(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF PLAINTIFF AND OF DEFENDANT

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2020] NZHRRT 31**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 026/2018
UNDER	**SECTION 51 OF THE HEALTH AND DISABILITY COMMISSIONER ACT 1994**
BETWEEN	**MELANIE DAVIS**
	PLAINTIFF
AND	**GEOFFREY ROGERS**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Dr SJ Hickey MNZM, Member
Ms NJ Baird, Member

REPRESENTATION:
Mr S Rennie for plaintiff
Mr AH Waalkens QC for defendants

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **3 August 2020**

(REDACTED) DECISION OF TRIBUNAL GRANTING BOTH PARTIES NAME SUPPRESSION[1]

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[1] [This decision is to be cited as: *Davis v Rogers (Final Non-Publication Orders)* [2020] NZHRRT 31. Note publication restrictions. Those restrictions require this decision to be anonymised by the redaction of the true names of the plaintiffs. In substitution the plaintiffs are to be referred to as "Melanie Davis" and "Geoffrey Rogers" (not their true names).]

Background

[1] Filed on 2 July 2018, these proceedings were subsequently discontinued by the plaintiff. The settlement was notified to the Tribunal on 9 March 2020, prior to the substantive hearing scheduled to commence on 16 March 2020.

[2] Both parties have applied for a final consent order suppressing their identities. The burden of the argument has been carried by the defendant.

[3] The names of the parties have already been published in an interlocutory decision of the Tribunal which has been reported in a series of law reports and in at least two specialist law databases. However, the defendant's evidence and submissions have clarified that his real concern is not such publication, but rather publication on social or other media of the allegations made in the statement of claim.

THE RELEVANT LAW

Human Rights Act, s 107

[4] Across all three of its jurisdictions the Tribunal's power to make non-publication orders is conferred by the Human Rights Act 1993 (HRA), s 107 which is incorporated into proceedings under the Health and Disability Commissioner Act 1994 by s 58 of that Act:

> **107 Sittings to be held in public except in special circumstances**
>
> (1) Except as provided by subsections (2) and (3), every hearing of the Tribunal shall be held in public.
> (2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
> (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
> (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof:
> (b) make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
> (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.
> (4) Every person commits an offence and is liable on conviction to a fine not exceeding $3,000 who acts in contravention of any order made by the Tribunal under subsection (3)(b) or subsection (3)(c).

[5] The effect of s 107(1) and (3) is that the Tribunal is under a mandatory duty to hold every hearing in public unless the Tribunal is satisfied it is "desirable" to make an order prohibiting publication of any report or account of the evidence.

The case law

[6] The operation of s 107 in the context of an application for final name suppression has been considered at length in *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4 (*Waxman*) and in *Director of Proceedings v Brooks (Application for Final Non-Publication Orders)* [2019] NZHRRT 33 (*Brooks*). Both decisions applied *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 (*Erceg*). In that decision the Supreme Court held that where in civil cases suppression orders are sought it is not a matter of balancing the principle of open justice against the interests of the applicant or of showing exceptional circumstances. Rather the inquiry is into what will serve the ends of justice. A non-publication order is only valid if it is really necessary to secure the proper

administration of justice in the particular proceedings. The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one. See *Erceg* at [2], [3], [13] and [18].

[7] In *Waxman* at [63.3] the Tribunal held that the same applies in the context of applications under HRA, s 107 because it too emphasises the public interest in adhering to an open system of justice (s 107(1)) while allowing exceptions when the Tribunal is satisfied it is desirable to make a suppression order (s 107(3)). It is implicit from the context of s 107 that the applicant for the suppression order must show (to use the language of the Supreme Court) specific adverse consequences sufficient to justify an exception to the fundamental rule. The standard is necessarily a high one.

[8] The Tribunal in *Waxman* at [63.4] further concluded that the phrase in s 107(3) "satisfied that it is desirable to do so" means desirable not from the point of view of the party seeking the suppression order, but desirable from the point of view of the administration of justice, a phrase which must (as emphasised by the Supreme Court) be construed broadly to accommodate the particular circumstances of individual cases as well as considerations going to the broader public interest. Fundamentally it is an inquiry as to what will serve the ends of justice, not a balancing exercise.

