ORDER FOR NON-PUBLICATION OF INFORMATION CONTAINED AT [79] OF THIS JUDGMENT

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 45
EMPC 477/2021

IN THE MATTER OF	an application for leave to file amended pleadings
AND IN THE MATTER OF	applications for non-publication orders
AND IN THE MATTER OF	an application to exclude evidence
BETWEEN	SIOUXSIE WILES Plaintiff
AND	THE VICE-CHANCELLOR OF THE UNIVERSITY OF AUCKLAND Defendant

Hearing:	On the papers
Appearances:	C W Stewart and D Church, counsel for plaintiff P M Muir and R Judge, R Cabraal, S-J Lloyd, counsel for defendant
Judgment:	20 March 2023

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE J C HOLDEN
(Application for leave to file amended pleadings; applications for non-publication orders; application to exclude evidence)

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[1] Associate Professor Wiles has brought proceedings against her employer, the Vice-Chancellor of the University of Auckland (the University). The case arises in the context of the COVID-19 pandemic, and public commentary given by Associate Professor Wiles that has led to her being targeted by some members of the public.

[2] This judgment deals with various interlocutory matters raised by the parties that have delayed the progression of the substantive proceedings.

History of the proceedings

[3] Associate Professor Wiles's statement of claim was filed in the Court on 27 January 2022. The Court was able to hear the matter expeditiously, but due to availability and preparation issues, the dates agreed for the hearing were 5–13 September 2022.

[4] Timetabling was put in place towards that date.

[5] On 15 July 2022 Associate Professor Wiles filed an application for leave to file an amended statement of claim; on 26 July 2022 the University filed a memorandum objecting to proposed evidence filed for Associate Professor Wiles. These matters were dealt with in an interlocutory judgment dated 9 August 2022.[1]

[6] Timing for the hearing was, by then, tight but manageable, and on 11 August 2022 the September dates were confirmed.

[7] However, on 18 August 2022, Associate Professor Wiles filed a memorandum in which the principal order sought was for leave to file a second amended statement of claim. Other directions were also sought.

[8] At that point the hearing dates were regrettably vacated. The parties were directed to mediation but that has been unsuccessful to date.

[9] Since then, both parties have filed further applications and memoranda, most recently in December 2022.

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1 *Wiles v The Vice-Chancellor of the University of Auckland* [2022] NZEmpC 140.

[10] Reviewing the various memoranda and notices of application, it seems the outstanding interlocutory matters comprise:

(a) the application by Associate Professor Wiles to file a second amended statement of claim;

(b) a direction sought by her that the University statement of defence to the second amended statement of claim only address new matters arising from the second amended statement of claim;

(c) the treatment of the bundle of documents filed by the University;

(d) Associate Professor Wiles's objections to proposed evidence included in the University's briefs of evidence;

(e) non-publication orders sought by the University; and

(f) a joint application by the parties for non-publication orders in respect of the identity of various people who are named in the proposed evidence.

[11] This judgment addresses all but the last of those issues.

Associate Professor Wiles seeks to amend her statement of claim

[12] The amendments Associate Professor Wiles wishes to make to her statement of claim comprise:

(a) responses to the amended statement of defence (paragraphs 29–33);

(b) deletion of references to the University of Auckland Charter and alleged breaches of that Charter, and instead reference to the University of Auckland Investment Plan 2020-2022 and Taumata Teitei Vision 2030 and Strategic Plan 2025 and alleged actions that were inconsistent with those documents (paragraphs 42(c)(vii)–(ix) and (xii));

(c) minor updates (paragraphs 26, 42(c)(v) and 48); and

(d) a new paragraph in which Associate Professor Wiles seeks to limit the scope of her claims (alleged personal grievances and breaches of contract and good faith) for the period up to 24 August 2022, which was when the hearing for the case was vacated (paragraph 49).

[13] The defendant objects to the filing of the second amended statement of claim. In particular it says:

(a) it is not the purpose of a statement of claim to seek to respond to matters raised in a statement of defence;

(b) the change to the documents referred to in paragraphs 42(c)(vii)–(ix) and (xii) would mean that the University would need to adduce further evidence in response, which would further delay matters, extend the length of the hearing time and add further costs; and

(c) while Associate Professor Wiles may limit her claim as she sees fit and thereby influence what may be relevant, the University is able to plead its defence, including where relevant matters post-date the claim.

