Employment Court of New Zealand

H v A Limited [2014] NZEmpC 92 (13 June 2014)

Last Updated: 16 June 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 92

ARC 3/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	H Plaintiff
AND	A Limited Defendant

Hearing: 24 February 2014
(Heard at Auckland)

Court: Chief Judge G L Colgan Judge Christina Inglis
Judge M E Perkins

Appearances:
RE Harrison QC and C Abaffy, counsel for plaintiff
D France, counsel for defendant

Judgment: 13 June 2014

JUDGMENTS OF THE FULL COURT

A The plaintiff is not prohibited by s 179(5) of the Employment Relations

Act 2000 from bringing this challenge (unanimous judgment).

B Until further order of the Court there will be an order prohibiting publication of the parties' names and other identifying particulars (judgment of the majority).

REASONS FOR JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] This case relates to the narrow, but important issue, of the sort of matters that give rise to a right to challenge a determination of the Employment Relations

Authority during the course of its investigation. The particular issue relates to a determination of the Authority declining to prohibit publication of the plaintiff's name and identifying details,1 but the principles that apply to determining the scope of the right of challenge, and when it may be exercised, have more general application. It is for this reason, and against the backdrop of differing approaches that have been adopted in this Court, that a full bench was convened.

[2] It is unnecessary to dwell on the background facts in anything other than a cursory manner. The plaintiff was dismissed from his

employment with the defendant for alleged sexual harassment. The plaintiff denied the allegation and pursued a personal grievance in the Authority. Before the Authority's investigation meeting had taken place he made an urgent application for non-publication orders pending the Authority issuing a final determination on the substantive matters under investigation. These orders were sought on the basis that if his name was published it would likely have an adverse effect on his family, although the details of the plaintiff's concerns and the nature and extent of the material filed in support of the application were not referred to by the Authority in its determination. What were sought, therefore, were interim rather than final orders.

[3] On 13 December 2013 the Authority made an interim non-publication order that would lapse at 3:00 pm on 20 January 2014. The Authority member concluded that this order "was appropriate to allow the applicant an opportunity to inform his family and to exercise his rights of appeal if a further non-publication order was sought".2

[4] The plaintiff took up the option identified in the Authority's determination and filed a de novo challenge on 13 January 2014 seeking a non-publication order prohibiting publication until 28 days following the Authority's substantive determination. Issues were then raised as to whether the Court could entertain the challenge having regard to the scope of s 179(5) of the Employment Relations Act

2000 (the Act).

1 *A v B Ltd* [2013] NZERA Auckland 575 [Interim Authority determination].

2 Interim Authority determination, above n 1, at [3].

[5] Section 179 sets out the circumstances in which a challenge may be pursued. It provides that:

179 Challenges to determinations of Authority

(1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the Court.

...

(5) Subsection (1) does not apply—

(a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is

intending to follow; and

(b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or

adopt a particular procedure.

[6] It follows that the Authority must have issued a "determination" and that the challenge cannot relate to the procedure that the Authority has, is, or intends to follow.

Discussion – scope of s 179(5)

[7] It is common ground that the Authority issued a determination. The parties are at odds over whether the determination relates to a matter of procedure for the purposes of s 179(5). Counsel for the plaintiff, Mr Harrison QC, urged us to adopt a narrow approach to the definition of "procedure". Mr France, counsel for the defendant, argued the converse. The proper approach to s 179(5) requires an analysis of its text and purpose.

[8] Relevantly, while s 179(1) remains in its original form (conferring a broad right of challenge), subs (5) was part of a suite of amendments enacted in 2004.3

The history behind the reforms appears, at least in part, to be a legislative response to the judgment of the Court in *David v Employment Relations Authority*.4 There, the Court held that the application of an Authority practice direction preventing the

cross-examination of witnesses could be the subject of review.

3 By s 59 of the Employment Relations Amendment Act (No 2) 2004. Section 143(fa) was introduced by cl 45 of the 2003 Bill.

4 *David v Employment Relations Authority* [2001] NZEmpC 75; [2001] ERNZ 354 (EmpC).

[9] As the Court of Appeal pointed out in *Employment Relations Authority v Rawlings*, the Act enables this Court to supervise the Authority either by challenge (under s 179) or by way of review (under s 194).5 It went on to observe that:6

... The Act makes it clear, albeit in different ways, that the general policy of the Act is against such supervision being exercised in relation to procedural rulings.

[10] The Court of Appeal emphasised that although s 179(5) limits the right of challenge in respect of an ongoing Authority investigation, once that investigation has been completed a party has a right of challenge in the Court by way of hearing de novo. In particular the Court stated that:7

We are satisfied that ss 179(5) and 184(1A) are intended to prevent challenge or review processes disrupting unfinished Authority investigations. But once the investigation is over and a determination has been made, there is no reason for limiting the challenge and

review jurisdictions of the Employment Court. If the procedure adopted by the Authority has had a decisive influence on result (eg by refusing an adjournment and proceeding in the absence of a witness), the affected party, in the course of questioning that result, will be entitled to put in issue that procedure.

[11] The definition of "procedure" under s 179(5) was first considered in *Keys v Flight Centre (NZ) Ltd*.8 There the Court found that the question of whether the Authority could issue Anton Piller orders was not a matter of procedure. In obiter observations the full Court said that:9

... the notion of 'procedure' is limited to the manner in which the Authority conducts its business and does not include outcomes, substantive or interim, and certainly not a determination of its jurisdiction.

[12] The term was subsequently considered in *Oldco PTI (New Zealand) Ltd v Houston*.10 In refusing a challenge to an Authority determination which declined to suppress information acquired in the course of an investigation, Judge Couch drew a distinction between substantive determinations, which affect the rights and obligations of the parties and which may be interim or final; procedural

determinations, which direct the manner in which the employment relationship

5 *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26 at [23].

6 At [23].

7 At [26].

8 *Keys v Flight Centre (NZ) Ltd* [2005] NZEmpC 59; [2005] ERNZ 471 (EmpC).