[9] There is no fixed, uniform measure of what will serve the interests of justice and the general rule of open justice. As noted in *Brooks* at [80], some circumstances will impact on open justice to a greater degree than others.

[10] It is also necessary for the Tribunal to consider the New Zealand Bill of Rights Act 1990 (NZBORA) and in particular, whether or not a suppression order is a limitation on the s 14 right to freedom of expression that complies with s 5 of that Act.

The rules regulating access to documents held by the Tribunal

[11] These foregoing factors are reflected also in the Senior Courts (Access to Court Documents) Rules 2017 and in particular rr 12 and 13 from which the Tribunal takes guidance. See *A v Van Wijk (Access to File)* [2019] NZHRRT 12 at [11].

[12] The degree of access to documents held by a court or a tribunal is in the first instance regulated by the stage the proceedings have reached at the time the request is made. Three stages are recognised and for each a different approach is mandated when balancing the interests of the requester and those of the parties. The protection of confidentiality and privacy interests is similarly stipulated by r 12(c) and (d) as a mandatory relevant consideration:

> **12 Matters to be considered**
>
> In determining a request for access under rule 11, the Judge must consider the nature of, and the reasons given for, the request and take into account each of the following matters that is relevant to the request or any objection to the request:
> (a) the orderly and fair administration of justice:
> (b) the right of a defendant in a criminal proceeding to a fair trial:
> (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
> (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
> (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
> (f) the freedom to seek, receive, and impart information:

(g) whether a document to which the request relates is subject to any restriction under rule 7:
(h) any other matter that the Judge thinks appropriate.

13 Approach to balancing matters considered

In applying rule 12, the Judge must have regard to the following:
(a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to documents be limited:
(b) during the substantive hearing, open justice has—
  (i) greater weight than at other stages of the proceeding; and
  (ii) greater weight in relation to documents relied on in the hearing than other documents:
(c) after the substantive hearing,—
  (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but
  (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

[13] In *Crimson Consulting Ltd v Berry* [2018] NZCA 460, [2019] NZAR 30 (*Crimson Consulting*) the Court at [39] and [40] recognised that when matters are still at the pleading stage, there is inherent unfairness in the publication of the allegations made in the statement of claim, allegations which have not been tested by the giving of evidence:

> [39] …When matters are still at the pleadings stage, there is an element of unfairness on parties in the publication of one side of the story. The allegations in the statement of claim have not yet been tested by the giving of evidence. There being no hearing in court, the need for transparency and public scrutiny is less, because pre-trial the court is generally not determining substantive issues.
>
> [40] However the principle of open justice, and the freedom to seek information, remain important factors which do not cease to work in the pre-trial stage.

[14] The explicit statutory recognition of the importance of confidentiality and privacy interests where proceedings are settled prior to the substantive hearing is of material assistance to the parties in the circumstances of the present case. At the very least it facilitates a finding that a suppression order would be a justified limitation in terms of NZBORA, s 5.

THE EVIDENCE

[15] Only the defendant has filed an affidavit in support of the joint application.

[16] In this affidavit (sworn on 16 July 2020) the defendant, a registered medical practitioner and specialist, has emphasised he rigorously denies the allegations made in the statement of claim. He also makes the following points:

[16.1] He has enjoyed a reputation for excellence and competence in his field of specialisation.

[16.2] About 95% of the work he undertakes in his specialist field is through word of mouth or referral by one means or another. Those referrals are dependent upon his reputation.

[16.3] Publicity of the allegations made in this case, in particular that he allegedly acted in flagrant disregard of the plaintiff's rights, would carry a very real risk of harm to his reputation and would risk damaging his primary source of work, being referrals and word of mouth recommendations.

[16.4] The primary concern driving his application for permanent name suppression is that there may be publicity of the case on social media or potentially even in the conventional print or public media.

[16.5] When the plaintiff approached the defendant to discontinue her claim, the defendant reached agreement with her that he would not seek costs against her and in turn, she would agree in writing not to make any further comment or criticism, whether verbally or in the print or social media, with regard to the litigation and its subject matter. It was also agreed that the plaintiff's husband would likewise confirm an agreement to this effect.

[16.6] While the plaintiff has confirmed this agreement in writing, her husband has not.

[16.7] The defendant is therefore concerned there is risk that the husband or someone else who knows about the case, or who is otherwise close to the plaintiff, may publish details in social or other media. There would be a real risk this would dissuade those who refer work to him from doing so.