Second amended statement of claim may be filed, with limits

[14] The point of a statement of claim is for a plaintiff to outline their claim. The statement of claim is to include the general nature of the claim and the facts (but not the evidence of the facts) upon which the claim is based.[2] The statement of defence then responds to those claims.

[15] Here, the proposed second amended statement of claim seeks to rebut statements made in the statement of defence. That is not the place of a statement of claim. One would expect the University to call evidence to prove assertions in the statement of defence; that evidence can be rebutted by the witnesses for Associate Professor Wiles and/or tested by cross-examination. The amendment sought to include the new paragraphs 29–33 is not permitted.

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2 Employment Court Regulations 2000, reg 11(1).

[16] The reason for the amendments to change the documents being referred to is that Associate Professor Wiles learnt, after filing the previous statement of claim, that the University of Auckland Charter dated 2003, which she had referred to, is now obsolete. The matters previously included in the Charter are apparently now in the two named documents. The proposed second amended statement of claim is more detailed in respect of the alleged inconsistent actions, but the assertions appear to be of a similar nature to the claimed inconsistent actions with the Charter, covering academic freedom, equity and Te Ao Māori principles.

[17] I acknowledge that the filing of a second amended statement of claim at this stage is late, being after the evidence has largely been filed. In the circumstances, however, the amendments to paragraphs 42(c)(vii)–(ix) and (xii) are permitted.

[18] There is no issue regarding the minor updating, and the amendments to paragraphs 26, 42(c)(v) and 48 are also permitted.

[19] Finally, to the extent Associate Professor Wiles seeks to limit the University's defence, that is not permissible. If matters are relevant, they may be pleaded; if evidence is relevant, then, absent some other valid ground for objection, it may be given, even if it relates to matters that happened after the date specified by Associate Professor Wiles.

[20] The second amended statement of claim is to be filed and served within 14 days of the date of this judgment. A statement of defence to the second amended statement of claim is to be filed and served within 14 days of service of the second amended statement of claim.

University's supplementary bundle is to be identified as such

[21] The concern expressed by Associate Professor Wiles to the bundle of documents filed by the University is that it is described as a "Supplementary Bundle", which may suggest it is an agreed or common bundle even though it is not. The Bundle will be renamed in the Court file as the "Defendant's Supplementary Bundle of Documents". Associate Professor Wiles should advise the Court and the University which documents in the Defendant's Supplementary Bundle of Documents are

accepted and may be produced by consent, and which are not. To the extent Associate Professor Wiles does not agree to the documents in this bundle going in by consent, they are subject to the rules regarding the production of evidence by one party.

Various objections have been raised to the University's evidence

[22] Associate Professor Wiles's objections to evidence of non-expert witnesses are on the grounds of:

(a) hearsay;

(b) legal submission; and

(c) irrelevancy and unfair prejudice.

[23] She also objects to evidence filed as expert evidence as she says:

(a) the witnesses are not impartial;

(b) the witnesses are not experts in the matters on which they give evidence;

(c) the evidence contains legal submission; and

(d) the evidence contains opinions and is not of substantial help.

[24] Some of the objections are relatively minor and of little moment, particularly as the hearing is, of course, before a judge alone.

General principles – starting point is s 189(2) of the Act

[25] The starting point on admissibility issues in this Court is the Court's equity and good conscience jurisdiction under s 189(2) of the Act. Whether evidence and/or information should be "admitted", "accepted", or "called for" is informed by a broad inquiry, and not one that necessarily focusses on whether the evidence and/or information would be admissible in the High Court.[3] It is the twin principles of equity

[3] *Cronin-Lampe v The Board of Trustees of Melville High School* [2023] NZEmpC 18 at [27].

and good conscience that must be looked to for the guiding light in exercising the Court's discretion under s 189.[4]

[26] The Court is likely, however, to be assisted by the principles in the Evidence Act 2006 as well as by the general rules of evidence.[5]

Inadmissible hearsay

[27] A statement is a hearsay statement if it:[6]

(a) was made by a person other than the witness; and

(b) is offered in evidence at the proceeding to prove the truth of its contents.

