**ORDER FOR NON-PUBLICATION OF INFORMATION CONTAINED AT [106] OF THIS JUDGMENT**

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

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

**[2024] NZEmpC 147**
**EMPC 20/2023**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | MW<br>Plaintiff |
| AND | SPIGA LIMITED<br>Defendant |

Hearing: 9–10 October 2023
(Heard at Auckland and by memoranda filed on 3 and 8 May 2024)

Full Court: Judge B A Corkill (Presiding)
Chief Judge Christina Inglis
Judge J C Holden
Judge M S King

Appearances: A Mapu, advocate for plaintiff
No appearance for defendant
R Harrison KC, counsel to assist
P Cranney, counsel for New Zealand Council of Trade Unions as intervener
K Radich and C Pearce, counsel for New Zealand Law Society Te Kāhui Tūre o Aotearoa and New Zealand Bar Association (Ngā Ahorangi Motuhake o Te Ture) as interveners
CW Stewart and JO Whyte, counsel for The Law Association Incorporated as intervener
AF Drake, counsel for Employment Law Institute of New Zealand Incorporated as intervener (attendance excused for 9 October 2023)
K Dalziel and J Wong, counsel for Privacy Commissioner as intervener
P O'Neil (via VMR), counsel for Employers and Manufacturers Association (Northern) Incorporated as intervener
K Khanna (via VMR), agent for Human Resources Institute of New Zealand as intervener

D Nilsson, counsel and H Ewen, advocate for Stuff Limited, NZME Publishing Limited and Radio New Zealand Limited as interveners
P Kiely and A Kamphorst, counsel for Business New Zealand as intervener
R Siciliano and J Rainbow (via VMR), counsel for Te Hunga Rōia Māori o Aotearoa Incorporated as intervener

Judgment: 8 August 2024

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**JUDGMENT OF THE FULL COURT**

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**REASONS**


| | **Para No.** |
|---|---|
| Judge Corkill, Judge Holden and Judge King | [1] |
| Chief Judge Inglis | [109] |


**JUDGES B A CORKILL, J C HOLDEN AND M S KING**

**Table of Contents**


| | |
|---|---|
| The plaintiff challenges the Authority's decision declining non-publication | [1] |
| The parties and their problem | [7] |
| Two issues arise | [11] |
| Case law to date | [13] |
| The powers of the Authority and the Court | [22] |
| *Particular provisions relating to the Employment Relations Authority* | [26] |
| *Particular provisions relating to the Employment Court* | [28] |
| Open justice is fundamental | [36] |
| The broader context | [47] |
| The relevance of privacy interests | [56] |
| The role of tikanga | [62] |
| The effect of publication | [69] |
| The relevance of confidential information/commercial realities | [79] |
| The evidential standard | [82] |
| Our preferred approach | [86] |
| Challenge succeeds – non-publication orders should be made | [97] |
| Conclusion and orders | [105] |
| Final record | [108] |

## The plaintiff challenges the Authority's decision declining non-publication

[1] MW was employed by Spiga Ltd for around three months. An employment relationship problem arose, ultimately leading to attendance at mediation and MW's departure on agreed terms. The settlement was signed off by a mediator engaged by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE), under s 149 of the Employment Relations Act 2000 (the Act).[1]

[2] Although Spiga Ltd made the payments required by the settlement agreement, MW claimed in the Authority that Spiga Ltd did not comply with the confidentiality and non-disparagement clauses in the agreement and sought non-publication orders. While the Authority found that the confidentiality provision in the settlement agreement had been breached and made a non-publication order to preserve the confidentiality of the settlement sum, it declined to make such an order in respect of MW's name.[2] MW has challenged that aspect of the determination.

[3] The challenge raises an important issue about the approach the Employment Relations Authority and the Employment Court should follow in considering non-publication orders under the Act.[3] The central question is whether the approach generally followed in other courts, and so far in the employment institutions, is one that ought to apply going forward in the employment jurisdiction.

[4] The challenge by MW is directed to a relatively narrow point, namely whether a non-publication order ought to have been made in respect of their name in the context of a confidential s 149 settlement agreement. However, it has provided an opportunity to review the approach to non-publication in general.

[5] For this reason, a full Court was convened to hear the challenge, and leave was granted to numerous interested organisations to appear and be heard. The Court has been assisted by their submissions, the evidence and information they have put before us, and the differing perspectives they have brought to bear on the analysis.

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1 Referred to colloquially as a s 149 settlement agreement.
2 *MW v Spiga Ltd* [2022] NZERA 661 (Member Urlich). The Authority also ordered Spiga Ltd to pay a penalty.
3 Employment Relations Act 2000, sch 2 cl 10 and sch 3 cl 12.

[6] The judges of the full Court unanimously agree that the challenge succeeds; non-publication is appropriate in the circumstances. The judges, however, have differing views as to the correct approach going forward. This judgment is that of the majority.

## The parties and their problem

[7] Before going further, we say a bit more about the parties and what has brought them before the Court.

[8] Neither Spiga Ltd nor MW is particularly well-resourced. Spiga Ltd is a small company with what appears to be limited resources. MW gave evidence that after their employment with Spiga Ltd ended, they put their savings towards the purchase of a small business, which they now run. They may want to return to employment at some stage but are concerned about the impact of the Authority's decision not to grant non-publication orders in their favour. They fear that prospective employers will draw adverse conclusions about their suitability and that their reputation within their community and within their broader family network will suffer. We were told that MW's representative has personally met the costs associated with the challenge, as MW is not in a position to do so.

[9] In their evidence, MW confirmed that they wanted to avoid the possibility of being publicly named and that this was a key reason why they had agreed to settle with the company. We had no difficulty accepting their evidence.

[10] Because of the s 149 settlement agreement, MW did not pursue a claim against Spiga Ltd in the Authority. Spiga Ltd then breached the terms of settlement, which led to MW taking action in the Authority, something they had wanted to avoid by settling with the company. Although the Authority found that Spiga Ltd breached the confidentiality provision in the settlement agreement, it declined to prohibit publication of MW's name.

## Two issues arise

[11] Two non-publication issues arise. First, for the purposes of the challenge, we must consider the principles relating to applications for non-publication orders in the Authority to determine whether it erred as a matter of fact or law in the approach it adopted.

[12] Second, the Court must also consider the principles that apply to its own consideration of applications for non-publication orders. This is because an interim order of non-publication was made in respect of the proceedings in the Court, so as to protect the plaintiff's position whilst the challenge was considered. Should the Court make that order permanent? If the challenge were to be allowed, it would be almost inevitable that the Court would need to make a mirror order to that of the Authority. However, as this judgment is a guideline judgment, we must consider the non-publication principles that apply to the Court.

## Case law to date

[13] It is convenient to start with the approach that applied for many years. That approach was epitomised by the judgment of Chief Judge Goddard in *Anderson v Employment Tribunal.*[4] There, the Court said the power to make a non-publication order should only be exercised where "some serious impairment to the interests of justice" would otherwise occur.[5] In Chief Judge Goddard's view, the appropriate test was whether there were "exceptional circumstances which reveal a real risk that the administration of justice would be frustrated or rendered impracticable" if publication was to occur.[6]

[14] Coming forward to 2014, a full Court considered the test for non-publication applications in *H v A Ltd*.[7] The focus of debate was whether to apply either an "exceptional circumstances" threshold, or a less onerous test or standard. The majority

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4 *Anderson v Employment Tribunal* [1992] 1 ERNZ 500 (EmpC).
5 At 522.
6 At 523.
7 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38.

preferred an "overall interests of justice" standard.[8] However, the minority preferred an "exceptional circumstances" standard.[9]

[15] Leave to appeal that decision was declined.[10] In declining leave, the Court of Appeal cited its then recent decision in *Jay v Jay*, in which it held that there was no requirement for "exceptional circumstances" in civil cases.[11] The Court in *Jay v Jay* also noted the Supreme Court's observation in *Muir v Commissioner of Inland Revenue* that the situations warranting confidentiality were "likely to differ … within [civil cases], as legislation often dictates."[12]

[16] The next significant case is *Erceg v Erceg [Publication restrictions]*.[13] That case concerned the power of the courts "to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers."[14] 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."[15]

[17] *Crimson Consulting Ltd v Berry* considered the application of *Erceg* in the Employment Court, against the background of the full Court decision in *H v A Ltd*.[16] *Crimson Consulting* involved a non-de novo challenge to a determination where the Authority had declined to maintain extensive non-publication orders relating to the names of the parties and to information alleged to be commercially sensitive or prejudicially irrelevant and inadmissible.[17] Since the substantive proceeding had yet to be heard, the Court made an interim order in respect of commercially sensitive information and allegations alleged to be irrelevant to the proceeding.[18]

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8 At [78]–[79] and [97].
9 At [43].
10 *A Ltd v H* [2015] NZCA 99 at [8].
11 *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [118].
12 *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 376 (SC) at [2].
13 *Erceg v Erceg* [*Publication restrictions*] [2016] NZSC 135, [2017] 1 NZLR 310.
14 At [13].
15 At [13].
16 *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.
17 At [15].
18 At [128], [133] and [180]; and see *Crimson Consulting Ltd v Berry* [2017] NZEmpC 106 as to the final form of the orders made at that stage.

[18] On the issue of principle, the Court considered an applicant must show "specific adverse consequences which would justify a departure from the fundamental rule."[19] 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.[20]

[19] More recently, there has been a series of cases where the Court noted concerns as to the impacts of publication. A theme of these cases was a concern that there may be a risk of prejudice to people seeking employment who have been publicly involved in proceedings under the Act.[21] By 2022, it was observed that where an employee's ongoing prospects of employment could be detrimentally affected by participation in an employment proceeding, that was relevant to the weighing exercise the Court was required to undertake.[22]

[20] In this case, the Court is required to determine whether the test which has often been applied by both the Authority and the Court since 2016, relying on *Erceg* and *Crimson Consulting*, should now be revisited. A helpful and broad spectrum of views on this point has been placed before the Court by the plaintiff, counsel to assist, and the interveners.

[21] For the purpose of addressing the issues, it is first necessary to analyse the powers of the Employment Relations Authority and the Employment Court under the Act, as well as any relevant implied powers.

## The powers of the Authority and the Court

[22] Both the Authority and the Court are established under the Act and have exclusive jurisdiction over employment relationship problems.[23]

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19 *Crimson Consulting,* above n 16, at [96].
20 At [96].
21 See *JGD v MBC Ltd* [2020] NZEmpC 193, [2020] ERNZ 447 at [8]–[9]; *AJH v Fonterra Co-operative Group Ltd* [2021] NZEmpC 111, [2021] ERNZ 462 at [12]; *GF v Comptroller of the New Zealand Customs Service (No 3)* [2022] NZEmpC 47 at [3]; and *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, [2017] ERNZ 352 at [100].
22 *GF v Comptroller of the New Zealand Customs Service*, above n 21, at [3].
23 Employment Relations Act, ss 156, 161, 186 and 187.

[23] The Act recognises that this is a special jurisdiction.[24] The Authority must act as it thinks fit in equity and good conscience.[25] The Court also has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to do the same.[26] The Authority is a specialist decision-making body.[27] The Court has special powers, which are to be recognised when the Court of Appeal is considering an appeal.[28]

[24] Both the Authority and the Court have broad powers to order non-publication.[29] It is worth noting that under the previous statute, the Employment Contracts Act 1991, the powers of the Employment Tribunal and the Employment Court were limited to making non-publication orders in respect of any part of any evidence given or the name of any witness.[30] Those powers were broadened in the Employment Relations Act. The current provisions allow the Authority and the Court to 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 made subject to such conditions as the Court or Authority thinks fit.[31] Both the Authority and the Court also have the power to order non-publication in respect of terms of settlement where proceedings have been resolved by a consent order.[32]

[25] The ability to make non-publication orders is related to the Authority's and Court's power to depart from an open hearing. We elaborate on the details of that power for each body.

