

**ORDER PROHIBITING PUBLICATION OF NAME OF PLAINTIFF AND  
OTHER INFORMATION – SEE [29]-[31].**

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

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUTAHI**

**[2024] NZEmpC 246  
EMPC 320/2024**

IN THE MATTER OF      a challenge to a determination of the  
Employment Relations Authority

BETWEEN                NHL  
Plaintiff

AND                        THE PRIORY IN NEW ZEALAND OF  
THE MOST VENERABLE ORDER OF  
THE HOSPITAL OF ST JOHN OF  
JERUSALEM  
Defendant

Hearing:                On the papers

Appearances:        A Fechney, advocate for plaintiff  
No appearance for defendant

Judgment:            11 December 2024

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1] The plaintiff challenges a determination of the Employment Relations Authority that discontinued a non-publication order in respect of the plaintiff's name.<sup>1</sup>

[2] The plaintiff's substantive claim before the Authority is for unjustifiable dismissal. The plaintiff succeeded in obtaining an order for interim reinstatement.<sup>2</sup>

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<sup>1</sup> *NHL v ZNO* [2024] NZERA 496 at [1]–[6].

<sup>2</sup> At [88].

[3] On 16 July 2024, after the plaintiff filed the application for interim reinstatement, the Authority made an order for interim non-publication over the names of both parties. That order was discontinued in the determination now challenged.

[4] Neither party seeks to have a non-publication order over the name of the employer; the challenge relates only to the name of the employee.<sup>3</sup>

[5] The employer, the Priory in New Zealand of the Most Venerable Order of the Hospital of St John of Jerusalem (St John), does not oppose the challenge; it made no substantive submissions and abides the decision of the Court.

[6] The Authority accepted that the plaintiff had a right to privacy over certain personal information and made a permanent order prohibiting publication of that information, except with the plaintiff's express permission.<sup>4</sup>

[7] Otherwise, on the basis of the evidence before it, the Authority considered it unnecessary to prohibit publication of the plaintiff's name.<sup>5</sup>

[8] The evidence before the Court has been more fulsome than that given in the Authority. This is largely because the plaintiff has had the time and capacity to provide more detailed evidence, including a report from the clinical psychologist who has been providing support to the plaintiff.

[9] Ms Fechny, advocate for the plaintiff, also provided detailed and considered submissions, both written and oral, on the plaintiff's behalf.

[10] The Authority and the Court are both able to order that the name of any party not be published and may make such an order subject to such conditions as they think fit.<sup>6</sup>

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<sup>3</sup> The plaintiff considers that publication of the name of the employer is useful for various reasons.

<sup>4</sup> *NHL v ZNO*, above n 1, at [5].

<sup>5</sup> At [6].

<sup>6</sup> Employment Relations Act 2000, sch 2 cl 10(1) and sch 3 cl 12(1).

[11] Ms Fechny pointed to the Court’s recent decision in *Spiga*.<sup>7</sup> The majority there determined that, generally, for a non-publication order to be justified, a party first must establish that there is reason to believe that specific adverse consequences could reasonably be expected to occur if publication were to go ahead. Second, the Court would need to be satisfied that those consequences justify a departure from the principle of open justice.<sup>8</sup>

[12] While Ms Fechny suggested a lower evidential threshold may be appropriate when considering interim orders, they still must have an evidential foundation.

### **There are specific potential adverse consequences**

[13] Ms Fechny says there are specific potential adverse consequences that would arise for the plaintiff if their name is published.

[14] The plaintiff has provided evidence from a clinical psychologist. That evidence was not available to the Authority. The clinical psychologist has explained his view, which concludes that publication of the plaintiff’s name would be detrimental to the plaintiff’s ongoing therapeutic progress and overall wellbeing. The plaintiff has also given evidence of the progress they have been making on their health issues, and their concern that publication of their name would set that work back.

[15] In addition, the plaintiff has given evidence of what they consider may be the impact on them as they carry out their work. [Redacted pursuant to [31]].

[16] On the basis of the evidence, I accept there are specific potential adverse consequences that could reasonably be expected to occur if the plaintiff’s name were published.

[17] Ms Fechny also makes broader submissions that I now address. She submits that the non-publication order of the Authority in respect of “certain personal

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<sup>7</sup> *MW v Spiga Ltd* [2024] NZEmpC 147.

