

**ORDER PROHIBITING PUBLICATION OF NAMES AND IDENTIFYING
DETAILS IN THE CONTEXT OF THIS JUDGMENT**

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2024] NZEmpC 102
EMPC 270/2023**

IN THE MATTER OF	an application for non-publication order
BETWEEN	C Applicant
AND	P Respondent

Hearing: On the papers

Representation: M Belesky, counsel for C
P Robertson, counsel for P (appearance excused by leave)

Judgment: 12 June 2024

JUDGMENT OF JUDGE B A CORKILL

[1] Some three years ago, judgments of this Court were issued between the above parties, resolving employment relationship problems between an employee and an employer.

[2] More recently, the parties attended mediation and, amongst other things, agreed they would jointly apply to this Court for removal of the Court decisions involving the parties “from the website/online ...”. This was because the employee considered publication of the subject judgments had led to significant adverse consequences, which I will outline shortly.

[3] A joint application was then made by both parties seeking non-publication orders. In addition, takedown orders were sought in respect of the subject judgments from the Employment Court's website and in respect of determinations of the Employment Relations Authority. Takedown orders were also sought in respect of a range of other judicial websites; this was because an online search produced links to the subject judgments on the websites of those other judicial bodies.

[4] The application related only to the publication of the subject judgments online, and not to their publication in law reports.

[5] Because of the potential implications of this Court being requested to make orders binding other judicial bodies, I initially asked the Solicitor-General to appoint counsel to assist. That resulted in Crown Counsel, Mr Peter Gunn, raising with the Court the alternative possibility of the Attorney-General being joined, given possible comity issues.

[6] Subsequent inquiries by the Registrar, however, confirmed that there were obvious technological problems. I understand the subject judgments had been correctly loaded on the Employment Court platform for judgments and, at the time the joint application was made, not loaded on the other judicial websites. A Ministry of Justice information technology (IT) team ultimately advised the Court that there had been a third party anomaly which could be corrected administratively by the removal of the subject judgments from this Court's website. Such a step would result in the erroneous third party links ceasing to operate; a message would appear stating "Page not found". The Ministry would then be able to request that the third party remove the listing. The subject judgments could be reinstated subsequently on the Employment Court website, if considered appropriate.

[7] Because of this anomaly, I directed that the subject judgments be taken down from the Court's website, as advised by the IT Team. I understand that subsequently this led to the removal of the links to the subject judgments from the third party platform, and that a request has been made for removal of the erroneous listings.

[8] It is not known whether the references to the subject judgments being on the websites of other judicial bodies caused prejudice. Those listings were linked to the Employment Court judgments which were properly published. Whilst the erroneous links are irregular, I place this issue to one side since the focus of the application relates to the content of the subject judgments. It is this content which the employee says has led to adverse consequences.

[9] In light of the administrative developments I have described, Mr Belesky confirmed orders in respect of other judicial bodies were no longer required. I accordingly concluded it was unnecessary for counsel to assist to be appointed. Mr Gunn also confirmed the Attorney-General no longer had an interest in the matter.

[10] To complete the background picture, the information before the Court confirms that the subject judgments are also on private subscriber platforms, such as LexisNexis and Westlaw, as well as on the public platform operated by the New Zealand Legal Information Institute. One of the relevant determinations is on the Authority's website.

[11] Evidence was filed in support of the joint application by the employee, which included a copy of the record of settlement as agreed between the parties at mediation. Also provided was detailed information setting out the significant issues which had been suffered as a result of publication of the subject judgments online, the prejudicial effect which such publication had on the employee's ability to obtain work over a period of years, as well as adverse and hurtful comments being made to the employee over time by third parties.

[12] As noted, initially it was suggested that a non-publication order and takedown orders be made. Such a procedural step is possible, even after a judgment has been issued, so long as appropriate grounds exist.¹

[13] However, when a non-publication order is sought after publication, the Court has no way of knowing who may now have copies of the subject judgments, and who would be potentially in breach of an order of non-publication were one to be made. Thus, it has long been the case that where information as to the identity of someone

¹ *Speed v Board of Trustees of Wellington Girls' College* [2023] NZEmpC 99 at [36].

appearing before the Court is already in the public domain, it is not generally considered appropriate to grant name suppression.² It is often said it is futile to do so.

[14] I discussed this issue with counsel, who subsequently filed a memorandum in which he requested that the subject judgments be taken down, and that consideration be given to anonymisation.