*Particular provisions relating to the Employment Relations Authority*

[26] Relevantly, the Authority may, in investigating any matter, decide that an investigation meeting should not be "in public" or "should not be open to certain

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24 Sections 214 and 216.
25 Section 157(3).
26 Sections 157(3) and 189.
27 Section 143(f).
28 Sections 214 and 216. See also *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [53]–[59]. For detailed analysis of the long history of this specialist jurisdiction dealing with employment matters in New Zealand see *Canterbury Spinners Ltd v Vaughan* [2003] 1 NZLR 176 (CA) at [1]–[2]; and *New Zealand Van Lines Ltd v Gray* [1999] 2 NZLR 397 (CA) at 402–405.
29 Employment Relations Act, sch 2 cl 10 and sch 3 cl 12.
30 Employment Contracts Act 1991, ss 97 and 109.
31 Employment Relations Act, sch 2 cl 10(1) and sch 3 cl 12(1).
32 Schedule 2 cl 10(2) and sch 3 cl 12(2).

persons".[33] This language implies that an investigation meeting will normally take place in public but that the Authority retains a discretion to sit in private. It may do so as an aspect of its obligation to dispense practical justice.[34] As a party-centric body, it must act as it thinks fit in equity and good conscience and is to issue speedy determinations according to the substantial merits of the case without regard to technicalities.[35]

[27] This is the context within which cl 10 of sch 2 of the Act sits.

*Particular provisions relating to the Employment Court*

[28] There is no express provision governing the circumstances as to when the Court is required to sit in public, or when it may sit in private. The issue of whether the Court can order that involves consideration of whether there is an inherent power to do so under s 188(1) of the Act.

[29] As noted by the Supreme Court in *Siemer v Solicitor-General*, every court has inherent powers which are incidental or ancillary to its jurisdiction.[36] The Supreme Court held: "The courts' inherent powers include all, but only, such powers as are necessary to enable a court to act effectively and uphold the administration of justice within its jurisdiction."[37] A similar observation was made by the full Court in *Axiom Rolle PRP Valuations Services Ltd v Kapadia*, which confirmed that this Court can find and invoke inherent powers to enable it to "act effectually within its jurisdiction, for the necessary expedition of the administration of justice and to avoid abuse of the Court's process."[38]

[30] The obligation to sit in public in order to satisfy open justice principles is related to the ability to sit in private or, as it may be described, in camera (that is, in chambers).[39] The latter is the opposite of the former. In *Erceg*, the Supreme Court said: "there are circumstances in which the interests of justice require that the general

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33 Section 160(1)(e).
34 Employment Relations Authority Regulations 2000, reg 4(1)(c).
35 Employment Relations Act, ss 157, 174, 174A(2), 174B(2) and 174C(3).
36 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [113] and [156]–[159].
37 At [114].
38 *Axiom Rolle PRP Valuations Services Ltd v Kapadia* [2006] ERNZ 639 (EmpC) at [89].
39 *Erceg*, above n 13, at [2].

rule of open justice be departed from, but only to the extent necessary to serve the ends of justice"; significantly "proceedings may be heard in camera, either in whole or in part, in the exercise of the court's inherent power."[40]

[31] The topic of inherent powers was also touched on by the full Court in *Hynds Pipe Systems Ltd v Forsyth*.[41] It noted that the Court's inherent powers "derive from common law", and that: "Various courts have had recourse to such powers over time to do a range of things".[42] It, too, found that one such power is to direct that the Court sit in camera.[43]

[32] The Court has also said it could have recourse to the High Court Rules 2016 on this issue.[44] Rule 9.51 states:

> **Evidence to be given orally**
>
> Unless *otherwise directed by the court* or required or authorised by these rules or by an Act, disputed questions of fact arising at the trial of any proceeding must be determined on evidence given by means of witnesses examined orally *in open court*.
>
> (emphasis added)

[33] The conclusion from the foregoing is that the Court must sit in open court, save in circumstances where the statute says otherwise, or by recourse to the inherent power to do otherwise where a departure is necessary to serve the ends of justice.[45]

[34] Because non-publication involves a departure from the fundamental principle of open justice, we think that the evaluation of a non-publication application must take account of the rationale for sitting in public.[46]

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40 At [3].

41 *Hynds Pipe Systems Ltd v Forsyth* [2017] NZEmpC 89, [2017] ERNZ 484 at [13]–[17].

42 At [13] and [16].

43 At [16]. See also Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 901–902.

44 *Q v Commissioner of Police* [2015] NZEmpC 8, [2015] ERNZ 202 at [20].

45 *Erceg*, above n 13, at [3].

46 The Court exercises another related power when considering applications for access to court documents. In the absence of an express power, it applies the provisions of the Senior Courts (Access to Court Documents) Rules 2017, via reg 6 of the Employment Court Regulations 2000. See for example *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 160 at [4]. The principle of open justice and the freedom to seek, receive and impart information are relevant considerations. A leading authority on the underlying considerations is *Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd* [2019] UKSC 38, [2020] AC 629.

[35] As is evident from what we have said, there are different thresholds as to when either the Authority or the Court may sit in private. But the relevance of that distinction is limited.

## Open justice is fundamental

[36] What is open justice? Its nature and importance were discussed by the Supreme Court in *Erceg*:

> [2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open Court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language.
>
> [3] However, it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. …

[37] After the hearing of the present challenge, the Court was advised that the Supreme Court was considering an important open justice issue in *M (SC 13/2023) v R*.[47] Accordingly, the Court delayed issuing the present judgment so that it could receive that decision, as well as submissions from counsel about it.

[38] In *M v R*, the Supreme Court was dealing with name suppression under the Criminal Procedure Act 2011. In that context, it confirmed the two-stage test identified by the Court of Appeal in *Robertson v New Zealand Police*: stage one being a threshold determination, and stage two involving a discretionary assessment.[48] In that context, it held that the presumption of open reporting plainly applied to the

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47 *M (SC 13/2023) v R* [2024] NZSC 29 [*M v R*].

48 At [35]; and *Robertson v New Zealand Police* [2015] NZCA 7 at [39]. However, in *M v R*, above n 47, at [45]–[47], the Supreme Court raised a question as to whether the stage two assessment is "discretionary" or "evaluative".

second stage assessment, recognising that "open justice remains a strong and important value because it is fundamental."[49] Although the Court was dealing with the statutory provisions relating to criminal proceedings, it expressly endorsed the statement in *Erceg*, referred to above.[50]

[39] As a civil case, *Erceg* is of more direct relevance to Employment Court proceedings. In that judgment, the Supreme Court stated that, in seeking a departure from open justice, "the party seeking [a non-publication] order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but … that the standard is a high one."[51] It endorsed a statement made by McHugh JA in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* that a non-publication order was only valid "if it is really necessary to secure the proper administration of justice in proceedings before it."[52] The Supreme Court noted, however, 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.[53]

[40] The Supreme Court also approved of a statement made by Kirby P in *John Fairfax Group Pty Ltd v Local Court of New South Wales* regarding exceptions to the general principle, as follows:[54]

> 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.

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49 *M v R*, above n 47, at [39].
50 At [40].
51 *Erceg*, above n 13, at [13].
52 At [17]; and *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 (NSWCA) at 477.
53 *Erceg*, above n 13, at [18].
54 At [18]; and *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 141.

[41] As noted both in *Erceg* and in *M v R*, the right to freedom of expression, affirmed in s 14 of the New Zealand Bill of Rights Act 1990, is plainly a key feature of open justice and is highly relevant to name suppression and non-publication decisions.[55]

[42] As Mr Nilsson, counsel for the media entities, emphasised, there is a connection between the fundamental principle of open justice and protecting the integrity of the justice system. Non-publication and suppression orders affect the relationship between the judiciary and the general public. Whenever such orders are made, that detracts from open justice and has the potential to affect confidence in the applicable court or tribunal. While, of course, this does not mean that non-publication should never be granted, it is no small matter to make such an order. [56]

[43] We accept that many parties to employment litigation would prefer to keep their identity or other aspects of their dispute private. That is far from unique to this jurisdiction. Being involved in civil litigation brings with it the prospect that the parties and their dispute will become known. In many, if not most, cases that is an unwelcome aspect of litigation. *Erceg* is a prime example, where the parties were involved in a dispute relating to private family matters and to confidential family trusts. The applicants for non-publication orders considered that publication of names and other details in the case could create or increase disharmony in the wider family, undermine confidentiality and create concerns for the personal safety of some members of the family.[57] Effectively, the general rule of open justice will usually trump private interests.

[44] The approach in *Erceg* has now been applied in a number of differing statutory and other contexts, including under the Criminal Procedure Act,[58] the Human Rights

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55 *Erceg,* above n 13, at [2] and fn 4; and *M v R*, above n 47, at [42]. See also *Farish v R* [2024] NZSC 65 at [34]–[36].

56 For a recent discussion of the importance of open justice (albeit in the United Kingdom) see Matthew Nicklin, Chair of the Judiciary's Transparency & Open Justice Board "Transparency & Open Justice: Opportunities and Challenges" (Newcastle-upon-Tyne Law Society Annual Lecture 2024, Newcastle Law School, 9 May 2024).

57 *Erceg*, above n 13 at [8]–[9].

58 *M v R*, above n 47.

Act 1990,[59] and the Health Practitioners Competence Assurance Act 2003.[60] It also has been applied where there is no statutory guidance, which was the situation in *Erceg*.[61]

[45] In our view, the only basis for finding that the general rule does not apply for the purposes of non-publication issues in the employment jurisdiction would be if the Act required otherwise.

[46] We turn to consider this issue by reference to particular provisions of the Act, considered in light of its policy and object.

## The broader context

[47] There is no specific provision in the Act that indicates that "the general rule of open justice", as it was referred to in *Erceg*, should not apply as a fundamental principle when considering non-publication orders under the Act. This is in contrast to the situation that exists in a number of jurisdictions, including the Family Court, Youth Court, various professional bodies and with respect to residential tenancies.[62]

[48] Nevertheless, while there is no guidance that specifically deals with the approach the Authority or the Court should take to applications for non-publication, the relevant provisions involve broadly framed discretions in the Act that should be exercised to promote the policy and the object of the Act.[63]

[49] The policy of the Act was discussed by the Supreme Court in *FMV v TZB*.[64] It noted that the Act has competing objectives: on the one hand, ensuring employment contracts are successful market transactions, and on the other hand, protecting

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59 *JM v Human Rights Review Tribunal* [2023] NZHC 228 at [31]–[36] and [83].

60 *Johns v Director of Proceedings* [2017] NZHC 2843 at [172].

61 This has routinely been the position in many civil cases in the senior courts since: *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 at [201]; *Nottingham v Ardern* [2020] NZCA 144, [2020] 2 NZLR 207 at [8]; *Ryan v Health and Disability Commissioner* [2021] NZCA 347 at [93]–[98]; and *Peter T Rex LLC v NZME Publishing Ltd* [2024] NZSC 10.

62 Family Court Act 1980, s 11B; Oranga Tamariki Act 1989, s 438; Health Practitioners Competence Assurance Act 2003, s 95; Education and Training Act 2020, s 501; Lawyers and Conveyancers Act 2006, ss 148, 188, and 240; and Residential Tenancies Act 1986, s 95A.

63 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53], citing *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030.