<sup>8</sup> At [87]–[89].

information” does not sufficiently protect the plaintiff’s privacy. [Redacted pursuant to [31].<sup>9</sup>

[18] In that regard, she notes the particular issues facing people with disabilities. She refers to the labour force participation rate for people with disabilities, which is very low compared with that for people who have no recognised disabilities. In support of her submission, she points to art 5 of the United Nations Convention on the Rights of Persons with Disabilities, which requires states to prohibit discrimination on the basis of disability.<sup>10</sup>

[19] Ms Fechny does not advocate for an approach whereby every litigant in the employment jurisdiction with a disability should be the subject of a non-publication order. I also did not take her to be suggesting that a potential employer should not be told of a person’s particular health issues, to the extent they are relevant to the job. In this particular situation, however, she notes that the plaintiff’s disability is an “invisible” one and submits the plaintiff should be able to maintain control over how and when information is disclosed.

[20] I acknowledge the point Ms Fechny makes, and certainly accept that having a disability could well exacerbate the consequences of publication. In the present case, however, the evidence does not establish potential adverse consequences in respect of future employment that are specific to the plaintiff. The specific potential adverse consequences established are the health issues referred to above.

### **A departure from open justice is warranted**

[21] The context of this case is that the Authority’s determination relates to an application for interim reinstatement and the substantive case is still to be heard. That affects the weighing exercise.

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<sup>9</sup> [Redacted pursuant to [31].

<sup>10</sup> Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008).

[22] The public interest supports non-publication where, as here, there are likely significant health impacts on a party. There is no other countervailing public interest that requires general publication, at least at this stage.

[23] Further, as noted, the plaintiff has been reinstated into their role with St John on an interim basis and is concerned that publication will negatively impact their work performance. That concern is consistent with the advice of the clinical psychologist. It is in the public interest for the plaintiff's work performance not to be negatively impacted. [Redacted pursuant to [31]]. It also is in the public interest that the employment relationship between the plaintiff and St John continues to be productive during this period.<sup>11</sup>

[24] I note a further point made by Ms Fechny, which I consider to be valid, being that, in circumstances such as the current one, it may be necessary for the Court or Authority to be more fulsome about personal information in order to contextualise an employee's actions and provide an assessment of whether the employer has behaved reasonably in the circumstances. Where such information is included, publication of the plaintiff's name would adversely impact upon their right to maintain privacy over their medical records.

[25] At an interim stage, it is not possible to assess with any degree of reliability whether it will be necessary to include such information in a substantive decision, but the risk of it being included could constitute a specific potential adverse consequence of publication. For this reason, where, as here, it appears, at an interim stage, that private health information may be relevant to the assessment of a claim, that too supports a departure from open justice such that an interim non-publication order is warranted.

[26] In short, I am satisfied that in view of the potential adverse consequences that could reasonably be expected to occur, the public interest supports a non-publication order over the name of the plaintiff, at least at this stage in the proceedings.

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<sup>11</sup> Employment Relations Act, s 3(a).

## **Conditions to apply**

[27] I accept that the plaintiff has shown that there would be specific adverse consequences to them if their name were to be published and that the public interest supports non-publication of their name. I consider, however, there needs to be exceptions. Ms Fechney has identified one, and that is in the context of the workplace, where the plaintiff's colleagues are aware of these proceedings. The non-publication order will not prevent either the plaintiff or St John from identifying the plaintiff in the workplace to allow the plaintiff to be properly supported and managed. Further, if the plaintiff provides a person at St John as a referee in any future applications for employment, that person should not be prevented from providing such information to the prospective employer as is relevant to the potential employment of the plaintiff.

[28] Finally, I note that proceedings are ongoing. The non-publication order is an interim order only at this stage; it only continues until further order of the Authority or the Court.

## **Orders made**

[29] In conclusion, the challenge is successful. The determination discontinuing the non-publication order in respect of the plaintiff's name is set aside insofar as it relates to the issue of non-publication. It is substituted by the following order, covering both the proceedings in the Authority and in the Court.

[30] Publication of the plaintiff's name and of the personal information identified in the Authority's determination<sup>12</sup> is not permitted, except as follows:

- (a) The plaintiff and relevant information may be identified within St John to enable the plaintiff to be properly supported and managed within the workplace.
- (b) The order does not prevent St John, or its employees or former employees, from providing the name of the plaintiff and relevant

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<sup>12</sup> *NHL v ZNO*, above n 1, at [5].

information in respect of a future application by the plaintiff for employment.<sup>13</sup>

[31] In addition, to further protect the plaintiff's privacy, some information at [15], [17] and [23] of this judgment has been redacted from the publicly available version of this judgment. Publication of that information also is not permitted, except to extent set out in [30] above.

[32] There is no order as to costs.

J C Holden  
Judge

Judgment signed at 12.15 pm on 11 December 2024

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<sup>13</sup> Noting that the Privacy Act 2020 continues to apply in respect of personal information held by St John about the plaintiff.