[15] There is a distinction between non-publication orders and the Court anonymising its decisions, as was observed by the Supreme Court in *D (SC 31/2019) v New Zealand Police*.³ There, the Court stated that anonymisation of a judgment, unlike suppression, does not require the Court to make any formal order.⁴ The Court, in that instance, said it would not have made a suppression order, but was prepared to anonymise the name of the accused in its own judgment.⁵ It also stated that the judgments of lower courts, which had recorded the accused's name, would remain available to the public unaltered.⁶

[16] Subsequently, such an approach has been adopted by the High Court in civil cases.⁷

[17] I have considered the question as to whether this Court has jurisdiction to anonymise a judgment as outlined in these cases.

[18] First, I refer to s 221(d) of the Employment Relations Act 2000 (the Act), which enables the Court to give such directions as are necessary or expedient in the circumstances to more effectually dispose of any matter before it according to the substantial merits and equities of the case, at any stage of the proceedings, of its own motion or on the application of any parties. In *Kidd v Equity Realty Ltd*, the Court of Appeal stated the language of s 221 is "broad and untechnical."⁸ That said, the discretion bestowed by the subsection is one which must be exercised in a principled

² For example, *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [94].

³ *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213.

⁴ At [139].

⁵ At [142].

⁶ At [146].

⁷ See *GF v Minister of COVID-19 Response* [2021] NZHC 2337 at [40]; and *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064 at [81]–[83].

⁸ *Kidd v Equity Realty Ltd* [2010] NZCA 452 at [12].

way. In my view, the breadth of this power permits the Court to consider anonymisation of names, as identified by the Supreme Court in *D v New Zealand Police*,⁹ if there is good reason to proceed in this way.

[19] Secondly, and alternatively, the ability to proceed in an equitable way is reinforced by the broad power to act in equity and good conscience as the Court thinks fit under s 189 of the Act for the purposes of supporting successful employment relationships. This case potentially involves the support of a successful employment relationship.

[20] I conclude the Court is able to address the issues that have arisen by way of anonymisation. But the Court must be persuaded that appropriate grounds exist. A case-by-case analysis is required.

[21] Here, I am satisfied that the Court should act for the following reasons:

- (a) The interests of open justice have been met by the initial publication of the subject judgments online some three years ago. That publication continued until recently when they were taken down because of the technological issues. From this point on, the interests of open justice will be adequately served by other means. For instance, publication in law reports will remain effective and, as outlined below, copies of the subject judgments may be requested from the Court.
- (b) A relevant consideration is the fact that both parties joined to make the application which is before me as an outcome of a mediated settlement. That factor is entitled to considerable weight, given the cornerstone role of mediation under the Act.
- (c) Importantly, the employee has placed evidence before the Court to the effect that their ability to obtain further employment has been adversely

⁹ *D v New Zealand Police*, above n 3.

impacted because of the way the various determinations and judgments have been published online. This is a significant consideration.¹⁰

- (d) There is also evidence of adverse inferences being drawn about the employee by third parties, including those in the individual's community and friends, due to the extensive publication which has occurred. The employee states they have been subjected to negative and demeaning actions; these consequences are verified in doctors' notes. Relevant medication has been prescribed. A psychologist's report confirms that the orders sought are desirable for the employee's mental wellbeing, and would assist that person's search for meaningful employment.

[22] In these circumstances, I direct that the previous judgments of the Court which identified the parties are not to be re-published by the Court online. If, however, any person reasonably requests a copy of the previously published judgments, they are to be made available in anonymised form.

[23] I direct that the employee may provide copies of the previously published judgments to any person if the employee elects to do so.

[24] I am not making any orders in relation to publication of the relevant determinations on the Employment Relations Authority website, nor on any of the other platforms I mentioned earlier. It is for the employee to take steps in that regard, if considered appropriate.

[25] I am anonymising the names and identifying details of the employee and employer in this judgment. For the avoidance of doubt, a copy of this judgment is to be placed on the Court's website. Also for the avoidance of doubt, the employee may

¹⁰ Previous judgments of the Court have noted that non-publication orders may be appropriate where work applications have been compromised were publicity to occur: *Elisara v Allianz New Zealand Ltd* [2019] NZEmpC 123, [2019] ERNZ 348 at [61]–[65]; *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441 at [12]; and *AJH v Fonterra Co-operative Group Ltd* [2021] NZEmpC 111, [2021] ERNZ 462 at [12].

provide a copy of this judgment to any third parties and, in doing so, confirm they are the subject person.

[26] I make a non-publication order in respect of the personal medical information contained in the employee's evidence. I also direct that the file not be searched without permission of a Judge; any application in that regard is to be notified to the employee to enable a response to be given.

[27] There is no issue as to costs.

B A Corkill
Judge

Judgment signed at 4.30 pm on 12 June 2024