ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 179
EMPC 301/2024

IN THE MATTER OF	an application for non-publication order
BETWEEN	FDE Applicant
AND	UWV Respondent

Hearing:	On the papers
Appearances:	Applicant in person Respondent in person
Judgment:	19 September 2024

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The applicant seeks a permanent order of non-publication of their name and identifying details. The application comes nearly three years after the Court delivered its substantive judgment, and two other judgments, in proceedings involving these parties. The proceedings related to a challenge to a determination of the Employment Relations Authority (the Authority) dismissing the applicant's personal grievance for unjustifiable dismissal. I held that the Authority had been correct to find that the employment had ended on the basis of mutual agreement.

[2] The application is advanced on four grounds. First, the applicant says that publication to date has had a "severe" impact on their employment prospects. The difficulties they have encountered in finding alternative employment are set out in an affidavit filed in support of the application.

[3] The applicant says that, despite their qualifications and extensive experience in IT sales, business development and management, they have received rejection notices or no responses at all from prospective employers. They describe their "diligent efforts to secure employment", including that they have submitted over 100 job applications across various industries since January 2023. It is said that the public availability of information regarding their involvement in the case has resulted in potential employers associating their name with the legal proceedings, leading to prejudice in the way in which the significant number of applications have been responded to and that:

> The stigma attached to my name due to the ongoing publication has rendered my chances of securing employment near impossible.

[4] The other grounds relied on in the application include general impacts on the applicant's professional reputation, including "unfair stigma and prejudice" influencing perceptions of their professional capabilities and integrity, as well as privacy and personal reputation concerns. As to the latter, it is said that publication has led to unnecessary scrutiny and judgement from peers and the public. The applicant also gives evidence that ongoing publication has had, and continues to have, consequences on their overall well-being.

[5] Lastly, it is submitted that the balance of justice strongly favours the application for non-publication. The potential harm to the applicant's future employment prospects and personal reputation is said to far outweigh any public interest in knowing the details of their involvement in the case.

[6] The previous employer does not oppose the application.

Approach to non-publication

[7] A full Court has recently considered the correct approach to non-publication in the Authority and the Employment Court in *MW v Spiga Ltd.*[1] The approach adopted by the majority may be summarised as follows.

[8] Open justice is of fundamental importance and may only be departed from to the extent necessary to serve the ends of justice.[2] Ordinarily, the Court will only order non-publication where there is reason to believe that specific adverse consequences could reasonably be expected to occur which justify a departure from open justice.[3] Two steps were outlined to assist in that analysis.

[9] 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.[4]

[10] 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.[5] In conducting that weighing exercise, a number of factors may be relevant, including:[6]

(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;

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1 *MW v Spiga Ltd* [2024] NZEmpC 147.
2 At [87], relying on *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [2]–[3] and [13].
3 *MW v Spiga Ltd,* above n 1, at [87]–[89].
4 At [88].
5 At [89].
6 At [94].

(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.

[11] 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.[7] 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.[8]

[12] Finally, the majority noted that where non-publication is sought but not granted, it will still sometimes be appropriate to anonymise the names of participants in proceedings, particularly where a name has been previously published, where concerns are raised about names being available via internet searches, and where witnesses are referred to.[9] The majority did not set out the test to apply for anonymisation (and were not asked to do so), but indicated that anonymisation may be granted more frequently in the Court and more readily than non-publication.[10] In other judgments the Court has indicated that it must be persuaded that appropriate grounds exist before an anonymisation order will be made, and that a case-by-case analysis is required.[11]

[13] I delivered a minority judgment in *Spiga.* While I would have adopted a different approach to non-publication,[12] it is appropriate to apply the majority's approach to the current application, which I now turn to.

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7 At [87] and [92].

8 At [92] and [93], citing *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 141.

9 *MW v Spiga Ltd,* above n 1, at [96].

10 At [96]; see also *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [136]–[147]; *GF v Minister of COVID-19 Response* [2021] NZHC 2337 at [37]–[41]; and *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2021] ERNZ 1079 at [81]–[83].

11 *C v P* [2024] NZEmpC 102 at [20]; and *M v Q* [2024] NZEmpC 153 at [17].

12 And I preferred not to express a view as to an increased use of anonymisation.

Application of *Spiga* approach in this case

[14] I start by considering whether there is reason to believe that specific adverse consequences could reasonably be expected to occur. In this case the issue needs to reframed. That is because the applicant says that publication has already given rise to adverse consequences, namely that prospective employers are carrying out internet searches on their name to inquire into their employment history, and not progressing their application further because prospective employers can see that they have pursued a personal grievance against a previous employer. So the question that arises in this case is whether there is reason to believe that specific adverse consequences have occurred and/or could reasonably be expected to occur into the future.

