

Application for interim non-publication orders

[2] The plaintiff has filed a challenge to a determination of the Employment Relations Authority (the Authority).¹ The Authority had investigated the following two key issues in the context of an unjustified disadvantage claim brought by the plaintiff:

- (a) whether the defendant failed to follow a reasonable process in the investigation of the plaintiff's personal grievances and allegations of bullying; and
- (b) whether the Board breached its duty of good faith in failing to provide a safe workplace for the plaintiff due to bullying or other issues raised in her personal grievance.

[3] The plaintiff also sought orders preventing publication of any identifying details. The Authority ultimately dismissed the plaintiff's claims for unjustified disadvantage and declined to make permanent non-publication orders in her favour.

[4] On 5 July 2024 the plaintiff applied for interim non-publication orders, preventing the publication of her name and any identifying details in the Authority proceedings and the present proceedings before the Court. The plaintiff has also applied for permanent non-publication orders on the same basis.

[5] During a telephone directions conference on 31 July 2024, interim non-publication orders were made in order to preserve the status quo until the interim non-publication application was determined by the Court.

[6] A summary of the plaintiff's grounds for seeking interim non-publication orders are that:

¹ The Authority determination is not publicly available.

- (a) Publication will result in significant and unjust damage to her reputation and career and adversely impact her future employment opportunities and professional relationships.
- (b) Publication will cause her emotional harm. The plaintiff submits the stress and anxiety associated with her name being connected with the Authority and Court proceedings will have adverse impacts on her wellbeing and mental health.
- (c) The plaintiff says that the defendant has disregarded her privacy through the discussion of an extremely sensitive childhood event, which has triggered her post traumatic stress disorder (PTSD). In her evidence she has provided a redacted letter dated 5 August 2021 from the Accident Compensation Corporation (ACC) confirming that she had suffered a PTSD injury on 7 October 2020. In submissions, the plaintiff produced a letter dated 6 August 2024 from her General Practitioner (GP) which provided that publication would re-victimise the plaintiff and have an impact on her ongoing mental health.
- (d) The plaintiff claims that the person who allegedly harmed her as a child has approached the defendant's school seeking her out. She alleges that this underscores her need for non-publication and that the defendant is acting in bad faith and intends to cause her harm by undermining her rights and wellbeing in opposing non-publication.
- (e) The plaintiff claims that the defendant is deliberately showing malice and bad faith by opposing her application for non-publication and that open justice is not achieved in naming or identifying her, instead the plaintiff submits that publication would cause significant harm to her based on the above factors.

[7] The defendant opposes the application for non-publication on the grounds that it does not disclose any adverse consequences if the non-publication orders are not made. A summary of the defendant's key submissions is that:

- (a) The plaintiff was the one who raised the sensitive childhood event in the Authority and these proceedings. The event is not relevant to the employment dispute between the parties and as such the Authority's determination does not make any reference to the event in any identifiable way. The event is not relevant to the matters before the Court and does not need to be referenced in any Court judgment.
- (b) The plaintiff has failed to disclose any compelling evidence to show that publication of her name would affect her health. The letter from ACC is unspecific, it does not set out how the 7 October 2020 event occurred, or its relevance to these proceedings. The letter from the plaintiff's GP was not provided in evidence, the defendant has not had an opportunity to respond to it. The defendant submits that if it had, it would seek to provide evidence that the plaintiff has a history of providing medical certificates that support her version of events, that these are selective and to her own advantage, and need to be treated with some caution by the Court.
- (c) The plaintiff has brought the Authority and Court proceedings. The defendant's conduct has been under scrutiny, it has simply defended itself from multiple disputes brought by the plaintiff. The defendant has not made any counterclaim or raised allegations that would impact on the plaintiff's professional reputation. There is no evidential basis that it has intended or caused the plaintiff emotional harm, or otherwise acted in bad faith when doing so.
- (d) Lastly, the defendant submits that the plaintiff's application for non-publication orders is for an improper motive, namely to avoid raising the Authority's determination when seeking to strike out the plaintiff's claims in the Human Rights Review Tribunal (HRRT) under s 79A(5) of the Human Rights Act 1993, which prevents an employee from bringing proceedings relating to the same matter, or grievances in the Authority and under the Human Rights Act 1993, which is improper and effectively an abuse of process.

Legal principles

[8] The Court has the power under the Employment Relations Act 2000 (the Act) to make non-publication orders.² While the Court has a broad discretion, this 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.³ Ordinarily, the Court will only order non-publication where there is a reason to believe that specific adverse consequences could reasonably be expected to occur which justify a departure from open justice.⁴ The full Court in *MW v Spiga* outlined the two steps that 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 drawn 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.⁵

[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.⁶ In conducting that weighing exercise, a number of factors may be relevant, including:⁷

- (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;

² Employment Relations Act 2000, sch 3 cl 12.

