NOTE: This determination contains an order prohibiting publication of certain information at [29]

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE

[2024] NZERA 749
3147665

	BETWEEN	MSN Applicant
	AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Digby Livingston, counsel for the Applicant Peter Chemis and Jessica Taylor, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	Up to and including 16 September 2024 from Applicant 6 August and 16 August 2024 from Respondent
Determination:	16 December 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] MSN worked for the respondent, the Chief of the Department of Corrections (the Department) for approximately 4 years before they were dismissed. MSN brought proceedings in the Employment Relations Authority that were ultimately unsuccessful. No challenge to the Authority's determination was lodged and no application for non-publication was made at the time the Authority determined the matter.

[2] Two years later MSN applies to the Authority to have their name suppressed in the Authority's written determination on the grounds that:

(a) The publication of their name has created a barrier to future employment;

(b) The publication of their name is causing hardship;

(c) The harm caused by the publication is disproportionate to the interest in attaching MSN's name to the particulars of the decision;

(d) The publication could deter employees from seeking vindication of their rights.

[3] MSN says since the determination they have studied to become a counsellor and cannot obtain training placements because of online news articles about the determination despite the passage of two years. MSN is a single parent and has incurred a student loan.

[4] It is submitted on their behalf there is no public interest in attaching their name to the particulars of the decision beyond the principle that justice is ordinarily done openly. If non-publication is not granted, MSN's study will be wasted. Student debt will have been incurred and she faces a serious barrier to employment on a permanent basis.

[5] It was agreed this matter could be heard on the papers. An application for non-publication, an affidavit from MSN and submissions on behalf of MSN and the Department were received. Further submissions on the parties' views on anonymisation (as opposed to non-publication) and evidence of the impact on MSN were requested and provided.

[6] The Department has provided submissions on the law to assist the Authority and confirms it will abide by the decision of the Authority.

The parties' submissions

[7] It was submitted on MSN's behalf that in applying the normal tests in relation to non-publication, there is a sound reason to displace the presumption in favour of

open justice noting that publication of identifying details that creates a barrier to further employment is a recognised ground for displacing the principle of open justice.[1]

[8] I was reminded the Authority has a statutory discretion to order non-publication and it was submitted this discretion must be exercised consistently with the objectives of the legislative framework. Because the legislative framework includes the need to support successful relationships and address the inherent inequality of bargaining power between employer and employees, a party should be able to seek vindication of their employment rights but not attract publicity which may create a barrier to future employment.

[9] Looking at the overall fairness of the situation it was submitted MSN has showed remorse for their actions. The articles about the determination have caused significant "hardship and grief" such that they have almost given up finishing their study and seeking employment. In addition they are suffering emotional and financial hardship at the upper end of the spectrum with an impact on the ability to provide for their children.

[10] With a public interest in having more trained counsellors and the public interest in MSN's name in the substantive determination being limited beyond the principle of open justice, it was submitted the public interest in publication of MSN's name is outweighed in this case by the specific adverse consequences affecting MSN.

[11] The respondent set out the legal principles noting the Authority has a wide discretion to prohibit publication of evidence and other matters in accordance with Clause 10(1) of Schedule 2 of the Employment Relations Act 2000. The Supreme Court case of *Erceg v Erceg*[2] provides the framework for the Authority's analysis and it was noted in *Erceg* that non-publication orders must be "*necessary to secure the proper administration of justice*" and that the phrase "*proper administration of justice*" should be construed broadly, accommodating the varied circumstances of the particular case.[3]

[1] See for example *JGD v MBC Ltd* [2020] ERNZ 447 at [9].
[2] *Erceg v Erceg* [2016] NZSC 135 at [13].
[3] Above at [18].

[12] The respondent largely agreed with the principles set out in the submissions on MSN's behalf but noted the well established principle that a Court or the Authority should not make an order for non-publication where it would be futile to do so.[4]

[13] With regard to retrospective non-publication MSN submitted there was no legislative barrier to imposing a non-publication order after the release of a determination based on two cases that considered whether the Authority as a matter of process was required to recall or rehear a case before determining applications for non-publication made after determinations were released.[5]

[14] MSN's current issue is the impact on placements for their training caused by three articles containing MSN's name written around the time the determination was issued. Evidence from placement providers confirmed background checks had revealed the articles and this was becoming an impediment to MSN completing the required placements for their study.

[15] Evidence of the general impact on MSN's wellbeing and general employment prospects was also provided. The Courts' observations in *JGD v MBC* of the potential for significant detrimental impact that publication of parties' names can have on the ongoing prospects for employment, regardless of the outcome of the case, were noted in MSN's submissions.[6]

Non-publication after a determination is issued

[16] In *Speed v Board of Trustees of Wellington Girls College* it was held that non-publication is possible even after a judgment has been issued, so long as appropriate grounds exist.[7]

[17] What MSN is seeking is removal of their name from the Authority determination in order that the publishers of three articles about the determination will be obliged to comply with a request to amend their articles and remove MSN's name. It was submitted that anonymisation would not achieve the intended result because

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[4] For example see *AJH v Fonterra Co-Operative Group Ltd* [2021] NZEmpC 111, *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, *Timmins v Asurequality Ltd* [2011] NZEmpC 167 and *Q v W* [2012] NZEmpC 216.
[5] *Carrothers v Jasons Travel Media Ltd* ERA Auckland AA 30A/07 21 March 2007 at [39] and *JKL Stirling Andersen Ltd* [2022] ERNZ 422.
[6] Above n1 at [8].
[7] *Speed v Board of Trustees of Wellington Girls College* [2023] NZEmpC 99.

without non-publication there would be no obligation on the publishers to comply with a request to amend their articles to match any anonymised decision.

