

Balancing privacy and open justice: Full Employment Court provides guidance on non-publication orders

A full Employment Court has released a judgment providing guidance on how the Employment Relations Authority and Employment Court should approach non-publication orders in the future.¹

The case arose from a challenge to an Employment Relations Authority (**Authority**) decision where the Authority had made various orders in favour of the plaintiff, but had declined to make an order for non-publication over the plaintiff's name. The plaintiff challenged the non-publication aspect of the determination.

While the challenge was directed to a narrow point, the Employment Court (**Court**) considered it was a good opportunity to review the Authority and Court approaches to non-publication in general. A full Court was convened to hear the challenge, and leave was granted to numerous interested organisations to appear and be heard.

Spoiler alert – the full Court unanimously agreed to overturn the Authority determination and granted the application for non-publication. However, whilst the judges all agreed on the overall result, Chief Judge Inglis preferred a different approach to considering non-publication matters than the Majority (made up of Judge Corkill, Judge Holden and Judge King).

Current approach to non-publication

At the time this case was heard, the *Erceg v Erceg*² and *Crimson Consulting Ltd v Berry*³ approaches to non-publication were often being applied to applications for non-publication.

In *Erceg*, the Supreme Court reinforced the fundamental importance of open justice and concluded

that "*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.*"

Crimson then considered the application of *Erceg* in the Employment Court. On the issue of principle, the Court considered an applicant must show "*specific adverse consequences which would justify a departure from the fundamental rule.*" The Court described that as a high standard and stated that a case-specific balancing of competing factors was required. However, the Court noted that the position may be different at the interim stage.

Judgment of the Majority

The Majority concluded that the general rule of open justice (as expressed in *Erceg*), applies in the employment jurisdiction.

The Majority's preferred approach to non-publication orders is:

1. Open justice is of fundamental importance. It may be departed from, but only to the extent necessary to serve the ends of justice.
2. In most cases, there must first be reason to believe that the specific adverse consequences could reasonably be expected to occur.
3. The necessary evaluation will focus on evidence available. Inferences may be required, but they must be reasonable inferences that may be taken from the evidence, based on the specific circumstances of the case, when considered in context.
4. The Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case. This is a weighing exercise. Equity and good conscience may play a part. Consideration of tikanga will,

¹ *MW v Spiga Limited* [2024] NZEmpC 147.

² *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.

³ *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.

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(Continued)

where appropriate, be woven through that weighing exercise.

5. Neither the Authority nor the Court needs to wait for an application for a non-publication order; they may raise the issue themselves.
6. The same general approach ought to apply at an interim stage as applies at a permanent stage, but the weighing of particular factors may differ at different stages.

The Majority said that one circumstance in the employment jurisdiction where the broader public interest may weigh more heavily in favour of non-publication is where employees go to the Authority or Court seeking minimum entitlements.

The Majority further noted that where enforcement proceedings are brought for a breach of a s 149 settlement agreement that contains a confidentiality clause (as was the case in *Spiga*), that confidentiality clause will necessarily be a significant factor in the application of the *Erceg* test. This will be especially the case where enforcement proceedings relate to enforcing the confidentiality clause itself.

The Majority then set out examples of factors that may be relevant in the weighing exercise:

1. Circumstances of the case.
2. Interests of the person or entity applying for a non-publication order, the other party or parties to the litigation, and any third party.
3. Public interest, including the rights of media.
4. Any further issues of equity and good conscience.
5. Tikanga and its principles, values, or concepts.

The Majority also noted that one option which perhaps should be used more often is that of anonymising the names of participants in the proceedings.

Judgment of Chief Judge Inglis

Chief Judge Inglis suggested that the approach generally adopted to applications for non-publication in the employment jurisdiction should be recalibrated. The Chief Judge would prefer to remove the presumption against non-publication, and for the Authority and Court to make an order where they consider it appropriate to do so.

The Chief Judge's view was that, in considering an application, it would be appropriate to assess what is at stake and what the interests of justice require, viewed through the lens of the objectives of the legislation – listing equity and good conscience as the ultimate touch-stone.

While the Chief Judge had differing views on the 'right' approach, the majority's approach will be applied in future cases.

Applying the Majority's approach

We are now starting to see the Authority and Court apply the Majority's approach to subsequent cases.

Interestingly, in *M v Q*,⁴ Judge Corkill anonymised the names and identifying details of parties to a judgment that was issued seven years prior. Judge Corkill also made a non-publication order in respect of personal medical information from the employee's evidence.

Chief Judge Inglis has applied the Majority's approach in *FDE v UWV*.⁵ The applicant had struggled to find alternative employment, and considered prospective employers had been googling their name. Chief Judge Inglis said that equity and good conscience was "*particularly engaged*" and that it would "... offend the Court's conscience for the applicant to be penalised into the future for exercising a right they were perfectly entitled to exercise..."⁶

While the Majority in *Spiga* essentially kept the status quo, with some employment specific flare added, we do expect to see the number of non-publication applications, and perhaps, those granted, to increase.

⁴ *M v Q* [2024] NZEmpC 153.

⁵ *FDE v UWV* [2024] NZEmpC 179.

⁶ At [27].

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