

**ORDER PROHIBITING PUBLICATION OF NAMES AND IDENTIFYING
PARTICULARS OF THE PARTIES AND OTHER PERSONS**

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2025] NZEmpC 32
EMPC 230/2024**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application for a non-publication order

BETWEEN ZUW
Plaintiff

AND WFW
Defendant

Hearing: 13 February 2025
(Heard at Christchurch via Audio Visual Link)

Appearances: M J Foley, counsel for plaintiff
Defendant's appearance excused

Judgment: 27 February 2025

**JUDGMENT OF JUDGE K G SMITH
(Application for a non-publication order)**

[1] On 23 May 2024, the Employment Relations Authority determined that WFW was unjustifiably dismissed by ZUW, a company in a provincial centre in New Zealand.¹ ZUW was ordered to pay compensation. In reaching that decision the Authority was satisfied that WFW was the victim of sexual harassment.

¹ *WFW v ZUW* [2024] NZERA 306 (Member Doyle).

[2] The Authority made a permanent non-publication order in relation to WFW and two witnesses; WFW's parent and a previous employee of ZUW. The order extended not only to prohibiting the publication of the names of those people but also to any information that might identify them.²

[3] ZUW unsuccessfully applied to the Authority for a non-publication order seeking to prohibit the publication of its name, and the name of its only director.³ While the Authority declined to make a permanent order, an interim one was made to provide an opportunity to ZUW to challenge the determination.⁴

[4] After ZUW filed its challenge, the Authority made another interim order prohibiting the publication of the company's name and the name of its director, or any information that might identify them, pending further order of the Court.⁵

The challenge

[5] ZUW's challenge to the Authority's determination was confined to the refusal to make a permanent non-publication order. It accepted the adverse findings about the behaviour of its director and the appropriateness of the compensatory award.

[6] There are two other matters that need to be mentioned at this stage. As a precaution, ZUW filed an interlocutory application for a non-publication order pending its challenge being resolved, even though the Authority's interim order continued to apply. The application was subsumed into the challenge when it was heard.

[7] The second matter is about the role taken by the defendant. Initially, WFW defended the claim seeking to uphold the Authority's refusal to grant a non-publication order to ZUW. Subsequently, the defendant's counsel asked to have the defendant excused from further participation for practical reasons; the existence of the permanent order in WFW's favour in the Authority and to avoid ongoing expense. That request was granted.

² At [11].

³ At [4].

⁴ At [12].

⁵ *WFW v ZUW* [2024] NZERA 365 (Member Doyle).

Evidence by affidavit

[8] Evidence supporting this challenge was provided by affidavit. One reason for ZUW's application failing in the Authority was that it did not substantiate the grounds it relied on.⁶ In ZUW's challenge that omission was rectified and the Court received a substantial body of evidence from its director and his former partner (referred to as D). That evidence described the director's personal circumstances, the anticipated impacts on him if he is identified, and concerns about the potential impact on D and on their child (referred to as F) who is growing up with a disability. That evidence will be returned to shortly.

Power to grant non-publication

[9] The Court's power to grant non-publication is in cl 12 of sch 3 to the Employment Relations Act 2000 (the Act). In any proceeding the Court may order that all or any part of the evidence given, or the pleadings filed, or the name of any party, witness or other person not be published. Any order may be subject to conditions. There is no material difference between the Court's power in cl 12 and the power conferred on the Authority by cl 10 in sch 2 to the Act.

[10] The subject of non-publication was recently examined by a full Court of this Court in *MW v Spiga Ltd*.⁷ In that case, the majority of the Court held that the general rule applying in this Court is the one described in *Erceg v Erceg*; that open justice is of fundamental importance.⁸ It may be departed from but only to the extent necessary to serve the ends of justice.⁹ That means there must be sound reasons for making an order of non-publication justifying such a departure.¹⁰

[11] In *Spiga*, a two-step approach was adopted. The first step is to establish a reason to believe that the specific adverse consequences said to support an application could reasonably be expected to occur. Inferences from that evidence may be

⁶ *WFW v ZUW*, above n 1, at [10].

⁷ *MW v Spiga Ltd* [2024] NZEmpC 147, (2024) 20 NZELR 723.

⁸ *Erceg v Erceg [Publication Restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310.

⁹ *Spiga*, above n 7, at [86] and [87]; and *Erceg*, above n 8, at [2] and [3].

¹⁰ *Spiga*, above n 7, at [87].

appropriate and, if any are to be drawn, they must be reasonably based on the specific circumstances of the case, considered in context.¹¹

[12] The second step described in *Spiga* is that the Court must consider whether the adverse consequences that may reasonably be expected to occur justify departing from open justice in the circumstances of the case. This step is a weighing exercise where equity and good conscience may play a part.¹² Considerations of tikanga may be appropriate and woven into the weighing exercise.¹³ In the following discussion of ZUW's application the approach in *Spiga* is applied.