³ *MW v Spiga* [2024] NZEmpC 147 at [87], relying on *Erceg v Erceg* [*Publications restrictions*] [2016] NZSC 135, [2017] 1 NZLR 310 at [2]–[3].

⁴ At [88]–[89], relying on *Erceg v Erceg* at [13].

⁵ At [88].

⁶ At [89].

⁷ At [94].

- (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] However, 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.⁸ The Full Court in *Spiga* acknowledged that there are situations where the administration of justice and broader public interest may weigh against full openness.⁹

Analysis

[12] There is no compelling evidence that publication of the Authority's determination would cause the plaintiff reputational harm or adversely affect her career prospects. The Authority determination was written by an objective decision-maker in a judicial process, in response to a claim brought by the plaintiff. While the plaintiff may disagree with the Authority's determination and consider its findings may cause her to feel embarrassment or feel aggrieved, that does not justify non-publication.

[13] There is no evidential basis to support the claims that the defendant has intended to cause, or otherwise caused her harm or acted in bad faith in these proceedings.

[14] While I acknowledge that the nature of the plaintiff's sensitive childhood event would ordinarily require the name of the plaintiff to be protected, the event does not appear relevant to the employment matters between the parties; neither has it been referenced in any detail in the Authority's determination, nor at this stage is there any need to reference the event in detail in these proceedings.

[15] I accept that it would be an abuse of process if the non-publication orders are being sought to prevent the defendant producing and relying on the determination

⁸ At [87] and [92]–[93].

⁹ At [92].

when seeking to strike out the plaintiff's claim in the HRRT under s 79A(5) of the Human Rights Act 1993.

[16] The plaintiff's strongest argument is her claim that publication will cause significant harm to her health. Her GP has provided a medical opinion that publication will "compromise her personal safety and her mental well being." This would effectively "revictimise" her and have a "huge impact on her ongoing mental health." The plaintiff has produced a redacted letter from ACC advising that she has PTSD. The defendant is critical of the plaintiff's evidence in support of this argument, namely that it is light in detail and/or does not show a causative link to employment matters, or publication, and the GP's letter is not strictly evidence, all of which are valid criticisms. However, the plaintiff is self-represented, and it appears that she does not fully understand what evidence is required to obtain the protections she is seeking; she should be given the opportunity to preserve her position. As a matter of equity and good conscience, at an interim stage, I am prepared to place weight on the medical information she has provided from her GP to find that adverse consequences to her health and welfare could reasonably be expected to occur.

[17] It is also relevant that the defendant is a small rural school with less than five teachers. There is a real concern that identification of the defendant or any witnesses would likely lead to the identification of the plaintiff, if orders prohibiting publication of the plaintiff's name are made. To be effective they will need to be extended to the defendant for this reason.

[18] Next, I consider whether the adverse consequences identified above justifies a departure from open justice in the circumstances of the case. That involves a weighing exercise and includes an assessment of the seven factors identified above.

[19] I have already set out the circumstances in which the parties find themselves. The medical opinion provided by the plaintiff, if accepted as evidence, provides a basis for finding that publication could reasonably be expected to have adverse consequences on the plaintiff's health and wellbeing. The defendant has raised concern over the admissibility and validity of the plaintiff's GP's medical opinion and a separate concern that the plaintiff's application for non-publication orders is being

used inappropriately, as a means to prevent the defendant from producing and relying on the Authority's determination when seeking to strike out the plaintiff's claims in the HRRT.

[20] I am satisfied that the defendant's first concern over the admissibility and validity of the plaintiff's medical evidence can be addressed when the Court determines the application for permanent non-publication orders. This approach is consistent with the Court exercising its broad discretionary jurisdiction under s 189(2) of the Act when determining whether or not to admit evidence. In the circumstances, it is equitable and fair for the Court to give a self-represented plaintiff benefit of the doubt, admitting the medical evidence they have provided on an interim basis. The parties will have a full opportunity to put forward and test the plaintiff's medical evidence when the Court determines whether to make any permanent non-publication orders.

[21] The defendant's second concern can be addressed through the Court imposing a condition on any order, which allows the defendant to produce the Authority determination and any documentation related to the Authority investigation and Court proceedings in the HRRT.

[22] I do not consider the other factors identified at [10] above are engaged in this matter.

[23] Accordingly, I consider that the facts of this particular case, and the interests engaged, are sufficient to displace the principle of open justice on an interim basis.

