Employment Court of New Zealand

ELG v KLE [2025] NZEmpC 87 (2 May 2025)

Last Updated: 4 November 2025

ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND WITNESSES

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2025] NZEmpC 87
EMPC 429/2023

IN THE MATTER OF	an application for search orders
AND IN THE MATTER OF	applications for non-publication orders
BETWEEN	ELG Applicant
AND	KLE Respondent

Hearing:	19 February 2025 (Heard at Christchurch (by audio-visual link))
Appearances:	M Sumpter and M Wisker, counsel for applicant C Eggleston, counsel for respondent N Fong, counsel assisting the Court
Judgment:	2 May 2025

JUDGMENT (NO 7) OF JUDGE K G SMITH

[1] On 23 November 2023, ELG was granted a search order without notice. The order authorised ELG to search for certain intellectual property removed by its former employee, KLE.1

[2] The order made in November 2023 was subsequently reviewed and extended by consent.2 The upshot was that ELG and KLE co-operated in the return of the intellectual property and resolved their employment relationship problem. ELG's

1 *ELG v KLE* [2023] NZEmpC 211.

2 *ELG v KLE* [2023] NZEmpC 219; *ELG v KLE (No 3)* [2024] NZEmpC 8; *ELG v KLE (No 4)* [2024] NZEmpC 36; and *ELG v KLE (No 5)* [2024] NZEmpC 57.

claim against KLE in the Employment Relations Authority was settled and the search order was discharged by consent.3

[3] The only matter that remains outstanding is non-publication. When the search order was made, interim non-publication orders placed restrictions on the publication of the judgment and prohibited searches of the Court file without permission from a judge. Publication of the judgment was confined to the parties and their professional advisors, certain technical consultants and to the lawyer supervising the search. Each subsequent extension of the search order continued the interim non-publication order.

[4] When the search order was discharged, both parties indicated they would seek permanent non-publication orders and for that reason the interim order was preserved. In May 2024, ELG sought orders permanently prohibiting publication of:

> (a) the names of the parties, witnesses and any other person identified in any document filed in, or otherwise on, a Court file in this proceeding;
> (b) anything in the pleadings and affidavits filed in the proceeding; and/or
> (c) any information on the Court file which, if published, is likely to cause it and/or its employees and agents serious specific harm.

[5] In June 2024, KLE sought orders permanently prohibiting publication of:

> (a) all information relating to his personal, private, family and health circumstances, the names of the parties, witnesses and any other person identified in any document filed in the proceeding or otherwise before the Court;
> (b) anything in the pleadings and affidavits filed in the proceeding; and
> (c) any information on the Court file which, if published, is likely to cause him specific harm.

3 *ELG v KLE (No 6)* [2024] NZEmpC 63.

[6] Both applications relied on the Court's power to grant non-publication orders under sch 3 cl 12 of the Employment Relations Act 2000 (the Act). The scope of these applications was very broad and they did not describe how the Court would identify what information the parties thought might create serious or specific harm for them.

[7] Since the parties supported each other's applications, it was necessary to appoint counsel to assist. The Court has been greatly aided by Mr Fong's submissions and he is thanked for his role as counsel assisting.

[8] The applications were not heard immediately for two reasons. First, the respondent needed to support his application with a specialist medical opinion. The demand on the services of the respondent's specialist meant he could not obtain an appointment or a report for some time. Second, when the applications were made a full Court of the Employment Court was considering the approach to non-publication in this jurisdiction in *MW v Spiga Ltd*.4 The parties were aware of the full Court's deliberations and it was thought appropriate to wait for the judgment to be delivered so that it could inform their submissions.

[9] Before the hearing Mr Sumpter filed a memorandum proposing an amendment to ELG's application. What was proposed represented a change in the scope of the application by seeking non-publication of:

> (a) the parties' names, witnesses' names, and that paragraph [4] and one word in paragraph [25] be redacted from the "Search Order Judgment"; and
> (b) that the Court file be permanently "sealed" to protect the parties and others involved in this proceeding.

[10] There was a further, slight, refinement of the amended application which occurred during Mr Sumpter's submissions. Rather than seek the second order (asking for the Court's file to be permanently sealed), ELG accepted that there would be

4 *MW v Spiga Ltd* [2024] NZEmpC 147, [2024] ERNZ 678.

sufficient protection for the parties in the Court's usual practice of applying by analogy the Senior Courts (Access to Court Documents) Rules 2017.