9 At [51].

10 *Oldco PTI (New Zealand) Ltd v Houston* [2006] NZEmpC 26; [2006] ERNZ 221 (EmpC).

problem between the parties is resolved or determines the environment in which the investigation process takes place; and jurisdictional determinations, which determine whether the Authority has the power to make a substantive or procedural determination.11 He concluded:

[52] If a determination is substantive or jurisdictional, it will be outside the scope of s 179(5) and open to challenge under s 179(1). If it is neither substantive nor jurisdictional, it is likely to be "about the procedure" of the Authority. Section 179(5) will then apply and no right of challenge will be available.

[13] Judge Couch considered that a key indication of whether a determination is substantive will be whether it affects the remedies sought and, if so, the determination will almost certainly be a substantive one,12 holding:13

... Whether or not suppression or exclusion orders were made did not affect the rights and obligations of the parties. Nor did it form any part of the resolution of the employment relationship problem between the parties. It only affected the environment in which the Authority decided to conduct its investigation. As such the determination was procedural and not substantive.

[14] We agree with Judge Couch that, in assessing whether a decision of the Authority is procedural or not, it is more important to have regard to the effect of the decision rather than the nature of the power being exercised.

[15] In *Rawlings,* the Court of Appeal expressed itself in broad agreement that determinations which are able to be challenged are not confined to decisions on the substantive merits of a particular case, having regard to the way in which "determination" is used in s 179(5).14

[16] This Court has since considered the application of s 179(5) in a number of cases, including:

- In *X v Bay of Plenty District Health Board* Judge Travis declined to hear a challenge against an Authority decision granting a stay of proceedings

as it related to "the manner in which the employment relationship

11 At [47]-[52].

12 At [49].

13 At [55].

14 *Rawlings,* above n 5, at [42].

problem between the parties is resolved" and was accordingly barred by

s 179(5).15

- In *Alim v LSG Sky Chefs New Zealand Ltd* Judge Travis declined to hear

a challenge to an adjournment of proceedings by the Authority.[16]

In *Grant v Vice-Chancellor of the University of Otago* Chief Judge Colgan permitted a challenge to an Authority determination which held that an extension period for a recommendation pursuant to s 173A of the Act had been validly granted in spite of consent not being personally

obtained by the applicant.[17]

In *Pivott v Southern Adult Literacy Inc* Judge Couch refused to contemplate a challenge to an interim determination of the Authority to

decline an application for joinder by the plaintiff.[18]

In *Vice-Chancellor of Lincoln University v Stewart* Judge Couch held that a challenge to a determination of the Authority on an application for

removal was permitted.[19]

In *Morgan v Whanganui College Board of Trustees* Chief Judge Colgan concluded that a determination as to the admissibility of evidence was

challengeable and not barred by s 179(5).[20]

In *McConnell v Board of Trustees of Mt Roskill Grammar School* Judge Inglis declined to entertain a challenge relating to a decision of the Authority to exclude evidence from an investigation meeting because it

related to the Authority's procedure.[21]

15 *X v Bay of Plenty District Health Board* [2007] ERNZ 781 (EmpC) at [35].

16 *Alim v LSG Sky Chefs New Zealand Ltd* [2012] NZEmpC 147.

17 *Grant v Vice-Chancellor of the University of Otago* [2011] NZEmpC 172, [2011] ERNZ 491.

18 *Pivott v Southern Adult Literacy Inc* [2011] NZEmpC 67.

19 *Vice-Chancellor of Lincoln University v Stewart* [2008] ERNZ 249 (EmpC).

20 *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, (2013) 10 NZELR 727.

21 *McConnell v Board of Trustees of Mt Roskill Grammar School* [2013] NZEmpC 150, (2013) 10

NZELC 79-031.

[17] The Authority's investigatory procedures and meetings should generally

proceed uninterrupted by challenges. It would undermine the evident purposes of s

179(5) and the Act more generally to allow or encourage challenges at a pre- determination stage, thereby increasing costs, reliance on legalities and technicalities, and generating delays.

[18] Parliament's intention in limiting the powers of the Employment Court in relation to the proceedings of the Authority is reflected in the Explanatory Note to the Employment Relations Law Reform Bill (No 2):22

...the Bill improves the ability of the Employment Relations Authority to deliver speedy, effective, and non-legalistic problem resolution services by restricting the ability of the Employment Court to intervene during Authority investigations. This will ensure that the focus remains on the immediate employment relationship problem itself, rather than on how the institutions deal with it.

[19] This intention is further supported by a number of other amendments introduced by the 2004 Act, namely ss 143(fa), 178(6), 184(1A) and 188(4).

[20] Section 179 falls within Pt 10 of the Act. Its objects are set out in s 143. It is immediately apparent that the statutory focus is on the expeditious resolution of employment relationship problems and the relatively informal way in which the Authority is to operate, without undue regard to technicalities. Section 143(fa) provides that one of the objects of this Part of the Act is to:

...ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations...

[21] This is reinforced by s 157(1), which sets out the role of the Authority. It provides that:

The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

[22] Section 160 details the Authority's powers. It states that, in investigating any matter, the Authority may follow whatever procedure it considers appropriate and take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.23

[23] It is clear that the policy intent underlying s 179(5) is to enable the Authority to settle matters coming before it at the appropriate level, with as little judicial intervention during the investigative process as possible. A balance is struck between the policy imperatives underlying the reforms and access to justice considerations in the retention of the right of challenge or review once the Authority has made a final determination on the matter before it.

[24] We do not, however, consider that s 179(5) is to be construed as wholly ousting access to the Court at an interlocutory stage. This would be the effect of adopting the defendant's approach in the present case. Instead, the Court must have regard to the effect of the Authority's determination in light of the policy objectives set out above.

[25] While not impacting on (and, in particular, delaying) the substantive outcome of a proceeding, a refusal to grant a non-publication order may well cause significant and irreversible damage – not only to the applicant but also affected non-parties. Although an ability to challenge the refusal of a non-publication order at an interlocutory stage may disrupt unfinished Authority business, in the sense identified by the Court of Appeal in *Rawlings*, its distinguishing characteristic is that it is not the sort of determination that can subsequently be remedied on a challenge or by way of review. The horse will have well and truly bolted by that stage.