[15] The applicant has affirmed an affidavit setting out the steps that they have taken to find alternative work; and what they surmise are the reasons why prospective employers are not taking their job applications any further. In other words, the applicant infers that they are not progressing past a certain stage in the application process because their name is publicly associated with employment proceedings. Essentially the applicant invites the Court to draw the same inference.

[16] The majority in *Spiga* held that 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.[13] In that case the majority were prepared to draw inferences of specific adverse consequences from an affidavit filed by the plaintiff and oral evidence given in Court. That evidence was couched in speculative terms,[14] including, for example, the concern that people would see nothing good in them having had a dispute with a former employer. The majority were satisfied, on the basis of the concerns identified in the plaintiff's evidence, that the evidence was such that the suggested adverse consequences could reasonably be expected to occur.[15] The evidence is stronger in this case because it reflects steps the applicant has taken to find alternative employment, without success. By contrast in *Spiga*, the plaintiff was self-employed

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13 *MW v Spiga Ltd,* above n 1, at [88].
14 At [101].
15 At [103].

but anticipated future problems if they were to attempt to seek to return to employment at some time in the future. Applying the majority *Spiga* approach, I am satisfied the suggested adverse consequences could reasonably be expected to occur in this case.

[17] Having reached that conclusion, although it is unnecessary to determine whether there is reason to believe the suggested adverse consequences have already occurred, I conclude that it is more likely than not that they have. That conclusion is based on the evidence before me and is reinforced by a range of research material that now exists into the impact of publication on employment prospects. That material is set out in the *Spiga* minority judgment at [162] to [164].

[18] Next, I consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case. That involves a weighing exercise.

[19] The majority identified seven factors that may be relevant (set out above). The factors that I consider to be of particular relevance in this case are the circumstances of the case; the interests of the applicant; the public interest, including the rights of the media; tikanga; and equity and good conscience.

[20] I have already set out the circumstances in which the applicant finds themself in. The reality is that publication has already occurred, and for almost three years their name has been searchable on the internet in association with the employment litigation they pursued. The fact that publication has already occurred, and the horse (to use the majority's analogy in *Spiga*) left the stable some time ago, weighs against an order being made.

[21] The applicant has a demonstrable interest in being able to seek alternative employment and to have any application for work dealt with on its merits, rather than being blacklisted as they contend is happening (and which may be inferred to have happened). This weighs in favour of an order being made.

[22] The interests of the other party to the litigation, the respondent, is a neutral factor. As I have said, the respondent does not oppose the application and is prepared to abide the decision of the Court. No third party interests are identifiable.

[23] Turning to the public interest, I consider that three aspects of the public interest consideration are particularly relevant to the weighing exercise in a case such as this. First, there is a broader public interest in access to information relating to the business of the courts, including to enable the media to report on proceedings. Making an order of non-publication in this case would impact on that; this weighs against an order being made. Having said that, there is nothing to suggest that there is any particular public interest engaged in respect of the applicant or their circumstances. So while there is a general public interest in open justice, there is no demonstrable particular public interest in the identity of the applicant in this case. Insofar as prospective employers may have an interest in knowing the identity of the applicant and the circumstances of the termination of their employment, those interests can adequately be met by other means, including by asking appropriate questions at the recruitment stage (a point I return to below).

[24] Second, there is a broader public interest in employees such as the applicant being able to exercise their legal rights to bring a personal grievance claim against their employer and have it resolved without having their future job prospects compromised by the mere fact of doing so. That broader public interest is engaged in a case such as this, not only in relation to the applicant but more generally, including the narrative that builds up in employment law and practice over time as to the negative consequences of bringing a claim unrelated to the merits of that claim. I sought to explain this in my minority judgment in *Spiga*.[16] I see the point as being relevant to the assessment of the public interest endorsed by the majority. To my mind, this broader public interest weighs in favour of an order being made.

[25] Third, there is a broader public interest in supporting, where appropriate, the rights of individuals (such as the applicant) to privacy and to access the labour market (which I also sought to explain in *Spiga*).[17] The legitimate interests of a prospective

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16 At [176].

17 At [204]–[208] and [213]. See also at [59] per the majority.

employer are not, in my view, unduly undermined by an inability to freely search for the applicant's name in respect of their litigation in the Court; the reality is that a prospective employer is entitled to ask applicants about their employment history to determine suitability for a particular role. These aspects of the broader public interest weigh in favour of an order being made in this case.

