



# Employment Court of New Zealand

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## Emmerson v Northland District Health Board [2020] NZEmpC 180 (5 November 2020)

Last Updated: 11 November 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2020\] NZEmpC 180](#)

EMPC 278/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for permanent non- publication orders
BETWEEN	LYNDA MARIE EMMERSON Plaintiff
AND	NORTHLAND DISTRICT HEALTH BOARD Defendant

Hearing: (on the papers)

Appearances: S Henderson and C Martin, counsel for plaintiff  
S Hornsby-Geluk, counsel for defendant

Judgment: 5 November 2020

### JUDGMENT OF JUDGE B A CORKILL

**(Permanent non-publication orders)**

#### Introduction

[1] Following the substantive hearing of the challenge to which this proceeding relates, I recorded in my judgment that the Northland District Health Board (NDHB) had requested that the Court's interim non-publication orders be made permanent; these related to two witnesses who gave evidence for the defendant, Dr M and Dr N.1

1 *Emmerson v Northland District Health Board* [\[2019\] NZEmpC 34](#) at [\[422\]](#).

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[2] I directed that NDHB file and serve its submissions in support of its application within 21 days of the judgment; and that Dr Emmerson could file and serve hers within a like period thereafter.2

[3] The NDHB application was made on 18 April 2019, supported by affidavits from both doctors.

[4] Counsel for Dr Emmerson, Mr Martin, advised the Court that no submissions would be filed on her behalf on this topic.

[5] Because the issue of non-publication of names of those persons was still before the High Court in related proceedings, I subsequently issued a minute indicating I would defer my consideration of the NDHB's application until that Court had concluded whether its interim orders would be made permanent. Subsequently, the High Court issued a judgment, in which

final suppression orders were made in respect of Dr M and Dr N.<sup>3</sup>

## The substantive judgment

[6] My substantive judgment dealt with Dr Emmerson's claim she had been badly mistreated by the NDHB when it was her employer, and then wrongfully dismissed. She had sought substantial remedies.

[7] NDHB vigorously denied all her assertions, stating it had acted in a fair and reasonable way at all times, and that all her claims were misconceived. Further, if the Court were to get to the point of considering remedies, NDHB argued that none should be awarded in light of her egregious misconduct.

[8] I found that two of four of Dr Emmerson's causes of action were established. One of those related to unjustified dismissal; however, having regard to significant contributory conduct no remedies were awarded. The other claim which succeeded was a disadvantage grievance which resulted in an award of \$3,600 in favour of Dr Emmerson.

2 At [423].

3 *Emmerson v A* [2019] NZHC 3234.

## Application for non-publication of name

[9] The application for non-publication of the two witnesses' names and identifying details was made on several grounds, which Ms Hornsby-Geluk, counsel for NDHB, summarised with reference to their affidavits.

[10] First, it was submitted that there should be a departure from the fundamental rule of open justice because the ability of Dr M and Dr N to treat their patients may be compromised were their names to be publicised:

- a. Dr Emmerson had made allegations about those witnesses which went to the heart of their integrity, and which were fundamental to their clinical practice. The vast majority of those allegations had not been upheld.
- b. The patients cared for by Dr M and Dr N are vulnerable, have fragile mental states, and have a high risk of relapse, self-harm, suicide or of causing harm to others. Most suffer from schizophrenia with others having bi-polar disorder.
- c. Many of the witnesses' patients also have persecutory and paranoid delusions about their safety.
- d. It is essential that the patients treated by the witnesses have trust in their treating practitioner and can engage in what is called a "therapeutic alliance". There is a real risk that publication of the witnesses' names in relation to the matter could adversely impact the trust and confidence the patients have in those persons.
- e. If their names were published in conjunction with the proceeding, there would be a risk that the patients they treat would question the competence of their health practitioners and disengage from treatment.
- f. Publication of the witnesses' names would seriously undermine their ability to effectively interact and manage future patients for the same reasons.

[11] Second, publication of the health practitioners' names in conjunction with the proceeding could result in permanent damage to their reputations, particularly given the nature of the allegations made by Dr Emmerson against them.

[12] Third, each of the witnesses have family members who are of advanced ages and who may be susceptible to particular adverse effects. These were outlined.

[13] Finally, the High Court and the Health Practitioners' Disciplinary Tribunal had both made orders prohibiting publication of the witnesses' names in respect of matters relating to Dr Emmerson. If the Court were to publish the witnesses' names or identifying details, those orders would be undermined.

[14] Appropriate legal principles were referred to, the essence of which is that the standard for departing from principles of open justice is high.<sup>4</sup>

[15] Ms Hornsby-Geluk also emphasised that an order could be made if there would otherwise be an impact on the health circumstances of a third party.<sup>5</sup>

## Analysis

[16] I deal first with the primary ground raised for Dr M and Dr N, relating to the possibility that treatment of their patients may be compromised.

[17] Ms Hornsby-Geluk's summary of the key points made by them in their affidavits is accurate.

[18] Both doctors are senior specialists. It is appropriate for the Court to rely on their expert opinions on the issue of patient management.

[19] It is obvious from their evidence that the maintenance of trust and confidence by patients in the therapeutic relationship they have with their treating practitioner is fundamental to their care. I am also satisfied that the patients involved were, and are,

4 *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96].

5 *H V A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [89].

very vulnerable, with a high risk of causing harm to themselves or others, if they were to disengage from treatment.

[20] Consideration of these patient interests is a very strong factor which justifies the making of permanent orders.

[21] The second ground relied on, to the effect that Dr M and Dr N could suffer permanent damage to their reputations, is less persuasive. Whilst there are some aspects of the evidence they gave about their role in the matters that were reviewed by the Court which may not necessarily place them in a good light, this is not a sufficient reason for making a permanent order of non-publication. Had this been the sole ground relied on, I would not have granted the application.

[22] The third ground, which relates to potential impact on associated family members is perhaps more persuasive; but it is a borderline factor.

[23] The fourth ground, however, is more significant. The High Court has made permanent orders, essentially for the same reasons as have been outlined above.<sup>6</sup> So also has the Health Practitioners' Disciplinary Tribunal.<sup>7</sup>

[24] There are references in my substantive judgment to both such proceedings.<sup>8</sup> Were this Court not to make non-publication orders, the orders made by both these judicial bodies would potentially be undermined, because the identity of Dr M and Dr N could be established by reference to this proceeding.

[25] Given a context where there are significant patient safety issues, this is an important justification for the making of permanent orders.

## Conclusion

[26] For the foregoing reasons, I am well satisfied that the application should be granted in respect of each witness.

<sup>6</sup> *Emmerson*, above n 3, at [21]–[25].

<sup>7</sup> *A Professional Conduct Committee v Emmerson* 981/Med16/358P, 22 August 2018 at [10]–[11].

<sup>8</sup> *Emmerson v Northland District Health Board*, above n 1, at [10]–[11].

[27] I make permanent orders of non-publication of the name and identifying details of each of Dr M and Dr N.

[28] There is no issue as to costs.

B A Corkill Judge

Judgment signed at 3.15 pm on 5 November 2020