Plaintiff's case

[13] Ms Foley addressed the two-step approach in her submissions. She began by accepting that the plaintiff faces a difficulty in seeking non-publication based on the circumstances of its director. That was a reference to cases concluding that, where sexual harassment occurred, the public interest in open justice is stronger so that the name of the person responsible should not usually be protected, while the name of the victim should usually be protected.¹⁴ Ms Foley sought to overcome that difficulty by weaving together submissions about the director's personal circumstances with the potential impacts on D and F.

[14] ZUW is a small company in a provincial centre in the South Island. Its director is closely identified with the company to such an extent that they are seen in the community as one and the same thing. The director has a cultural background distinct from the majority of people in the community where he, D and F live.

[15] D is the director's former partner. They maintain a close and co-operative relationship to care for F. D does not use the director's surname, but their previous relationship is well known in the community as is the fact that they continue to share responsibility for caring for and supporting F.

¹¹ At [88].

¹² At [89].

¹³ At [89].

¹⁴ See for example, *KN v New Zealand Steel Ltd* [2024] NZEmpC 65.

[16] Adverse impacts on D were said to be likely to arise if ZUW's name and the director's name are published. The evidence was that life with a child with a disability is a battle and that the additional support provided by the director is extremely important to both D and F. That includes financial support generated by ZUW, which was likely to be compromised by publication if there is an adverse impact on the business. An inference invited to be drawn was that, if publication occurs, D will endure unwelcome scrutiny for maintaining close contact with the director. D is also concerned about the potential impact on her other personal relationships and career prospects. She felt a deep sense of shame over what happened and needed to address those feelings privately with her whānau in accordance with tikanga, which she considered would not be possible if the director's name is published.

[17] F is a primary school-aged child. F does not use the director's surname but their family relationship is common knowledge. F is well aware of the challenges that come from living with a disability. Regrettably, F has been bullied and singled out because of the disability. F is also aware of the cultural differences between the director and the community where they live. Ms Foley submitted that F is not only sensitive to these differences but is likely to be subjected to additional stigma and be exposed to more bullying, if the director's name is published.

[18] Ms Foley accepted that the impact on the director is less significant than the impacts on D and F. However, she submitted that what sets this case apart from others where the harasser has been named is the smallness of the community they live in, the director's distinct culture and the easily-made connection between the director, D and F.

[19] At the Court's invitation, Ms Foley addressed the defendant's situation even though the defendant was excused from participating in the hearing. That request was made because the Authority ordered permanent non-publication of the defendant's name or any identifying information. An issue arose about whether a consequential non-publication order is necessary to preserve the Authority's order protecting the defendant. Ms Foley submitted it is necessary to do that. That was because of a combination of where they all live, the easy identification of the director and ease with which connections could be made between the director, the company and its former employee.

Analysis

[20] The first step from the majority judgment in *Spiga* is satisfied. I accept that there is a risk that the specific adverse consequences for D and F could be expected to occur if ZUW's name and the name of the director are published. Those adverse consequences have already been noted; the easy identification of D and F and the likely impacts on them given their particular circumstances, including the risk of being subjected to unacceptable responses from some people in their community. I accept the inference invited by Ms Foley that the risks are real.¹⁵ It is compounded by the fact that F is dealing with a vulnerability created by living with a disability.

[21] I also accept Ms Foley's submission that there is a real risk of specific adverse consequences for the defendant, who may be identified by association, undermining the Authority's non-publication order.

[22] The second step is a weighing exercise. Ms Foley identified the factors that might be relevant from *Spiga*:¹⁶

- (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.
- (f) Any further issues of equity and good conscience.
- (g) Tikanga principles, values or concepts.

¹⁵ *Spiga*, above n 7, at [88].

¹⁶ At [94].

[23] Ms Foley submitted that there is some overlap between the first and second step. While she identified factors to assist the director, the thrust of her submissions about the weight to be assigned to these factors concentrated on the interests of D, F and the defendant. She submitted the only negating factor in the weighing exercise that might need specific attention was the public interest. Ms Foley considered that factor was adequately addressed by the Authority's decision and that the public interest in this case did not require the disclosure of the names of ZUW and the director.

[24] The weighing exercise required by the second step in *Spiga* points firmly towards allowing the challenge and making a non-publication order. The impacts on D and F are likely to be such that protecting them is necessary to serve the ends of justice in the sense referred to in *Erceg* as applied in *Spiga*.

[25] Considerable weight must also be placed on the risk Ms Foley identified to the integrity of the Authority's order designed to protect the defendant. Even if the factors referred to in Ms Foley's submissions for D and F had been insufficient, the defendant's interests alone are enough to justify making a non-publication order in favour of ZUW and the director.

Outcome

[26] The challenge is successful. There is a permanent order prohibiting the publication of the name of ZUW, or its director, or any information that might identify them.

[27] There is no order as to costs.

K G Smith
Judge

Judgment signed at 4.50 pm on 27 February 2025