IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2023] NZEmpC 99
WRC 20/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for non-publication order
BETWEEN	DOMINIC JAMES SPEED Plaintiff
AND	BOARD OF TRUSTEES OF WELLINGTON GIRLS COLLEGE Defendant

Hearing: 10 March 2023
(Heard at Christchurch via Audio Visual Link)

Appearances: No appearance for plaintiff
P McBride and A Nash, counsel for defendant
J Wass, counsel assisting

Judgment: 23 June 2023

JUDGMENT OF JUDGE K G SMITH
(Application for non-publication)

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[1] As long ago as June 2017, I issued an interlocutory judgment in a claim by Dominic Speed against his former employer, the Board of Trustees of Wellington Girls College.[1]

[1] *Speed v Board of Trustees of Wellington Girls College* [2017] NZEmpC 74.

[2] The judgment dealt with Mr Speed's application for a stay of the proceeding while he pursued a claim in the High Court related to, and potentially touching on, the subject matter of the claim before this Court.

[3] Mr Speed now has concerns that his name was published in the judgment and attributes certain personal difficulties to that fact. He has sought orders, to be discussed more fully shortly, relating to the publication of his name.

[4] A brief overview is required to provide some context to this discussion. Mr Speed is a qualified school teacher. From February 2006 he was employed by the College.[2] Mr Speed applied to what was then the New Zealand Teachers Council to renew the practicing certificate he was required to hold to be employed by the College and which was necessary to maintain his work visa.[3] The Teachers Council did not process his application. The result of that failure was that Mr Speed could not maintain his visa or employment. He was dismissed by the College.

[5] Mr Speed successfully judicially reviewed the failure of the Teachers Council to process the application to renew his practising certificate.[4] He then issued proceedings in the High Court against the Teachers Council and others, including the College, seeking damages. Separately he had pursued employment-related remedies from the College following his dismissal. It was his challenge to an Employment Relations Authority determination that was stayed.

[6] When the application for a stay was heard Mr Speed did not seek an order for non-publication of his name, even though the subject was raised with counsel who appeared at that time.[5]

[7] In 2019 Mr Speed discontinued his proceeding in this Court. Matters rested there for several years until mid-2022, when he applied for "interim name suppression". Two applications were filed that have been dealt with together. The first application sought orders in the following terms:

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2 At [6].
3 At [8].
4 *S v New Zealand Teachers Council* [2014] NZHC 2881, [2015] 3 NZLR 39.
5 *Speed*, above n 1, at [6].

(a) That the name Dominic James Speed be suppressed on an interim basis in any "republication" of the whole or any part of the judgment dated 9 June 2017.

(b) That in any such "republication" he be referred to only as "S".

[8] In the second application Mr Speed sought to "suppress" his name but included a request described as being for a non-publication order. The further orders sought were for:

(a) removal of the judgment from the Court's website;

(b) removal of it from "Google searches"; and

(c) the amendment of his name in the judgment to read "D Speed".

[9] In support of these applications Mr Speed supplied a copy of a letter from the Teaching Council of Aotearoa New Zealand apologising to him for what happened and a certificate of his professional standing as at 15 August 2019.[6] The certificate stated that Mr Speed was registered from September 2004 and that his registration and/or practising certificate had not been suspended or revoked. It recorded that there were no disciplinary matters outstanding and no formal action had been taken in relation to him.

[10] In combination both applications described briefly Mr Speed's difficulties over attempts to secure, or maintain, ongoing employment. The second application acknowledged five other judgments or decisions of New Zealand courts or tribunals where Mr Speed's name was published.

[11] The second application was supported by a statement that a request that his name not be published should have been made at the hearing that resulted in the June 2017 judgment but was not.

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6 Teaching Council Aotearoa New Zealand is the legal successor to New Zealand Teachers Council.

Non-publication

[12] Despite the wording of the applications, it was common ground that what was being sought were orders for non-publication pursuant to cl 12 of sch 3 to the Employment Relations Act 2000 (the Act).

[13] Clause 12(1) of sch 3 to the Act reads:[7]

> 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.