[28] Hearsay statements are not admissible under the Evidence Act unless one of the exceptions in the Act applies.[7] Under s 18 of the Evidence Act, hearsay statements are admissible in any proceeding if the circumstances relating to the statement provide reasonable assurance that the statement is reliable and either the maker of the statement is unavailable as a witness, or the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.[8] While the Court ultimately must determine under s 189 whether a particular paragraph should be admitted as a matter of equity and good conscience, these provisions of the Evidence Act provide guidance to the Court.

[29] In considering whether a statement is reliable, the Court must look at not only the accuracy of the record of what is said and the veracity of the person making the statement, but also the nature and content of the statement, and the circumstances relating to its making.[9] For the Court to have a reasonable assurance of reliability means that the evidence is reliable enough for the Court to consider it and draw conclusions as to its weight.[10] Whether undue delay or expense would be caused by

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4 *Lyttelton Port Company v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [53].
5 *Pilgrim v Attorney-General (No 6)* [2022] NZEmpC 145 at [69]–[73]; *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14] and [27].
6 Evidence Act 2006, s 4.
7 Section 17.
8 Section 18(1).
9 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734, (2010) 24 CRNZ 702 at [45].
10 *R v Burr* [2015] NZHC 1623 at [12].

calling the maker of a statement will depend in part on the significance of the proposed evidence. If the evidence concerns a peripheral matter of minor importance, a modest delay or expense in requiring the maker of the statement to give evidence would qualify as undue. Conversely, where the evidence is important and contentious, a far higher degree of delay or expense would be required to justify admitting the hearsay statement rather than calling the maker of the statement as a witness.[11] Requiring a party to call numerous additional witnesses to provide direct evidence of peripheral matters, and thereby adding to the length and cost of the trial, is not in the interests of the parties or the Court.

Legal submission does not belong in evidence

[30] Witnesses are generally there to provide evidence of facts.[12] It is not the place of a witness to make legal submissions. In particular, statements from expert witnesses that are intended to advocate for a particular legal position will not be admissible.[13]

Relevant statements are admissible

[31] Under the Evidence Act, the fundamental principle is that relevant evidence is admissible, with relevant evidence being evidence that has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.[14] Evidence is relevant if it has some probative tendency. It does not have to have sufficient probative tendency to prove a component of a claim or defence.[15]

[32] In considering relevance, the pleadings will need to be examined. The Court also is conscious that it is not always easy to assess the relevance of evidence before trial. Ruling evidence to be inadmissible on the grounds of irrelevance should be rare in advance of a hearing, as the Court would be doing so in the absence of a full understanding of the case and how it will be presented. For this reason it is only in

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11 *Northe v R* [2020] NZCA 558 at [15].
12 But allowing for opinion evidence in restricted circumstances (ss 24 and 25 Evidence Act).
13 See High Court Rules 2016, r 9.43(2) and sch 4 cl 2; see also *Penny v Commissioner of Inland Revenue* [2011] NZSC 95 at [32].
14 Evidence Act, s 7.
15 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].

the very clearest of cases that evidence would be ruled inadmissible solely on the grounds of relevance.[16]

[33] The extent to which the evidence is prejudicial may come into play. Section 8 of the Evidence Act provides that a judge must exclude evidence if its probative value is outweighed by the risk that the evidence will be unfairly prejudicial. That provision is concerned with whether the connection between the evidence and the proof is "worth the price to be paid by admitting it in evidence".[17] Where the relevance of evidence is perhaps marginal, it is more likely that prejudice will lead the Court to rule it inadmissible.

Experts may give opinions in their area of expertise

[34] Under the Evidence Act, expert evidence means the evidence of a person who has specialised knowledge or skill based on training, study, or experience, and the evidence is based on that specialised knowledge or skill. It includes evidence given in the form of an opinion.[18] Such evidence must satisfy the relevance test in s 7 of the Evidence Act and s 25. Section 25 relevantly provides:

> **25 Admissibility of expert opinion evidence**
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> (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
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> (2) An opinion by an expert is not inadmissible simply because it is about—
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> (a) an ultimate issue to be determined in a proceeding; or
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> (b) a matter of common knowledge.
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> (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.
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> (4) …
>
> (5) …

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16 *BNZ Investments Ltd v Commissioner of Inland Revenue* (2008) 19 PRNZ 71 (HC) at [15], upheld on appeal *Commissioner of Inland Revenue v BNZ Investments Ltd* [2009] NZCA 47, (2009) 19 PRNZ 553 at [45].

17 *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1 at [62].

