

**ORDER PROHIBITING PUBLICATION OF HEALTH INFORMATION
AT [27] OF THIS JUDGMENT**

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 67
EMPC 322/2022**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GREGORY BENNETT Plaintiff
AND	SHELLEY GOLDIE First Defendant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Defendant

Hearing:	On the papers
Appearances:	G Bennett, plaintiff in person Appearances excused for first and second defendants
Judgment:	28 April 2023

JUDGMENT OF JUDGE J C HOLDEN

[1] This judgment is in respect of a challenge from Mr Bennett, an employment advocate, of an aspect of an Employment Relations Authority determination whereby the Authority declined to make non-publication orders sought by Mr Bennett over his health information or his identity.¹

¹ *Goldie v Chief Executive of the Department of Corrections* [2022] NZERA 408 at [13]-[14] (Member Arthur).

Mr Bennett was acting for Ms Goldie

[2] In late 2021, Mr Bennett accepted instructions from Ms Goldie to pursue her personal grievance against her employer, the Department of Corrections. That personal grievance was not raised within the 90-day period within which personal grievances generally must be raised. Ms Goldie applied to the Authority for leave to raise her personal grievance outside of the 90-day period.²

[3] Ms Goldie's application to the Authority was unsuccessful, but her challenge succeeded in the Court.³ The judgment of the Court outlines the relevant history of Ms Goldie's interactions with Mr Bennett.

[4] In the Authority, Mr Bennett applied for various non-publication orders, some of which were made by the Authority. The Authority, however, declined to make a non-publication order over Mr Bennett's own health information or his identity.

[5] Mr Bennett filed a challenge to the Authority's determination. He also filed an application for urgency and an application for interim non-publication orders as well as an affidavit in support of those applications.

[6] On 21 September 2022, in order to preserve Mr Bennett's position, the Court made an interim non-publication order in respect of Mr Bennett's name, pending further order of the Court.

[7] On 3 October 2022, there was a telephone directions conference. Mr Bennett indicated that he would be filing an affidavit from an expert in relation to neurological issues, as well as a further affidavit from himself. Both Ms Goldie and the Department of Corrections advised that they abide the decision of the Court, and they were excused from filing statements of defence. Timetabling was put in place so that Mr Bennett's affidavits in support of his challenge and his submissions were to be filed by 4 pm on Monday, 14 November 2022.

² Employment Relations Act 2000, s 114.

³ *Goldie v Chief Executive of the Department of Corrections* [2023] NZEmpC 30.

[8] Since the directions conference on 3 October 2022, Mr Bennett has filed no further documents. On 16 February 2023, the Court advised by Minute that if Mr Bennett had any further evidence and/or submissions or any application that he wished to file, he must do so no later than 4 pm on Thursday, 16 March 2023; otherwise the Court would deal with the challenge on the basis of the papers that had been filed.

[9] Mr Bennett then sent various emails to the Court in respect of his personal circumstances and medical history and diagnosis, but he has filed no formal papers.

[10] In fairness to Mr Bennett, this judgment takes account of his email correspondence as well as his notice of application and affidavit.

[11] The affidavit and emails are focussed on explaining why Mr Bennett may have failed to take the steps necessary to progress Ms Goldie's personal grievance. There is nothing explicit, however, about the effect Mr Bennett anticipates if a non-publication order is declined.

[12] Having read the medical information Mr Bennett has provided, I accept that he was facing significant difficulties in the early part of 2021.

Court may make non-publication orders

[13] In general, cases are heard openly and in public. Proceedings and judgments can be reported in the media. In any proceeding, however, 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.⁴

[14] While the discretion is broad, it must be exercised consistently with applicable principles. The principle of open justice is of fundamental importance. It forms the starting point for determining whether the circumstances of a particular case justify an order for non-publication. Anyone applying for a non-publication order must establish

⁴ Employment Relations Act 2000, sch 3 cl 12.

that sound reasons exist for the making of such an order, displacing the presumption in favour of open justice.⁵

[15] Most applications are in respect of a party or witness; applications in respect of a representative are rare.⁶

Mr Bennett holds himself out as an advocate

[16] Mr Bennett has practiced as a lay advocate in the employment jurisdiction for some years. He practices under the firm name “Bennett & Associates Employment Law”.