Counsel to assist

[14] Mr Wass was appointed as counsel to assist. The Court is grateful for his thorough and very helpful submissions and other assistance.

[15] Mr McBride appeared for the College in the original hearing and in response to Mr Speed's applications. His participation was described as being to assist the Court with factual and legal matters aside from which the College abided the Court's decision.

Preliminary issue

[16] There is a preliminary issue to address. Mr Speed lives in the United Kingdom. At a late stage he advised the Court that he had encountered a difficulty in the United Kingdom preventing him from participating any further in support of his applications, but he stopped short of withdrawing or discontinuing them.

[17] At my direction Mr Wass made inquiries about the nature and extent of that difficulty. Following Mr Wass' inquiries, Mr Speed and counsel were informed that there was no impediment to the Court considering the applications. They were set

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[7] And see cl 12(2) which allows orders to be made where the Court resolves a proceeding by consent order.

down to be heard by audio visual link at a time enabling Mr Speed to participate from the United Kingdom.

[18] Just before the hearing date Mr Speed requested an adjournment to an indeterminate future date. That request was declined. He did not attend the hearing and efforts to contact him at the beginning of it went unanswered.

[19] Mr Speed knew the hearing date and time because he had received a hearing notice advising him of them. His request for an adjournment was made in the knowledge that he was asking to defer the hearing from the allocated date. The minute declining to adjourn confirmed the hearing date. Despite Mr Speed not being present or represented, I decided it was appropriate to continue bearing in mind that he had already filed brief submissions and assistance was being provided to the Court by Mr Wass and Mr McBride.[8]

Relevant issues

[20] The applications give rise to the following issues:

(a) Issue 1: Can the judgment now be revisited to order that Mr Speed's name not be published or that it is anonymised?

(b) Issue 2: If the answer to (a) is yes, should an order be made in this case?

(c) Issue 3: Can the Court make orders preventing the judgment from being able to be searched using Google or any other search engine (referred to as a take-down order)?

(d) Issue 4: Can the judgment be ordered to be removed from the Ministry's website and, if so, should such an order be made?

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[8] The Court is empowered to proceed if any party fails without good reason to attend or be represented; see sch 3 cl 16 to the Act.

Issue 1: Can the judgment now be revisited?

[21] Mr Speed's submissions concentrated on the consequences he attributed to the judgment being available to search. He made no separate comment about the Court's ability to grant the orders he sought.

[22] Mr Wass accepted that the starting point is the fundamental principle of open justice, as described in *Erceg v Erceg*, which would ordinarily result in a party's name being published.[9] However he submitted the fundamental principle described in *Erceg* could be departed from provided there was a proper reason to do so.

[23] The argument was that cl 12 provides the Court with a discretion that is sufficiently broad that it can be used to respond to the circumstances of this case.[10] That meant the Court could prohibit the publication of Mr Speed's name now, even though that action would be several years after the judgment was issued and despite it already being available publicly.

[24] Mr Wass supported his submission by relying on the text of cl 12, which is both broadly expressed and without any temporal parameters. To emphasise this submission, he referred to other powers of the Court that enable it to act effectively. He was referring to the inherent powers available to the Court subject to statutory regulation or limitation.[11]

[25] Supplementing those observations Mr Wass pointed to other parts of the Act, and Employment Court Regulations 2000, that assist this broad interpretation. Specifically, he referred to the Court's equity and good conscience jurisdiction and to reg 6.[12] By way of example the regulation had been used to enable the Court to correct slips or errors,[13] to recall judgments,[14] and to consider ordering an in-camera hearing.[15]

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9 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.
10 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38.
11 See *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.
12 Employment Relations Act 2000, s 189.
13 *Vaughan v Canterbury Spinners Ltd* EmpC Christchurch CC5/04, 18 March 2004.
14 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (HC); referred to in *Tairawhiti Polytechnic v Hayward* EmpC Auckland ARC 17/04, 22 December 2005.
15 *Q v Commissioner of Police* [2015] NZEmpC 8, [2015] ERNZ 202.