[26] A refusal to make a non-publication order does not fall within s 179(5), not because such an order directly impacts on a party's rights or obligations but rather because the denial of such an order has an irreversible and substantive effect. It cannot have been Parliament's intention that a litigant in the plaintiff 's shoes would

have such an important issue (non-publication) determined at first and last instance by the Authority, with no recourse to the Court to review the Authority's refusal.24

[27] In this regard, it is evident that the new sections introduced by the 2004 amendments are not intended to deny a party access to justice, but are rather intended to facilitate the resolution of employment relationship problems through providing a forum that is not unduly preoccupied with legal technicalities. Section

179(5) operates to *defer*, in order to give effect to the important policy imperatives underlying the provisions, but not *deny* access to the Court. To apply subs (5) to the circumstances of this case would be to deny access to justice.

[28] Accordingly, a determination of the Authority will be amenable to challenge where it has a substantive effect, which cannot otherwise be remedied on a challenge or by way of review.

[29] It follows that the plaintiff has a right of challenge in the present case, which is not excluded by operation of s 179(5).

Application for interim non-publication orders

[30] All members of the Court agree that the plaintiff is not prevented by s 179(5) of the Act from bringing his challenge to this Court and with the foregoing reasoning on this issue. I do not, however, agree that a non-publication order should have been made by the Authority and I disagree with the reasoning and the decision of the majority of this Court to make such an order. The following are my reasons for diverging from the majority view.

[31] The plaintiff has filed affidavits in support of the challenge. The defendant opposes the application, arguing that the threshold for non-publication has not been met in the circumstances of this case. The plaintiff contends that he is not obliged to point to exceptional circumstances and that the usual presumptions relating to open justice apply with reduced force in the employment jurisdiction.

[32] The Authority is given a broad discretion to make non-publication orders under cl 10(1) of sch 2 to the Act, which 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 or 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.

[33] The Court of Appeal has repeatedly stated that the principle of open justice is the appropriate starting point in cases involving non-publication orders and that this applies in both civil and criminal proceedings.25 In *R v Liddell*, the Court emphasised the importance of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public".26

[34] While it may be said that the public has a particular interest in criminal proceedings, there are two foundations underpinning the principle of open justice: the need for transparency of process and the need for accountability of members of the judiciary for their decisions, providing an incentive for the sound and principled exercise of judicial power.27 These foundations have equal application in both the criminal and civil jurisdictions. In its relatively recent report on *Suppressing Names and Evidence*,28 the Law Commission noted a general concern that name suppression was granted too readily, and that this undermined public confidence in the justice system, ran the risk of eroding the principle of open justice, and unreasonably impinged on the right to freedom of expression.29

[35] The principle of open justice includes (absent exceptional circumstances) the public identification of all involved in proceedings.30 The right to freedom of

expression set out in s 14 of the New Zealand Bill of Rights Act 1990 (BORA) is

25 See for example *X v Standards Committee* [2011] NZCA 676; *Muir v Commissioner of Inland Revenue* [2004] NZCA 277; (2004) 17 PRNZ 365 (CA) at [29]; *Clark v Attorney-General (No 1)* (2004) PRNZ 554 (CA) at 562 ; and *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at [42]. See too *Vasan v Medical Council of NZ* [1991] NZCA 561; [1992] 1 NZLR 310 (CA) at 311- 312; *Peters v Birnie* HC CIV-2009-404-8199, 19 March 2010 at [22].

26 *R v Liddell* [1994] NZCA 417; [1995] 1 NZLR 538 (CA) at 546.

27 *Commerce Commission v Visy Board (NZ) Ltd* [2010] NZHC 1986; [2011] NZAR 89 (HC) at [19].

28 Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009).

29 At [1.5].

30 *Clark,* above n 25, at [36].

subject to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.31

[36] While not developed in submissions, it is possible to argue that a different approach is required in the Authority because of the way in which that body operates under the statute. In particular it may decide that its investigation meeting should not be in public or open to certain persons under s 160(1)(e) of the Act.32 However I doubt that this was intended to diminish the importance of open justice in that forum. In relation to analogous (now repealed) provisions in the Criminal Justice Act 1985, the Court of Appeal in *R v Mahanga* made the following points:33

The concern for open or public justice is not diminished by the exceptions provided for by s 138 and s 140 which enable a Court to forbid publication of reports of evidence, submissions and the names and identifying particulars of offenders, witnesses and others connected with criminal proceedings. The Court has emphasised that in exercising the discretionary power of suppression of names of offenders under s 140 the starting point is the importance of freedom of expression and open judicial proceedings. In relation to suppression the presumption is always in favour of openness.

[37] In my view s 160(1)(e) simply reflects that, in some instances, it will be appropriate for the Authority to hear evidence or proceedings in camera and empowers it to do so.

[38] In civil proceedings the High Court enjoys an inherent jurisdiction to grant non-publication orders. The Authority and the Employment Court do not. Their ability to make such orders is sourced in statute. While cl 10 is broadly crafted I do not consider that this provides a basis for adopting a diluted approach to non- publication in cases coming before the employment institutions. Much employment litigation can be characterised as 'private', but so too can much civil litigation coming before the High Court involving evidence that may impact significantly on a party or non-parties. Notably, while Parliament has introduced constraints on the

ability to publish in certain classes of proceedings in other courts and tribunals,34 it

31 Section 5.

32 See *Davis v Bank of New Zealand* [2004] NZEmpC 130; [2004] 2 ERNZ 511 (EmpC) at [14]- [17].

33 *R v Mahanga* [2000] NZCA 354; [2001] 1 NZLR 641 (CA) at [18] (citations omitted).

34 See for example s 11B Family Courts Act 1980 allowing reporting of proceedings in the Family Court subject to restrictions designed to prevent the identification of the parties and their next of kin.

has not done so in this jurisdiction. Indeed, the current formulation of the Authority/Court's power to prohibit publication represents a significant departure from the position under the Labour Relations Act 1987, under which grievance committees met in private and copies of their written decisions were made available on a very limited basis.35

[39] While cl 10 confers a discretion on the Authority, it is not unfettered. It cannot be exercised arbitrarily according to the whim of the decision-maker. Like all discretions it must be exercised according to principle. I consider it appropriate to adopt the same approach to non-publication as applied by the High Court in civil cases in the exercise of its inherent jurisdiction. I do not accept that a special, or materially different, approach is required in terms of the principles to be applied in this jurisdiction.