18 Evidence Act, s 4.

[35] Thus, to the extent the expert evidence is evidence of fact, it must be relevant, and to the extent it is expression of an opinion, it must be substantially helpful to the fact-finder. Where the position of the proposed expert is so lacking in independence as to make it obvious that an opinion they express in evidence will not be able to be substantially helpful, it may be appropriate to rule out the evidence at the pre-trial stage.[19]

[36] Where the lack of independence does not reach that level, the connection between the expert and the party calling the expert would be a factor affecting the weight to be attributed to their evidence, which would be a matter left for the judge at trial.[20]

[37] In considering the various objections made to the expert evidence, I am guided by the provisions of the Evidence Act and also take into account the approach I adopted in my judgment of 9 August 2022. Ultimately, again, the test is that set out at s 189(2) of the Act.

The pleadings and agreed issues form the context in which the evidence is considered

[38] Associate Professor Wiles's statement of claim (including the proposed second amended statement of claim) alleges:

(a) unjustifiable action causing disadvantage;

(b) breach of contract; and

(c) breach of good faith.

[39] The unjustifiable disadvantage claim is directed to alleged failures by the University to take adequate steps to protect Associate Professor Wiles's safety.

[40] The breach of contract claim alleges breaches of Associate Professor Wiles's employment agreement, with the alleged breaches generally covering health and

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19 *Commissioner of Inland Revenue v BNZ Investments Ltd*, above n 16, at [22].
20 At [23] and [25].

safety issues, Te Tiriti o Waitangi principles, and obligations with respect to academic freedom and the right to make public commentary on matters related to Associate Professor Wiles's academic expertise.

[41] The breach of good faith claim is that the University failed to be active and constructive in establishing and maintaining a productive employment relationship in which parties are responsive and communicative.[21] Again, references are made to health and safety issues and obligations on the University to honour Te Tiriti o Waitangi. References also are made to the University embarking on an internal employment investigation process around Associate Professor Wiles's outside activities and alleged breaches of the Code of Conduct.

[42] The remedies sought by Associate Professor Wiles are for compensation, damages, penalties, declarations and recommendations.

[43] Associate Professor Wiles's focus on health and safety, treaty obligations and academic freedom come through in the various memoranda and the briefs of evidence filed on her behalf. The University also has agreed that those issues are at the forefront of this litigation. I bear these matters in mind in considering the objections to the proposed evidence.

There are extensive objections to the proposed evidence

[44] Associate Professor Wiles's objections in respect of the briefs of evidence filed for the non-expert witnesses relate to particular paragraphs of their evidence. In respect of those witnesses, the schedule to this judgment sets out the objections, the University's response and the outcome.

[45] Associate Professor Wiles seeks to strike out the entirety of the evidence filed by the University as expert evidence and included in:

(a) the supplementary brief of evidence of Professor Freshwater (the Vice-Chancellor and defendant in this proceeding);

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[21] Employment Relations Act 2000, s 4(1A)(b).

(b) the brief of evidence of Professor Paul Rishworth KC; and

(c) the brief of evidence of Associate Professor Te Kawehau Hoskins.

[46] She says they lack independence. She also says Professor Freshwater and Associate Professor Hoskins are not experts in the relevant areas and that Professor Rishworth gives evidence on matters of law.

[47] In summary, the University:

(a) accepts that the proposed evidence in Professor Freshwater's supplementary brief is not strictly expert evidence, but submits that it should be accepted under s 189 of the Act;

(b) agrees that certain paragraphs can be deleted from Professor Rishworth's brief of evidence (and potentially addressed in submission), but says that the balance of his proposed evidence should remain in the brief; and

(c) says the brief of evidence of Associate Professor Hoskins covers both evidence of fact and expert opinion and that her brief should be allowed in in its entirety.

[48] The first point I make is that I do not strike out any of the three briefs in their entirety. I acknowledge, as does the University, that Professor Freshwater's supplementary brief of evidence is not strictly expert evidence. Her supplementary brief of evidence is allowed in on the basis that it is not treated as expert evidence.

[49] The connection between the University and Professor Rishworth and Associate Professor Hoskins is noted, and goes to the weight that may be given to the proposed expert evidence. This is a matter that the parties can make submissions on in due course.