[26] Finally, Mr Wass referred to Judge Beck's decision in *JKL v Stirling Andersen Ltd* that analysed the Authority's powers to order non-publication. In that case the Court concluded there were no time-related restrictions that would prevent the Authority from making an order after it had released a determination.[16] Mr Wass' submission was that the similarity between powers available to the Authority and Court pointed to the same conclusion being reached in this case.

[27] With that background Mr Wass submitted that Mr Speed's applications could be successful provided the evidence he presented reached the required threshold. In relation to that threshold he drew attention to other cases where the Court had been prepared to make non-publication orders about a party's name because of concerns about future employment-related problems.[17]

[28] Mr McBride's response was that cl 12 contemplates in its text and purpose the making of non-publication orders prospectively but not retrospectively. He emphasised the reference to "in any proceedings", which he considered contemplates something that is still in some way properly before the Court. The proceeding ended in August 2019 when Mr Speed discontinued it and that meant, it was said, there was nothing left to resolve or to revisit. In a colourful expression Mr McBride likened the power in cl 12 to keeping "the genie within its bottle" not to "try to put the genie back into the bottle".

[29] The Court's inherent powers to discharge its statutory jurisdiction and uphold the administration of justice within its jurisdiction did not assist, in Mr McBride's submission, because the Court lacked the jurisdiction to entertain the applications.[18] On this analysis the Court could not revisit the judgment to consider if a non-publication order should be made.

[30] Mr McBride made two further submissions. The first one was that, even if the Court could make an order, it would be futile to do that now given the elapsed time since the 2017 judgment was delivered and the judgments from other Courts that

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16 *JKL v Stirling Andersen Ltd* [2022] NZEmpC 107.
17 *Elisara v Allianz New Zealand Ltd* [2019] NZEmpC 123, [2019] ERNZ 438 at [63]; *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441.
18 *Seimer v Solicitor General* [2013] NZSC 68.

named Mr Speed. The second one was that the text in cl 12 was not broad enough to result in a decision to not publish the judgment itself.

[31] Mr Wass and Mr McBride each referred to cases which touched in some way on the ability or appropriateness of making retrospective orders that illustrated divergent results. For example, Mr Wass referred to *D v The Police* where an anonymisation order was made by the Supreme Court with retrospective effect.[19] Mr McBride referred to *W v R* where the Court of Appeal doubted it could redact retrospectively a judgment that had previously been issued.[20]

Analysis

[32] The starting point is the principle of open justice explained by the Supreme Court in *Erceg*, as being of constitutional importance that was "an almost priceless inheritance".[21]

[33] The underlying rationale for the principle is that transparency for court proceedings maintains public confidence in the administration of justice and guards against arbitrariness or partiality, or a suspicion of them.[22] The Supreme Court accepted that the principle may be departed from, but only to the extent necessary to serve the ends of justice.[23]

[34] Clause 12 was analysed extensively in *Crimson Consulting Ltd v Berry*.[24] In that case the Court held that cl 12 did not require the party seeking non-publication to establish exceptional circumstances exist to justify an order being made, although the standard for departing from the fundamental principle of open justice is a high one.[25]

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19 *D v The Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [136]-[147]. I note that this case and *W v R* [2019] NZCA 192 both involved name suppression in criminal matters which may involve different considerations from those in cl 12.
20 *W v R*, above n 19, at [26].
21 *Erceg*, above n 9, at [2]; *Scott v Scott* [1913] AC 417 (HL) at 447.
22 At [2].
23 At [3].
24 *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94; [2017] ERNZ 511.
25 At [96].

[35] In *Crimson*, the Court commented that the party seeking an order must show specific adverse consequences, and a case-specific balancing of the competing factors is required.[26] Similar conclusions were reached in *AJH v Fonterra Co-Operative Group Ltd*.[27]

[36] I am satisfied that the Court has the power to grant a non-publication order after a judgment has been issued, so long as appropriate grounds exist.