[40] The applicable principles are conveniently set out in the Court of Appeal's

judgment in *Clark v Attorney-General (No 1)*:36

[42] With regard to Mr Ellis' comment that there is no public interest in the publication of Mr Clark's name, we remark that *the principles of open justice and the related freedom of expression create a presumption in favour of disclosure of all aspects of Court proceedings which can be overcome only in exceptional circumstances.* We refer here to the case of *Re Victim X* [2003] NZCA 102; [2003] 3 NZLR 220 (HC and CA) in which this Court upheld the setting aside of a suppression order in favour of the intended victim of a kidnapping plot. The Court was mindful of the "sense of anguish" the result would cause the intended victim and his family but held that the victim's private interest did not outweigh the fundamental principles of open justice and freedom of expression.

[43] *No exceptional circumstances have been pointed to in this case justifying departure from the open justice principle.* We apprehend that Mr Ellis' main concern is that publicity will focus on what he sees as irrelevant matters, viz Mr Clark's crimes, rather than his

alleged treatment at the hands of prison officers. It is not for the Courts, however, to grade public interest factors into matters that can or should be reported and those that should not. The right to freedom of expression is better served by placing as few restrictions as possible on it and certainly by avoiding value judgments by the Courts as to the relative worth of matters the press chooses to publish.

35 See *Anderson v Employment Tribunal* [1992] 1 ERNZ 500 (EmpC) at 510.

36 *Clark*, above n 25.

[41] The Court did not seek to define what would amount to "exceptional circumstances". In *Brown v Attorney-General* the Court of Appeal again declined to do so, observing that:37

In the analogous field of suppression orders under s 140 of the Criminal Justice Act 1985, this court has also refrained from laying down "any fettering code" as to the circumstances in which the court should depart from "the starting point" of "freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public".

[42] The onus is on the party seeking non-publication to establish that an order should be made. As Asher J said in the context of civil proceedings in *Peters v Birnie*:38

There is then, in civil proceedings, an onus on a party to establish a proper foundation for a confidentiality order, just as there is in criminal proceedings. Given the paramount principle of open justice, it is necessary for a person seeking confidentiality orders to point to some public interest such as particular circumstances relating to the privacy of an individual, to justify a departure from the open justice process. ... *I conclude, therefore, that a party seeking to justify a confidentiality order will generally have to show specific adverse consequences that are exceptional.*

[43] This approach has not been universally adopted. In *ASB Bank v AB* Harrison J rejected the proposition that the applicant must discharge the onus of proving exceptional circumstances to displace the principle of open justice, holding that: "there is no onus on an applicant to show exceptional circumstances; the question is simply whether the circumstances justify an exception to the fundamental

principle".39 This approach was cited with approval in *Harrison v Auckland District*

Health Board.40

[44] It seems to me that if the circumstances justify an exception to the fundamental principle of open justice then it is likely that the circumstances will be exceptional. More than a simple balancing exercise is required. If it were otherwise

the starting point would be neutral. The starting point cannot be neutral because

37 *Brown v Attorney-General* [2005] NZCA 374; (2006) NZAR 450 (CA) at [14].

38 *Birnie*, above n 25, at [25]. Cited with approval in *Ridge v Parore* [2013] NZHC 2335, [2013] NZAR 1355 at [9]; *Visy Board (NZ) Ltd*, above n 27. See also *Q v Legal Complaints Review Officer* [2012] NZHC 3082 [2013] NZAR 69 (HC) at [76] and *Madsen-Riest v Just* [2013] NZHC 2346 at [7].

39 *ASB Bank Ltd v AB* [2010] NZHC 1266; [2010] 3 NZLR 427 (HC) at [14].

40 *Harrison v Auckland District Health Board* [2012] NZHC 3133, [2013] NZAR 10 at [11].

there is a strong presumption in favour of open justice. In order to overcome the presumption the opposing factors will need to be weighted enough to tip the scales in an applicant's favour.

[45] A relevant factor will be the stage in the proceedings at which the application is advanced, and whether it is before or after final disposition. However even at an interim stage the starting point remains the principle of open justice. The civil equivalent of the presumption of innocence is to be taken into account and given such weight as is appropriate having regard to the circumstances. So too is the possibility of the stigma of the allegations remaining, even in the event that they are not later made out.

[46] Because of the effluxion of time between the bringing of the challenge and its determination, the Authority has now issued a considered substantive determination, finding that the plaintiff's dismissal was justified.41 That determination is subject to challenge in this Court. I pause to note that interim orders were sought, but only granted to enable an (unsuccessful) appeal to be pursued, at a similar stage of proceedings in *C v Air Nelson*.42 The case has some similarities to present one.43

The fact that a substantive determination had issued was noted by the Court of Appeal as a factor that had weighed in favour of the Employment Court in declining an interim order.44 The Court of Appeal dismissed the application for leave to appeal.45

[47] With the foregoing framework in mind I turn to consider the merits of the application advanced on behalf of the plaintiff.

[48] The application was primarily pursued on the basis of concerns relating to the potential impact of publication on the plaintiff's children, most particularly the plaintiff's teenage son. It was also submitted that publication would likely affect the

plaintiff's reputation.

41 *A v B Ltd* [2014] NZERA Auckland 131.

42 *S v Airline Ltd* [2010] NZCA 263, (2010) 7 NZELR 553 [*Air Nelson* (CA)].

43 The background details are set out in the Authority's substantive determination.

44 *Air Nelson* (CA), above n 42, at [6] per Ellen France and Randerson JJ.