[11] There were no changes to the respondent's application.

The test

[12] The Court has power in any proceeding to order that all or part of the evidence given, or pleadings filed, or the name of any party or witness or other person not be published. An order may be subject to any conditions the Court thinks fit to impose.5 It was common ground that this power is discretionary and that the discretion must be exercised in a principled way.

[13] As referred to earlier, a full Court considered the power to order non- publication in *Spiga*. The majority in that case held that the general principle applying in this Court is the one stated by the Supreme Court in *Erceg v Erceg*,6 namely that open justice is of fundamental importance.7 In *Erceg*, the Court held that open justice may be departed from but only to the extent necessary to serve the ends of justice. It concluded that there must be sound reasons for making an order for non-publication such that departure from the principle of open justice is justified.8

[14] Spiga created a test with two limbs to assess when non-publication could be ordered. The first limb is that there must be reason to believe that specific adverse consequences could reasonably be expected to occur if non-publication is not

ordered. In considering this limb, the evaluation will focus on the evidence that has been submitted and/or is available; inferences may be required but they must be reasonable and based on the specific circumstances of the case when considered in context.9

[15] The second limb is for the Court to consider whether the specific adverse consequences that could reasonably be expected to occur justify a departure from open

5 Employment Relations Act 2000, cl 12 sch 3.

6 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.

7 *Spiga*, above n 4, at [87].

8 *Erceg*, above n 6, at [2]–[3] and [13].

9 *Spiga*, above n 4, at [87]–[88].

justice in the circumstances of the case. This limb was described in *Spiga* as a weighing exercise.10

[16] Spiga listed some factors that might be relevant in the weighing exercise required by the second limb:11

(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.
(e) The public interest, including the rights of media.
(f) Any further issues of equity and good conscience.
(g) Tikanga and its principles, values or concepts.

[17] The Court also considered that an alternative might be the anonymisation of the names of participants in the proceeding.12

[18] In granting non-publication in *Spiga*, the Court was influenced by the existence of a confidential settlement between the parties signed by a mediator under s 149 of the Act.13 The weight given to that settlement was significant because a decision to decline non-publication would detract from it and undermine the importance of mediation in resolving employment relationship problems.14

10 At [89].

11 At [94].

12 At [96].

13 At [53]–[54], [92]–[93] and [98].

14 At [104].

Analysis

[19] As will be apparent from the intituling of this judgment, I have decided to grant a non-publication order about the names of the parties and information that might identify them. A corollary to that decision is the need to prohibit publication of the names of witnesses for the obvious reason that they hold positions with ELG so that naming them would identify it.

[20] As will be discussed shortly, the reason for this decision is that the parties entered into a settlement signed by a mediator under s 149 of the Act. Before discussing that agreement brief comments about each application need to be made.

ELG's application

[21] Some of Mr Sumpter's submissions were overtaken by the revised application. Initially, ELG believed non-publication was required to protect certain commercially sensitive information, which it closely guards, from being accessed by others either through information in the judgments or by accessing evidence held on the Court's file. It considered the possible disclosure of that information created an unacceptable risk to its business.

[22] Mr Fong's submissions about those claimed risks were more compelling, namely that there was nothing in the judgment

or evidence supporting ELG's position.

[23] There was nothing particularly sensitive in the evidence. ELG did not disclose, except in a general way, the nature and quality of the information removed by KLE. Nor was there anything compelling in ELG's assertion that there would be others with vested interests who might intensify their efforts to obtain ELG's business secrets. In my view, ELG overstated the risks it faces which were no more and no less than everyday business risks. Certainly, ELG faced potential embarrassment but that would not have been enough to justify making an order.

[24] The grounds of the application relying on protecting commercially sensitive information would not have passed the first limb in *Spiga*. Even if that limb had been

satisfied, the weighing exercise is likely to have come down against making a non- publication order.