64 *FMV v TZB*, above n 28.

employees with unequal bargaining power against the natural tendency of such transactions to commodify their labour.[65] The Act's focus is on employment relationships.[66] The duty of good faith in all employment relationships underpins the Act's relational approach.[67] This duty is a two-way street, and it includes a requirement that parties to an employment relationship must not, directly or indirectly, do anything to mislead or deceive each other, or that is likely to mislead or deceive each other. They also must be active, constructive, responsive, and communicative.[68]

[50] The thrust of much of the argument in favour of a broader approach to non-publication orders is that candidates for employment should be able to keep certain information about their prior employment private. That includes information that employers may consider to be relevant to their employment decisions. While the legal obligation of good faith only arises once the parties are in an employment relationship, nevertheless, this argument runs counter to the recognition in the Act that employment relationships must be built on the implied mutual obligations of trust and confidence and that parties must act towards each other in good faith and not do anything that is likely to mislead or deceive each other.[69]

[51] The object of the Act also specifically includes promoting mediation as the primary problem-solving mechanism, other than for enforcing employment standards, and reducing the need for judicial intervention.[70] Those goals are reflected in pts 9 and 10 of the Act.[71]

[52] Parties participate in mediation for various reasons, principally cost (time and money), privacy, certainty of outcome, maintenance of relationships, and finality. Different parties will attribute different weightings to these considerations, but there is no doubt that privacy is important to many, if not most, participants.

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65 At [1].
66 At [46].
67 At [47]–[52].
68 Employment Relations Act, s 4.
69 Sections 3 and 4.
70 Section 3(a)(v)–(vi).
71 Sections 101(ab), 143, 159, 159A and 188(2)(b); see also *FMV v TZB*, above n 28, at [55]–[56].

[53] Settlements under s 149 generally have the effect of finally resolving the employment relationship problem between the parties. The latest publicly available figures (from July 2022 to June 2023) put the rate of settlement at approximately 70 per cent; nearly 9,600 records of settlement were signed off in that year.[72] A table of compliance actions presented by the New Zealand Bar Association and the New Zealand Law Society identified that, in the period 1 December 2021 to 30 June 2023, the Authority only issued 29 determinations in which it made compliance orders against employers for a breach of a settlement agreement.[73]

[54] We do not accept the suggestion made by Mr Cranney, counsel for the New Zealand Council of Trade Unions, that the rule should be changed so that it is more likely that employees will get non-publication of their name in order to change the context in which mediation occurs. Effectively, the argument was that the Authority or Court should reduce the prospects of publication of the dispute and its details, so that this consideration carries less weight in mediation. We accept that mediation is conducted by dedicated MBIE mediators who act professionally, with parties being required by the Act to act in good faith.[74] It is contrary to the promotion of mediation as the primary problem-solving mechanism to remove or limit one of the incentives to settling at mediation as a matter of general policy. Accordingly, we do not agree that the considerations raised by Mr Cranney warrant a change to the general rule.

[55] In our view, the statutory context mandates open justice, and there is nothing in the objects or the policy of the Act that forms a basis for finding that the general rule does not apply for the purposes of non-publication issues in the employment jurisdiction.

## The relevance of privacy interests

[56] Ms Dalziel, counsel for the Privacy Commissioner, submitted there is strong public interest in privacy; she said this value is an important right within itself, but it

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72 Employment New Zealand "Employment Services - Year at a Glance (2022/2023)" <www.employment.govt.nz>.

73 In a few other cases there had been a breach that was rectified before the Authority issued its determination.

74 Employment Relations Act, s 143(a).

also underlies other human rights which are relevant to the public interest, such as access to justice.

[57] She referred to the recognition by the Supreme Court in *Brooker v Police* of the public interest in privacy.[75] The Court referred to art 17 of the International Covenant on Civil and Political Rights, which states:[76]

> (a) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (b) Everyone has the right to the protection of the law against such interference or attacks.

[58] In his judgment in that case, McGrath J analysed privacy interests in detail, pointing out that such rights had received increasing recognition in recent years in New Zealand, both in statute and in private law cases.[77] An example to which he referred was that privacy concerns were to be taken into account in the exercise of the judicial discretion to allow the media access to court records of criminal proceedings under the search rules.[78] That is, privacy principles intersect with an aspect of open justice. He also observed that privacy is "an aspect of human autonomy and dignity".[79] Similarly, Baragwanath J, in *X v Police*, concluded that privacy "is likely to be the major interest to be weighed in favour of name suppression."[80]

[59] We agree there is a strong connection between employment law and privacy law in that both fields deal with the balancing of rights where there is an inherent imbalance of power.[81] Employers have significant obligations to employees under the Privacy Act 2020. From time to time, the Authority and the Court will be required to consider these.[82] This will include where non-publication is being considered.

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75 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [11], [123] and [215].

76 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

77 *Brooker v Police,* above n 75, at [122]–[129].

78 At [122]; and *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [7].

79 *Brooker v Police,* above n 75, at [123].

80 *X v New Zealand Police* HC Auckland CRI-2006-404-259, 10 August 2006 at [12].

81 See Employment Relations Act, s 3(a)(ii).

82 See Paul Roth and Blair Stewart *Roth's Companion to the Privacy Act 2020* (LexisNexis, Wellington, 2021) at pt 5.

[60] It is appropriate to specifically refer to the challenging non-publication issues that may arise with regard to sexual harassment and/or sexual misconduct in the workplace. Those complex issues were discussed in depth by Chief Judge Goddard in *Z v A*, in the course of which he said: "In the majority of cases the interests of justice will require that the name of a grievant in a complaint of sexual harassment should be protected."[83] The difficulties that may arise in such cases were discussed more recently in an interim non-publication case where there were issues of sexual harassment.[84]

[61] We conclude that the right to privacy will be particularly relevant if information is placed before the Authority or the Court which is intensely personal. If so, this value should be weighed into the scales and assessed.

## The role of tikanga

[62] Māmari Stephens was appointed as a Pūkenga to advise the Court on the role of tikanga in non-publication proceedings. Ms Stephens was principally focused on the approach to non-publication of names in the context of a confidential settlement agreement, but she also addressed more broadly the approach to non-publication in both the Authority and the Court. Ms Stephens identified tikanga-based legal norms, including whanaungatanga;[85] mana;[86] utu;[87] ea;[88] whakamā;[89] and hara.[90] She also

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83 *Z v A* [1993] 2 ERNZ 469 (EmpC) at 495.

84 *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441 at [13].

85 Broadly understood as referring to relationships between people, particularly concerning the notion of collective obligations whereby support is reciprocally given and received between individuals and their collective kin groups, Māmari Stephens *Pūkenga Report* (29 September 2023) at 4; and Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at 56–62 [*He Poutama*].

86 A driver of reciprocity in relationships, giving rise to obligations to uphold the mana of others, Stephens, above n 85, at 5; and *He Poutama*, above n 85, at 71–77.

87 A norm that is vital in regulating relationships within and between groups in ways that can enhance and decrease mana. It can be said to refer to enacting a return for something that has occurred. It can govern a process that achieves reciprocity and that assigns responsibility, accountability, blame or credit, Stephens, above n 85, at 5; and *He Poutama*, above n 85, at 66–71.

88 A state of balance and fulfilment which can be achieved through processes such as utu, Stephens, above n 85, at 6–7; and *He Poutama*, above n 85, at 67.

89 A sense of shame, which occurs when persons or groups perceive they have less or lessened mana, Stephens, above n 85, at 9–10; and *He Poutama*, above n 85, at 76–77.

90 Actions or states that incur legal consequences, such as a breach, an offence or a failure, Stephens, above n 85, at 6; and the discussion around hara in the context of mauri and ea in *He Poutama*, above n 85, at 65–66 and 68–69.

identified process based legal norms including: hohou i te rongo,[91] he tatu pounamu,[92] and muru.[93] Ms Stephens considered that these legal norms were applicable to the Court's approach to its inquiry. The meanings of the terms Ms Stephens refers to (as footnoted) are based on those in her pūkenga report.

[63] The Court was further assisted by the submissions advanced by interveners on the relevance of tikanga to non-publication. The majority of interveners deferred on this issue to Te Hunga Rōia Māori.

[64] Ms Siciliano, counsel for Te Hunga Rōia Māori, observed in her submissions that tikanga is recognised as a free-standing legal system and that it has been and will continue to be recognised in the development of the common law, including in the employment jurisdiction.[94] Her submissions drew on natural synergies between tikanga and employment law, focusing on the relationship-centric nature of the employment jurisdiction.

[65] Ms Siciliano submitted that an appropriate non-publication test is one which incorporates tikanga by doing what is right in the context, having regard to the purpose of the Act and the relational nature of the jurisdiction. She said that the Supreme Court in *Erceg* had not taken tikanga into account, and that if considered, tikanga may more readily displace open justice. In her submission, engaging with tikanga requires evidence of the tikanga that is said to apply and a consideration of how the tikanga is relevant to the employment relationship or context of each case. She recognised that tikanga is not fixed and that its application may vary according to circumstances. Ms Siciliano also urged the Authority and Court to exercise caution when dealing with tikanga to avoid unintentionally distorting or developing tikanga.

[66] We accept that tikanga is relevant to the approach that the Authority and the Court might appropriately take to non-publication. We acknowledge, however, the

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91 Lashing parties together to a peace agreement, Stephens, above n 85, at 6.

92 A symbol of enduring peace (resolution) often brought by women, Stephens, above n 85, at 7.

93 A practice that enables parties to a conflict to reach resolution and obtain ea in cases where some form of property compensation is required to address a wrong committed, Stephens, above n 85, at 7; and *He Poutama*, above n 85, at 95.

94 *Ngāti Whātua Ōrākei Trust v Attorney General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [355]; and *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [19].

need for the Authority and the Court to exercise caution when engaging with tikanga and its principles. These bodies are not the makers of tikanga, and as Williams J has previously observed about common law judges more generally: "they have neither the mandate nor the expertise to develop or authoritatively declare [its] content".[95] They must engage with tikanga with care and manaakitanga, in a way that upholds its mana and integrity.[96]

[67] We thus endorse the cautious approach for engaging with tikanga as proposed by Ms Siciliano on behalf of Te Hunga Rōia Māori. What tikanga is said to apply and whether it will be relevant to the employment relationship, and if so, how much weight will be accorded, will depend on the context.[97] As Williams J observed in *Ellis v R* "there is no getting past that fact."[98] Thus, at times, tikanga and its principles may be relatively clear, or even a controlling factor.[99] At other times, tikanga and its principles may be relevant alongside other factors in the weighting exercise, or there may be a clash between tikanga and other values in society, or principles within the common law or statute, which will need to be worked through.[100] There may also be circumstances where tikanga and its principles, values or concepts have no direct relevance or bearing on the outcome of the matter.[101] It follows that the role tikanga will play in the weighing exercise will be on a case-by-case basis.

[68] Mr Nilsson in his submissions raised the issue of whether a departure from the "traditional approach" to applications for non-publication, which he says favours publication, could undermine the Authority or Court's mana, or the mana of the communities they serve. In response to questions from the Court, Ms Stephens said she considered that if the mana of the decision-maker was raised as a consideration, it would need to be assessed in the context of the case, taking into account the application of the relevant tikanga norms, that are deeply interlinked with each other. In our view, if the mana of the decision-making body is raised in the context of a case, then it would certainly fall for consideration in the ultimate evaluation.

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95 *Ellis* above n 94, at [270].
96 *He Poutama*, above n 85, at [4.10], [8.105]–[8.110] and [10.5]; and *Ellis*, above n 94, at [181].
97 *Ellis*, above n 94, at [261] per Williams J.
98 At [261].
99 At [118] per Glazebrook J and [267] per Williams CJ.
100 At [118] per Glazebrook J and [182] per Winkelmann CJ.
101 At [182] per Winkelmann CJ.

## The effect of publication

[69] The principal issues with respect to publication mainly concern employees. We now deal with some of the issues that were raised at the hearing.

[70] We accept that publication of an employee's name can have consequences. In personal grievance cases before the Court, we have observed employers noting that an employee (or, more commonly, a former employee) has a 'history' of bringing personal grievances. This generally has been raised to question the validity of the personal grievance then being faced by the employer/ex-employer. This demonstrates that, at least in that context, employers may become aware of prior disputes.