[50] I agree that Professor Rishworth strays into evidence of law, even beyond the paragraphs the University has already identified. That is not to say that the material is irrelevant or unhelpful, but it belongs in legal submission rather than evidence. I take

into account the approach that I took in particular to Professor Heinemann's evidence and, in fairness, allow Professor Rishworth's responses to the evidence that has been filed for Associate Professor Wiles generally. Paragraphs 56–66, 72–93 and 118 of Professor Rishworth's brief of evidence are struck out by consent. In addition, paragraphs 20, from the third sentence to "So" at the start of the last sentence, 29, 35–55, 70, 110–113 and 115 are struck out as being on matters of law. The remainder of the brief of evidence is allowed.

[51] The brief of evidence of Associate Professor Hoskins is allowed in. I accept that she has relevant expertise in the area in which she provides expert opinion evidence.

[52] The University's revised briefs of evidence are to be filed and served within 14 days of the date of this judgment. Any briefs of evidence in reply on behalf of Associate Professor Wiles are to be filed and served within a further 14 days.

The University applies for non-publication orders

[53] The University applies for non-publication orders covering aspects of the pleadings and evidence in the case:

(a) regarding funding contracts, and a University safety report and plan;

(b) being specific details relating to a witness's previous employment and work experience with the New Zealand Police;

(c) identifying a third party NGO and its employee;

(d) identifying information about individuals who are mentioned in the evidence;

(e) the contents of a risk assessment included in the Defendant's Supplementary Bundle of Documents.

The starting principle is that justice should be administered openly

[54] The Court has a discretion to order that all or any part of any evidence given or pleadings not be published and any such order may be subject to such conditions as the Court thinks fit.[22] Where commercial sensitivity is claimed, the Court will need to assess whether the information before it is, in fact, commercially sensitive, and of such a nature that would justify an exception to the fundamental principle of open justice.[23] In *Erceg v Erceg*, the Supreme Court noted that simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing or unwelcome is not sufficient. The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule; the standard is a high one.[24]

[55] It confirmed that a court can only depart from the rule that the administration of justice must take place in open court where its observance would frustrate the administration of justice or some other public interest.[25] The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. The order also must be clear in its terms and do no more than is necessary to achieve the due administration of justice.

[56] The Supreme Court emphasised that the phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of particular cases.[26] It confirmed that the test might be met where, for example, the publication of information would involve a breach of a duty of confidence.[27]

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22 Employment Relations Act 2000, sch 3 cl 12(1).
23 *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [117].
24 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].
25 *Erceg v Erceg*, above n 24, at [17].
26 At [18].
27 At [19].

[57] Importantly, there must be some material before the Court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient.[28]

Some evidence is provided in respect of the funding contracts

[58] Evidence has been provided by the University's associate director, HR advisory, of the University's concern over disclosing the content of the funding contracts. No evidence has been provided for the Ministry of Business, Innovation and Employment (MBIE) or the Department of Prime Minister and Cabinet (DPMC) who are the other signatories to those contracts. The evidence of the University is that the contracts contain commercially sensitive information, including pricing, COVID-19 modelling scenarios, staff salaries and personal information. The University points to the MBIE contract being classified as "in confidence" and notes that there are confidentiality obligations in the DPMC contract whereby each party agrees not to use or disclose the other party's confidential information (subject to various exceptions).

[59] The order the University seeks is over the contents of the contracts "to the extent that such information is not already in the public domain". There is little indication of what is in the public domain and what is not.

[60] Associate Professor Wiles is agreeable to non-publication orders being made over personal information pertaining to other staff members, specifically in relation to their salaries. As she notes, this is restricted to some information in a spreadsheet headed "Budget" in the DPMC contract.

[61] Associate Professor Wiles does not agree that any further non-publication orders over the contents of the contracts is required. She says the contracts are central to a key issue in the proceedings, being the extent to which Associate Professor Wiles was permitted, or indeed obliged to, communicate her work to the public. She also gives evidence that the modelling scenarios referred to in the DPMC contract were well publicised in the public domain. The University also refers to media reporting of

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[28] At [17]; see *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (NSWCA) at 476–477.

the Government's contracting for COVID-19 modelling, attaching an article that includes various figures representing the values of contracts and noting that presentations were given in at least one of the Prime Minister's press conferences.

[62] I agree (as does Associate Professor Wiles) that the personal information contained in the budget attached to the DPMC contract should be the subject of non-publication orders. That covers the content of the columns headed "Salary", "OH" and "Monthly Cost". Otherwise, I am not satisfied that a non-publication order is required in respect of the funding contracts.