[17] Under s 236 of the Employment Relations Act 2000, a party can choose anyone to represent them, including before the Authority or the Court.⁷ Representatives do not need to be lawyers. There is no regulation of lay representatives; a party who is dissatisfied with the conduct of their lay representative is not able to lodge a complaint with any official body. The New Zealand Law Society, which oversees such matters in respect of lawyers, has no role to play in respect of lay representatives. The lack of any regulation or required oversight of lay representatives has been the subject of discussion. The issue is, however, principally one for Parliament.⁸

[18] Nevertheless, as the Court and the Authority have previously noted, all representatives in employment law matters have a considerable responsibility to the people or businesses they represent. If representatives find they cannot properly represent their clients, they should advise their clients of the true state of affairs and help them find assistance elsewhere.⁹

[19] As can be seen from the *Goldie* judgment, Ms Goldie relied on Mr Bennett to advance her personal grievance in a professional and prompt manner. As also can be

⁵ *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310; and *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.

⁶ But see *Parker v Silver Fern Farms Ltd (No 2)* [2009] ERNZ 327 (EmpC); *HG v Employment Relations Authority* [2021] NZEmpC 148; and *GF v New Zealand Customs Service* [2021] NZERA 382.

⁷ See also Employment Relations Act 2000, sch 3 cl 2.

⁸ *Ward v Concrete Structures (NZ) Ltd* [2019] NZEmpC 111 at [11]–[12].

⁹ *Bennett v Employment Relations Authority* [2020] NZEmpC 54, [2020] ERNZ 136, at [55]; and *Davidson v Great Barrier Airlines Ltd* [2016] NZERA Auckland 403 at [26].

seen, no steps were taken by or on behalf of Mr Bennett to advise Ms Goldie of the difficulties that he was facing. Indeed, in mid-March 2022, Mr Bennett spoke with Ms Goldie and advised her he would update her the following day.¹⁰ Even accepting the difficulties Mr Bennett found himself in, at an absolute minimum he, or someone on his behalf, should have advised Ms Goldie in or before that conversation that he could no longer act for her. Ideally, assistance would have been given to her to find someone else to deal with her personal grievance.

[20] Mr Bennett suggests that no third party is affected if the non-publication order is made. I do not accept that. Unfortunately, as Ms Goldie pointed out before the Authority, she is not the first client of Mr Bennett's to be let down.¹¹ *Bennett v Employment Relations Authority* refers to a matter that arose in 2016,¹² but even before then there were other instances on the public record that illustrated similar behaviour on Mr Bennett's part.¹³

[21] It is also of concern that, despite these issues arising previously, no steps seem to have been put in place prior to Mr Bennett's engagement by Ms Goldie to ensure that his clients were protected if he again was unable to proceed with instructions. There is no indication that Mr Bennett has now retired from working as an employment advocate. Potential clients of Mr Bennett are entitled to know of the possible difficulties that may arise.

[22] I am conscious too that if non-publication orders were made to the extent sought by Mr Bennett, Ms Goldie would be unable to advise friends or associates of the name of the advocate who had failed to look after her interests. I consider that would be an unfair restraint on Ms Goldie and that there could be consequences for other people that she is associated with if she is unable to warn them of the difficulties she encountered with Mr Bennett.

¹⁰ *Goldie*, above n 3, at [21].

¹¹ *Goldie*, above n 1, at [10].

¹² *Bennett*, above n 9; *Davidson*, above n 9.

¹³ *Davidson*, above n 9, at [28]; *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 289 at [24]; and *McCormick v Compass Communications Ltd* [2015] NZERA Auckland 293 at [4] and [14]–[16].

[23] As Mr Bennett identified in his notice of application, the Court has to balance the principle of open justice and the interests of the person seeking non-publication orders. Here, the Court must balance the interests of members of the public who may be looking to engage an employment advocate against the potential detriment to Mr Bennett or other people of his name and medical information being published.

[24] That previous similar instances are already in the public domain counts against an order being made in respect of Ms Goldie's case. Further, and as noted, although Mr Bennett has provided information to explain why he failed to progress Ms Goldie's matter, he has given very little information on what he anticipates would be the consequence to him or to other people of publication.

[25] In the circumstances, I do not consider that a non-publication order over Mr Bennett's name is in the interests of justice. The interim order made on 21 September 2022 is rescinded. This judgment will, however, be withheld from the Employment Court's website for 28 days from the date of the judgment to allow Mr Bennett to consider the judgment.

[26] Mr Bennett has provided detailed health information to explain his inaction on Ms Goldie's case. I accept that there are significant privacy issues involved. I also see no wider public interest in the health information being published beyond what is contained in this judgment and in the Authority's determination.

[27] Accordingly, I make an order that the information before the Court and the Authority of Mr Bennett's own health issues may not be published, beyond what is contained in this judgment and in the Authority's determination. For completeness, I confirm that the non-publication orders made by the Authority continue.

[28] There is no issue as to costs.

J C Holden
Judge

Judgment signed at 9.45 am on 28 April 2023