[71] We accept too that some litigants believe that being named in an Authority determination or a Court judgment has impeded their ability to obtain new employment. James Crichton, the former chief of the Authority, has confirmed this.[102] We also accept that mediators and representatives, including unions, advise individuals that this may be the case. A number of judgments have acknowledged this perceived potential detrimental impact of publication, particularly of an employee's or former employee's name on their future job prospects, most commonly citing Mr Crichton's address.[103]

[72] We have some sympathy for the criticism several interveners had of the evidential basis for such observations. While judges in this specialist jurisdiction may draw on their understanding of relevant dynamics and realities when exercising broad discretionary powers, the Court's general observations have largely been founded on Mr Crichton's comments.[104]

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[102] James Crichton "Employment Institutions — an argument for reform" (Paper presented to the Marlborough Colloquium of the Society of Local Government Managers, Blenheim, January 2019).

[103] See *Elisara v Allianz New Zealand Ltd* [2019] NZEmpC 123, [2019] ERNZ 348 at [63]; *FVB v XEY*, above n 84, at [12]; *JGD v MBC Ltd*, above n 21, at [8]–[9]; *WN v Auckland International Airport Ltd* [2021] NZEmpC 153, [2021] ERNZ 684 at [44]; and *GF v New Zealand Customs Service* [2021] NZEmpC 162 at [3].

[104] The Court of Appeal has previously recognised the Court's ability draw upon its expertise in exercising its discretion: *Madar v P & O Services (NZ) Ltd* [1999] 2 ERNZ 174 (CA) at [24]. See too *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA) at [41] for recognition of the Court of Appeal's "limited jurisdiction" when it comes to appeals.

[73] Nevertheless, in these proceedings, evidence was filed by the Employers and Manufacturers Association (Northern) Inc (EMA) that showed that internet searches of decisions were undertaken by some employers, and that some of them regarded information obtained as relevant or essential.[105] Such a practice is not inconsistent with employers looking at substantive findings of the Authority or the Court. Employers may well have a legitimate interest in knowing relevant found facts about potential employees contained in decisions of the Authority and of the Court. These decisions, written by objective decision-makers in a judicial process, may be seen as more reliable than references, which tend to be from referees selected by the candidate who the candidate assumes will provide positive comment.

[74] We accept also that there are cases where there is express evidence to show that publication has impeded a party's ability to obtain new employment.[106] But again the evidence does not extend to the reasons employers may have been cautious about employing the people concerned. There is some suggestion that just being named in a decision (for example, as a witness) can result in a form of 'blacklisting', but we have seen no evidence to support a conclusion that this is a current practice of any significance in New Zealand.

[75] We have not seen evidence to enable us to conclude that there is an increased 'chilling effect' – that employees are increasingly not pursuing claims out of fear that they will be 'blacklisted'. As noted in the submissions from the EMA, the number of proceedings in the employment jurisdiction has not reduced since the introduction of more widespread internet availability of decisions and social media discussion.

[76] This position may, however, change. Research has indicated there is a danger in online publication being used by statistical and machine learned algorithms. These are increasingly being used by employers to make hiring decisions. Researchers from the United Kingdom state that these algorithms work by drawing on data about a given population with a view to identifying correlations between certain characteristics, and

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[105] The EMA sent its survey to 4,527 employer contacts, of whom 294 responded. Approximately 70 per cent of those who responded said they sometimes, often or always undertook internet searches of candidates for employment to see whether they had previously been involved in employment-related litigation.

[106] *C v P* [2024] NZEmpC 102; and *Ioan v Scott Technology NZ Ltd, (t/a Rocklabs)* [2018] NZEmpC 4, [2018] ERNZ 1 at [30].

combinations of characteristics, and particular forms of behaviour. Thus, predictions are generated about how likely an individual is, given their characteristics, to engage in a specific behaviour in the future. If details about claimant characteristics are made available to the public, then there is scope for employers to rely on such techniques to predict how likely an individual is to take them to court (to challenge unlawful decisions and/or engage in litigation in the future) with a view to refusing them employment on that basis.[107]

[77] We acknowledge, also, the changing landscape generally. In *X v R*, the Court of Appeal considered the provisions of the Criminal Procedure Act, and reference was made to their genesis.[108] The Court said s 200 of that Act had its origins in a 2009 New Zealand Law Commission report entitled "Suppressing Names and Evidence".[109] As at the date of that report, which led to the enactment of that provision two years later, Facebook had been around for five years, Reddit for four, and X (formerly Twitter) for three. Instagram did not yet exist. In the context of the proposed reforms, the Law Commission was aware of, and discussed the difficulties posed by, social media in terms of maintaining and respecting suppression orders. But, as the Court in *X v R* said, no consideration was, or could have been, given to the universality (and toxicity) of social media's form in 2020.[110] When the Employment Relations Act was enacted in 2000, there was even less awareness of the challenging problems that online publication and social media platforms could generate.

[78] Mindful of s 11 of the Legislation Act 2019, which provides: "Legislation applies to circumstances as they arise", it is obvious that the term "publication" must encompass modern methods for imparting information.[111] Thus, the Authority and the Court must now consider the challenges of publication, not only via the traditional forms as provided by the organised and regulated media, but also via online sources,

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107 Zoe Adams, Abi Adams-Prassl and Jeremias Adams-Prassl "Online Tribunal Judgments and The Limits of Open Justice" (2022) 42(1) Legal Studies 42 at 52.

108 *X v R* [2020] NZCA 387, (2020) 30 CRNZ 296 at [50].

109 Te Aka Matua o te Ture | Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009).

110 *X v R,* above n 108, at [51].

111 The section presumptively requires an ambulatory or "updating" approach to interpretation, see Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 527 and 551.

including social media platforms. Increasingly, the phenomenon of publication is becoming less formalised and more pervasive.

## The relevance of confidential information/commercial realities

[79] For the purposes of this guideline judgment, it is appropriate to refer briefly to another type of application that falls for consideration from time to time, relating to non-publication of confidential information and/or commercially sensitive material.

[80] Such an application needs to be adequately supported by evidence that allows the appropriate decision-making body to conclude whether protection is necessary in the interests of justice.[112]

[81] In the past, consideration has occasionally been given to the non-publication of the name of an employer. This unusual step, however, is generally to ensure any order made in favour of an employee is not undermined.[113] Again, in any application for non-publication of the name of an employer, the issue is whether the interests of justice require such a step.

## The evidential standard

[82] Applications for non-publication generally involve a predictive assessment as to the asserted adverse consequences of publication, however these may occur. The Authority and the Court are well used to considering likely prospects of events in an employment-related setting.

[83] Some assessments of non-publication are more straightforward than others. A non-publication application founded on mental health grounds may be supported by an opinion from a health professional as to the likely effects of publication on the individual involved. If the decision-making body considers the opinion to be reliable, the making of the order may well follow. Similarly, a non-publication application may be sought to protect confidentiality of sensitive commercial information; if supported

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112 *Crimson Consulting*, above n 16, at [96].
113 See *FGH v RST* [2018] NZEmpC 145 at [16].

by reference to material that plainly endorses the concern, that may well also prove persuasive.

[84] But there are other circumstances where there is rather less reliable information. It is not always clear how publication may in fact ultimately occur or how the published information may be utilised. There may well be uncertainty on those possibilities that cannot be predicted accurately by anyone, as a matter of fact. Thus, it may be difficult to provide evidence of "specific adverse consequences" on an applicant's future reputation.

[85] We consider the test adopted by the High Court in *JM v Human Rights Review Tribunal* is appropriate – does the evidence show that the suggested adverse consequences could reasonably be expected to occur?[114] That test also aligns with the test adopted by the Court of Appeal in *Jay v Jay,* which ordered non-publication where there was a reasonable prospect of reputational damage to the company and to its employees if it was publicly associated with the case.[115]

## Our preferred approach

[86] As we have noted, the general rule, as expressed in *Erceg*, applies in the employment jurisdiction; we do not consider any substantive difference in approach between the Authority and the Court is warranted.

[87] Open justice is of fundamental importance. Open justice may be departed from, but only to the extent necessary to serve the ends of justice. This means there must be sound reasons for the making of an order of non-publication such that a departure is justified.

[88] In most cases, there first must be reason to believe that the specific adverse consequences could reasonably be expected to occur. The necessary evaluation will focus on such evidence as has been submitted and/or is available. Inferences may be required by the Authority or the Court. But these must be reasonable inferences that

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114 *JM,* above n 59, at [99].
115 *Jay v Jay*, above n 11, at [123].

may be taken from the evidence, based on the specific circumstances of the case, when considered in context.

[89] Second, 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.[116] Consideration of tikanga will, where appropriate, be woven through that weighing exercise.[117]

[90] Neither the Authority nor the Court needs to wait for an application for a non-publication order; they may raise the issue themselves, for example, where a party is unrepresented or represented by a person who appears not to be aware that the circumstances require express consideration of such an application. It also may be appropriate for the issue to be raised in the case of witnesses who have no representation or where non-parties are mentioned in the course of proceedings.

[91] 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 the different stages.

[92] As noted, however, the *Erceg* approach allows for exceptions where the administration of justice may weigh against full openness.[118] One circumstance in the employment jurisdiction where the broader public interest may weigh more heavily in favour of non-publication is where employees come to the Authority or Court seeking minimum entitlements. In such a case, mediation cannot be used to compromise those entitlements. Generally, such cases do not involve an assessment of the actions of the employee.[119] They may well fall into the category identified in *John Fairfax Group Pty Ltd v Local Court of New South Wales*, cited with approval by the Supreme Court in *Erceg*.[120]

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116 Employment Relations Act, ss 157(3) and 189.
117 *Ellis*, above n 94, at [257].
118 *Erceg*, above n 13, at [18]. See also above at [40].
119 Employment Relations Act, s 148A.
120 *John Fairfax Group Pty Ltd v Local Court of New South Wales*, above n 54, at 141.

[93] Further, where enforcement proceedings are brought for a breach of a s 149 settlement agreement that contains a confidentiality clause, that confidentiality clause will necessarily be a significant factor in the application of the *Erceg* test. This is particularly the case where the enforcement proceedings relate to enforcing the confidentiality clause itself. The prospect of publication in such circumstances would likely discourage parties who wish to enforce a settlement agreement from taking proceedings in the Authority, if one of the reasons that they entered into the settlement in the first place was to maintain privacy over the dispute. In such circumstances, there is a real risk that publication could destroy the attainment of justice in the particular case, which would serve to undermine rather than promote mediation as the primary problem-solving mechanism within the Act.

[94] Where the Authority or Court is considering whether to order non-publication, the following are examples of factors that may be relevant in the weighing exercise:

(a) the circumstances of the case;

(b) the interests of the person or entity applying for a non-publication order;

(c) the interests of the other party or parties to the litigation;

(d) the interests of any third party;

(e) the public interest, including the rights of media;

(f) any further issues of equity and good conscience; and

(g) tikanga and its principles, values, or concepts.

[95] We note that the weighing of any of the competing factors when considering whether to order non-publication is a matter for the specialist bodies, applying their particular expertise.

[96] We also note one option available to the Authority and the Court, which perhaps should be used more than it previously has been, is that of anonymising the names of participants in the proceedings. This may be useful where the name has appeared previously – in earlier judgments for example. Anonymisation sometimes occurs informally with respect to witnesses, who may, for example, be referred to by job title, but the option also exists in respect of parties. This approach was adopted by the Supreme Court in *D v New Zealand Police* and has been followed in civil cases in the High Court and, very recently, in this Court.[121] The benefit of this approach is that no formal order is required and so no "little private offences" are created. While participants in the proceedings may speak freely about the litigation, the party or other person has protection, especially in respect of internet searches (which are a key concern).

## Challenge succeeds – non-publication orders should be made

[97] Given the importance of the issues which have been considered, it is appropriate to outline the application of relevant principles in some detail for the purposes of the challenge.

