

opportunity to address the allegations or try to protect their identity.¹ When the Court reviewed the matter on 18 September 2023, that order was continued, to be reviewed again on 2 October 2023.²

[2] Shortly before the review hearing on 2 October 2023, the respondents filed an application to sustain the non-publication order until the Employment Relations Authority has determined the substantive matter.

[3] The primary basis for the application is that the second respondent has been suffering from mental and physical health issues since the Authority and Court matters arose. The respondents say also that their reputations will be affected in circumstances where the Authority matter has not yet concluded, and no determination has been made.

[4] The second respondent filed an affidavit in support of the application. He says the proceedings have left him short of money. He says that he has been suffering from mental and physical health issues since the proceedings began, whilst still trying to run his business. He attaches medical certificates and a prescription provided to him. No report from a specialist is provided, but the second respondent has been engaging with Te Whatu Ora's local mental health acute team and saw a consultant psychiatrist, who certified him as unfit for work for approximately three weeks. He received a prescription to deal with low mood, depressive symptoms, and anxiety.

[5] When the freezing orders came before the Court again for review on 2 October 2023, I heard from the parties on the application to sustain the non-publication order. The Labour Inspector opposes the continuation of the order. Mr La Hood, counsel for the Labour Inspector, submits that there is an insufficient evidential foundation to depart from the principle of open justice.

¹ *A Labour Inspector of Ministry of Business, Innovation and Employment v ZAQ Ltd* [2023] NZEmpC 146 at [4].

² *A Labour Inspector of Ministry of Business, Innovation and Employment v ZAQ Ltd (No 2)* [2023] NZEmpC 156 at [7] and [11].

The Court can make non-publication orders

[6] In any proceeding before it, the Court may order that the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Court thinks fit.³

[7] In considering whether to continue the non-publication order, I am conscious of the fundamental importance of the principle of open justice. In accordance with that principle, cases are generally heard in public, and evidence and party names may be freely published. That principle may, however, be departed from to the extent necessary to secure the proper administration of justice.⁴ The proper administration of justice must be construed broadly and will be contextual.⁵ The Supreme Court in *Erceg* noted that the administration of justice standard is capable of accommodating the particular circumstances of individual cases as well as considerations going to the broader public interest. It cited with approval the decision in *John Fairfax Group Pty Ltd v Local Court of New South Wales*.⁶ In that decision Kirby P identified some of the exceptions to the principle of open justice at common law and then said:⁷

The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case.

[8] It is uncontroversial that the principle of open justice may be departed from where there are serious mental health concerns for a party or for someone else connected to the litigation.

³ Employment Relations Act 2000, sch 3 cl 12.

⁴ *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [2], [3] and [18]; and *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96].

⁵ *Erceg*, above n 4, at [18]; and *Johns v The Director of Proceedings* [2017] NZHC 2843 at [171]–[173].

⁶ *Erceg*, above n 4, at [18].

⁷ *John Fairfax Group Pty Ltd (receivers and managers appointed) v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 141.

[9] The standard for departing from the principle of open justice is high.⁸ There must be some material before the Court upon which it can reasonably reach the conclusion that there is a risk of specific adverse consequences arising from publication such that it is necessary to make an order prohibiting publication. Essentially, the Court must be satisfied that the suggested adverse consequences could reasonably be expected to occur.⁹

[10] It is recognised that where, as here, the application is for an interim non-publication order, the principle of open justice has less weight than at a later stage in the proceedings.¹⁰ I also recognise that the evidence available at an early stage in proceedings may be somewhat limited. Nevertheless, there still must be a sufficient basis for the order.

[11] Having made these comments, I acknowledge that there are recognised issues relating to the way in which applications for non-publication orders should be dealt with in this jurisdiction, and that a decision of the full Court is awaited.

There is a sufficient evidential basis for an interim order over the Court proceedings

[12] The reputation issues raised by the respondents would not provide a sufficient basis for the continuation of the non-publication order. The application turns on the second respondent's health issues.

[13] I accept that if grounds exist for an order with respect to the second respondent, it will also be necessary to include the first respondent in the order; if the name of the first respondent is published, that would inevitably lead to the identification of the second respondent.

[14] It is normal for individuals involved in litigation to suffer some anxiety, and that is not sufficient to displace the principle of open justice. The evidence provided

⁸ *Erceg*, above n 4, at [13].

⁹ *JM v Human Rights Review Tribunal* [2023] NZHC 228 at [99].

¹⁰ *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441 at [11].

from the medical practitioners is not detailed. There is no medical evidence directly connecting the second respondent's health issues to the issue of publication.

[15] The evidence, however, suggests the second respondent's issues go beyond general anxiety. Although I note the point made by the Labour Inspector, that applications for non-publication on health grounds would usually include evidence from a specialist confirming the nature and extent of the health issues, and the link between publication and the potential exacerbation of those issues, I take into account the relatively short timeframe in which medical attention has been sought, and the interim nature of the orders applied for. I accept there is a risk that the second respondent's health issues will be negatively impacted by publication at this stage.

[16] I also take into account that negative connotations flow from the Court's judgments in this matter but that those judgments can be ringfenced from the Authority investigation. The link between the Court's judgments and the Authority proceedings is not so obvious that an order in the Court would automatically suggest a similar order is needed in the Authority. That is a matter for the Authority to determine.

[17] In short, I am satisfied that the respondents have established grounds for a non-publication order in respect of their identities in the Court proceedings, on an interim basis.

[18] Accordingly, it is appropriate for non-publication to continue on an interim basis. An order is therefore made prohibiting publication of the identities of the respondents, in the context of the Court proceedings, including their names and any details that would tend to identify them, and over the evidence filed in these proceedings, except as referred to in the Court's judgments. This order is to apply until further order of the Court. The issue of non-publication will be revisited on advice from the Labour Inspector that the Authority's investigation has concluded, or earlier on further application. The order that the Court file may not be inspected by a non-party without the leave of the Court likewise continues to apply.

[19] Costs are reserved.

J C Holden
Judge

Judgment signed at 4.00 pm on 13 October 2023