ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES

IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 243
EMPC 451/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for interim non-publication order
BETWEEN	VSL Plaintiff
AND	ZSM LIMITED Defendant

Hearing: 6 December 2024
(Heard at Wellington by way of telephone directions conference)

Appearances: A Fechney, advocate for plaintiff
D Browne, counsel for defendant

Judgment: 9 December 2024

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for interim non-publication order)

Introduction

[1] The plaintiff seeks an interim order of non-publication of their name and identifying details. The application arises in the context of interim orders having been made in the Employment Relations Authority (the Authority) pending further orders of the Court; the Authority had declined an application for permanent orders.[1]

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1 *VSL v ZSM Ltd* [2024] NZERA 632 (Member Beck) at [11]-[12].

[2] In its determination declining permanent orders (but granting interim orders pending the exercise of the plaintiff's challenge rights), the Authority noted that it had been "hampered by a lack of corroborating evidence on specific health issues including whether they were ongoing or not."[2] While accepting the plaintiff's evidence which pointed to (amongst other things) some significant reactive health issues due to the stress of ongoing problems they had been encountering at work and the impact of their dismissal, the Authority member concluded that they did not sufficiently establish "out of the ordinary grounds" for a blanket non-publication order; that they were "not convinced" that the suggested adverse consequences could reasonably be expected to occur or that the factual matrix involved any significant contextual issues or claims that pointed to the need to protect VSL from undue publicity.[3]

[3] As I have said, the Authority made an interim non-publication order pending the matter being determined by the Court in the event that a challenge proceeded.

[4] The plaintiff has filed a challenge and seeks interim orders of non-publication pending the outcome of the challenge. The plaintiff wishes to advance an application for permanent orders at the substantive hearing.

[5] During the course of a telephone conference on Friday 6 December 2024 I granted the application for interim orders and said that my reasons would follow. These are my reasons.

Approach to non-publication

[6] The full Court has recently considered the correct approach to non-publication in the Authority and the Employment Court in *MW v Spiga Ltd*.[4] The majority concluded that the approach to interim orders ought to be materially the same as the approach to permanent orders.[5] While I delivered a minority judgment in the case, it is appropriate to apply the majority's approach, which can be summarised as follows.

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2 At [8].
3 At [8]-[9].
4 *MW v Spiga Ltd* [2024] NZEmpC 147.
5 At [91].

[7] Open justice is of fundamental importance and may only be departed from to the extent necessary to serve the ends of justice.[6] Ordinarily, the Court will only order non-publication where there is reason to believe that specific adverse consequences could reasonably be expected to occur that justify a departure from open justice.[7] Two steps were outlined to assist in that analysis.

[8] The first step is an assessment of whether there is reason to believe that specific adverse consequences could reasonably be expected to occur. The necessary evaluation will focus on such evidence as has been submitted and/or is available. Inferences may be required by the Authority or the Court, but these must be reasonable inferences that may be taken from the evidence, based on the specific circumstances of the case, when considered in context.[8]

[9] The second step is a weighing exercise in which the Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case.[9] In conducting that weighing exercise, a number of factors may be relevant, including:[10]

(a) the circumstances of the case;

(b) the interests of the person or entity applying for a non-publication order;

(c) the interests of the other party or parties to the litigation;

(d) the interests of any third party;

(e) the public interest, including the rights of media;

(f) any further issues of equity and good conscience; and

(g) tikanga and its principles, values, or concepts.

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6 At [87], relying on *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [2]–[3] and [13].
7 *MW v Spiga Ltd,* above n 4, at [87]–[89].
8 At [88].
9 At [89].
10 At [94].

[10] The underlying test for non-publication is not whether there are specific adverse consequences justifying a departure, but rather whether a departure from open justice is necessary to serve the ends of justice or where the administration of justice may weigh against full openness.[11] On that note, the majority of the full Court indicated that non-publication may be appropriate where minimum entitlements are in issue and where proceedings are brought to enforce confidential settlement agreements.[12]

Analysis

[11] I concluded that it was in the broader interests of justice to make the interim orders sought on the basis of the material before the Court. That is because interim orders of non-publication are necessary to preserve the position of the plaintiff pending determination of the application for permanent orders, which will be dealt with at the substantive hearing.[13]

[12] The defendant was comfortable with an interim non-publication order being granted, and this factor weighed in favour of the application.

[13] While there is a general public interest in open justice, which must be weighed in the assessment process, there is no demonstrable particular public interest in the identity of the plaintiff at this stage. And, as observed in *FDE v UWV*,[14] there is a broader public interest in employees being able to exercise their legal rights without unduly undermining their privacy.

[14] As I have said, the full Court has confirmed that the same approach is to be applied in determining interim and permanent orders.

[15] In respect of the need for corroborating evidence (referenced by the Authority), I make two points. The plaintiff's representative was in a position to advise the Court

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11 At [87] and [92].
12 At [92] and [93], citing *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 141.
13 See, for example, *DGE v AKO* [2024] NZEmpC 211.
14 *FDE v UWV* [2024] NZEmpC 179, at [25].

as to the availability and cost of obtaining a report from a psychologist to support the plaintiff's application. To obtain a report promptly, within around two weeks, would cost approximately $4,000; to obtain a report within two to three months would cost approximately $2,000. The cost under either option is significant; the time delay (under the cheaper option) is also significant.

[16] I note that the majority was prepared to rely on the uncorroborated evidence of the applicant in *Spiga* in terms of the detriment they contended they would suffer from if their name and identifying details were published. And the extent to which inferences may appropriately be drawn by this Court in such cases was referred to in *Spiga* and subsequently in *FDE*, applying *Spiga*.[15]

[17] I did not consider it necessary or appropriate in the interests of justice to require the plaintiff to go to the expense and time of obtaining a psychologist's report to support their application for interim orders. It may be that direct evidence on the alleged impact of publication on the plaintiff at the substantive hearing will provide a basis for the Court to adequately assess the factors relevant to the discretionary process required under the Employment Relations Act 2000. If, after hearing that evidence, further evidence is required, it may be appropriate to adjourn to enable steps to be taken in that regard. Such an approach would have the benefit of not imposing significant costs on the parties unless that proves necessary. As discussed with the representatives during the course of the conference, the same considerations would likely apply if the defendant (a small sized company) was to advance a similar application.

[18] In short, it is apparent that money and time are scarce commodities for both parties, and it is consistent with equity and good conscience that the Court have regard to that when dealing with interlocutory applications.

Conclusion

[19] The facts of this case, and the interests engaged (specifically and more generally), warrant a departure from the principle of open justice and support an

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[15] *Spiga*, above n 4, at [88] and [165]; *FDE*, above n 14, at [9].

interim order of non-publication being made. There is accordingly an order prohibiting publication of the plaintiff's name and identifying details pending further order of the Court. In order to render the order effective, the defendant's name and identifying details are also not to be published until further order of the Court (a point I did not understand the defendant to take issue with).

[20] The application for permanent non-publication orders will be dealt with at the time of the substantive challenge.

[21] No issue of costs arises.

Christina Inglis
Chief Judge

Judgment signed at 11.30 am on 9 December 2024