[16.8] Publicity would also run the risk of undermining the confidence of the defendant's existing patients. Many are under a treatment plan that continues for many months, some even years.

[17] The legal submissions filed by Mr Waalkens QC first address the fact that, as mentioned, an interlocutory decision given by the Tribunal in these proceedings has for some time been published on the Tribunal's website and on the NZLii website. The decision has also been reported in a set of law reports. Two points are made:

[17.1] The audience for such publications is limited (predominantly to the legal profession, and even then, likely only to the modest number who practise in this area). The defendant's real concern in this case is the risk of harm to him in the event of publication on social and other media. The refusal of the plaintiff's husband to give his written consent to an agreement recording there will be no further comment or criticism with regard to the litigation and its subject matter means there remains a risk of further publicity on social or other media.

[17.2] There is authority for the proposition that earlier name publication is not a reason for declining to make a suppression order. Some of the relevant case law is collected in *Brooks* at [122.1].

[18] The balance of the submissions address the core of the defendant's claim, namely:

[18.1] His practice is dependent upon referrals direct from the public or other health practitioners. Publicity of the allegations made in the statement of claim would jeopardise that stream of referrals and work.

[18.2] No substantive hearing has taken place with regard to the matters in issue. It follows the principle of open justice carries less weight. See for example the Senior Courts (Access to Court Documents) Rules and *Crimson Consulting* at [38].

[18.3] There is good reason why courts and tribunals limit damaging publicity flowing from untested allegations made by one party only. It is not uncommon in the analogous medical disciplinary arena for orders of permanent suppression to

be made where a proceeding involving serious allegations against the defendant is discontinued or not proceeded with. The relevant provision of the Health Practitioners Competence Assurance Act 2003, s 95 does have some similarity to HRA, s 107. See *Brooks* at [69].

DISCUSSION

[19] The inquiry is into what will serve the ends of justice. The proper administration of justice and the fundamental principle of open justice are not, however, absolutes. They are concepts sufficiently broad to accommodate the particular circumstances of individual cases, provided specific adverse consequences are established sufficient to justify an exception to the fundamental principle.

[20] We are of the view such adverse consequences have been established and that suppression of the names of the plaintiff and of the defendant is appropriate for the following reasons:

[20.1] The plaintiff has agreed in writing not to make any further comment or criticism, whether verbally or in the print or social media, with regard to this litigation and its subject matter. However, although it was further agreed with the plaintiff that her husband would likewise confirm an agreement to the same effect, her husband has declined to sign the agreement.

[20.2] Consequently there is a risk of publicity, a risk which cannot be lightly dismissed.

[20.3] Should details of the plaintiff's allegations be published in social or other media, the defendant will be at serious risk of loss of reputation and of harm to his practice. There will also be a risk that the confidence which existing patients have in him will be undermined.

[20.4] The proceedings having settled before the substantive hearing, the confidentiality and privacy interests of the parties must be given greater weight than if the hearing had proceeded. The allegations in the statement of claim have not been tested.

[20.5] Publication of the interlocutory decision in which the names of both parties appear does not count against the granting of the application. Publication is to a very limited audience, primarily members of the legal profession and others who are particularly interested in this aspect of the law. As the real concern is the prospective risk of harm to the defendant in the event of publication on social or other media, there will be no need for the Tribunal's suppression order to be applied retrospectively to the interlocutory decision.

[21] For these reasons we conclude the ends of justice will be served by the granting of orders suppressing the name of the defendant. In view of the terms of settlement, the fact that this is a joint application and recognising that the grant of name suppression to the defendant could be undermined if the plaintiff's name were not also to be suppressed, the order of the Tribunal is that the names of both parties are suppressed.

ORDERS

[22] The following orders are made pursuant to s 107 of the Human Rights Act 1993 and s 58 of the Health and Disability Commissioner Act 1994:

[22.1] Publication of the name, address, occupation and of any other details which could lead to the identification of the plaintiff and defendant in these proceedings is prohibited.

[22.2] There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiff and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.

[22.3] Leave is reserved to both parties to make further application should the need arise.

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Mr RPG Haines ONZM QC	**Dr SJ Hickey MNZM**	**Ms NJ Baird**
Chairperson	**Member**	**Member**