45 At [18] per Ellen France and Randerson JJ.

[49] Mr Harrison sought to bolster the first limb of the application by way of reference to the international obligations contained in the United Nations Convention on the Rights of the Child (UNCROC), particularly art 3(1) which states that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best

interests of the child shall be a primary consideration".46

[50] Mr Harrison submits that in determining the application for non-publication orders the Authority (and the Court on the challenge) is obliged to have regard to the interests of the plaintiff 's child as a primary consideration. Reference was made to *Ye v Minister of Immigration.* That case arose in the immigration context and directly concerned the children involved. It does not appear that UNCROC has been applied in any case involving an application for name suppression in any court in New Zealand, other than in cases where the applicant is the child. Mr France did not address this point in his submissions.

[51] While the point at issue in these proceedings does not appear to have arisen previously, an argument that the Court's approach to name suppression must be tempered by international obligations, namely the United Nations Convention Against Torture (CAT), was pursued (unsuccessfully) in *Clark.* There the Court of Appeal rejected a submission that CAT either explicitly or by necessary implication imposes an obligation on State parties to reverse the presumption in favour of open justice and, absent special reasons, to grant name suppression on request wherever

there are allegations of torture.47 It also observed that:48

Mr Ellis did point to material setting out the practice of the United Nations Committee Against Torture in this regard but that material shows that the granting of anonymity is not even an invariable practice of that Committee. Even if it had been so, however, this cannot translate into an obligation on New Zealand Courts to modify the principle of open justice and the related freedom of expression are themselves important rights, guaranteed under BORA and international covenants to which New Zealand is a party.

46 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20

November 1989, entered into force 2 September 1990). Reference was also made to arts 12(1) and

(2); 16(1) and (2); 19(1); 23(1).

47 *Clark*, above n 25, at [37].

48 At [38].

[52] These remarks are apposite in the current context. I accept, however, that the potential impact of publication of the plaintiff's name on non-parties, including the plaintiff's son, is relevant to an assessment of whether the application ought to be granted.

[53] This Court has made orders prohibiting publication of an individual's identity in cases where there has been proof of real and substantial likelihood of undue harm to others, and where there have been persuasive medical reasons underpinning such orders.49 Mere assertions of the impact of publication are not enough. As the Court of Appeal pointed out in a somewhat different context in *Hosking v Runting*, "danger is not to be lightly assumed. As in all fields of law, the Courts must act on evidence not speculation".50

[54] The evidence before the Court establishes that there is a possibility of some adverse consequence to the plaintiff's son if the plaintiff's name and identifying details are published. He was diagnosed some years ago with Developmental Verbal Dyspraxia, which affects his verbal skills. A clinical psychologist's report (dated 27

January 2014) notes that he may have difficulty responding appropriately if he was subjected to teasing or bullying by other children about his father's predicament. The report notes that he is not suffering from a mood or anxiety disorder and that he is functioning well socially and academically despite the Dyspraxia. The report writer concludes that the plaintiff's son is at a higher than average risk of suffering adverse psychological effects if there is publicity about his father's case and that there is a risk that the progress he has made academically could be undone.

[55] The plaintiff also refers to an Educational Assessment Report. That report is now nearly five years old. It notes "[the plaintiff's son] showed some anxiety when new information was presented to him. Please provide a certain amount of predictability and structure within his environment". The report concludes that he was a very able student who had overcome many areas relating to his Developmental

Verbal Dyspraxia.

49 *C v Air Nelson* [2010] NZEmpC 18 at [16] [*Air Nelson* (EmpC)]. See too *Q v W* [2012] NZEmpC

216 at [23].

50 *Hosking v Runting* [2004] NZCA 34; [2005] 1 NZLR 1 (CA) at [147].

[56] I agree with Mr France's submission that the evidence falls short of disclosing the sort of risk of harm that would ordinarily justify the making of an order, even at an interim stage. The likelihood of harm is couched as a possibility rather than a probability and is itself dependant on a number of contingencies. I infer, from the material before the Court, that the risks that have been identified could be minimised through appropriate support.

[57] The plaintiff also submitted that he would face possible damage to reputation if his name and identifying details were published, because "mud sticks". I accept that potential damage to reputation is a relevant factor in determining whether the orders sought ought to be made and that there is a risk that the plaintiff's reputation might be damaged, even in the event that the allegations are later proved to be unfounded. I also accept that the proceeding may well give rise to publicity, including of the plaintiff's name unless prohibited. The risk of publicity does not of

itself warrant the making of a non-publication order.51 As the High Court observed

at first instance in *Clark v Attorney-General*:52

[8] A corollary of the principle that the courts proceed in public is that those persons who are engaged in its processes, as litigants or witnesses, will also necessarily be publicly identified. They might well prefer that that were not so. However, that is seen as a necessary consequence of the public administration of justice. As Lord Atkinson said in *Scott v Scott* [1913] AC

417 at p 463:

"*The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect*."

[9] Those principles have been applied in cases involving applications for

the suppression of names in civil proceedings. ...

51 See *Y v D* [2004] 1 ERNZ 1 (EmpC) at [20], where Chief Judge Colgan accepted that there was a real risk of publicity but held that this did not amount to an exceptional circumstance. He did, however, hold that the plaintiff 's mental health gave rise to an exceptional circumstance justifying non-publication on an interim basis, in light of the significant risk of suicide revealed in medical reports before the Court.

52 *Clark v Attorney-General* [2004] NZHC 1959; (2004) 17 PRNZ 161 (HC) at [8]- [9] (emphasis added). Cited with approval in this Court in *Timmins v Asurequality Ltd* [2011] NZEmpC 167 at [19] and *Q v W*, above n

49, at [26].

[58] If publicity ensued it is conceivable that the defendant would seek to invoke that publicity as a basis for refusing reinstatement.53 However, that possibility is no more than speculative and has not been signalled by the defendant.

