IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 160
CRC 23/12

IN THE MATTER OF	an application for permanent non-publication orders
BETWEEN	DR X Applicant
AND	A DISTRICT HEALTH BOARD Respondent

Hearing: By memoranda filed on 21 and 27 June, 10, 12 and 15 July, 7 and 20 August 2013

Appearances: Hanne Janes, counsel for applicant
Paul McBride, counsel for respondent

Judgment: 2 September 2013

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

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[1] The applicant seeks a final order for non-publication of her name and identifying details. Interim orders were previously granted and permanent orders have been made by the Employment Relations Authority (the Authority).[1]

[2] The proceeding originally came before the Court on a challenge by the applicant. In the event the challenge did not proceed. Rather, the parties entered into a settlement agreement on 23 July 2012. A notice of discontinuance was subsequently filed by the applicant. The applicant is no longer an employee of the respondent and while an investigative report was prepared and two clinical reviews were conducted, the employment processes that were instigated by the respondent were never concluded.

[1] *Dr X v A District Health Board (No 2)* [2012] NZERA Christchurch 130.

[3] At some point the Medical Council became involved. It made a determination that the applicant was not required to undergo a performance assessment, including because insufficient practice concerns had been raised to warrant such a step. Counsel for the applicant, Ms Janes, characterises the Medical Council's determination as favourable. The respondent is critical of the conclusions reached by the Medical Council and the process that it followed. Mr McBride, counsel for the respondent, submits that the conclusions reached by the Medical Council are not, in any event, determinative of the current application. While I accept that this is so, they are however relevant to the weight he seeks to place on issues of public safety, which I return to below.

[4] In summary, the applicant's position is that permanent non-publication orders have been made in the Authority; the Medical Council has been involved and has determined that no performance assessment is required and that Dr X may continue to practice, without restriction; the parties have settled their employment relationship issues; and the proceeding in this Court has been discontinued.

[5] The application for permanent non-publication orders in this Court is opposed by the respondent. In essence, Mr McBride submits that there is a presumption in favour of open justice; that there is insufficient evidence to establish exceptional circumstances; and that there are serious issues of public safety that weigh against the application. He also submits that reputation is not a basis for non-publication, particularly where, as here, a party has put themselves in the public domain by commencing litigation.

[6] The applicant contends that exceptional circumstances exist justifying permanent non-publication, including having regard to the alleged basis on which settlement was reached. A supplementary affidavit, which included reference to the terms of settlement, was objected to on behalf of the respondent. Mr McBride mounted a three-pronged objection to the admissibility of the affidavit, on the basis that it had not been contemplated by timetabling orders made earlier by the Court; that it was not strictly in reply; and that it was in breach of s 148 of the Employment Relations Act 2000 (the Act).

[7] The terms of settlement have already been the subject of discussion in the Authority's determination of 7 November 2012.[2] While the timetabling orders did not make provision for the filing of a supplementary affidavit, parts of the applicant's most recent affidavit simply seek to respond to matters contained in the respondent's evidence. It is true that other aspects of the affidavit do not fall strictly within the confines of evidence, but I would not otherwise have excluded it on this basis. The Court has a broad discretion and I am not minded to deal with the affidavit on the basis proposed by the respondent. Having said that, I have not found it of any real assistance in determining the issues now before the Court, namely whether permanent non-publication orders should be made.

[8] Clause 12(1) of sch 3 to the Act provides:

> **12 Power to prohibit publication**
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> (1) 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.

[9] 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. Ultimately the overall consideration is the interests of justice.

[10] The Authority has made a permanent non-publication order. If the Court was to decline permanent non-publication in this forum it would have the effect of rendering the orders already made in the Authority nugatory. However, I accept Mr McBride's submission that the application must be considered on its merits and the Court is not bound to make permanent orders simply because they have been made elsewhere.

[11] The applicant says that irreparable harm would be done to her reputation if the non-publication orders were lifted. Particular reference is made to the sting of

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[2] [2012] NZERA Christchurch 245.

the allegations made against her and their serious nature, and the likely impact on her reputation and ability to secure employment. She would also, it is said, be unable to respond to or contextualise the allegations of misconduct if publicised, given that the terms of settlement are confidential.

[12] As Mr McBride points out, there is not a presumptive entitlement to suppression for professional people.[3] It is, however, well established that the interests of the applicant are relevant to an exercise of the Court's discretion and there is no logical reason why this would not include the potential for damage to reputation.

[13] There are a number of cases involving medical practitioners where non-publication orders have been made. In *B v B*,[4] Blanchard J signalled that it was entirely reasonable not to prejudice the ability of a health practitioner to continue his or her right to practice by refusing name suppression. In *Dr J v New Zealand Psychologists Board*[5] the High Court granted J (a clinical psychologist) permanent suppression even though a disciplinary finding involving clinical failures had been made. The Court found that, weighing all matters before it, the public did not need to know the name or identity of the practitioner. In this regard Ellis J held that:[6]

> The board considered that the public and potential future clients of the practitioner should be warned about the practitioner. I think this is greatly overstating the danger. I think the unusual situation, the mixed managerial and professional functions performed by the practitioner and the two testimonials I have referred to strongly negative the need to warn the public about the practitioner.