[18] I accept the articles have affected MSN's placements for their studies and publication creating a barrier to employment has been accepted by the Courts as a specific adverse consequence in the past. Despite that MSN's application faces a number of hurdles given the Authority's determinations and the resulting articles have been published and available online on a number of platforms for over two years.

[19] In *AJH v Fonterra Co-Operative Group Ltd*, AJH had brought proceedings in the Authority that were unsuccessful and a challenge to that determination was also unsuccessful. Almost 10 years later AJH applied to the Court to have their name "removed from the internet" and suppressed. They said having their name on the internet was causing them difficulty in gaining employment because employers commonly conduct a media search and would see that AJH had taken their previous employer to court.

[20] AJH's application failed because of the well settled principle that suppression or non-publication should not be ordered if it would be futile to do so.[8] The Court noted AJH's main hurdle was the readiness with which the judgments in their case were available upon a Google search. It was noted they were published on a number of databases and had been cited in employment law textbooks and other Court judgments.

[21] MSN faces similar hurdles. MSN's name having been in the public arena for at least two years both in the Authority determinations (there is a determination on costs as well as the substantive determination) published on the Authority's website as well as being published in articles in at least three different online platforms, and available on Westlaw and Lexis Nexis, it would appear to be futile to make an order for non-publication now. In addition, there is no way of knowing the extent to which the determinations or articles have been disseminated that contain MSN's name.

[22] In *C v P* the Court anonymised a judgment when non-publication orders were possible.[9] The facts in *C v P* involved a joint application by both parties to the original employment relationship problem for non-publication and a take down order. While the Court accepted non-publication order and take down orders could be made and that

[8] Also see *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94 at 105.
[9] *C v P* [2024] NZEmpC 102.

such a step was possible, even after a judgment has been issued, so long as appropriate grounds existed, the identity of C was already in the public domain and the Court had no way of knowing who may now have copies of the subject judgments and who would be potentially in breach of an order for non-publication if orders were made. On that basis non-publication was considered futile but the application was subsequently changed to one of anonymisation rather than non-publication.

[23] In the similar case of *M v Q*, publication of the employee's name was said to have led to difficulties in obtaining employment and to have contributed to decisions made by the employer about redundancy. Judge Corkill discussed the issue of futility in this way:[10]

> M's application for a non-publication order was brought well after the date when initial publication occurred. This means the Court has no way of knowing who may now have copies of the subject judgments, and who would potentially be in breach of non-publication orders were these to be made. It has long been the case that where information as to the identity of someone appearing before the Court is already in the public domain, it is not generally considered appropriate to grant name suppression.
>
> (footnote omitted.)

[24] In *C v P* it was a relevant consideration that both parties had joined to make the application which was before the Court as a mediated settlement and in *M v Q* the fact the parties had attended mediation and resolved their differences was listed a relevant consideration.

[25] *MW v Spiga Limited*, dealing with non-publication, was issued MSN's application and submissions had been lodged. Anonymisation was discussed as follows:[11]

> We also note on option available to the Authority and the Court, which perhaps should be used more than it previously has been, is that of anonymising the names of participants in proceedings. This may be useful where the name has appeared previously – in earlier judgments for example. Anonymisation sometimes occurs informally with respect to witnesses, who may, for example, be referred to by job title, but the option also exists in respect of parties. This approach was adopted by the Supreme Court in *D v New Zealand Police* and has been followed in civil cases in the High Court and, very recently, in this Court. The benefit of this approach is that no formal order is required and so no "little private offences" are created. While participants in the proceedings may speak freely about the litigation, the party or other person has protection, especially in respect of internet searches (which are a key concern).

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[10] *M v Q* [2024] NZEmpC 153 at [16].
[11] *MW v Spiga Limited* [2024] NZEmpC 147 at [96].

(footnote omitted.)

[26] Further submissions on anonymisation as opposed to non-publication were sought. It was confirmed anonymisation was not applied for because anonymisation of the original decision now would not result in MSN's name being removed from the three specified articles as the publishers would not be obliged to comply with a request to amend their articles to match any anonymised decision.

Conclusion

[27] I accept in this case that MSN has provided sufficient evidence of specific adverse consequences and it is likely this would be sufficient to outweigh the public interest in open justice and publication of MSN's name. However, given the publication of the Authority's determinations and several articles in which MSN is named and the delay of approximately two years, non-publication now be would be futile and I decline to order it.

Non-publication of this determination

[28] An application was made for anonymisation of this judgment. I consider in the circumstances a non-publication order to be appropriate and in the interests of justice. Although MSN's application was unsuccessful there are no adverse findings in relation to MSN and the public interest in publication of MSN's name in this judgment is minimal.

[29] Accordingly, there is an order preventing the publication of MSN's name in the content of this judgment and the application that led to it or any details that may identify them.

Costs

[30] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[31] If the parties are unable to resolve costs, and an Authority determination on costs is needed the Chief Executive of the Department of Corrections may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum MSN will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[32] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[12]

Sarah Kennedy-Martin
Member of the Employment Relations Authority

[12] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1