

**ORDER PROHIBITING PUBLICATION OF THE NAME OR IDENTIFYING
INFORMATION OF THE PLAINTIFF**

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

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

**[2024] NZEmpC 160
EMPC 112/2024**

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
BETWEEN	MZHZ Plaintiff
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Defendant

Hearing:	On the papers
Appearances:	Plaintiff in person P Chemis and E Hendy, counsel for defendant
Judgment:	26 August 2024

**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for non-publication orders)**

[1] The plaintiff challenged a determination of the Employment Relations Authority which included declining an order for non-publication of his name and information that might identify him.¹

¹ *MZHZ v LPS Mesh Ltd* [2024] NZERA 121 (Member Larmer).

[2] To provide context to this application, a brief overview of the proceeding is necessary. On 29 February 2024, the Authority dealt with a preliminary issue about whether the plaintiff was employed by LPS Mesh Ltd and/or the Ministry of Social Development (MSD).²

[3] At the end of the investigation the Authority held that the plaintiff was not employed by LPS Mesh or MSD and consequently that it did not have jurisdiction to investigate the plaintiff's claims.³

[4] The Authority declined to make a permanent non-publication order.⁴ It concluded that the plaintiff's evidence fell short of displacing the presumption of open justice as discussed in *Erceg v Erceg*.⁵ Nevertheless, an interim order was made to enable the plaintiff to challenge the determination and, in the meantime, the Authority anonymised his name and the name of a company he incorporated.

[5] The Authority's interim order was time limited. It remained in place for 30 days and left the issue of any further non-publication order for the Court.⁶

The challenge

[6] The determination was challenged by the plaintiff, seeking to establish an employment relationship existed between him and MSD. He did not repeat the claim against LPS Mesh.

[7] The plaintiff filed his challenge on 26 March 2024. Two days later, he filed an application for an interim non-publication order to avoid the one made by the Authority lapsing. The application was supported by the plaintiff's affidavit which, among other things, expressed his concerns as to the possible impacts on him if publication occurred.

² At [18].

³ At [193].

⁴ At [11].

⁵ *Erceg v Erceg* [*Publication restrictions*] [2016] NZSC 135, [2017] 1 NZLR 310 at [13]; and *MZHZ*, above n 1, at [11]–[14].

⁶ *MZHZ*, above n 1, at [17].

[8] The application was made on the eve of a public holiday and just before the expiry of the Authority's interim order. Of necessity, it was dealt with on an urgent basis and without substantive argument. On 28 March 2024, an interim order was made continuing the Authority's order to preserve the position in the meantime. The Court's interim order was subject to review at the earliest possible time.

[9] The order made on 28 March 2024 was reviewed at a conference on 18 April 2024. During it, counsel who was then acting for the plaintiff sought an opportunity to further support the application with a medical report and evidence from the plaintiff's religious community. Counsel anticipated that obtaining the medical report could be a lengthy process, given the expected commitments of the medical practitioner who would provide it. The directions that followed allowed sufficient time for this further information to be provided. The order made on 28 March 2024 was continued and the Court adopted the anonymisation of the plaintiff's name used by the Authority.

[10] The plaintiff has now filed an updating affidavit and two affidavits from former colleagues. He did not provide an affidavit from a medical practitioner although, as will be discussed shortly, two letters about his mental health were supplied.

[11] Until very recently MSD adopted a neutral position about whether an order should be made. It has now filed supplementary submissions supporting the application for permanent non-publication orders.

The grounds of the application

[12] On 13 June 2024, the plaintiff filed an amended application giving nine grounds for making a permanent non-publication order that can be summarised as:

- (a) adverse impacts on his health and wellbeing;
- (b) concerns about the adverse impact on his future employment opportunities;

- (c) his less-favourable employment conditions as part of a minority religious community;
- (d) the protection of his financial privacy;
- (e) the overall “exceptional and less favourable” conditions he is facing;
- (f) unequal bargaining power and significant power imbalance;
- (g) consistency with the broader legislative framework;
- (h) there is no or very little public interest in his identity; and
- (i) the overall interests of justice.

[13] A brief comment is required about the references to financial privacy and power imbalance. The plaintiff is concerned that the Authority inadvertently disclosed the rate he was paid even though it had attempted to not release that information. The reference to a power imbalance was not explained, but appears to be to the inequality of bargaining power to which s 3 of the Employment Relations Act 2000 (the Act) is directed.

[14] The adverse impacts on the plaintiff’s health and wellbeing were referred to at length in both of his affidavits filed in March and June 2024. To support the plaintiff’s health-related concerns, exhibited to the March affidavit was a letter from a post-clinical intern psychologist, countersigned by a clinical psychologist, describing aspects of his mental health. Exhibited to the June affidavit was a letter dated 10 June 2024, from a different clinical psychologist, reporting on the plaintiff’s mental health between February and May 2023 and addressing the potential impact on him if his name is published.

[15] The plaintiff did not provide evidence from a leader in his religious community.

Analysis

[16] In any proceeding the Court may order that the name of any party, witness or other person not be published.⁷ Any order may be subject to conditions.

[17] The Act does not contain a test for non-publication, but the fundamental principle is open justice.⁸ The principle may be departed from to the extent necessary to secure the proper administration of justice, which must be construed broadly but is a contextual analysis.⁹

[18] In *Erceg*, the Supreme Court held that the administration of justice is capable of accommodating the particular circumstances of individual cases as well as considerations about broader public interest. The Court cited, with approval, from the decision in *John Fairfax Group Pty Ltd v Local Court of New South Wales* and Kirby P's comments regarding the exceptions to the principle of open justice at common law:¹⁰

The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case.

[19] Before an order can be made there must be material before the Court on which it could reasonably conclude that the risk of specific adverse consequences arising from publication justifies a departure from open justice. The Court has to be satisfied that the suggested adverse consequences could reasonably be expected to occur.¹¹

[20] The plaintiff holds concerns about future employment prospects, and considers they are likely to be further hindered by bias or discriminatory treatment (on the basis

⁷ Employment Relations Act 2000, sch 3 cl 12.

⁸ *Erceg*, above n 5; and *MW v Spiga Ltd* [2024] NZEmpC 147.

⁹ *Erceg*, above n 5, at [3] and [18].

¹⁰ At [18]. *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 141.

¹¹ *MW v Spiga Ltd*, above n 8, at [88]–[89].

of his religion, ethnicity, culture and/or his status as a recent migrant). I do not consider there is sufficient basis upon which to conclude that these concerns justify a departure from open justice. There was, for example, no obvious link in the information provided connecting the identified grounds of discrimination with his concerns about previous or future employment.

[21] However, there is one respect in which a permanent order is justified and that is because of the impacts on the plaintiff's mental health that are likely to arise from any attendant publicity about this litigation. The plaintiff's medical condition has existed for some time and appears to be on-going. It is likely to be exacerbated by the publication of his name and/or information identifying him. I accept that the identified risk needs to be taken into account and addressed. That points towards an order being made and is sufficient to displace the principle of open justice.

[22] I make a permanent non-publication order prohibiting the publication of the plaintiff's name or any information that might identify him and that includes the name of his company.¹²

[23] There is no order as to costs.

K G Smith
Judge

Judgment signed at 11 am on 26 August 2024

¹² Referred to as "I Ltd" in the Authority's determination.