[98] A key point is that the employment relationship problem between MW and Spiga Ltd had its genesis in a settlement under s 149 that included a confidentiality clause. As discussed in detail earlier, mediation is the preferred method for resolving employment relationship problems.[122] It is a confidential process.[123]

[99] That parties have attended mediation, however, is not in itself a confidential fact. Parties may come to mediation having told some people of the dispute and subsequently may inform them of their having attended mediation. This leads to a recommendation routinely being given by mediators when an employment

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121 *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [136]–[147]; *GF v Minister of COVID-19 Response* [2021] NZHC 2337 at [37]–[41]; *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064, [2021] ERNZ 1079 at [81]–[83]; and *C v P*, above n 106.

122 Employment Relations Act, s 3(a)(v); and *FMV v TZB*, above n 28, at [56]. See also above at [51]–[54].

123 Employment Relations Act, s 148.

relationship problem is resolved at mediation that parties should advise those people who know of the dispute just that the problem was resolved on a confidential basis.

[100] In this case there was a small number of people who knew of the parties' dispute. That does not mean there was no utility in a non-publication order of the subsequent enforcement proceedings. It is a quite different proposition to have a few people in a small circle know that there was a dispute and that it was resolved, to having it set out in a public, published determination, especially one such as in the present case where some details of the breach of a confidentiality clause were identified. Drawing on the argument that prior publication means the "horse has bolted" and non-publication should not, therefore, be ordered, this limited knowledge of the dispute and its settlement may be likened to a small pony trotting around a stable yard, with a published determination being a stallion galloping across the countryside.

[101] We note that the plaintiff gave evidence of what they anticipated would be the impact on them if the Authority's determination was issued without a non-publication order. They noted that they are a member of a small community in New Zealand and that people would see nothing good in them having had a dispute with their former employer. They commented that it would destroy what they had built up and referred to suppliers, staff that they worked with, and other people. Their concern was that publication would destroy their reputation, which they had endeavoured to grow by trying to do what they say was the right thing. Although the plaintiff is presently self-employed, they see employment as a possibility in the future.

[102] In terms of the role of tikanga, the subsequent hara (breach) by Spiga Ltd disrupted the state of ea achieved by the settlement agreement. Tikanga would suggest that the consequences to MW of the hara, including the risk of MW experiencing whakamā, should not be exacerbated by further publication. Given the circumstances of the case, non-publication is consistent too with equity and good conscience.

[103] In summary then, the evidence was such that we are satisfied that the suggested adverse consequences could reasonably be expected to occur. We also are satisfied that the interests of justice require a departure from open justice.

[104] We consider too that this is a case to which Kirby P's comments in *John Fairfax Group Pty Ltd v Local Court of New South Wales* apply.[124] A decision to decline non-publication in the circumstances that applied here detracted from the settlement the plaintiff had achieved, and undermined the importance of mediation. This consideration too is a powerful point favouring the grant of a non-publication order.

## Conclusion and orders

[105] The challenge succeeds, and the Authority's determination as to non-publication is set aside.

[106] In these proceedings, a permanent non-publication order is made in respect of the plaintiff's name and identifying details which, for the avoidance of doubt, extends to references to their father-in-law's name, as their familial connection could lead to MW's identification. This also affects the Authority's determination.

[107] No costs issues arise in respect of counsel to assist or the interveners. The defendant company chose not to take an active role in the challenge, but it does not necessarily follow that it is immune from costs. If the plaintiff wishes to advance an application for costs, the appropriate documentation should be filed and served on the defendant within 20 working days of the date of this judgment; any reply is to be filed and served within a further 20 working days. The file shall then be referred to a Judge of the full Court for a decision on the papers.

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[124] *John Fairfax Group Pty Ltd v Local Court of New South Wales*, above n 54, at 141. See also above at [92]–[93].

## Final record

[108] Finally, we wish to thank Ms Stephens, the representatives, and Mr Harrison KC, in his role as counsel to assist, for their assistance.

Judge B A Corkill (for himself
and Judge J C Holden and
Judge M S King)

**CHIEF JUDGE CHRISTINA INGLIS**

**Table of Contents**


| | |
|---|---|
| Introduction | [109] |
| The Court's/Authority's approach to non-publication to date | [111] |
| The statutory framework: non-publication | [120] |
| The provisions in context | [145] |
| Potential impact of publication | [157] |
| *Specialist knowledge and understanding* | [158] |
| *Not susceptible to evidential proof* | [160] |
| *Capacity of parties in employment disputes* | [166] |
| *The evidence in this case* | [170] |
| *Primacy of mediation, but at what cost?* | [173] |
| *The relevance of technological developments and the pace of change* | [180] |
| *MW's evidence* | [183] |
| What of access to justice? | [184] |
| What of open justice? | [188] |
| What of freedom of expression? | [200] |
| What of privacy interests? | [204] |
| What of the right to work, and to protection against unemployment? | [209] |
| What of Tikanga? | [216] |
| What of the different principles/rights/interests/values? | [225] |
| A recalibration? | [228] |
| My preferred approach | [232] |
| *Is statutory amendment required?* | [237] |
| *A different approach in the Court and the Authority?* | [240] |
| *Do parties need to front-foot an application in the Authority?* | [242] |
| *A different approach at different stages: interim and permanent?* | [245] |
| Anonymisation v non-publication | [247] |
| Application of preferred approach to MW's case | [248] |


## Introduction

[109] I agree with the majority that the challenge succeeds and the determination of the Employment Relations Authority must be set aside. While we have reached the same end point, we have taken different paths to get there. This separate judgment sets out my preferred approach to the Authority/Court's power to make orders of non-publication. As will become apparent, I would have recalibrated the conventional approach to non-publication in this specialist jurisdiction based on the scheme and purpose of the Employment Relations Act 2000 (the Act) and how I see that informing the exercise of the Authority/Court's discretionary power.

[110] The background to this challenge is conveniently set out in the majority judgment, and it is unnecessary to repeat it here.[125]

## The Court's/Authority's approach to non-publication to date

[111] One decade ago, a full Employment Court considered the approach to non-publication orders in *H v A Ltd.*[126] The majority referred to the fundamental principle of open justice, which was said to be a starting point that can be departed from only through a principled exercise of discretion.[127] The test, the majority said, was whether the interests of justice warrant the making of an order in the applicant's favour. Cases in which the test is met were said to likely be "exceptional" in the sense that such orders will only be made in a "very small minority of cases".[128] The minority judgment on the non-publication issue adopted what might be described as the traditional common law approach to suppression orders. In a subsequent judgment on the substantive matter in the same proceedings, the Court applied the majority's approach, determining that the interests of justice required the making of a permanent non-publication order.[129]

[112] It is probably fair to say that the law had, by the time *H v A Ltd* was decided, entered into a phase of uncertainty in respect of suppression orders across the courts. The Supreme Court had the opportunity to consider the approach in *Erceg v Erceg*.[130] The case was one involving a long running, and apparently bitter, intra-family dispute that had attracted significant interest. There the Court said that:[131]

> … it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice.

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125 See above at [1]–[10] of the majority judgment.
126 *H v A Ltd*, above n 7.
127 At [76].
128 At [78] and [79].
129 *H v A Ltd* [2014] NZEmpC 189 at [146]. Leave to appeal the permanent non-publication order was declined in *A Ltd v H*, above n 10, at [8].
130 *Erceg v Erceg*, above n 13.
131 At [3].

[113] A suppression order was declined in that case because the Court was not satisfied that the applicant had demonstrated "to the requisite high standard that the interests of justice require a departure from the usual principle of open justice".[132]

[114] This Court considered *Erceg* in *Crimson Consulting Ltd v Berry*.[133] The Court stated that the starting point in this jurisdiction was the principle of open justice, that the threshold for departing from that principle was high and an applicant must show "specific adverse consequences" which would justify a departure from the "fundamental" rule (namely open justice).[134] A case-specific balancing of the competing factors was required. The Court acknowledged that the position might be different at an interim stage.[135]

[115] As will be apparent, implicit in the approaches adopted by *H v A Ltd* and *Crimson Consulting* is a presumption in *favour* of publication, expressed to be based on the fundamental principle of open justice.[136]

[116] A review of post-*Crimson Consulting* judgments in this Court reflects that a degree of uncertainty has emerged, including in respect of the weight assigned to various factors in the discretionary exercise, and (most particularly) the extent to which an applicant is required to establish a risk of adverse consequences, and the means by which this is to be done.[137]

[117] During the course of submissions reference was made to some recent judgments adopting what was described as a traditional *Erceg/Crimson Consulting* approach, but which brings other interests and the objectives of the Act into the

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132 At [21].
133 *Crimson Consulting Ltd v Berry*, above n 16.
134 At [96].
135 At [96].
136 See, for example, *FVB v XEY*, above n 84, at [9] for recognition of a presumption favouring publication.
137 See, for example, *GF v Comptroller of the New Zealand Customs Service (No 3)*, above n 21, at [4] where the Court did not simply assess whether the party could show specific adverse consequences and instead assessed whether there was "a material risk of adverse consequences". That approach was preferred in *JKL v Stirling Andersen Ltd* [2022] NZEmpC 107, [2022] ERNZ 422. Compare *Labour Inspector of the Ministry of Business, Innovation and Employment v ZAQ Ltd* [2023] NZEmpC 177 at [9] where the Court adopted the specific adverse consequence test, with the overlay that the Court must be satisfied that the suggested adverse consequences could reasonably be expected to occur.

balancing exercise.[138] One example referred to was *GF v Comptroller of the New Zealand Customs Service.* There the Court expressed the framework for analysis as follows:[139]

> [3] A party applying for such an order must establish that sound reasons exist for the making of an order of non-publication, displacing the presumption in favour of open justice. The discretionary exercise involves the Court balancing other interests with the fundamental principle of open justice. The discretion must also, of course, be exercised consistently with the objectives of the legislative framework that applies in this specialist Court. These objectives include the need to address the inequality of bargaining power between employers and employees. As has previously been observed, the significant detrimental impact that publication of the names of parties, or even witnesses, can have on their ongoing prospects of employment, regardless of the outcome of the case, is a factor which has become increasingly well recognised in this jurisdiction as relevant to the weighing exercise the Court is required to undertake.

[118] What is also apparent from a review of Court judgments and Authority determinations is a marked similarity of approach, tending to cite *Erceg* and *Crimson Consulting.*

[119] I make two final preliminary points before turning to consider the specific powers conferred on the Authority and the Court within their statutory context. First, *Erceg* did not consider the statutory powers to make non-publication orders under the Employment Relations Act; it considered the non-publication powers held by courts in the exercise of their inherent jurisdiction or powers. Second, there have been numerous developments in the law, in technology and in our understanding of the potential impact of publication since *Erceg* was decided eight years ago. I return to each of those issues below, as I see them informing the appropriate approach to the power to prohibit publication in both the Authority and the Court in 2024 and going forward.

## The statutory framework: non-publication

[120] Contrary to the themes running through a number of submissions, I consider that the Employment Relations Act itself is the starting point for analysis. Both the

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138 Mr Pearce, for the NZLS and NZBA, submitted this was not a "watering down" nor a move away from the traditional approach per se.

139 *GF v Comptroller of the New Zealand Customs Service (No 3)*, above n 21.

Authority and the Court are creatures of statute, and it is the statute which confers on the Authority and the Court an express discretionary power to make non-publication orders.[140]

[121] In order to understand the proper nature and scope of the discretionary power to prohibit publication it is necessary to examine the words of the statute in context, as s 10 of the Legislation Act 2019 makes plain (the meaning of legislation must be ascertained from its text and in the light of its purpose and context). As explained by one leading academic:[141]

> The courts' authority to mould and develop the law is exercised also in applying legislation. This authority is implicit when Parliament confers a statutory discretion on the courts: for example, to grant such relief as the court thinks "fit" or "just". Statutory discretions are so commonplace they mark a kind of "new statutory equity". As the legislative outcome is not prescribed, statutory discretions run statutory meaning and application into one.