There is little evidence regarding concerns over the safety report and plan

[63] The University claims that there could be health and safety risks to Associate Professor Wiles and/or other University staff if information in relation to the specific content of the safety report and plan are published. The report outlines opportunities for improvement that have been identified by the consultant, the actions that have been and will be taken by the University as a result, and the proposed timeframes for each action. The University says it has only shared the information on a limited and confidential basis and it is concerned about the health and safety risks to staff if the specific contents of the report and plan are published. It has not clearly identified which parts of the report and plan are of particular concern; it seeks a non-publication order over the entirety of both documents.

[64] Associate Professor Wiles notes that the report and plan contain numerous statements that are important to the case, which are referenced by several witnesses on both sides of the litigation. She submits that no specific adverse consequences that justify departure from the principle of open justice have been identified.

[65] She notes that there is no evidence before the Court or reason to believe that the publication of the contents of the report and/or the plan could have an adverse effect on any third party, particularly given the contents of those documents and the fact they have been widely disseminated.

[66] Although there is scant evidence or information in respect of the concerns around the safety report and implementation plan, I am prepared to make interim non-

publication orders over the content of those documents, bearing in mind the safety issues contended for by the University. That interim order is to be in place pending further order of the Court, but I would expect it to be addressed in submission at the hearing.

The information about the witness's work with Police is said to be confidential and private

[67] The University says the information relating to a witness's previous employment and work experience with the New Zealand Police is confidential and private information relating to the witness and the work of the New Zealand Police, which is not currently in the public domain.

[68] Associate Professor Wiles says that the witness's evidence is being relied on by the University and no specific adverse consequences have been identified.

[69] Neither the witness nor the New Zealand Police has given any evidence about what consequences might flow from the release of the information. The issue is not elaborated on in the University's memoranda.

[70] No basis for a non-publication order has been established.

Interactions with the NGO are claimed to be confidential

[71] The University says that the proposed evidence relating to its interactions with the NGO are confidential, not currently in the public domain and that it would be detrimental to the University and the NGO if details of those interactions were disclosed. It provides no evidence of any likely harm to the NGO and none is apparent from the evidence on its face.

[72] Associate Professor Wiles has objected to this evidence but says that, in any event, there is no reason why the material should be the subject of non-publication orders with no specific adverse consequences being identified or envisaged, particularly since there are no issues regarding the conduct of the NGO itself. She

says that, to the extent any evidence might be detrimental to the University, that is a result of its own decision to involve the NGO in this matter.

[73] No basis for a non-publication order has been established.

Privacy is cited with respect to named individuals

[74] The University relies on privacy issues in its application for non-publication orders prohibiting the publication of any pleadings or evidence in respect of various named individuals and entities. In that regard, its application relates to them being third parties and asserts that disclosure of their names would be a breach of their privacy. None of the named individuals has provided any evidence.

[75] The main thrust of Associate Professor Wiles's objection to non-publication orders in respect of the individuals is that evidence involving them is relevant to the proceeding and no specific adverse consequences have been identified.

[76] For the most part, the evidence relating to the third parties is not sensitive information; it is simply part of the narrative of the background to the litigation. It is not of a nature that sometimes sees this Court looking to the special features that apply in this jurisdiction.[29] Privacy is not generally considered to be a ground for non-publication. While people may prefer not to have their names associated with a court proceeding, the interests of open justice prevail. There is no evidence or submission identifying any specific adverse consequences to the individuals in question. No basis for non-publication orders has been established.

The information in the risk assessment is said to be sensitive

[77] The University says the risk assessment contains sensitive information in relation to the University's assessment of risk. No evidence has been provided as to the consequences of the risk assessment being published and no particular areas of concern have been identified.

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[29] *JGD v MBC Ltd* [2020] NZEmpC 193, [2020] ERNZ 447 at [6]-[10].

[78] This document is high level and does not refer to particular individuals or actions. No basis for a non-publication order has been established.

Limited non-publication order granted

[79] In conclusion:

(a) A non-publication order is made prohibiting the publication of the last three columns in the schedule to the DPMC contract entitled "Budget", being the columns under the headings "Salary", "OH" and "Monthly Cost".