[37] I do not accept Mr McBride's submissions that cl 12 contemplates only prospective orders and that there must still be a proceeding before the Court before one can be made. That approach is too narrow. In my view Mr Wass was correct to say that the text of the clause is sufficiently broad to encompass Mr Speed's applications and there are no timing-related restrictions in it to the contrary.

[38] While it is correct to say that a judgment once delivered must stand for better or worse, there are situations where it is appropriate for steps to be taken after it is delivered, which supports the view that the power in cl 12 is not time limited.[28] Examples include those mentioned earlier, such as recalling a judgment to correct a slip, or to deal with issues that ought to have been addressed but were overlooked for some reason. It would be artificial, and contrary to the Court's equity and good conscience jurisdiction, to place the Court in the position where it could not respond to a situation meriting non-publication merely because the application was made late.[29]

[39] The answer to the first issue is yes, the Court continues to have jurisdiction to make a non-publication order.[30]

Issue 2: Should an order be made?

[40] Two preliminary observations need to be made. The first one is about the passage of time since the judgment was issued. It was published on the Court's website shortly after it was provided to the parties. It has been, therefore, available

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26 At [96]. It was accepted that the position may be different at an interim stage.
27 *AJH v Fonterra Co-Operative Group Ltd* [2021] NZEmpC 111.
28 *JKL*, above n 16.
29 Section 189.
30 *Horowhenua*, above n 14.

publicly for about five years. At no time during those years has an attempt been made to seek either non-publication or anonymisation of Mr Speed's name.

[41] The second observation is the number of decisions relating to Mr Speed that touch on his employment in New Zealand aside from the Court's June 2017 judgment. His applications concentrated on the judicial review proceeding where his name was anonymised and reported as *S v New Zealand Teachers Council* but there were three other High Court judgments each one of which named him.

[42] Mr Speed was named twice in the High Court by Williams J, in decisions where interim orders were sought to prevent his deportation.[31] In the first decision the Court described Mr Speed's employment by the College, the difficulties he got into with authorities, and that he faced deportation. The second decision was an unsuccessful application to recall the first judgment.

[43] In 2016, Brown J dealt with applications for security for costs sought in the proceeding Mr Speed filed seeking damages after his success in *S*.[32] The judgment named Mr Speed and referred to the earlier judgment in *S*. While non-publication was not explicitly addressed by Brown J, naming Mr Speed and cross-referencing to a decision where his name was anonymised indicates that, by 2016, the High Court was no longer prepared to prohibit publication of his name.

[44] Mr Speed was also named in two Authority determinations.[33] All of those decisions are available to be searched.

[45] Aside from the difficulties presented by the timing of Mr Speed's applications they were not supported by information which could have led to a non-publication order.

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31 *Speed v Chief Executive of the Department of Labour* HC Wellington CIV-2011-485-1369, 18 July 2011; *Speed v Chief Executive of the Department of Labour* HC Wellington CIV-2011-485-1369, 14 July 2011.

32 *Speed v Education Council of Aotearoa New Zealand* [2016] NZHC 1848, (2016) 23 PRNZ 271.

33 *Speed v Board of Trustees Wellington Girls College* [2012] NZERA Wellington 79; *Speed v Board of Trustees of Wellington Girls' College* [2012] NZERA Wellington 113.

[46] The onus was on Mr Speed to establish that an order should be made. He filed a brief affidavit that was a vehicle to produce to the Court the letter of apology from the Teaching Council and its statement of his professional standing mentioned earlier. He provided an email from one person in the United Kingdom asking him for his version of events about a "perturbing article", which is presumably about a news item not the judgment.

[47] As to Mr Speed's employment-related difficulties in recent years, he supplied little information from which relevant conclusions might be drawn. He stated that he lost a job in Bangalore when it was curtailed to one year, another potential job in Morocco was refused, an unnamed school terminated his employment on the first day, a reputable employment agency refused to put his name forward for further employment opportunities, and he referred to one incident where an employment opportunity was withdrawn by a school in Mumbai without reasons being given.

