵

[14] In these proceedings, the plaintiff is unhappy with the findings of the Authority. They are hoping the Court will make different findings. The fact that they are not applying for permanent non-publication orders suggests that they are content to have the Authority's determination (with their name in it) in the public arena, provided the Court's decision is also available.

No specific adverse consequences justifying order

[15] The difficulty is that the plaintiff has not pointed to specific adverse consequences that would merit non-publication.

[16] Neither party sought non-publication of the defendant's name in the Authority. The defendant does not now seek a non-publication order. The plaintiff does not identify why an order should be made. I find no basis for such an order.

[17] The two specific matters raised regarding the plaintiff's identity arise independently of publication. Even if their application for non-publication is granted, if the plaintiff is asked the reason they are no longer employed by the defendant, their honest answer would be the same as that which previously gave rise to concerns from prospective employers. The plaintiff's feelings of shame also do not seem to relate to name publication and would not by themselves justify name suppression in any case.

[18] Further, the plaintiff has only applied for orders in respect of the parties' names, and the removal of those names will not mitigate any of the stated concerns about safety issues as the anonymised version will still be available.

² *WN v Auckland International Airport Ltd* [2021] NZEmpC 153, [2021] ERNZ 684 at [41]; *GF v Comptroller of the New Zealand Customs Service* [2022] NZEmpC 47 at [2].

³ *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2021] ERNZ 511 at [96].

⁴ At [96].

⁵ *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

[19] While the Court does make non-publication orders to protect a person from unfair detrimental impact on their ongoing prospects of employment, the argument for such orders is stronger at an interim stage than it is here, where the Authority has investigated the matter and made a determination.⁶

[20] On balance, I am not satisfied that non-publication orders are justified. The plaintiff's application for interim non-publication orders pending the resolution of this matter before the Court is declined.

[21] I do, however, make a non-publication order over the names of the parties for 28 days from the date of this judgment, recognising that the plaintiff may wish to apply for leave to appeal this judgment. Unless otherwise ordered, the non-publication order will then cease to have effect.

Stay application not proper approach

[22] As noted, the plaintiff has also made an application for a stay of the Authority's determination regarding non-publication. In view of the conclusion I have reached on the application for non-publication orders, there is no separate need to address the application for a stay. For completeness, I decline the stay and make the following comments.

[23] The Court's power to grant a stay arises under reg 64 of the Employment Court Regulations 2000. A stay can apply to either the whole or part of a determination and can be made subject to conditions.⁷

[24] The Court may grant a stay to preserve the status quo, generally with the stay operating in a negative way by restraining a successful party from implementing a decision in its favour.⁸ Where non-publication has not been granted, a stay would have the opposite effect; rather than acting negatively, it would positively give a party interim non-publication. The jurisdiction to grant a stay cannot be used in this manner.

⁶ *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441 at [11].

⁷ Employment Court Regulations 2000, reg 64(3).

⁸ See *DN v Family Court at Auckland* [2021] NZHC 1116 at [41].

[25] In any event, the considerations for a stay do not favour the plaintiff. In particular, as the plaintiff has expressly said they do not seek permanent non-publication orders, even were it available, a stay is not required to protect the plaintiff's rights to the remedies they seek on the challenge.⁹

[26] Costs are reserved.

J C Holden
Judge

Judgment signed at 11 am on 30 August 2022

⁹ *Assured Financial Peace Ltd v Pais* [2010] NZEmpC 50 at [5].