IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2022] NZEmpC 27
EMPC 363/2021

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 orders
BETWEEN	HOSEA COURAGE, DANIEL PILGRIM AND LEVI COURAGE Plaintiffs
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
AND	APETIZA LIMITED Fourth Defendant

Hearing: On the papers

Appearances: B Henry, D Gates and A Kenwright, counsel for the plaintiffs
S G Wilson, counsel for second, third and fourth defendants

Judgment: 18 February 2022

INTERLOCUTORY JUDGMENT (NO 5)
OF CHIEF JUDGE CHRISTINA INGLIS
(Application for permanent non-publication orders)

[1] This matter is set down for a five-day hearing commencing next week, on 21 February 2022. On 14 February 2022 counsel for the second, third and fourth defendants filed an application for permanent non-publication orders. The orders sought are extensive, covering identified parts of various witnesses' proposed evidence and (in some cases) the entirety of that evidence. The application has been opposed. Further material was filed in support of and in opposition to the orders sought. The parties were agreed that the application could be dealt with on the papers in advance of the hearing.

[2] The application is declined for the reasons that follow.

[3] The Court has a discretion 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order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published.[1] Before exercising its discretion the Court must be satisfied that there is an appropriate basis for doing so. That is because an order of non-publication, either interim or permanent, marks a departure from the fundamental principle of open justice.

[4] An applicant must establish that sound reasons exist for the presumption to be displaced. This generally involves pointing to specific adverse consequences which would justify a departure from the principle of open justice. The standard for departure has been described as a high one.[2] Ultimately, the Court is required to weigh the interest in open justice with other interests.

[5] As Mr Wilson (counsel for the applicant defendants) points out, this Court has recognised the potential for significant and long-term damage to reputation (including future job prospects) in publicising the names and identifying details of parties and

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1 Employment Relations Act 2000, sch 3 cl 12.
2 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13]; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96].

non-parties (such as witnesses) in exercising its discretion.[3] This is not, however, a different standard to that set by the Supreme Court. Rather, it is an exercise of the Court's discretion recognising a specific adverse consequence in light of the objects of the Employment Relations Act 2000 and the context of the employment jurisdiction.

[6] The application now before the Court has two prongs – first in relation to proposed evidence that is said to be commercially sensitive and ought to be subject to permanent orders of non-publication on that basis; second, that the privacy interests of three individuals who are to give evidence on behalf of the applicant defendants warrant the imposition of such orders.

Does commercial sensitivity justify permanent non-publication in this case?

[7] The Court will, in appropriate cases, make orders protecting against the risk of harm to litigants and others by disclosure of commercially sensitive information. The sort of matters that will weigh in the mix can be distilled from the Supreme Court's judgment in *Erceg*:[4]

(a) The "fundamental principle [is] that justice should be administered in open court, subject to the full scrutiny of the media".

(b) It is nevertheless "well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice".

(c) Confidential information can only be suppressed if the party seeking the redactions can show specific adverse consequences that are sufficient to justify an exception to the fundamental rule.

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3 See for example *JGD v MBC Ltd* [2020] NZEmpC 19; *WN v Auckland International Airport* [2021] NZEmpC 153.

4 *Erceg*, above n 2, at [2], [3], [12] and [13]; as distilled by Katz J in *NZME Ltd v Nine Entertainment Co Holdings Ltd* [2020] NZHC 1565.

(d) The threshold or standard is a high one. However, the circumstances do not have to be exceptional or extraordinary.

[8] As Judge Corkill observed in *Crimson Consulting v Berry*:[5]

> … the exercise of the discretion [to order non-publication] 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.

[9] The Court in *Erceg* identified two broad categories of case which might, and might not, attract the making of orders:[6]

> … We accept that the courts are able to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers. 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).

[10] It is submitted that non-publication orders are necessary in order to protect information which is commercially sensitive relating to details of the operation of various entities which are not parties to the proceedings. There is a lack of specificity as to why the identified information relating to the Trust, the Partnership arrangements, and the interrelationship of the various Gloriavale entities, is said to be commercially sensitive; what the nature and extent of any adverse consequences might be in the absence of orders being made; and no evidence filed in support of these matters.