[48] Why Mr Speed encountered these difficulties, and when, was not explained. From this information it is impossible to know if the reason for adverse decisions or outcomes was dissatisfaction with him, concerns over attention he garnered in the press when his difficulties in New Zealand emerged, the 2017 judgment or something else.

[49] One document was provided as an attachment to Mr Speed's submissions that may have assisted him. It was from an Employment Tribunal case and was in the nature of a statement of defence filed by a school in the United Kingdom. That document refers to an internet search that led to the 2017 judgment. However, without more complete information explaining the litigation, the unverified contents of that document do not advance the discussion far, nor illustrate why the delay in applying should be put aside.

[50] I am not satisfied that non-publication orders should be made for the following reasons. First, the time that has elapsed since 2017 makes the application futile.

[51] Second, the evidence falls short of establishing that the high threshold for non-publication has been reached.

[52] Third, there is considerable force in Mr McBride's observations:

(a) that Mr Speed's name has already been published in connection with his disputes with the Teachers Council and College; and

(b) that the High Court discontinued the anonymisation of his name,

both of which point away from making an order.

[53] Fourth, all the other judgments or determinations referred to earlier named him and are able to be searched and connected to the circumstances that saw him lose his employment with the College.

[54] Before leaving the discussion of this issue a brief comment is required about an assumption in Mr Speed's applications to the effect that if non-publication had been applied for in 2017, it would have succeeded. Such an assumption is misplaced. It is not at all clear that at the time the hearing was conducted there were any circumstances that might have justified non-publication being ordered. By that time Mr Speed's name had already been published by the High Court and the Authority.

Issue 3: Take-down orders?

[55] The next issue is the request for the judgment to be removed from internet searches, described by Mr Wass as an application for a take-down order. Mr Speed's application was interpreted by counsel as inviting the Court to make an order that the judgment be removed from the Court's website and be taken down from other sites. Mr Wass and Mr McBride submitted that such an order was not possible.[34] This issue is overtaken by the conclusion on issue 2, but nevertheless I agree with counsel's submission.

[56] The High Court has power to issue take-down orders by exercising its inherent jurisdiction. That jurisdiction is not available in this Court. However, in *Bay of Plenty*

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[34] *Bay of Plenty District Health Board v Culturesafe New Zealand Ltd* [2020] NZEmpC 149, [2020] ERNZ 367; citing *Lyttelton v R* [2016] NZCA 279, [2016] 2 NZLR 21.

District Health Board v Culturesafe New Zealand Ltd, Judge Corkill considered the Authority's power to make take-down orders and concluded that one could be made as a condition of a non-publication order but not otherwise.[35] Applying the same analysis to the Court's jurisdiction, Mr Wass submitted that the Court might contemplate a take-down order if, for example, a compliance order under s 139(2) was made. I agree with the analysis in *Bay of Plenty District Health Board* and its applicability to this Court, but that was not the situation in this case.

[57] There was therefore nothing to which a take-down order could be connected. Any publicity flowing from the Court's judgment did not breach an order. It follows that the Court could not direct any publishing platform to take down either the decision or comment about it.

[58] Finally, Mr Speed referred to the fact that a number of news outlets have published articles about him but, according to him, either withdrawn them from accessible platforms or agreed to anonymise his name when approached to address his concerns. Any arrangements he has made with news agencies have no bearing on whether his name should be published in the 2017 judgment.

Issue 4: Can the judgment be removed from the Ministry's website?

[59] This issue has been dealt with in the earlier analysis. In the absence of a decision in Mr Speed's favour there could be no justification for directing the Court (assuming but without deciding that such a power exists) to remove the decision from the Ministry of Justice's website.

Outcome

[60] Mr Speed's applications for non-publication or anonymisation of the 2017 judgment and associated orders are unsuccessful and are dismissed.

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[35] *Bay of Plenty District Health Board*, above n 34, at [159]; Employment Relations Act 2000, s 160(1)(f).

[61] Costs are reserved. My preliminary view is that it would be appropriate for costs to lie where they fall. If, however, costs are to be pursued memoranda may be filed.

K G Smith
Judge

Judgment signed at 4.30 pm on 23 June 2023