Interim non-publication orders granted

[24] It is therefore appropriate to make the following interim non-publication orders:

- (a) The interim non-publication orders made by the Authority and Court prohibiting publication of the names and, or identifying details of the parties and any witnesses continues until further order of the Court.

The plaintiff and defendant are to be referred to by randomly selected letters.

- (b) The non-publication order above does not prevent either party from providing the Authority determination, documents filed by either party in the Authority, or Authority communications with the parties in the contemporaneous proceedings currently before the HRRT.
- (c) The non-publication orders do not prevent either party from providing any Court judgment or minute, documents filed in the Court, or Court communications with the parties in the contemporaneous proceedings currently before the HRRT.
- (d) The Court file is not to be inspected by any person without leave of a judge.
- (e) I direct the Registrar of this Court to draw these orders to the attention of the Authority.

Application for security for costs

[25] The defendant has applied for security for costs against the plaintiff on the grounds that the plaintiff's challenge has very limited prospects of success; she is self-represented and lacks financial incentive to seek a speedy resolution; and that she would have difficulty meeting any order for costs that were made against her were her challenge to be unsuccessful. The defendant has calculated the costs it is likely to incur in the event it was successful in defending the plaintiff's challenge, under the Court's Guideline Scale as to costs, on a category 2 band B basis, to be \$33,579.50.¹⁰ In its application for security for costs, it seeks the Court to award it security in the sum of \$30,000.

¹⁰ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[26] The plaintiff, for her part, submits that her challenge has a strong prospect of success and that the assertions made by the defendant as to her financial circumstances are speculative and lack any sufficient basis. She submits that the amount of security for costs being sought is excessive and that the application is vexatious. Also, that granting the application would hinder her ability to bring her challenge, which is not in the public interest.

Legal principles

[27] As there are no particular provisions relating to security for costs in the Act or the Employment Court Regulations 2000, the Court looks to the provisions of the High Court Rules 2016 when dealing with such applications.¹¹

[28] Under r 5.45(1)(a)(i) and (b) of the High Court Rules, the Court has a discretion to order the giving of security for costs if a plaintiff is resident outside of New Zealand or there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in their proceeding.

[29] In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.¹² An order may be made if it is just in all the circumstances.¹³ Where an order for substantial security may effectually prevent a plaintiff from pursuing their claim, security should only be ordered where the plaintiff's claim has little chance of success.¹⁴ If the defendant's actions, being the subject of the litigation, have caused the plaintiff's impecuniosity, that will count as a factor against security being granted.¹⁵

Analysis

[30] In its evidence the defendant has provided copies of earlier communications it had with the plaintiff where she has referred to herself as homeless, having no money

¹¹ See Employment Court Regulations 2000, reg 6(2)(a)(ii).

¹² *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

¹³ High Court Rules 2016, r 5.45(2).

¹⁴ *McLachlan v MEL Network Ltd*, above n 6, at [15].

¹⁵ *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 (HC) at 461.

and relying on the kindness and generosity of others just to survive. It also included an offer from the plaintiff to pay any Authority costs award to the defendant at a rate of “\$5 per week for the next 30 years.” The defendant points to the unnecessarily protracted and costly manner in which the plaintiff has run her case and claims that this has resulted in the defendant nearly exhausting its insurance policy limit of \$250,000 and not being in a position to meet additional legal costs should this occur.

[31] The plaintiff says there is no reason to believe that she will be unable to pay the defendant’s costs if she is unsuccessful. She admits that she was homeless and relying on the generosity of others. She says this was due to the defendant’s unjustified action of withdrawing its approval for her to live in a house owned by the defendant and its decision to place her on leave without pay and then terminate her employment, all of which placed her into financial hardship. The plaintiff says that the defendant’s evidence is out of date and that her circumstances have significantly changed since she had the above communications with the defendant.

[32] The plaintiff also questions the level of security for costs sought by the defendant. She says it cannot be just and fair for there to be an order for security for costs at that level, which would affect her rights to bring her claim and access justice. The plaintiff points to the defendant’s costs being covered by insurance and that to date it has only paid the excess of \$2,500 on its insurance policy towards legal fees in relation to this matter.

[33] The plaintiff has offered to pay \$1,250, being half of the defendant’s policy excess as security to the defendant. The defendant has rejected the proposal.

[34] I have considered the evidence provided by the defendant, including the statements the plaintiff has previously made. The evidence indicates that it is likely that the plaintiff would be unable to pay the defendant’s costs should she be unsuccessful in her challenge. The plaintiff has failed to provide documentary evidence to support her assertions that her financial position has changed and she has the means to pay any costs award.