[26] The relevance and weight accorded to tikanga in the non-publication analysis must be determined in context.[18] In *Spiga* all judges of the full Court held that whakamā was relevant on the evidence.[19] Here, the evidence before me is materially similar, including because (as in *Spiga*) the applicant did not speak directly to any tikanga but gave evidence more generally of the damage to their personal and professional reputation.[20] I accept that publication of the applicant's name risks a diminution of their mana and/or experiencing whakamā, as it did in *Spiga*, and that this points towards an order being made.[21]

[27] I consider the Court's equity and good conscience jurisdiction is particularly engaged in the present case.[22] Accepting the applicant's evidence, as I have, it would offend the Court's conscience for the applicant to be penalised into the future for exercising a right they were perfectly entitled to exercise, in circumstances where there was no established wrong-doing; rather there was a finding (upheld on a challenge) that there had been a mutually agreed termination of the employment relationship.

[28] Finally, under the majority *Spiga* approach I consider whether the facts of the particular case, and the interests engaged (specifically and more broadly), warrant a departure from the principle of open justice. As Kirby J cautioned in *John Fairfax Group Pty Ltd v Local Court of New South Wales*:[23]

> The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. I*f the very openness of court proceedings would destroy*

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18 At [67].
19 At [102] and [250].
20 See above at [4].
21 Hara may be engaged to a lesser extent as no breach (in *Spiga* of the settlement agreement) has occurred.
22 Employment Relations Act 2000, s 189.
23 *John Fairfax Group Pty Ltd v Local Court of New South Wales*, above n 8, at 141 (emphasis added).

> *the attainment of justice in the particular case* (as by vindicating the activities of the blackmailer) *or discourage its attainment in cases generally* (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) *the rule of openness must be modified to meet the exigencies of the particular case*.

[29] In *Spiga* a permanent order of non-publication was made on the basis of similar evidence to that which was given in this case, albeit in different factual circumstances. The most significant distinction is the fact that publication has occurred in this case, and over a period of time; that had not occurred in *Spiga* because interim orders had been sought and made. All judges of the full Court in *Spiga* were agreed that the Authority and the Court may appropriately go on the front foot to order non-publication and do not need to wait for an application to be advanced.[24] It goes without saying that this case arose well before that point was made clear.

[30] Prior publication generally weighs against an application for non-publication for reasons of futility.[25] However, as Moore J observed in *F v R*, "name suppression is not futile where it can protect from further harm".[26] I respectfully agree with that observation. I have already accepted that the suggested adverse consequences could reasonably be expected to occur into the future and I am satisfied that an order of non-publication would go some considerable way to protecting against those consequences.

[31] The obvious difficulty in this case is the fact that three judgments of the Court have been published on the Court's website and may well be accessible via other means. There are limits to the damage control that can be undertaken once that level of publication has occurred. The Court is not, however, without ability to deal with such matters having regard to the scope of its powers under sch 3 cl 12 and its equity and good conscience jurisdiction under s 189 of the Employment Relations Act 2000 (the Act).

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24 *MW v Spiga Ltd*, above n 1, at [90] and [242]–[244].

25 See *Timmins v Asurequality Ltd (formerly known as Asure New Zealand Ltd)*[2011] NZEmpC 167 at [23]; *Q v W* [2012] NZEmpC 216 at [31]–[33]; and *AJH v Fonterra Co-Operative Group Ltd* [2021] NZEmpC 111, [2021] ERNZ 462 at [13]–[17].

26 *F v R* [2022] NZHC 2547 at [130]. See also *DV (CA451/2021) v R* [2021] NZCA 700 at [58]–[61] and [64]. While these two cases concern non-publication in the criminal jurisdiction, the point seems to me to be equally pertinent in the employment jurisdiction.

[32] As sch 3 cl 12 of the Act makes clear, the Court may make an order of non-publication "…subject to such conditions as the court thinks fit". In the present case I am satisfied that it is appropriate to make an order of non-publication, subject to conditions, limiting what would otherwise be the effect of a broader order.

Conclusion

[33] Accordingly, there is a non-publication order over the name and identifying details of the applicant in this judgment. To avoid identifying the applicant, the respondent's name is also subject to a non-publication order. The applicant and respondent are to be referred to by randomly selected letters. The previous three judgments of the Court bearing the applicant's name are to be removed from the Court's website and replaced by versions using the same randomly selected letters for each party. Those judgments are to be immediately placed back on the Court's website and a reference to this judgment inserted in the intituling of each. For the avoidance of doubt, the original versions of those three previous judgments (including the parties' names) may still be published, or remain in publication, elsewhere, and I do not make any orders in relation to publication of them except as outlined in relation to the Court's website. Nor do I make any order in respect of the relevant determination on the Employment Relations Authority website, nor any of the other platforms or law reports. It is for the applicant to take steps in those regards, if considered appropriate.[27]

[34] No issue of costs arises.

Christina Inglis
Chief Judge

Judgment signed at 4.20 pm on 19 September 2024

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[27] See *C v P*, above n 11, at [26]. The applicant is concerned mainly with the "public availability" of their name in connection to their involvement in litigation. The judgments on the Court's website are publicly available and able to be searched via the internet; that is not the case with some platform services requiring a subscription.