[122] The Employment Relations Act confers on both the Court and the Authority the power to make non-publication orders, although those powers are couched in slightly (non-materially) different terms. The Authority's powers are set out in cl 10 of sch 2 of the Act, which provides:[142]

> **10 Power to prohibit publication**
>
> (1) *The Authority may, in respect of any matter, 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 Authority thinks fit*.
>
> (2) Where a matter is resolved by the Authority making a consent order as to the terms of settlement, the Authority may make an order prohibiting the publication of all or part of the contents of that settlement, subject to such conditions as the Authority thinks fit.

[123] The Court's powers are set out in cl 12 of sch 3 of the Act, which provides:[143]

> 12 **Power to prohibit publication**
>
> (1) *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*.

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140 See generally the comments made by Fitzgerald J in relation to the statutory non-publication powers in the Human Rights Act 1993 in *JM*, above n 59, at [83].

141 Joseph, above n 43, at 839 (footnotes omitted).

142 Emphasis added.

143 Emphasis added.

(2) Where proceedings are resolved by the court making a consent order as to the terms of settlement, the court may make an order prohibiting the publication of all or part of the contents of that settlement, subject to such conditions as the court thinks fit.

[124] Sections 157 and 189 (equity and good conscience) are central to the analysis. They provide the umbrella under which the discretionary non-publication powers (and various other broad discretionary powers conferred by the Act on the Authority and the Court) sit, directing how those institutions are to go about discharging their role in *all* matters before them. In respect of the Authority, s 157(3) provides:[144]

**157 Role of Authority**

…

(3) The Authority *must act as it thinks fit in equity and good conscience*, but may not do anything that is inconsistent with—

(a) this Act; or

(b) any regulations made under this Act; or

(c) the relevant employment agreement.

[125] Section 189 informs how the Court's power is to be exercised. It provides:[145]

**189 Equity and good conscience**

*(1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act … as in equity and good conscience it thinks fit.*

(2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[126] Notable too is s 184, which provides that only a lack of jurisdiction can be a ground for review proceedings in relation to proceedings, decisions and orders of the Authority in the first instance.[146]

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144 Emphasis added.

145 Emphasis added. The provision's meaning has been described extra-judicially as: "… the Court systematically brings to the decision of each case a certain attitude of mind which is that it should endeavour to do that which is right in adjusting the position of the parties": Thomas Goddard "Decision-Making in the Employment Court" [1996] NZLJ 409 at 411.

146 Note that *JM*, above n 59, arose out of an application for judicial review of the Tribunal's decision to decline to order non-publication.

[127] The Court's powers, which have a long history, have been described by Cooke J as "unusual".[147] And in *Wellington Road Transport Union of Workers v Fletcher Construction Co Ltd*, Woodhouse P observed that the general purpose of the legislation (at that time, the Industrial Relations Act 1973) was the improvement of industrial relations and that the Court ought to be left (within reasonable limits) "to develop its own methods and processes in order to find the just and fair solutions intended by the Act."[148] He went on to state that:[149]

> …[R]ecourse to technical legal language or the analogy to rules developed in conventional courts will not always be particularly helpful.

[128] In other words, it has long been recognised that the Court (and Authority) are concerned primarily with fairness, are to act according to equity and good conscience (where not contrary to express statutory provision)[150] and that seeking to apply analogies with other courts may not be helpful if the statutory objectives for the employment institutions are to be met.

[129] The power to prohibit publication does not operate in isolation. It operates within the particular statutory framework Parliament has put in place in order to achieve its objectives in respect of employment relations; the power is to be interpreted and applied within that framework. What is employment legislation broadly designed to achieve?

[130] The Court of Appeal recently restated the social purpose of the legislation in *Temple v Pilgrim.*[151] The Act, and the satellite legislation which sits around it, are

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147 *NZ Forest Products Ltd v Woodpulp Paper and Related Products IUW* [1981] ACJ 613 (CA). See the discussion in Alexander Szakats "The Arbitration Court – its "unusual" powers" [1982] 10 NZLJ 364.

148 *Wellington Road Transport Union of Workers v Fletcher Construction Co Ltd* [1982] ACJ 663 (CA) at 666.

149 At 666. See also at 668 per McMullin J: the phrase equity and good conscience clearly indicates that the Arbitration Court's "concern is to be primarily with matters of fairness"; and *Bell (Inspector of Awards & Agreements) v Broadley Downs Ltd* [1987] NZILR 959 (CA) at 962 per Cooke P: the provision "requires the Court to have regard not merely to the express provisions of the Act, but to its purposes and intention, and to the principles of industrial conciliation and arbitration on which the jurisdiction of the Court is founded".

150 It has been suggested that the Court's equity and good conscience jurisdiction has "arguably been significantly increased" by the Employment Relations Act (comparing it to the Employment Contracts Act): *Waitemata District Health Board v New Zealand Public Service Assoc* [2006] ERNZ 1029 (CA) at [46]–[48] per Chambers J (concurring).

151 T*emple v Pilgrim* [2023] NZCA 631, [2023] ERNZ 998 at [10].

protective, most particularly of employees who are recognised in s 3(a)(ii) of the Act as inherently vulnerable relative to employers. In this regard the Act has, as the Supreme Court observed in *FMV v TZB*, an intended "levelling effect."[152]

[131] More generally, the Act is designed to support successful employment relationships and the employment environment within New Zealand, and to equip the employment institutions (Mediation Services, the Employment Relations Authority and the Employment Court) to enable that to happen. Parliament has carved out an exclusive jurisdiction to promote its statutory objectives, entrusting it to the specialist institutions. Relevantly, the Act confers significant latitude on each of the institutions to develop their own practices and approach to best achieve the overarching statutory objectives, coupled with limited rights of review against decisions of the Authority and of limited rights of appeal against decisions of the Court.[153] That latitude is reflected in the breadth of the discretionary powers conferred on both institutions, the suite of wide-ranging powers each have to perform their specialist functions, and the statutory prohibition on the Court advising the Authority how to approach its investigative role.

[132] Parliament recognises that where employment relationship problems arise, they are best dealt with as quickly as possible and at the lowest level possible,[154] preferably between the parties themselves or with the assistance of specialist mediators (such as those appointed by the Chief Executive of MBIE, "an MBIE mediator")[155] via a free and confidential service.

[133] Mediation is described in the Act as the "primary problem-solving mechanism",[156] and is a central feature of the employment relations system.[157] Both the Authority and the Court have the power to direct parties to mediation, and are

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152 *FMV v TZB*, above n 28, at [52].

153 Also reflected in the requirement that the Court of Appeal have regard to the specialist knowledge of the Court when entertaining an appeal: Employment Relations Act, s 216.

154 Section 101(a) and (ab).

155 Section 144(1).

156 Section 3(a)(v).

157 However, it is recognised that mediation is often not appropriate when it comes to breaches of employment standards: Employment Relations Act, ss 159AA and 188A.

required to do so unless satisfied that mediation would not assist in resolving the matter, would not be in the public interest or would undermine the urgent or interim nature of the proceedings.[158] The Authority must prioritise previously mediated matters.[159] And both institutions are required to consider the use of mediation throughout the lifecycle of a matter.[160] I return to the significance of this later.

[134] The objects of pt 9 of the Act (relating to personal grievances, disputes and enforcement) recognise that access to both information and mediation services is more important than adherence to rigid formal procedures.[161]

[135] The Act confers on MBIE mediators a suite of flexible powers as to the way in which they undertake their role in the range of cases coming before them.[162] It provides that a mediator may sign off a settlement agreement and that agreement may not be called into question other than for enforcement purposes.[163] This is a popular option for employers and employees; a total of 9,591 records of settlement were signed by MBIE mediators in the year July 2022 to June 2023.[164] The settlement in the present case was one of them.

[136] The rate of settlement, where MBIE's mediators are involved, is high. The latest publicly available figures (from 2023) put that rate of settlement at 69 per cent.[165] While on one level such high rates of settlement may be said to reflect a satisfactory meeting of statutory intent (the resolution of employment problems between the parties themselves with the assistance of a specialist mediator), no

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158 Employment Relations Act, ss 159(1) and 188(2)(b). One further ground exists in the Authority, if the use of mediation would be otherwise impractical or inappropriate in the circumstances, which does not appear in s 188 in respect of the Court. It also must be noted that the discretion to order mediation may be overridden in certain cases. See, for example, ss 114(5) and 115A(5): "must direct". Section 114(5) is discussed in *Cronin-Lampe v Board of Trustees of Melville High School (No 1)* [2023] NZEmpC 144, [2023] ERNZ 837 at [46]–[47].

159 Employment Relations Act, s 159A.

160 Sections 159(1)(c) and 188(2)(c).

161 Section 101.

162 See, for example, ss 144(2), 145 and 147.

163 Section 149.

164 Employment New Zealand, above n 72.

165 Employment New Zealand, above n 72. See also Grant Morris "The new normal" [2024] NZLJ 138 for a further breakdown of recent statistics.

analysis (at least which I am aware of) has been done to assess the quality, as opposed to quantity, of settlements.[166]

[137] I infer from the table of compliance actions presented by the New Zealand Bar Association | Ngā Ahorangi Motuhake o te Ture and New Zealand Law Society | Kāhui Ture o Aotearoa,[167] that a number of employers may be gaming the system by securing settlements which they have little or no intention of complying with unless subsequently forced to do so by the Authority and the Court. It might also be inferred that within the period the table relates to (namely the 18 months to 30 June 2023) there were many more instances of non-compliance with settlement clauses but which did not result in compliance action, with the employee cutting their losses and walking away.[168]

[138] The Authority is an "investigative body";[169] it is not a court, and deliberately so. The underlying legislative intent is to equip the Authority with the tools to drive its inquiries to achieve a just, merits-based result, in a timely way, recognising that relationships between employers and employees are most likely to succeed if problems are resolved early.[170] The Act confers on the Authority the ability to conduct interviews with any person it considers appropriate, fully examine any witness, and gather information and evidence as it sees fit.[171] Importantly, there is no requirement that the Authority carry out its work in a courtroom setting and conduct a full hearing;

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166 While there has been research conducted into the percentage of clients satisfied with their last interaction with Mediation Services, it is unclear whether "satisfaction" related to the perceived quality of the services provided or the perceived quality of the settlements reached. See Ministry of Business, Innovation and Employment *Annual Report 2022/23 Growing Aotearoa for All* (Annual Report, 20 October 2023) at 100. See also Grant Morris "Eclecticism versus Purity: Mediation Styles Used in New Zealand Employment Disputes" (2015) 33 CRQ 203 which assessed the types of mediation styles used, not quality of settlements reached.

167 The table covers the period of around 18 months (to 30 June 2023). It records that during that timeframe 29 determinations were issued granting compliance orders against employers for breach of a settlement agreement. In a further seven determinations the breaches were established, and a penalty ordered and/or costs awarded, but no compliance ordered (typically because payment had since been secured or the breach was not ongoing, such as here).

168 It appears that no research has been undertaken in New Zealand on the actual total figure of non-compliance. Compare data from the United Kingdom collected in 2013, showing that only 41 per cent of awards by the Employment Tribunal were paid in full in the absence of enforcement action: Department for Business, Innovation & Skills "Payment of Tribunal Awards: 2013 Study" (1 November 2013) GOV.UK <www.govt.uk>.

169 Employment Relations Act, s 157.

170 See, for example, s 143(b).

171 Section 160(1)(a)–(d).

nor does the Act state that the Authority's interviews and information-gathering are to be open to the public. Rather, the Act confers an express power on the Authority to decide that an investigation meeting should be conducted privately.[172] And while, for example, the Authority must allow for cross-examination, the Act makes it clear that is only to the extent consistent with equity and good conscience.[173] The Act also specifies the matters that *need not* be set out in a written determination of the Authority.[174]

[139] The key point for present purposes is that the Authority is designed by Parliament to be party-centric and flexible, and to approach its primary task of speedily and effectively resolving employment disputes and problems in a fit-for-purpose manner largely unconstrained by the procedures applying in a courtroom setting. All of this is of particular importance when it comes to assessing the way in which the discretionary statutory powers conferred on the Authority are to be interpreted and applied.

