

**ORDER PROHIBITING PUBLICATION OF NAME(S) OR IDENTIFYING
PARTICULARS OF THE PLAINTIFFS UNTIL 6 MARCH 2026**

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

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

**[2026] NZEmpC 9
EMPC 366/2024
EMPC 367/2024**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

AND IN THE MATTER OF an application for non-publication orders

BETWEEN AX
First Plaintiff

AND BY
Second Plaintiff

AND A LABOUR INSPECTOR OF THE
MINISTRY OF BUSINESS, INNOVATION
AND EMPLOYMENT
Defendant

Hearing: On the papers

Appearances: BY, advocate for the first plaintiff and in person
M Brown, counsel for the defendant

Judgment: 22 January 2026

JUDGMENT OF JUDGE J C HOLDEN

[1] These are unusual challenges. They are in respect of directions of the Employment Relations Authority that declined to make permanent non-publication orders in respect of discontinued proceedings. There are no published determinations of the Authority about the matter.

The Labour Inspector withdrew proceedings

[2] [REDACTED]

[3] [REDACTED]

[4] [REDACTED]

[5] [REDACTED]

[6] [REDACTED]

[7] [REDACTED]

[8] [REDACTED]

[9] [REDACTED]

[10] [REDACTED]

The plaintiffs have challenged the Authority's refusal to order non-publication

[11] In August 2024, the plaintiffs filed statements of claim challenging the Authority's directions declining the applications for non-publication orders. There were procedural delays in bringing this matter to a conclusion, but ultimately the challenges were scheduled to be heard by the Court together on 25 November 2025.

[12] The day before the hearing was scheduled to commence, the plaintiffs applied for it to be vacated and for the matter to be determined on the papers. This application was made on the basis of health issues for both plaintiffs, but in particular BY. As well as being the second plaintiff, BY is the advocate for AX, operating through the company CAF Ltd. The application was not opposed by the Labour Inspector and was granted by the Court with a timetable for filing submissions. The plaintiffs did not wish to file evidence and did not do so; they submit that the matter is narrow and purely legal.

The plaintiffs seek to suppress information about the proceedings

[13] The plaintiffs submit this case sits in a distinct category; the Authority never exercised its adjudicative function and made no factual, credibility or legal findings about the allegations.

[14] In those circumstances, the plaintiffs say the allegations should not be able to be published. They say publication would impose reputational consequences indistinguishable from a finding of breach, despite no finding ever having been made. They acknowledge that no affidavit evidence has been filed as to harm, but say that, in the context of withdrawn enforcement actions and allegations that were never tested, the adverse consequences are inherent and well-recognised in the authorities.

[15] Against those consequences, the plaintiffs say that the principle of open justice holds little weight because there is no judicial reasoning to scrutinise, and no public interest served by the publication of untested and withdrawn allegations. Where a case is withdrawn without there being any examination of the merits, they say that a departure from open justice is necessary to serve the ends of justice.

[16] They seek orders prohibiting publication of:

- (a) their names and identifying details;
- (b) any reference linking them to the Authority proceedings;
- (c) all pleadings and documents filed in the Authority; and
- (d) all pleadings and documents filed in the challenge.

[17] They do not seek non-publication orders in respect of the fact of the challenge, the Court's reasoning or outcome, or of the unrelated procedural history.

The Labour Inspector opposes non-publication orders

[18] The Labour Inspector says there is no evidential basis for non-publication orders. The Labour Inspector notes that the Labour Inspectorate is subject to the

Official Information Act 1982, and that non-publication orders would prevent it from properly responding to requests for information from the media or from people who have complained to the Inspectorate regarding the plaintiffs or companies associated with them.

[19] The Labour Inspector also points to extensive litigation against ESD Ltd, some of which also included the plaintiffs. While there are interim non-publication orders in respect of some of those proceedings, others are public, and determinations have been published.¹

[20] [REDACTED]

[21] Adopting the test the Court arrived at in *MW v Spiga Ltd*,² the Labour Inspector says that there is no evidence to support the claim that the commencement of the proceedings or their withdrawal, including the reasons for the withdrawal, would give rise to adverse consequences for the plaintiffs. Even accepting that there may be adverse consequences, the Labour Inspector submits that those would not justify a departure from the principle of open justice.

The Court may make orders for non-publication

[22] The Court has the power to prohibit publication including in respect of pleadings filed or the name of any party to a proceeding. Any such order may be subject to such conditions as the Court thinks fit.³

[23] While this is a broad discretion, it must be exercised consistently with applicable principles. The principle of open justice is of fundamental importance and may only be departed from to the extent necessary to serve the ends of justice.⁴

¹ [Redacted].

² *MW v Spiga* [2024] NZEmpC 147, [2024] ERNZ 678.

³ Employment Relations Act 2000, sch 3 cl 12.

⁴ *MW v Spiga*, above n 2, at [87], relying on *Erceg v Erceg [Publications restrictions]* [2016] NZSC 135, 2017 1 NZLR 310 at [2]–[3].