[11] *WG Russells (Gore) Ltd v Muir* is cited as authority for the proposition that socially or commercially damaging material may be suppressed if the decision would make sense without it.[7] *Muir* is now 20 years old and must be read in light of more recent authorities, including the Supreme Court's judgment in *Erceg*.

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5 *Berry*, above n 2, at [117].
6 *Erceg*, above n 2, at [13].
7 *WG Russells (Gore) Ltd v Muir* [1993] 2 ERNZ 332 (EmpC).

[12] In any event, the Court in this case will almost certainly be required to look at the way the applicant defendants' operations are structured and administered, how work is performed, and how financial matters are dealt with. The fact that the information is commercial in nature does not lead to the conclusion it is sensitive. Similarly, the fact that the information may be sensitive, in the sense that it is currently private and will be subject to scrutiny in these proceedings, does not amount to a specific adverse consequence in the sense required.

[13] The information about how the applicant defendants' commercial operations and entities are structured does not engage the sort of interests which might justify orders of non-publication. Rather, the identified evidence falls more comfortably into the second category described in *Erceg*, namely that publication would likely place unwelcome attention on the applicant defendants' operations, practices and arrangements which they would prefer to avoid.

[14] There is reference in one of the briefs of evidence (sought to be suppressed) relating to a dairy farm and a neighbouring property, on which some community members are said to have worked from time to time. The evidence is general and while it relates to a non-party, I am unable to discern anything in it which would give rise to the sort of concerns which might otherwise justify non-publication orders being made in respect of it.

[15] I am not satisfied that the making of permanent non-publication orders in respect of the information which is said to be commercially sensitive is justified, and I decline to do so.

Do the identified privacy concerns justify permanent non-publication in this case?

[16] The applicant defendants seek non-publication of the names of three individuals who will give evidence on their behalf and who are residents within the Gloriavale community.

[17] It is said that permanent non-publication orders are necessary to protect the individuals in light of past experience, namely that residents have previously faced

verbal abuse and harassment after media coverage of the community. Further, it is submitted that the evidence they are intending to give is intimate in nature, relating to their qualifications, occupations, personal lives, familial history and dynamics. Publication would amount to an undue intrusion into the private lives of the individuals concerned.

[18] I have considered each of the briefs of evidence of the three individuals. In relation to the first, only one paragraph gives any detail on the individual's background and says very little other than age, when they joined the community, the number of children they have, and that some of their children have left the community. None of the children are named. The remainder of the evidence is given in their capacity as the person administering the Sharing Account. I am unable to identify any specific adverse consequences in relation to this evidence which would justify the making of a permanent non-publication order.

[19] Marginally more personal information is revealed in the brief of evidence for the second individual about their life in Gloriavale and day-to-day living, however I am unable to identify any specific adverse consequences which might otherwise justify the making of the orders sought.

[20] The third witness is 19 years of age, has joined the partnership, and says that they are voluntarily undertaking work; details are given of some of their educational qualifications. Again, I am unable to identify any specific adverse consequences which would justify the making of the orders sought in relation to this individual and their evidence.

[21] Mr Henry, counsel for the plaintiffs, makes the point that the community has itself courted media attention in the past and the concerns about the likelihood of unflattering media coverage if non-publication orders are not made ought to be viewed with caution. The key issue for present purposes is whether the particular orders sought in relation to the named individuals and parts of their proposed evidence are justified.

[22] Stepping back, the claim and its interrelationship with the Gloriavale community is in the public domain. The applicant defendants accept that there is a legitimate public interest in the proceedings. The proceedings may attract media attention and public interest. That may, in turn, give rise to the sort of concerns identified on behalf of the applicant defendants against members of the community generally but it remained unclear why the position of the three named individuals, or their evidence, warranted the making of orders.

[23] The Court is being asked to make permanent orders of non-publication on the basis of generally expressed privacy concerns and in an evidential vacuum. None of the information provided is of a particularly personal nature that would engage significant privacy interests, or amount to an unnecessary intrusion and be prejudicial to the individuals. Nor does the identified proposed evidence engage the sort of reputational damage previously recognised by the Court in considering applications of this sort.

[24] To make the orders sought would, in my view, undermine the principles of open justice and I decline to do so.

Conclusion

[25] The application for permanent non-publication orders is declined.

[26] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 11.50 am on 18 February 2022