[140] The Court deals with both originating proceedings (including applications for judicial review, declarations of employment status and the like) and appeals (called challenges) from decisions (called determinations) of the Authority. A challenge can be pursued by way of de novo hearing, so it is effectively heard afresh, or based on alleged errors of fact and/or law. The Act recognises the Court as a specialist court and it too has a suite of statutorily conferred tools to enable it to do its job, described in overarching terms as supporting "successful employment relationships and the good faith obligations that underpin them".[175]

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172 See s 160(1)(e); and James Crichton "Practice Note 1 – Steps to be Taken in Proceedings" (31 March 2016) Employment Relations Authority <www.era.govt.nz> at No 18. Compare Motor Vehicle Sales Act 2003, sch 1 cl 8: the Motor Vehicle Disputes Tribunal is directed to "have regard to the interests of any party and to the public interest" in considering whether to conduct a hearing in private. There is no statutory directive to consider certain matters under the s 160(1)(e) discretion.

173 Employment Relations Act, s 160(2A).

174 Section 174E (emphasis added).

175 Section 143.

[141] The role of the Employment Court, as a specialist court, was usefully summarised by former Chief Judge Colgan in *New Zealand Nurses Organisation v Waikato District Health Board*:[176]

> The role of the Employment Court is broader than just to decide single cases between litigants, although it does so of course. Its role, including in those individual cases, is to promote and encourage successful employment relationships including the avoidance of potential litigation between parties to ongoing relationships. *This is a future-looking jurisprudence and one which attempts to assist not only immediate parties to a case, but others in materially similar circumstances. This is one aspect of the Court's long-established and broad "equity and good conscience" jurisdiction and to meet the objectives of s 3 of the Act*. That wider view of the Court's role influences the decision in this case.

[142] The importance of context in understanding the nature and scope of statutory powers was emphasised by the Supreme Court in *Muir v Commissioner of Inland Revenue.* The Court observed that a one-size-fits-all approach to suppression is to be avoided, emphasising that situations warranting suppression orders are "likely to differ between [civil and criminal] categories and, … *within them, as legislation often indicates*."[177] In *Erceg* the Supreme Court was concerned with the inherent power to make non-publication orders in a civil context,[178] and was notably careful to draw a distinction between the way in which open justice principles have been recognised at common law and the way in which such principles have been constrained by statute.[179]

[143] I see the non-publication powers conferred on the Authority and Court under the Employment Relations Act, sitting within the overarching framework of equity and good conscience (s 157: the Authority; and s 189: the Court), as a case in point. The Supreme Court's most recent observations about the role of the employment institutions and the underlying objectives of the legislation, in *FMV v TZB*,[180] reinforce the position for reasons I attempt to explain below.

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176 *New Zealand Nurses Org v Waikato District Health Board* [2016] NZEmpC 89, [2016] ERNZ 345 at [37] (emphasis added).

177 *Muir v Commissioner of Inland Revenue*, above n 12, at [2] (emphasis added).

178 *Erceg v Erceg*, above n 13. At [7] the Supreme Court confirmed that reliance upon inherent powers in civil non-publication cases is soundly based and should continue.

179 At [3]. Note, however, that the Supreme Court has subsequently cited *Erceg* in recent decisions concerning statutory non-publication powers, see: *M v* R, above n 47, at [40]; and *Farish v R*, above n 55, at [34].

180 *FMV v TZB*, above n 28.

[144] Drawing the threads together, Parliament has deliberately conferred significant latitude on the Court and Authority in respect of the way in which they can go about exercising their exclusive and specialist jurisdiction within an equity and good conscience framework. That point is of central relevance when analysing the nature and scope of the specific statutory powers at issue in this case.

## The provisions in context

[145] As the non-publication provisions in the Act make clear, the power to order non-publication is broad – in any proceedings the Court may order that the name of any party or witness or any other person not be published, subject to such conditions as the Court thinks fit. The Authority may order likewise in respect of any matter before it.

[146] The broad statutory formulation is significant, but not surprising. It likely reflects the specialist knowledge each of the institutions can be expected to bring to bear in exercising their discretionary powers, balancing the competing, often complex, interests involved in employment relations – both in the particular case and to cast a guiding light for those who might find themselves in materially similar circumstances.[181]

[147] Turning to the legislative history, under the Labour Relations Act 1987 and the Employment Contracts Act 1991 the Court could order "that any part of any evidence given or the name of any witness not be published, and any such order may be subject to such conditions as the Court thinks fit".[182] After the Employment Tribunal (the Authority's predecessor) was later established, it could order the same.[183] The Labour Relations Act was the first enactment governing this Court's predecessor, the Labour Court, to expressly provide for non-publication powers. The provision was inserted into the Labour Relations Bill[184] following a recommendation of the Department of Labour in its report to the Labour Select Committee. The recommendation was for a new provision "whereby the Court is able to suppress the names of anybody referred

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181 *New Zealand Nurses Org*, above n 176.
182 Labour Relations Act 1987, s 284; and Employment Contracts Act, s 109.
183 Employment Contracts Act, s 97.
184 Labour Relations Bill 1987 (93-2), cl 273A.

to in its decisions".[185] While the provision did not go as far as officials had recommended at the time, Parliament later extended the class of people whose names could be the subject of a non-publication order when it enacted the Employment Relations Act, to refer to a party, witness or any other person.[186] While there appears to be nothing in the Parliamentary materials leading to the enactment of sch 2 cl 10 or sch 3 cl 12 which explains why this expansion of the power was seen to be desirable, the fact that Parliament decided to do so is notable.

[148] The way in which Parliament has chosen to draft sch 2 cl 10 and sch 3 cl 12 is also telling.[187] Parliament did not adopt into statute, as it could have, the approach at common law in other civil jurisdictions. Nor did it leave the issue silent to be dealt with by way of the Authority/Court's inherent powers. It did not, as it could have, make it clear that the statutory power of non-publication should be rarely exercised; or state that open justice is to be the paramount consideration and/or the starting point;[188] or set out a range of factors that must be considered;[189] or identify various threshold requirements that must be met before such orders can be made.[190]

[149] Parliament did not adopt a two-stage approach to non-publication as it did for the Human Rights Review Tribunal under the Human Rights Act 1993, as explained by the High Court in *JM v Human Rights Review Tribunal*.[191] Under the Human Rights Act, the Tribunal makes the parties' names public unless satisfied that it is

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185 Department of Labour *Labour Relations Bill - Report of the Department of Labour to the Labour Select Committee* (27 April 1987) at 62.

186 The range of material that could be the subject of a non-publication order was also extended.

187 See generally *Unison Networks*, above n 63, at [55].

188 Compare The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (UK), sch 1 para 50 and the direction that the Tribunal shall "*give full weight* to the principle of *open justice* and to the Convention right to *freedom of expression*" (emphasis added).

189 Compare Lawyers and Conveyancers Act, s 240; and Weathertight Homes Resolution Services Act 2006, s 69(3). Those statutes require the relevant tribunals to have "regard to" certain interests, such as the interest of any person (including the privacy of any complainant before the Disciplinary Tribunal), the interests of the parties and the public interest.

190 Compare Criminal Procedure Act 2011, s 200(2) which provides a list of threshold grounds, at least one of which must be met before moving to the second stage of the assessment: *Robertson v New Zealand Police*, above n 48, at [39]–[40]; affirmed *M v R*, above n 47.

191 See *JM*, above n 59, at [84]–[85]; and *Waxman v Pal* [2017] NZHRRT 4 at [62]–[65]; applying *Erceg*, above n 1. In *Waxman* the Tribunal held that the principles expressed by the Court in *Erceg* were "congruent" with s 107 of the Human Rights Act.

*desirable* to make an order prohibiting publication.[192] As Fitzgerald J pointed out, the power to order non-publication under the Human Rights Act involves two steps – the first is evaluative, namely whether it is "desirable" for the Tribunal to make such an order (a threshold issue); and second, whether in the Tribunal's discretion an order should be made.[193] Fitzgerald J found that the *Erceg* approach would be "highly relevant" at the evaluative stage; the second stage was described as purely discretionary.[194] The salient point for present purposes is that unlike the Human Rights Act, sch 2 cl 10 and sch 3 cl 12 do not specify two steps – the power is wholly discretionary.[195] In my view, all of this differentiates the analysis under the Human Rights Act (as explained in *JM*), from the analysis required under the Employment Relations Act.

[150] It may also be noted that a number of suppression provisions were rolled out across many tribunals in 2018 as part of a suite of amendments providing for the publication of tribunal decisions online.[196] Those provisions do not go quite as far as sch 2 cl 10/sch 3 cl 12 of the Act. They can broadly be divided into two categories. The first enables orders to be made over any part of the evidence given or the name of any witness.[197] In other words, these do not extend to the names of the parties, as they do in the Employment Relations Act. The other category empowers the relevant body to order that the decision, or part of a decision, not be published online, but that power can only be exercised where a 'good reason' exists.[198] Good reason is non-exhaustively defined and includes where there is limited public value in the decision or where publication would be contrary to the interests of justice. The 'good reason' formulation appears to signal the same sort of two-stage evaluative/discretionary

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192 Human Rights Act, s 107(3) (emphasis added). See also *JM*, above n 59, at [26] per Fitzgerald J: "The Tribunal is accordingly under a statutory directive, subject to prescribed exceptions, to hold every hearing before it in public. This will involve making parties' names public, unless the Tribunal is satisfied that it is desirable to make an order prohibiting the publication of any name, report, or account of the evidence." See also Fair Work Act 2009 (Cth), s 594 and the inclusion of "desirable".

193 *JM*, above n 59, at [84] and [85].

194 At [83].

195 See *Peter T Rex LLC v NZME Publishing Ltd* [2023] NZCA 469 at [42]–[48] for a recent discussion of the distinction between discretionary and evaluative decisions. See also *M v R*, above n 47, at [45]–[47] where the Supreme Court noted the distinction but left it to be addressed in a case where it truly arises. I see the non-publication power conferred under the Employment Relations Act as falling squarely into the discretionary categorisation.

196 Tribunal Powers and Procedures Legislation Act 2018.

197 See, for example, Disputes Tribunal Act 1988, s 20A.

198 See, for example, Education Act 1989, s 306AC. See also Human Rights Act, s 121C.

process adopted in the Human Rights Act as explained in *JM.* As I have said, I see it as significant that Parliament did not replicate such an approach when enacting sch 2 cl 10/sch 3 cl 12.

[151] The powers conferred on the Authority and the Court by the non-publication provisions appear, at first blush, to be unfettered. However, as the Supreme Court pointed out in *Unison Networks Ltd v Commerce Commission*:[199]

> A statutory power is subject to limits even if it is conferred in unqualified terms. *Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act*. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision-maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act".

[152] What is required is consideration of the extent to which exercise of the discretion to grant (or refuse to grant) an order prohibiting the publication of someone's name is consistent with (or undermines) the policy and objectives of the empowering legislation – both in specific cases and more generally. More particularly, it must be asked whether the imposition of starting points, general rules, evidential requirements, and what are effectively thresholds and presumptions sits well with the underlying statutory objectives and values embedded in the Employment Relations Act.

[153] The leading judgment on the applicable statutory objectives in this jurisdiction, and the role that the employment institutions are expected to play in supporting them, is the Supreme Court's judgment in *FMV v TZB*.[200] The majority identify the theme of the Act as being "relationships, not contracts". So employment relationships, and supporting them both on an individual and a broader basis, are the required focus.[201] That immediately differentiates the baseline for analysis in this jurisdiction from many others.