(b) An interim non-publication order is made prohibiting the publication of the content of the University's safety report and plan, pending further order of the Court. The existence of the safety report and plan is not subject to non-publication orders.

[80] Otherwise, the University's application for non-publication orders is unsuccessful.

Directions conference to progress joint application for non-publication orders

[81] As will be apparent, this judgment does not deal with the joint application for non-publication orders. A directions conference will be convened to discuss how that ought to be dealt with, including who, apart from the parties, should be allowed to be heard.

[82] Costs are reserved.

J C Holden
Judge

Judgment signed at 4.15 pm on 20 March 2023

SCHEDULE

FRESHWATER BRIEF OF EVIDENCE			
PARAGRAPH	**OBJECTION**	**RESPONSE**	**OUTCOME**
5 (part)	Statement of law	Non-controversial statement of fact.	Allowed in.
40(c) (part)	Statement of law	Mere quotes; in the interests of justice as well in the interest of equity and good conscience to admit as will be of assistance to the Court.	Objection upheld to the extent the first sentence of the first bullet point is struck out; the words "further limits" in the second bullet point are to be replaced, eg, by "refers to".
40(d) (part)	Legal submission	Professor Freshwater's understanding of the application of duty of good faith to Associate Professor Wiles's outside activities; and assistance to the Court.	Objection upheld – from "this includes…".
42 (part)	Legal submission	Mere quotes; in the interests of justice as well in the interest of equity and good conscience to admit as will be of assistance to the Court.	Objection upheld from "and this includes".

FRESHWATER BRIEF OF EVIDENCE continued			
43 (part)	Legal submission	Mere quotes; in the interests of justice as well as in the interests of equity and good conscience to admit as will be of assistance to the Court to explain the University's position on the scope of academic freedom.	Not allowed in current form; University can reword clarifying it is witness's position on academic freedom as a matter of policy.
44 (part)	Legal submission	Mere quotes; in the interests of justice as well as in the interests of equity and good conscience to admit as will be of assistance to the Court.	Objection upheld.
46 (entirety)	Reply to previously struck out evidence	First sentence can be removed. Balance is admissible as outlines the University's position in relation to its competing health and safety and academic freedom obligations.	First sentence removed; remainder may stay in.

BOYER BRIEF OF EVIDENCE			
PARAGRAPH	**OBJECTION**	**RESPONSE**	**OUTCOME**
18(f) (part)	Hearsay	Admissible applying sections 16(1) and 18(1) of the Evidence Act. Not contentious or of real significance. Not unfairly prejudicial. Reliability and weight can be determined by the Court.	Objection upheld.
18(ll)(v) and (vi) (part)	Hearsay	Outlines Ms Boyer's recollection and are supported by extrinsic evidence. Again ss 16(1) and 18(1) of the Evidence Act applies.	Allowed in. Supported by extrinsic evidence and s 18(1) of Evidence Act applies.
31 (part)	Hearsay	Outlines Ms Boyer's recollection and are supported by extrinsic evidence. Again ss 16(1) and 18(1) of the Evidence Act applies. Provides context.	Allowed in. Supported by extrinsic evidence and s 18(1) applies.
32 (entirety)	Relevance	Provides context in a key issue.	Allowed in.
35 (part)	Hearsay	Supported by extrinsic evidence, would assist the Court, admissible under s 18(1) of the Evidence Act.	Allowed in. Supported by extrinsic evidence and s 18(1) applies.
43 (part)	Hearsay	Refers to the witness's own knowledge (or lack of) and therefore admissible.	Allowed in. Refers to witness's level of knowledge.

BOYER BRIEF OF EVIDENCE continued			
58 (part)	Hearsay	Refers to the witness's own belief and therefore admissible. Section 18(1) of the Evidence Act applies.	Allowed in. Refers to witness's belief.
64 (part)	Hearsay	Refers to documentary evidence being provided including by a witness for Associate Professor Wiles. Section 18(1) of the Evidence Act applies.	Allowed in. Supported by extrinsic evidence and s 18(1) applies.