KLE's application

[25] KLE's application was supported by an opinion from a specialist who is a neuropsychologist and clinical psychologist. It is not necessary to record the specialist's opinion in any detail. The thrust of KLE's application for non-publication, supported by that opinion, was that in removing ELG's intellectual property he engaged in activity which would have been out of character for him prior to suffering a significant brain injury. The opinion described the decline in KLE's cognitive function and his changed personality following that injury. The specialist commented adversely on KLE's prospects of returning to the sort of work he had previously undertaken for ELG.

[26] Not surprisingly, Mr Eggleston's submissions focussed on the potential impact on KLE's future employment prospects and his recovery from the injury if publication occurred. While Mr Fong was critical of those grounds as not establishing sufficiently that non-publication should be ordered, he did not press the point strongly. Instead, Mr Fong urged caution in accepting that there would automatically be grounds for non-publication arising from concerns about future employment prospects.

[27] The medical opinion relied on by KLE identified the prospect of an improved chance of recovery from his traumatic injury that might be assisted by a non- publication order. That advice assisted KLE's application. However, I do not accept that the potential for an impact on his future employment prospects would, by itself, be sufficient.

The settlement agreement

[28] What has tipped this decision in favour of making a non-publication order is an agreement between ELG and KLE that preserved the confidentiality of the dispute between them and how it was resolved. On 14 November 2023, they entered into an agreement that was subsequently signed by a mediator under s 149 of the Act. Under that agreement they concluded the terms and conditions on which KLE's employment

would end. Some financial arrangements were recorded. Critically, they agreed that the existence of the settlement agreement and its terms would be confidential. The agreement required KLE to maintain strict confidentiality regarding the services and duties he performed for ELG and to not disclose or use confidential information. The agreement recorded it would not be disclosed, transmitted or copied to any other person in any circumstances except with the prior written consent of the other party or as required by law. The only other exception to the confidentiality created by the agreement was where disclosure was required to take legal advice or for accounting purposes.

[29] Confidential mediation is an integral part of resolving employment relationship problems.15 As the full Court observed in *Spiga*, a decision in this case to decline a non-publication order would detract from the settlement which the parties achieved with the assistance of mediation. The parties clearly intended the existence of their employment relationship problem, and the terms on which it was resolved, to be confidential.

[30] I accept the submissions from counsel that this litigation had a sufficient connection to the settlement agreement for the confidentiality it required to be maintained. Declining to make a non-publication order would impact on the settlement agreement by undermining both its confidentiality and the resolution of the employment relationship problem. That analysis satisfies *Spiga*.

[31] There are certain consequences arising from this decision. First, it follows that there will be orders prohibiting the disclosure of the identities of those persons who gave evidence. That is because identifying them will lead directly to disclosing the identities of the parties.

[32] The second consequence arises from Mr Sumpter's submission that the judgment granting the search order will need to be redacted. ELG's proposal was that the names of the parties could be anonymised and paragraphs [4] and [25] redacted. Paragraph [4] was sought to be wholly redacted because it described the industry in which ELG operates which could lead to

its identification. Only one word was sought

15 Employment Relations Act 2000, s 148.

to be redacted from paragraph [25] because it identifies the industry in which ELG operates. I agree that those redactions are appropriate. Mr Sumpter provided a marked-up copy of the search order judgment to show the proposed redactions and this decision accepts his proposal.

[33] The third consequence is that it follows that in each subsequent judgment extending the search order the names of the parties will be anonymised as they are in this judgment and as shown in footnotes 1 and 2. No other changes are required to those judgments.

Outcome

[34] The applications for non-publication orders are granted. The names and any identifying information of the parties to this litigation and of any witness are not to be published. In all of the judgments the applicant and respondent will be described as ELG and KLE respectively. Paragraph [4] of the judgment dated 23 November 2023 will be redacted as will one word in paragraph [25] stating the industry in which ELG operates.

[35] For the avoidance of doubt, the parties have seven working days from the date of this judgment to confirm to the Court that the redactions described in paragraphs

[32] and [34] are those that were sought as part of the amended application. After that time all of the judgments in the sequence of cases about ELG's application for a search order (the November judgment and those other decisions in footnotes 1 and 2) will be published in accordance with this decision.

[36] The parties accepted costs should lie where they fall. Accordingly, there is no order as to costs.

K G Smith Judge

Judgment signed at 12.30 pm on 2 May 2025