[14] In *Gravatt v The Coroners Court in Auckland*,[7] Whata J observed that:

> Health professionals plainly have legitimate, justiciable and actionable interests in protecting their privacy and reputation.

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[3] See *Hart v Standards Committee of the New Zealand Law Society* [2012] NZSC 4 at [2]-[3].
[4] HC Auckland HC4/92, 6 April 1993.
[5] HC Wellington AP34/01, 11 July 2001.
[6] At [9].
[7] [2013] NZHC 390 at [64].

[15] There are, as Mr McBride points out, also cases in which medical practitioners have unsuccessfully applied for suppression orders.[8] The particular circumstances of each case will be pivotal. Here, the parties have settled their employment relationship difficulties, and the Court has not been required to determine the substantive merits of each party's position. In these circumstances, the policy imperatives underlying the principle of open justice apply with diluted force.

[16] In *Chief Executive of the Department of the Prime Minister and Cabinet v Sisson-Stretch,*[9] the Chief Judge noted that the Court's usual reluctance to prohibit publication of details relating to identity or evidence about current litigation did not necessarily apply where a settlement had been entered into between the parties.

[17] The point is echoed in *Ryan v Auckland District Health Board,*[10] where a doctor, who had performed surgery on a patient suffering from Creutzfeldt-Jakob disease who later died, and five days later operated on the plaintiff's son, successfully applied for permanent non-publication orders. In that case, the proceedings against Dr XY were discontinued after a statement of defence was filed. The doctor sought permanent name suppression and this was granted by the High Court, with Associate Judge Doogue stating that:[11]

> There does not seem to be a need to demonstrate to the public that justice has been done where the Court has not resolved the issues between the parties; rather the parties have resolved them between themselves.

[18] He went on to observe that:[12]

> Potential harm could be caused to the applicant if persons who learnt of the allegations in the statement of claim mistakenly viewed them as statements of established fact. They would be quite wrong to do so, of course, for the assertions in the statement of claim are nothing more than allegations by a person with no standing to make pronouncements on medical matters including the likelihood of spread of disease and the professional standards met by the applicant. Unfortunately, the fact that there may be little or no basis for implicating the applicant in an allegedly harmful sequence of actions is unlikely to be given proper weight by many of those who might read about the allegations if a suppression order is declined.

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[8] See, for example, *Gilgen v Professional Conduct Committee* HC Wellington CIV-2007-485-1710, 5 December 2007.
[9] EC Wellington WRC 27/06, 25 October 2006.
[10] HC Auckland CIV-2007-404-6177, 5 December 2008.
[11] At [14].
[12] At [17] and [20].

…

> … the public interest factor must be less influential where the proceedings, as here, never got off the ground.

[19] The respondent had a number of concerns which formed the basis of its employment process with the applicant. In the event, the employment process was never concluded. While the respondent raises concerns about public safety, and the public interest in the identity of medical practitioners and their conduct, these interests must be weighed against the outcome of the Medical Council's deliberations. The Medical Council is a specialist body, set up to review the competence of medical practitioners to practise medicine (amongst other things). And despite the concerns articulated by the respondent in relation to the Medical Council's decision, it does not appear to have sought a review of it.

[20] The respondent says that it is desirable to be able to publish details relating to this matter (including the applicant's name) to educate doctors and the public. I do not accept that disclosure of the applicant's name and identifying details is required to achieve these ends.

[21] The respondent also submits that regard should be had to the interests of other doctors practicing in the field, to ensure they are not tarred with the same brush. I do not consider, based on the material before the Court, that this is a significant issue. The lapse in time since the events occurred means that the public interest is likely to be significantly reduced.

[22] While the applicant brought proceedings in the first place, thereby effectively putting her name into the public domain, that factor is not a sufficient reason to reject the application. If it were otherwise the Court's powers to issue such orders would be rendered meaningless in circumstances involving an application by a plaintiff in this Court. Again, each case must be considered on its merits and in light of its particular circumstances.

[23] Nor do I consider that the judgment of this Court in *White v Auckland District Health Board*[13] is analogous. There the doctor had admitted to allegations that he had acted improperly. No such admission exists in this case.

[24] Balancing all matters before me, I am satisfied that permanent non-publication orders ought to be made, in the overall interests of justice. In my view, the factors weighing in favour of the application in combination amount to extraordinary circumstances justifying an order in this case. I accordingly exercise my discretion to grant the orders sought by the applicant. There will be an order preventing publication of Dr X's name or the publication of any details that might lead to Dr X being identified. The Court file is not to be searched without the approval of a Judge.

[25] Costs are reserved, at the request of both parties. If they cannot otherwise be agreed, they may be the subject of an exchange of memoranda, with the applicant filing and serving any memoranda and material in support within 30 days of the date of this judgment and the respondent doing likewise within a further 20 days.

Christina Inglis
Judge

Judgment signed at 3 pm on 2 September 2013

[13] [2007] ERNZ 574 (SC).