

- b. If AVS files a challenge, this interim non-publication order will be extended to remain in place until the Employment Court makes any order that renders it unnecessary.**
- c. If AVS does not file a challenge to this determination then the interim order will lapse.**

C. Costs are reserved.

Employment relationship problem

[1] The applicant, AVS, claims he was unjustifiably dismissed from his employment with the respondent, CYE. CYE denies the claim for unjustified dismissal primarily on the basis that AVS was an independent contractor and, as a result, I do not have jurisdiction to hear any claim by him against CYE.

Non-publication order

[2] I conducted an investigation meeting on 21 March 2017 and then subsequently received submissions in writing on behalf of both parties. In addition to those submissions, on 27 April 2017 counsel for AVS applied for “name suppression” for AVS.

[3] The application is made pursuant to clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act) and is essentially an application for an order of non-publication of AVS’ name and any details that may identify him, including the name of CYE.

[4] Counsel for AVS submits that an order is appropriate because:

- a. AVS is involved in a relatively small industry, which relies on reputation and word of mouth for obtaining employment. Any decision I make may impact on AVS’ reputation and may affect his future employment prospects.
- b. The evidence I heard in my investigation includes evidence of AVS’ financial position and his wife’s financial affairs. This is highly personal information that is commercially sensitive, which, if made public, will affect AVS and his family including his children.

[5] Counsel for CYE responded to the application on 28 April 2017 by simply advising that the CYE had no view. I take this to mean that CYE does not oppose the application.

[6] Clause 10 of schedule 2 of the Act provides:

10 Power to prohibit publication

- (1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed in the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[7] In *XYZ v ABC*¹ Judge Inglis observed that the power to prohibit publication is a discretionary power that must be “exercised according to principle and consistently with the legislative scheme”². Each application must be assessed having regard to its particular circumstances. But, the approach must follow that recently set out by the Supreme Court in *Erceg v Erceg*³. Judge Inglis noted in particular that this approach differed from the Employment Court’s previous approach to non-publication expressed in *H v A Ltd*⁴.

[8] In *Erceg* the Supreme Court recorded that the principle of open justice is fundamental to our common law system. This principle means that judicial proceedings should be held in open court with the public having access. And, it means that the media should be free to provide fair and accurate reports of proceedings. The Supreme Court went on to say there are, however, well established circumstances where the interests of justice override the general rule of open justice and that general rule can be departed from. But any departure from the general rule can only be to the extent necessary to serve the ends of justice⁵.

[9] The Supreme Court then stated at [13]:

... We accept that the courts are able to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers. The need to protect trade secrets or commercially sensitive information, the value of which would be significantly reduced or lost if publicised, are obvious examples of situations where such orders may be justified. However, the courts have

¹ [2017] NZEmpC 40

² At [69]

³ [2016] NZSC 135

⁴ [2014] NZEmpC 92.

⁵ At [2] and [3]

declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party may, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those mentioned do not meet this standard. We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree the standard is a high one.

[10] So, AVS will need to show specific adverse consequences arising out of the publication of his name, or any matters that may identify him, that are sufficient to justify an exception to the fundamental principle of open justice. And whether the specific adverse consequences are sufficient to justify this exception, is a high standard.

[11] The Supreme Court is clear that adverse consequences such as embarrassment at having personal financial information disclosed or unwanted publication of private matters are not sufficient to justify an exception.

[12] In the same vein, the potential impact on a party's reputation for merely bringing a claim in the Employment Relations Authority cannot justify an exception. If it did every applicant to the Authority or any party to any court proceedings, would have a ready-made exception thus rendering the fundamental principle of open justice a nugatory one.

[13] Turning to AVS' application for non-publication and the reasons he seeks the order:

- a. That there might be a potential impact on AVS' reputation and a subsequent impact on his future employment prospects is insufficient to justify a non-publication order. This is particularly so because AVS' claim deals with two issues – whether he was a contractor or an employee and if he was an employee whether he was unjustifiably dismissed in circumstances where he resigned in response to actions by CYE. There are no allegations about AVS' conduct or performance that might be embarrassing or damaging to him. The only potential impact on his reputation that can arise is because he has pursued a claim and as I have stated above this is insufficient. It may not be fair

that AVS' reputation might be damaged because he seeks to enforce what he says are his employment rights but that is not enough.

- b. The financial information disclosed as part of my investigation pertains to what AVS earned whilst working for CYE, the financial difficulties he suffered after he resigned from CYE and the money he has earned subsequently. Whilst he may consider this private information, it is not commercially sensitive. It is notable that CYE did not make any submissions suggesting that it was concerned about the disclosure of details pertaining to what it paid AVS. And, whilst it might be embarrassing to have some of this financial information aired publically I simply cannot see how that would affect AVS' family including his children. This does not meet the high threshold required to justify a non-publication order being made.

[14] Finally, the fact that CYE does not oppose AVS' application is of no consequence. I still need to be satisfied that an order is appropriate and given the basis for the application and the principles set out in *Erceg* I am not. I decline AVS's application for non-publication orders.

[15] I have dealt with AVS' application on an interlocutory basis notwithstanding that my investigation has been complete and my substantive determination in this matter will be issued shortly. I have done this so AVS can challenge my refusal to grant non-publication if he wishes.

[16] In addition then I will grant interim non-publication orders so that if AVS does challenge and is successful in that challenge that is not rendered useless by publication of his name or identifying details now.

[17] As a consequence the Authority will not publish this determination or the substantive determination on the Authority's website until either the Employment Court has made orders or the interim order has lapsed in accordance with its terms.

Determination

[18] I decline AVS' application for a permanent non-publication order in respect of his name and any matters that might identify him.

[19] I grant an interim non-publication order prohibiting the publication of AVS' name and any matters that might identify him. The terms of the interim order are:

- a. This interim order is to stay in place for 28 days commencing from the day after the date of this determination, to allow AVS to file a challenge to this determination if he wishes.
- b. If AVS files a challenge, this interim non-publication order will be extended to remain in place until the Employment Court makes any order that renders it unnecessary.
- c. If AVS does not file a challenge to this determination then the interim order will lapse.

Costs

[20] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority