IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 105
CRC 6/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for permanent non-publication orders
BETWEEN	B Plaintiff
AND	VIRGIN AUSTRALIA (NZ) EMPLOYMENT AND CREWING LIMITED, PREVIOUSLY KNOWN AS PACIFIC BLUE EMPLOYMENT AND CREWING LIMITED Defendant

Hearing: By memoranda filed on 12 April 2013 and 17 May 2013

Appearances: Tim McGinn, counsel for plaintiff
John Rooney, counsel for defendant

Judgment: 6 June 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS IN RELATION TO APPLICATION FOR PERMANENT NON-PUBLICATION ORDERS

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[1] The plaintiff seeks a final order for non-publication of his name in these proceedings. Interim non-publication orders were made by Judge Couch on 20 August 2010,[1] prior to trial. In my substantive judgment of 20 March 2013,[2] in which I found that the plaintiff had been justifiably dismissed from his employment with the defendant company, I indicated that the issue of non-publication would need to be considered afresh. The plaintiff's current application followed. Initially the

[1] *Pacific Blue Employment & Crewing Ltd v B* [2010] NZEmpC 112 at [30].
[2] [2013] NZEmpC 40.

defendant took a neutral stance on the application. It now consents to the plaintiff's application for final non-publication orders.

[2] Mr McGinn, counsel for the plaintiff, submits that the publication of the plaintiff's name would immeasurably damage his flying career and that his professional reputation would be unduly damaged beyond the effect of having been an unsuccessful litigant in litigation between the parties. In an affidavit filed in support of the application, the plaintiff says that he has been offered a contract with an employer who is aware of his circumstances but is, he understands, likely to distance itself from him if the non-publication order is lifted and his name attracts media attention. The plaintiff expresses a concern that others may seize the opportunity to generate further publicity which would have an adverse affect on him.

[3] It is submitted that the public interest in this case has already been satisfied by publication of the details of the judgment without the plaintiff being identified. Mr McGinn submits that the plaintiff's name would be insignificant to the community or the public interest. It is submitted that it is clear, from the judgment, that the defendant no longer has any association with the plaintiff and accordingly there can be no suggestion of other pilots' reputations being tainted. It is also submitted that the interests of the parties to private litigation is a significant factor for the Court to weigh,[3] and that the defendant's support of the application is relevant to the weighing exercise.

[4] Clause 12(1) of Schedule 3 to the Employment Relations Act 2000 (the Act) provides:

> In any proceedings the court may 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 court thinks fit.

[5] An order will only be made in exceptional circumstances and will be limited to the extent necessary. It is not only the interests of the person seeking the order but those of other parties and the community that must be taken into account by the Court. The overall consideration is the interests of justice.

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[3] Citing *Y v D* [2004] 1 ERNZ 1 in support.

[6] Section 14 of the New Zealand Bill of Rights Act 1990 re-emphasises the basic value of the freedom to receive and impart information, affirming the freedom to seek, receive, and impart information and opinions of any kind in any forum. The starting point as to reporting is always in favour of openness.[4]

[7] While there are obvious differences between criminal and civil proceedings, I do not accept that those differences justify a significant weighting in favour of non-publication in private litigation, as the plaintiff suggests. That is because the principle of open justice applies in both civil and criminal courts. In *Clark v Attorney-General (No 1)*[5] the Court of Appeal, in dealing with an appeal from the judgment of the High Court declining to make a suppression order in civil proceedings, observed:[6]

> The corollary of the principle of open justice was, MacKenzie J said, that those persons engaged in proceedings will necessarily be identified publicly. As Lord Atkinson said in *Scott v Scott* [1913] AC 417 at p 463 this might be painful or humiliating but is tolerated employment contract a public trial is the beset security for the pure, impartial and efficient administration of justice and the best means for winning public confidence in and respect for the system.
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> 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] 3 NZLR 220; (2003) 20 CRNZ 194 (CA) in which this Court upheld the setting aside of a suppression order in favour of the intended victim of a failed 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.

[8] While the defendant now consents to the application, it is for the Court to determine whether a permanent non-publication order should be made in the circumstances.

[9] Permanent non-publication orders have been made by this Court from time to time, including where persuasive medical reasons exist;[7] publication of a party's

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[4] *R v Liddell* [1995] 1 NZLR 538 at 546 (CA).
[5] (2004) 17 PRNZ 554.
[6] At [11], [42].
[7] *X v A* [1992] 2 ERNZ 1079 ; *A v Attorney-General* WC1/00, 21 January 2000.

identity would be likely to aggravate the serious illness of a close relative;[8] and where a serious risk of self-harm or suicide is established.[9] The circumstances in which an order might be justified are not closed; however, an analysis of the cases reflects the high threshold that applies. This is consistent with the principles of freedom of speech, open judicial proceedings, and the right of the media to report.[10]

[10] The plaintiff's primary concern is reputational. He is concerned about his name being linked to "salacious details" referred to in the judgment and focused on by the media in what appears to be one media report to date. He is also concerned that his career prospects may be impeded, and that others may use any lifting of the interim orders as a springboard for damaging action against him. While such factors are relevant to the weighting exercise that must be undertaken, I am not persuaded that they outweigh the interests of justice in this case.

[11] Mr McGinn referred me to the dissenting judgment of William Young J in *S v Airline Ltd*[11] in support of his submission that adverse media coverage may justify the grant of non-publication orders.[12] The concerns identified by William Young J centred on the potential, at a pre-trial stage, for inaccurate and unfair reporting of the case and the impact on the plaintiff's ability, if successful in the Employment Court, to obtain reinstatement. He considered that there was an appreciable risk that the employer would use any adverse media coverage to argue that reinstatement was neither practicable nor reasonable.[13] Ultimately, the Employment Court granted permanent non-publication orders following its finding that the plaintiff's dismissal was unjustified. The Court found that the potential adverse consequences to reintegration into the workplace, and the impact on the plaintiff's family, weighed in favour of permanent non-publication.[14]

[12] The circumstances of the present case are materially different. The plaintiff's dismissal was held to be justified and no issue of reinstatement arises. A distinction

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[8] *Air New Zealand Ltd v V* [2009] ERNZ 185.
[9] *Y v D* [2004] 1 ERNZ 1.
[10] *R v Liddell* at 546.
[11] [2010] NZCA 263, (2010) 7 NZELR 553.
[12] The majority declined to interfere with the Employment Court's decision to decline interim name suppression pending trial.
[13] At [21], [24].
[14] [2011] ERNZ 207 at [78].

is to be drawn between the factors that apply at a pre, as opposed to post, trial stage. As Wild J observed in *Angus v H*:[15]

> Although there is a general presumption that justice should be openly done, that presumption may be rebutted by a situation where publication of a defendant's name pre-trial may have irreversibly prejudicial consequences. I stress pre-trial, because suppression is unlikely to be granted after judgment has been entered, regardless of what the judgment is.

[13] The potential for unfair reporting exists in all cases – a mere assertion that it might arise does not itself engage the interests of justice, and does not provide a principled basis for permanent orders prohibiting publication. And while I accept that a real prospect of harassment might qualify as a legitimate reason to prohibit publication,[16] the evidence falls well short in this case.

[14] The plaintiff's affidavit refers to the potential action that a prospective employer may take if the non-publication orders are lifted. There is no direct evidence that this is so. The plaintiff's employment prospects may be negatively impacted by releasing details of his name, but that is not uncommon, particularly where (as here) there has been a finding of justifiable dismissal. Potential harm could be caused to the plaintiff if alleged incidents and activities referred to in the judgment are taken as established fact. However, the potential for harm may be diluted by consideration of the judgment as a whole and the factual findings made within it. I do not consider that the potential for unfair criticism or unbalanced reporting by the media amounts to a circumstance which would otherwise outweigh the broader interests of justice in this case.

[15] While I accept that lifting the interim non-publication orders may have some practical consequences for the plaintiff, balancing the factors before me I do not consider that permanent non-publication is consistent with the overall interests of justice. As was observed in *Ryan v Auckland District Health Board and XY*,[17] the importance of maintaining a system of law which has the confidence of society at

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[15] HC Wellington CP129/99, 17 June 1999, at 5.
[16] See, for example, *Gravatt v The Coroners Court and Auckland District Health Board* [2013] NZHC 390 at [81].
[17] HC Auckland CIV-2007-404-6177, 5 December 2008 at [19].

large, cannot be overstated. Attaining that objective will sometimes come at the cost of potential harm to the private interests of individuals.

[16] The application for permanent non-publication orders is accordingly declined.

[17] To preserve the plaintiff's position, the existing interim order for non-publication is extended until 4 pm on Thursday 20 June 2013.

[18] No issue of costs arises.

Christina Inglis
Judge

Judgment signed at 3.30 pm on Thursday 6 June 2013