[59] The defendant submits that the ability to publish the plaintiff 's name may encourage others to come forward, and that this is an important consideration in the context of sexual harassment claims. It is also said that it may ensure a more thorough examination of past events that may be relevant to reinstatement. There are evidential advantages in full access to court proceedings which may secure the testimony of those who realise, from what they learn of the particular case through

news reporting, that they might have a contribution to make.54 As this Court

observed in *C v Air Nelson*:55

... even though, as Mr Haigh says, the plaintiff's identity is already well known within the communities of domestic airline pilots and perhaps even domestic airline employees, reinstatement in employment may be an issue if the Court finds that the plaintiff was dismissed unjustifiably. A very broad range of relevant considerations will be applicable to the test of practicability of reinstatement in these circumstances. This may include past similar conduct although that has not been relied on by the employer, presumably because it knows of none. If, however, the plaintiff's name is able to be published, this may allow for or encourage the emergence of other instances of previous sexual harassment which may be relevant to the question of reinstatement. I do not, of course, suggest that the plaintiff has been guilty of such, but the ability to publish his name may ensure a more thorough examination of past events relevant to reinstatement.

[60] The defendant also submits that it is important to send a clear message that complaints of sexual harassment will be treated seriously. I do not consider that the defendant's ability to communicate its position in relation to claims of sexual harassment would be unduly compromised if an interim non-publication order was made, including having regard to the stance it has taken in relation to the proceedings to date.

[61] While ultimately each case must be considered on its own merits, there is

some strength in the defendant's submission that granting the orders sought in the

circumstances of this case would likely encourage other applicants to seek non-

53 A possibility referred to by William Young J in his dissenting judgment in *Air Nelson* (CA), above n

42, at [24].

54 See *Anderson*, above n 35, at 514.

55 *Air Nelson* (EmpC), above n 49, at [21].

publication orders on the grounds of potential emotional harm or distress caused to family members.

[62] I accept that non-publication orders may invite speculation about other employees. Their interests too need to be considered. The defendant's submission that it would be futile to make the non-publication orders sought because the plaintiff's identity is already well known within the organisation may go some way to addressing this concern, although it would not address speculation outside of the organisation.

[63] Having considered the matters identified above, including the stage of the proceedings, and the respective interests and concerns identified by the parties, I am not satisfied that the particular circumstances displace the principle of open justice. The balance does not come down clearly in favour of non-publication,56 and I would not have granted the plaintiff's application.

Christina Inglis
Judge

JUDGMENT OF CHIEF JUDGE G L COLGAN AND JUDGE M E PERKINS

[64] As Judge Inglis has noted, we are all in agreement that s 179(5) is not applicable to this case and we adopt Her Honour's reasons for this conclusion. However, as a majority, we have concluded that the Authority ought to have made a non-publication order in this case and we would do so likewise. The following are our reasons, and therefore the reasons of the Court, for this part of the judgment.

[65] The Authority and the Court are given the same broad discretions to make non-publications orders. The Court's power (materially identical to the Authority's) is under cl 12(1) of sch 3 to the Employment Relations Act 2000 (the Act), which

provides:

56 *Lewis v Wilson & Horton Ltd* [2000] NZCA 175; [2000] 3 NZLR 546 (CA) at 559.

12 Power to prohibit publication

(1) In any proceedings the court may order that all or any part of any of any evidence given or pleadings filed or 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 court thinks fit.

[66] Both the Court of Appeal and the Supreme Court have addressed non- publication of parties' identities in employment cases in recent years. We put more weight on these than on judgments of the same Courts in criminal cases or even in other civil cases having different statutory provisions. We consider that Parliament, by enacting broad discretionary powers in the employment field, intended that the same considerations would not apply as in criminal cases or even in public law civil cases in the courts of ordinary jurisdiction.

[67] In *S v Airline Ltd* the Court of Appeal, by a majority, dismissed an application for leave to appeal a decision of the Employment Court refusing to make a non- publication order.57 The judgments, however, focus on the application of the particular circumstances to the statutory tests for an appeal by leave under s 214 rather than on the application of cl 12 of sch 3 to the Act.

[68] The Supreme Court in *C v Air Nelson Ltd* (the same case as bore the name *S v Airline Ltd* in the Court of Appeal) subsequently refused leave to appeal against the Court of Appeal's refusal to grant leave to appeal from the Employment Court.58

The Supreme Court's grounds for refusing leave also related to the leave tests under the Supreme Court Act 2003, rather than cl 12 of sch 3 to the Employment Relations Act.

[69] In an earlier case, the Court of Appeal also dealt with non-publication orders in employment proceedings in *White* v *Auckland District Health Board.*59 The Employment Court had declined to make a non-publication order covering the identity of an employee who had been dismissed unjustifiably and reinstated. The employee had applied to the Court of Appeal for leave to appeal on grounds which

included the refusal to order permanent suppression of his name. That application

57 *Air Nelson* (CA), above n 42.

58 *C v Air Nelson Ltd* [2010] NZSC 110 [*Air Nelson* (SC)].

59 *White v Auckland District Health Board* [2007] NZCA 227, [2007] ERNZ 441 (citations omitted).

for leave was dismissed. In a judgment delivered by William Young P, the Court of

Appeal held:

[14] In declining to order name suppression the Judge primarily relied on open justice considerations associated particularly with Dr

White's public position. He also mentioned pre-interim reinstatement publicity about Dr White's departure from the Health Board. Presumably he considered that this publicity meant that those who had followed the case closely would be able to work out the identity of the doctor who was involved in the case. The Chief Judge recognised that future publicity would "probably" cause Dr White embarrassment and even humiliation but he did not see this as justifying suppression, particularly in light of the reality that he had brought any such publicity upon himself by "his bizarre and inappropriate behaviour".

[15] As is almost always the case where a broad discretion has been exercised, it is possible to challenge some of what the Chief Judge said or did not say. For instance, we have reservations as to the significance of the pre- interim reinstatement publicity. As well, the use of the word "probably" in relation to embarrassment and humiliation was something an understatement. The Chief Judge did not allow for, at least explicitly, the possibility of an adverse impact on Dr White (and indeed the Health Board) of publicity resulting from possible difficulties which Dr White may have in securing research funding. The publicity will be very painful for Dr White's family, another consideration which was not addressed. We also accept that there is a real sense in which it was the Health Board's reaction to Dr White's behaviour — a reaction which the Chief Judge found to be unjustified — which has driven much of the publicity to date. Further, it is at least likely (although not certain) that if Dr White had not challenged his unjustified dismissal, the whole affair would have remained under wraps. This raises an access to justice issue which was not addressed by the Chief Judge.