KIRKHAM BRIEF OF EVIDENCE			
PARAGRAPH	**OBJECTION**	**RESPONSE**	**OUTCOME**
11 (part)	Hearsay	Not hearsay but referring to the witness's own experiences and can be tested in cross-examination. Also would be of assistance to the Court and prevents undue expense or delay that would be caused if other people were required to be subpoenaed as witnesses.	Allowed in. It is the witness's own view.
28-30 (entirety)	Hearsay	Not hearsay; directly quoting and explaining email correspondence that is in evidence. Alternatively, admissible under s 18(1) of the Evidence Act.	Objection allowed. Witness may simply refer to the email correspondence.
39 (part)	Hearsay	Advice was a matter within his own direct knowledge. Content of email in documentary evidence and non-contentious.	Allowed in. Within his own knowledge.
45 (part)	Hearsay	Provides first-hand account of the witness's interactions and is of relevance in explaining his views and responses in a meeting with Associate Professor Wiles. Section 18(1) of the Evidence Act applies. Not unfairly prejudicial. Issues of reliability and weight can be determined by the Court.	Allowed in. Evidence of the witness's interaction with the police personnel. Section 18(1) also applies.

KIRKHAM BRIEF OF EVIDENCE continued			
46 (part)	Hearsay	Not hearsay but a general comment on the nature of the witness's discussions and can be tested in cross-examination. Alternatively, of assistance to the Court and relevant. Section 18(1) of the Evidence Act applies.	Allowed in. Not hearsay.
49.3 (part)	Hearsay	Provides first-hand account of the witness's interactions and is of relevance in explaining his views and responses in a meeting with Associate Professor Wiles. Not unfairly prejudicial. Issues of reliability and weight can be determined by the Court. Section 18(1) of the Evidence Act applies.	Objection allowed in part. Last three sentences, from "I understood…" struck out.

FRASER BRIEF OF EVIDENCE			
PARAGRAPH	**OBJECTION**	**RESPONSE**	**OUTCOME**
18 (part)	Hearsay	Not hearsay but simply refers to the content of email correspondence which is included in the defendant's supplementary bundle of documents. Alternatively, admissible under s 18(1) Evidence Act and of assistance to the Court.	Allowed in. The sentence simply refers to the email, which is being produced.
35 (part)	Hearsay	Not hearsay but simply refers to matters outlined in an email of which the witness is aware and which is provided to the Court. Also admissible under s 18(1) of the Evidence Act and of assistance to the Court.	Allowed in. Email in evidence in the common bundle. Section 18(1) applies.

WHITMORE BRIEF OF EVIDENCE			
PARAGRAPH	**OBJECTION**	**RESPONSE**	**OUTCOME**
18 (part)	Hearsay	Not hearsay but a general statement. Other witnesses present who may be questioned on the statement. In the interests of justice and of assistance to the Court.	Allowed in. Not hearsay.

PHIPPS BRIEF OF EVIDENCE			
PARAGRAPH	**OBJECTION**	**RESPONSE**	**OUTCOME**
41 (part)	Hearsay	First part – not hearsay. Second part – would assist the Court and s 18(1) of the Evidence Act applies. Not unfairly prejudicial and the issue of reliability and weight can be determined by the Court.	Allowed in. First part not hearsay; s 18(1) applies to second part.
55 (part)	Hearsay	Assists the Court as it outlines the witness's understanding of matters. Can be tested with other witnesses.	Allowed in on basis it is the witness's understanding of matters.
57 (part)	Hearsay	Of assistance to the Court, not unfairly prejudicial and the issues of reliability and weight can be determined by the Court.	Allowed in. Statement can be tested in cross examination.
59 (part)	Unfairly prejudicial (without further disclosure)	Not unfairly prejudicial. Referring to matters within the witness's experience and knowledge which are relevant in relation to the claims made by Associate Professor Wiles. The University objects to further disclosure.	Allowed in. Statement can be tested in cross-examination. If further disclosure is sought, that needs to be dealt with formally.

PHIPPS BRIEF OF EVIDENCE continued			
64 (part)	Hearsay	Of assistance to the Court and witness would be available for further questions. Section 18(1)(b)(ii) of the Evidence Act applies. Not unfairly prejudicial. Issue of reliability and weight the Court can determine.	Objection upheld.
66 (entirety)	Hearsay	Witness is quoting from agreed evidence included in the common bundle. Further, s 18 of the Evidence Act would apply.	Allowed in. Transcript of meeting in common bundle.
71 (entirety)	Speculative opinion	Provides the evidence of the witness's perception of the implications for the University in relation to the competing rights and duties of academic freedom vis-à-vis health and safety. Of assistance to the Court.	Allowed in. Witness's perception of assistance to the Court.