[35] The defendant is entitled to seek security for the costs it will incur, and the fact that the defendant has insurance is not a relevant consideration to the setting of security for costs. The defendant is entitled to seek protection against an order for costs, regardless of whether it has insurance or not. The plaintiff's offer to pay \$1,250 as security is not reasonable in the circumstances.

[36] On balance, I consider that it is just in all the circumstances for there to be an order for security for costs. However, I consider the amount sought to be higher than is warranted. The defendant has estimated that the expected costs it will incur when defending the plaintiff's challenge in this Court on a category 2 band B basis using the Guideline Scale would be \$33,579.50. After reviewing the expected costs claimed by the defendant, there are a number of items which do not appear to be warranted in the circumstances:¹⁶

Item	Proceedings	Amount \$
8	Filing opposition to application for rehearing	2,390.00
14-16	Attendances in relation to case management	2,509.50
39	Appearance at three-day hearing being \$7,170 when only two days were estimated by the defendant previously (reduction of one day of hearing time (being \$2,390))	2,390.00
40	Second and subsequent representative if allowed by Court	3,585.00
Total		10,874.50

[37] Given the above, it is appropriate to reduce the defendant's estimated expected costs from \$33,579.50 to \$22,705.00.

[38] Also, at this stage, I cannot assess the plaintiff's prospects of success, and I would be concerned if the level of security was such that she was unable to pursue her challenge.

¹⁶ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[39] Balancing the interests of both parties, I consider it appropriate that security for costs in the amount of \$12,000 be ordered. If the plaintiff's financial position is as she says it is, that is not a figure that should be insurmountable for her to provide as security and having that level of security would be some protection for the defendant, even though, if the challenge is unsuccessful, it may well be entitled to a greater sum for costs.

[40] Accordingly, security for costs is ordered in the amount of \$12,000 which the plaintiff is to pay to the Employment Court registry within 21 days of the date of this judgment. The sum is to be placed by the Registrar of the Court in an interest-bearing account until further order of the Court. The substantive proceeding and any related interlocutory proceedings are stayed pending payment of security for costs.

Extension of time to file amended statement of defence

[41] On 13 December 2024 the plaintiff filed an amended statement of claim. By way of memorandum filed on 23 December 2024, the defendant sought an extension of time to file and serve an amended statement of defence until after this judgment has been issued. The plaintiff opposed any extension of time. The plaintiff filed detailed submissions. Her key submissions were that the defendant's conduct in this matter has involved delays, obstruction and bad faith, which she says have unfairly prejudiced her. The plaintiff submits that an extension is unjust in the circumstances. The defendant did not file submissions and will abide by the Court's decision.

[42] On balance, the plaintiff's opposition relies largely on matters between the parties that pre-date the proceedings in the Court and the Authority investigation. The evidence of the allegations has not been heard and tested by the Court and cannot be given much weight. The extension of time was sought by the defendant promptly, in advance of the statutory timeframe for filing expiring. The substantive proceeding has not been set down, an extension of time will not significantly prolong the proceedings. Overall, I find that it is in the interests of justice to grant the extension of time. The defendant will have 10 working days to file its amended statement of defence. This time period will commence the day after the plaintiff pays in full the security for costs ordered above.

Orders

[43] The application for interim non-publication is granted:

- (a) The interim non-publication orders made by the Authority and Court prohibiting publication of the names and, or identifying details of the parties and any witnesses continues until further order of the Court. The plaintiff and defendant are to be referred to by randomly selected letters.
- (b) The non-publication order above does not prevent either party from providing the Authority determination, documents filed by either party in the Authority, or Authority communications with the parties in the contemporaneous proceedings currently before the HRRT.
- (c) The non-publication orders do not prevent either party from providing any Court judgment or minute, documents filed in the Court, or Court communications with the parties in the contemporaneous proceedings currently before the HRRT.
- (d) The Court file is not to be inspected by any person without leave of a judge.
- (e) I direct the Registrar of this Court to draw these orders to the attention of the Authority.

[44] The application for security for costs is granted:

- (a) The plaintiff is to pay \$12,000 as security for costs to the Employment Court registry within 21 days of the date of this judgment. The sum is to be placed by the Registrar of the Court in an interest-bearing account until further order of the Court.
- (b) The substantive proceeding and any related interlocutory proceedings are stayed pending payment of security for costs.

[45] The defendant's extension of time to file an amended statement of defence is granted:

- (a) The defendant will have 10 working days to file its amended statement of defence. This time period will commence the day after the plaintiff pays in full the security for costs ordered above at [44](a).

[46] The costs on this application are reserved for consideration at the resolution of this proceeding.

M S King
Judge

Judgment signed at 3.45 pm on 24 January 2025