[16] ... Further, open justice considerations are always extremely important and the reality is that those who litigate necessarily put themselves and their affairs in the public domain.

[70] The Court of Appeal considered that the proposed challenge to the refusal to continue the suppression order had insufficient prospects of success to warrant granting leave.60

[71] On an application for a "leapfrog" appeal to the Supreme Court from the judgment of the Employment Court in the *White* case, the Supreme Court addressed one of the grounds advanced in support of the application for leave to appeal as

follows:61

60 At [17].

61 *White v Auckland District Health Board* [2007] NZSC 64, [2007] ERNZ 574.

[11] The final matter raised by the applicant is whether the private nature of employment grievance disputes, and the need for a person who has a personal grievance to bring proceedings if they are to assert their rights, warrants the Employment Court taking a different approach to name suppression than that applied by other Courts, and in particular those exercising the criminal jurisdiction. This question comes closest to raising an issue that meets the criteria for this Court to grant leave to appeal but we are satisfied that, in the circumstances of this case, the point would not provide a sufficient basis for the applicant to advance an argument having any prospect of success in an appeal to this Court.

[12] The decision of the Employment Court that the applicant should be reinstated in his employment, but without further prohibition on publication of his name, was that Court's ultimate assessment of the just outcome of the case which reflected the extent of misconduct and the balance of the various private and public interests involved. The Judge took into account the detrimental impact of publication on the applicant and, implicitly, others associated with him.

[72] The issue touched upon by the Supreme Court at [11] above but not decided, encapsulates the issue on which the Court is divided in this case. We are unfortunately, therefore, without authoritative and binding guidance on it.

[73] The plaintiff has filed affidavits in support of the challenge, which was pursued on a de novo basis. The defendant opposes the non-publication application, arguing that a high threshold applies and that the threshold has not been met in the circumstances of this case. The plaintiff contends that he is not obliged to point to exceptional circumstances and that presumptions relating to open justice in other courts apply with reduced force in the employment jurisdiction.

[74] It is important to identify that this case is not only a civil proceeding (and not a criminal prosecution) but that it is also private litigation as distinct from a public law case. The combined civil and private law categorisation of the proceeding is important in that it distinguishes a number of authoritative judgments of the Court of Appeal in both criminal proceedings and civil public law proceedings.

[75] Although we acknowledge the force of the reasoning of the Court of Appeal in *Lewis v Wilson & Horton Ltd* that the "principle of open justice" extends to civil proceedings, that was a case in which the High Court's inherent jurisdiction to

restrain publication of the identity of a litigant was for examination and decision.62

Here, the jurisdiction is statutory and not inherent and it is Parliament's intention in

cl 12(1) of sch 3 which is for examination and decision.

[76] Similarly, in *Clark v Attorney-General (No 1)* the Court of Appeal considered the question of non-publication in civil litigation and, in particular, whether there should be an automatic suppression of the individual identities of a distinct class of persons.63 Not only is that class-suppression issue not the situation in this case, but *Clark* had a substantial public law element in that it dealt with allegations of torture by agents of the State of prisoners and ex-prisoners. As the Court of Appeal noted in its judgment, any identity prohibition applying to classes of persons is a matter properly for Parliament to determine.64 Parliament has not gone so far as to legislate for non-publication by classes of persons, but has left this Court (and the Authority) with a broad discretion to do justice on a case by case basis

although in a principled way and from a starting point of 'open justice'.

[77] It is correct that Parliament has, in some other pieces of legislation, distinguished certain classes of persons whose identity should not be published and this case is not one about them. But it is equally true that Parliament has legislated quite specifically in the area of non-publication orders in criminal prosecutions65 in a way that is now quite different to the tests in cl 13(2) of sch 3 to the Act and its Authority equivalent.

[78] We agree that non-publication of names or other identifying particulars in employment cases will be "exceptional" in the sense that such orders are and will be made in a very small minority of cases. However, we do not agree that an applicant for such an order must make out, to a high standard, that there are such exceptional circumstances that a non-publication order is warranted. That is not the standard that

Parliament has prescribed for such orders in this Court or the Authority.

62 *Wilson & Horton Ltd,* above n 56, at [76].

63 *Clark*, above n 25.

64 At [44].

65 See Criminal Procedure Act 2011, ss 200-204.

[79] By making a non-publication order in a case in which the interests of justice warrant that order does not mean, in our view, that the Court has abandoned a commitment to 'open justice'. Whilst the identification of all persons involved in a case is a contributor to 'open justice', so too are a number of other safeguards that are not at issue, and therefore at risk, in this case. These include a public hearing of the case, a publicly issued and reasoned judgment of it, together with the rights of appeal and judicial review to attach to all of the work of the Authority and the Court. In addition, the statute clearly allows for a change to the presumption (and the reality in the vast majority of cases) that there will be no restriction on publishing any relevant information about a proceeding or of the judgment deciding the case.

[80] There are, of course, other circumstances in which this Court (and the Authority and other courts) prohibit publication of information about cases. Commercially sensitive information that may be misused by a competitor, if published, is perhaps the most common example of non-publication orders in this jurisdiction. Others have included information about the security arrangements of prisons which, if publicised, might endanger prison staff; the identities of persons who have been subjected to criticism in evidence but have had no opportunity to challenge or refute that criticism; and the identities of hospital patients whose care and treatment are the subject of proceedings involving professional health staff. There are many other instances of ad hoc non-publication orders which are, nevertheless, very much the exception than the rule.

[81] With this framework in mind we turn to consider the merits of the application advanced by the plaintiff.

[82] The application is advanced primarily on the basis of concerns about the

potential impact of publication on the plaintiff's child whom we will call "J". He is

14 years of age and attends secondary school. J has been diagnosed with a condition known as Developmental Verbal Dyspraxia and has a history of self-harming behaviour combined with other conditions including feelings of failure, impulsiveness, difficulty connecting with language heard, difficulty expressing ideas in an organised manner, and anxiety when new information is presented.