[24] The Court generally will only order non-publication where there is a reason to believe that specific adverse consequences could reasonably be expected to occur, and those specific adverse consequences justify a departure from open justice.⁵

[25] The assessment of whether there is reason to believe that specific adverse consequences could reasonably be expected to occur focuses on the evidence that has been admitted and/or is available, but inferences may be drawn by the Authority or the Court. Those must be reasonable inferences taken from the evidence, however, based on the specific circumstances of the case when considered in context.⁶

[26] The second step is a weighing exercise in which the Court considers whether a departure from open justice is justifiable in the circumstances of the case.⁷ There are a number of factors that may be relevant, including:⁸

- (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 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.

⁵ At [88]–[89].

⁶ At [88].

⁷ At [89].

⁸ At [94].

[27] The underlying test, however, is whether a departure from open justice is necessary to serve the ends of justice.⁹ There are situations where the administration of justice and broader public interest themselves may weigh against full openness.¹⁰

The Labour Inspectorate should be able to respond to requests for information in the usual way

[28] In this case, granting the orders sought would mean that, should it receive a request for official information from the media, the Labour Inspectorate would be prevented from conducting the usual analysis under the Official Information Act and releasing such information as it otherwise considers should properly be released. It also would prevent the Labour Inspectorate from passing on any information gained in respect of the plaintiffs, or of the two named companies, to any person who complains to it regarding the plaintiffs or any associated companies.

[29] Section 4 of the Official Information Act sets out the purposes of the Act:

4 Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

(a) to increase progressively the availability of official information to the people of New Zealand in order—

(i) to enable their more effective participation in the making and administration of laws and policies; and

(ii) to promote the accountability of Ministers of the Crown and officials,—

and thereby to enhance respect for the law and to promote the good government of New Zealand:

(b) to provide for proper access by each person to official information relating to that person:

(c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

⁹ At [87].

¹⁰ At [92]–[93].

[30] The overriding principle is that information should be made available unless there is good reason to withhold it.¹¹

[31] On receipt of a request for official information, an agency must assess the information and determine whether there is good reason for withholding it. In the usual course, that might require the agency to consider whether withholding the information is necessary to protect the privacy of natural persons, and whether, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.¹²

[32] In considering that broader public interest in the present scenario, the functions of the Labour Inspectorate are relevant. These include:¹³

- (a) determining whether the provisions of the relevant employment legislation have been complied with;
- (b) taking all reasonable steps to ensure that the relevant employment legislation is complied with;
- (c) monitoring and enforcing compliance with employment standards; and
- (d) performing any other functions conferred by or under the relevant employment legislation.

[33] The overarching submissions of the plaintiffs run counter to the aims and scheme of the Official Information Act and, if accepted, would prevent the Labour Inspectorate from performing the usual assessment as to whether there is good reason to withhold the information that outweighs the broader public interest in its release.

[34] I agree with the Labour Inspector that there are likely to be situations where there remains public interest in providing information to requestors under the Official

¹¹ Official Information Act, s 5.

¹² Section 9.

¹³ Employment Relations Act, s 223A.

Information Act regarding the outcome of a case, even where that case has been withdrawn.¹⁴ In this case, this may include explaining why the proceedings were withdrawn.

[35] A non-publication order would also detract from the ability of the media to report fairly and accurately on Court proceedings. If the media goes beyond fair and accurate reports, the qualified privilege allowed for media under the Defamation Act 1992 would not apply and, should they consider that the media reports are false and defamatory, the plaintiffs would be able to bring proceedings for defamation.¹⁵

[36] Accordingly, I do not consider that this case falls within the category of cases where the ends of justice require non-publication even in the absence of there being specific adverse consequences.

[37] Applying the usual two step analysis, the case fails at the first step; no specific adverse consequences have been identified. Further, having already been named in several determinations regarding employment law breaches, it is difficult to see how being named in respect of these proceedings would cause any significant additional adverse consequences for the plaintiffs.

[38] Even if there were such adverse consequences, there are previous decisions involving the plaintiffs and ESD Ltd and there is public interest in allowing the Labour Inspector to explain why the substantive proceedings were discontinued.

[39] In short, the principles of open justice should prevail. The Labour Inspectorate should be able to respond to any requests for information, guided by the principles of the Official Information Act.

[40] The applications are dismissed.

¹⁴ Official Information Act, s 4(a).

¹⁵ Defamation Act, s 16 and sch 1.

Interim order made

[41] There is, however, an interim non-publication order preventing publication of the names and identifying information with respect to the plaintiffs for a period up until 6 March 2026 to enable the plaintiffs, if they wish, to lodge an application for leave to appeal this judgment and for the Court of Appeal to consider any applications for interim non-publication in that context. A redacted copy of this judgment may be published immediately and will be placed on the Court's website. Unless there is a further order from the Court of Appeal, an unredacted copy of this judgment will be published after 6 March 2026.

The Labour Inspector is entitled to costs

[42] The Labour Inspector seeks costs. Unless they are agreed with the plaintiffs, the Labour Inspector is to file and serve a memorandum outlining the costs sought by 4pm on 27 February 2026. Any memorandum in opposition from the plaintiffs is to be filed and served by 4pm on 20 March 2026, and any reply from the Labour Inspector is to be filed and served by 4pm on 27 March 2026. It is proposed that any application for costs would then be dealt with on the papers.

J C Holden
Judge

Judgment signed at 10.30 am on 22 January 2025