[83] There are two uncontradicted expert reports provided in support of the application which place J at a higher than average risk of suffering adverse psychological effects from bullying or teasing that might occur if J's father's name is to be published in connection with the background events that led to his dismissal.

[84] Although, in our assessment, what might occur to the child would be more in the nature of teasing than bullying, the medical condition applies as much to teasing as it does to bullying, the latter being a subset of the former

[85] Mr Harrison has also drawn to our attention the desirability, if not the need, to take into account international human rights instruments when the interests of children may be affected by publication of accounts of proceedings. The leading convention is the United Nations Convention on the Rights of the Child

("UNCROC").66 Several of the UNCROC Articles are engaged by the

circumstances of this case including the following:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

legislative bodies, the best interests of the child shall be a primary

consideration.

...

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

...

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

...

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or

her honour and reputation.

...

2. The child has the right to the protection of the law against such interference or attacks.

...

66 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20

November 1989, entered into force 2 September 1990).

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or

mental violence, injury or abuse, neglect or negligent treatment, maltreatment

or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

...

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-

reliance and facilitate the child's active participation in the community.

[86] The application of UNCROC to New Zealand domestic law was considered by the Supreme Court in *Ye v Minister of Immigration*.67 The Supreme Court accepted that, in light of New Zealand's obligations under art 3(1), the interests of New Zealand children are to be regarded as important in [immigration] decision- making processes.68

[87] Although not all UNCROC articles are engaged by the circumstances of this case, we consider that several apply to our consideration as to whether non- publication should be ordered in the interests of J. These include, under art 3(1), that in a case concerning a child, the child's best interests should be the primary

consideration in determining the matter of publication or non-publication:

- under art 16, the Court should be concerned to ensure that the child's

privacy, honour and reputation should not be interfered with arbitrarily, and to grant the protection of the law accordingly;

- under art 19, in considering non-publication as an administrative measure, the Court should be concerned to protect the child from

maltreatment; and

- under art 23, a disabled child should expect to enjoy a full and decent life

in conditions which ensure dignity and facilitate the child's active

participation in the community.

67 *Ye v Minister of Immigration* [2010] NZSC 76, [2010] 1 NZLR 105 at [24]- [25].

68 At [24]-[26].

[88] Such considerations are behind statutory regimes which prohibit absolutely and universally the identification of child victims or complainants in certain criminal proceedings. It is a fundamental tenet of fairness and humanity that children should not suffer for the sins of others, including their parents, if it is possible avoid such suffering.

[89] So where it is established by evidence that publication of information relating to a proceeding (including, in particular, identifying particular persons) may cause harm to, or affect unreasonably, a child, this will be a factor in determining whether there should be a non-publication order, if such consequences may be avoided.

[90] We accept, based on evidence before the Court which was not before the Authority and which is uncontradicted, that there is a real risk of adverse consequences to the plaintiff's young son if the plaintiff's name and identifying details are published. Such risks cannot be accurately assessed but appear to us to be well founded and appreciable. The concerns that have been identified relate to a psychological condition and are set out in a recent report from a registered clinical psychologist with experience in child and adolescent mental health. We conclude that publication may well present serious challenges for the plaintiff's son in light of his condition and background history, and in circumstances where he is ill-equipped to cope with such difficulties.

[91] We do not accept Mr France's "floodgates" argument about the consequences of making a non-publication order in this case. It was speculative and the history of such arguments in this jurisdiction does not support it. It is not a convincing or just reason to refuse what is otherwise a meritorious submission.

[92] The defendant also submits that it is important to send a clear message that complaints of sexual harassment will be treated seriously; that the ability to publish the plaintiff's name may ensure a more thorough examination of past events relevant to reinstatement; and that non-publication will invite speculation about other employees of this employer. Conversely, the defendant submits that it would be futile to make the non-publication orders sought because the plaintiff's identity is already well known within the organisation.

[93] These submissions do not sit comfortably together. We accept the defendant's case that the plaintiff's identity is known to many within the defendant's organisation. That seems to us to address adequately the valid contention that knowledge of the identity of an alleged sexual harasser may allow other complainants to come forward. It also allows others to testify to an alleged harasser's good character in relevant circumstances. The importance of the non- publication orders now sought relates, however, to both future publication and that which may take place beyond the defendant's organisation.

[94] In any event we are not persuaded, based on the evidence before the Court, that such orders would be futile (most particularly in so far as the plaintiff's son is concerned). Nor do we consider that the defendant's ability to make it clear that it is concerned about such matters will be unduly compromised, including having regard to the stance it has taken in relation to the proceedings.

[95] We do not disagree with counsel for the defendant that complaints of sexual harassment should be treated seriously. We are satisfied, however, that such a stance will not be weakened by prohibiting publication of the plaintiff 's identity on an interim basis. Although responses by some employers to allegations of sexual harassment in work situations may still be wanting, it is our perception both that this issue is improving generally and there is no suggestion that the defendant employer in this case deals with such allegations other than appropriately.

[96] Finally, it is appropriate to re-emphasise that what was and is sought is an interim order and not a final order. The current position may change after the Court has examined and determined the merits of the plaintiff's dismissal.

[97] Having examined and balanced the respective interests and concerns identified by the parties, we conclude that there are persuasive considerations in the present case to displace the presumption in favour of disclosure of party identities. It is in the overall interests of justice between the parties and within the community generally that an order prohibiting publication of the name and identifying details of the plaintiff be made.

[98] Accordingly the plaintiff's challenge succeeds. There is an interim order prohibiting publication of the parties' names or any details that might lead to the plaintiff being identified. This order was to remain in place until 28 days following the Authority's substantive determination. That period has now passed but there are further interim non-publication orders made in the proceedings now before this Court on a challenge to the Authority's determination that the plaintiff's dismissal was justified. The Judge who hears and decides that challenge may have to determine also whether a final non-publication order is to be made if this is sought. One of the factors affecting that decision, if it has to be made, is the outcome of the plaintiff's case.

GL Colgan

Chief Judge

and on behalf of

Judge ME Perkins

Judgments signed at 1 pm on Friday 13 June 2014