[154] The majority in *FMV v TZB* went on to acknowledge that the Authority and the Court are "intended to give effect to the Act's overall object of building productive

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199 *Unison Networks*, above n 63, at [53].
200 *FMV*, above n 28.
201 At [46]–[51] and [124].

employment relationships through the promotion of good faith", in particular by promoting mediation as the primary problem-solving mechanism and by reducing the need for judicial intervention.[202] As s 3(a) expressly states, that object applies "in *all* aspects of the employment environment and of the employment relationship".[203] That scope, the majority observed, "could hardly be expressed more widely".[204] To my mind, it includes broader impacts on the employment environment.

[155] On a related point, it is also relevant, in terms of supporting the objectives of the legislation, that the Authority and the Court have regard to the need to acknowledge and address the inherent inequality of bargaining power in employment relationships and the Act's "intended levelling effect".[205] As the majority in *FMV v TZB* summarised, the Act is also designed to avoid unnecessary adversarialism.[206]

[156] Finally, the relationship-focused legislative framework in this jurisdiction creates natural synergies with tikanga-based legal norms, as Te Hunga Rōia Māori o Aotearoa Inc (as 11th intervener) submitted. This Court has previously described such norms as sitting comfortably with the values and expected behaviours embedded in the Act and that apply within the employment environment in Aotearoa New Zealand.[207] I consider the relevance of tikanga below.

## Potential impact of publication

[157] An increasing number of judgments in this Court have acknowledged the potential detrimental impact of publication, particularly of an employee or ex-employee's name on their future job prospects.[208] Some interveners were critical of the evidential basis for such judicial observations. I make four points in respect of these concerns.

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202 At [53].
203 Emphasis added.
204 *FMV*, above n 28, at [124].
205 At [52].
206 At [54].
207 See *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [16].
208 See, for example, *Elisara v Allianz New Zealand Ltd*, above n 103, at [63]; *FVB v XEY*, above n 84, at [12]; *JGD v MBC Ltd*, above n 21, at [9]; *WN v Auckland International Airport Ltd*, above n 103, at [44]; and *C v P*, above n 106, at [21].

*Specialist knowledge and understanding*

[158] First, it is well established that judges may take judicial notice of things without requiring evidence to be put before the Court; in appropriate cases judicial notice operates as a direct substitute for evidence.[209] Further, I consider that it is open to the Court, particularly because of its specialist expertise and understanding of employment relationships/dynamics and the realities of the employment relations landscape, to draw on that knowledge when exercising its broad discretionary powers.[210] Indeed, I would go further and say that is one of the reasons why our specialist Court exists and one of the reasons why s 189(2) expressly enables the Court to have regard to "information", as well as evidence.

[159] Reference was made to the approach in *JM*, said to be aligned with a Court of Appeal judgment in *Jay v Jay*,[211] in support of the imposition of an evidential standard requiring an applicant to show specific adverse consequences particular to them that could reasonably be expected to occur. I see it as relevant that *JM* concerned a materially different statutory power to the one at issue in this case, and *Jay v Jay* was concerned with the inherent power to order non-publication in civil courts. Both judgments are (in my view) accordingly distinguishable. In any event, it is apparent that the Court of Appeal in *Jay v Jay* was prepared to accept a likelihood of damage to reputation without referring to any evidence whatsoever. And in the subsequent *Erceg* judgment the Court did not explicitly specify any evidential standard. I see the imposition of an evidential standard as placing an unwarranted gloss on the broad discretionary power to grant orders of non-publication in this jurisdiction, and one which seems to me to be inconsistent with the extended powers in s 189(2).

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209 See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [230] per McGrath J. See also *R v Taulapapa* [2018] NZCA 414 at [46] where the Court of Appeal observed that where there are difficulties in obtaining evidence, for example of employers' attitudes to determine the potential consequences of a conviction on employment, the court must use what evidence is available and take judicial notice of facts where appropriate.

210 See *Madar v P & O Services (NZ) Ltd*, above n 104 (where the Court of Appeal acknowledged the Court's ability to draw upon its expertise in exercising a discretion, [24]); *Gallagher Group Ltd v Walley* (where the Court of Appeal recognised that Court's "limited jurisdiction" when it came to an appeal concerning this Court's discretionary assessment [41]).

211 *Jay v Jay*, above n 11.

*Not susceptible to evidential proof*

[160] Second, it remains unclear where the sort of evidence, which a number of interveners said was required, *would* be sourced from. Not surprisingly very little data exists on the impacts of publicly naming people involved in employment proceedings over time. In this jurisdiction, it is often the lived experiences of people who are vulnerable which is at issue, and which is hard to pinpoint with empirical evidence or with precision. That does not mean the lived experience has not occurred, will likely not occur or is irrelevant.[212] In such circumstances it is not, in my view, an adequate answer to say that empirical evidence is required and if it is not presented, the Court will not be persuaded the risk exists. A similar point was made by the High Court in *Newspapers Publishers Assoc of New Zealand (Inc) v Family Court*, referring to the potential impact of publication on a child's interests in the family jurisdiction:[213]

> … the issue which the Court was called upon to decide was whether ongoing publicity might be contrary to Liam's welfare, in that his privacy could be infringed. *The decision to make a suppression order was undoubtedly discretionary in nature, and was based upon an assessment of factors not susceptible of evidential proof*. In a word, the matters to be decided were essentially matters of impression.

[161] Further, and as I have already touched on, I see a requirement for empirical evidence as running counter to s 189(2), which makes it clear that the Court may, in exercising its powers under the Act, have regard to a broad range of material, including "information". In other words, Parliament has recognised that in order to support the objectives of the legislation, the Court may have regard to material which might not be admitted in another court when exercising its powers. And, as observed by Cooke J in *NZ Forest Products*, the "… comparatively unusual powers [of the Court] underline that often questions of onus may not be of much importance under the Act."[214]

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212 See Caroline Dommen "Human Rights Economics" (2023) 45 HRQ 205 at 227 for a discussion of the approach that human rights economics takes in respect of vulnerable or marginalised groups for which there is often no data available. It favours qualitative data, proxies for hard data and eliciting the voices and experiences of those who are more distant from the locus of the decision-making.

213 *Newspapers Publishers Assoc of New Zealand (Inc) v Family Court* [1999] 2 NZLR 344 (HC) at 353 (emphasis added). Compare, for example, the approach in *LNF v Department of Corrections* [2023] NZERA 399 (Member Szeto) at [144].

214 *NZ Forest Products*, above n 147, at 616.

[162] It is also notable that despite the lack of empirical evidence of damage to future job prospects, the issue has been gaining increasing attention and recognition.[215] This material can, I suggest, usefully inform the employment institutions' assessment of likely negative impact. By way of example, a relatively recent study from the University of Otago makes the following salient points:[216]

> On the other hand, previous experiences with shortlisting 'blacklists' show that discrimination and unfairness here can be an elusive target too. In our discussions during this project, we have heard accounts of recruitment companies using their datasets to secretly blacklist/downgrade applications (including applicants who 'make trouble' by bringing a personal grievance or using too much sick leave). These 'trouble-making' applicants are filtered from the shortlisted candidates by the recruitment company, but don't know that it has happened, far less why. They just apply for jobs and never get any interviews. They might suspect something is amiss, but have no way of knowing what, far less proving it. Unauthorised disclosure of personal information in this way could well contravene the Privacy Act 2020, but any legal challenge would depend on awareness that it is happening in the first place. This issue is apparently becoming a growing concern to employment lawyers and even judges, though no cases have resulted yet.

[163] In an article about access to justice in this jurisdiction, a lawyer at a Community Law Centre addressed the issue. The employment relations regime was described as important to the Centre's client base, as was the need for it to be sensitive to the needs of those who are most vulnerable. The approach to non-publication was specifically noted, as gleaned from client experiences, as a barrier:[217]

> … the naming of employee parties in decisions of the [Employment Relations Authority] is a deterring factor for workers seeking to resolve employment relationship problems, as there is a perception that this will harm their future job prospects.

[164] The issue has also recently been highlighted by leading labour law academics in their research paper *Online Tribunal Judgments and the Limits of Open Justice.*[218] There they refer to growing evidence of blacklisting practices, described as the

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215 See also Nicole Busby and Morag McDermont "Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal" (2020) 49(2) ILJ 159, for a discussion of other adverse impacts associated with employment litigation generally, including to future job prospects.

216 Colin Gavaghan, Alistair Knott and James Maclaurin "The Impact of Artificial Intelligence on Jobs and Work in New Zealand" (Commissioned report for external body, University of Otago, 25 May 2021).

217 Stephen Parry "Access to justice in the employment jurisdiction: a perspective from Community Law" (2020) 2 ELB 34 at 35.

218 Adams, Adams-Prassl and Adams-Prassl, above n 107, at 50–51.

practice of collating information about particular types of workers with a view to preventing their hiring on future jobs. The relative ease with which decisions of the Employment Tribunal (UK) can be found, and searched by name, is said to reflect a "*real* risk that employers or related third-party organisations might use this easy source of information to effectively blacklist employees based on their litigation history".[219] As the authors note:[220]

> Not only does this practice allow employers to refuse to hire applicants on grounds that are irrelevant to their capacity to do the job, thereby introducing new forms of discriminatory (and arguably irrational) hiring, it potentially discourages employees from bringing employment claims in the first place, out of a fear that to do so might negatively impact their future job prospects.

[165] I consider that there is sufficient material available to the Authority/Court to draw an inference as to the likelihood of damage to future job prospects from publication of the names of employees, witnesses or non-parties. The material I have referred to seems to me to take such risks out of the realm of "mere speculation or guesswork" referred to by the Court of Appeal in *Chorus Ltd v Commerce Commission*.[221]

*Capacity of parties in employment disputes*

[166] Third, it is appropriate that the implications of any approach to the exercise of the discretionary powers under the Act be considered, having regard to unintended (including perverse) consequences. The reality is that many employees and employers are not well-resourced (financially or otherwise), which appears to be the case for MW and Spiga Ltd; are often unrepresented and/or ill-equipped to shoulder the burden of gathering extensive (and often expensive) evidence to support applications for interlocutory or permanent orders. The cost (and likely delay) of obtaining a psychologist's report, for example, to support an interim application for non-publication is likely to represent a real barrier to many employees, and small employers. Further, many parties appearing before the employment institutions do not

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219 At 50–51.
220 At 51.
221 *Chorus Ltd v Commerce Commission* [2014] NZCA 440 at [112], referred to in *JM*, above n 59, at [96].

have an understanding of the protections they may be able to seek, how they might go about obtaining them, or the ability to put together an affidavit in support of an application.

[167] Recognition of the realities appears, to me, to be embedded in the statutory directives that the Authority is to avoid a technical approach when undertaking its tasks, and that both the Authority and the Court are to be guided by equity and good conscience. The point can be made by reference to two hypothetical examples:

(a) Complainant A worked in a dairy on the minimum wage. Complainant A alleges they were unjustifiably dismissed by their employer for workplace theft. They are fearful that they will be unable to find alternative work if their name is published. They are without work, have no savings and ongoing expenses to meet. Is complainant A required to obtain a recruitment specialist's report as to potential or actual risk to their job prospects to support an application for non-publication orders being made in their favour? Or can complainant A simply explain to the Authority/Court that they have this concern?

(b) Employer B, a small business with a small number of employees, is defending a claim that it has failed to comply with the minimum procedural requirements prior to dismissing an employee. Employer B is concerned that publication of its name will damage its reputation in the marketplace. Is employer B required to obtain an expert business risk analysis report as to potential risk to its reputation to support an application for non-publication orders in its favour? Or can employer B simply explain to the Authority/Court that they have this concern?

[168] The short point is that there is a need to be realistic about what can fairly and reasonably be expected in this jurisdiction and what approach would, and would not, support the objectives of the legislation. No doubt this is part of the reason why Parliament conferred significant latitude on the Authority and the Court to drive the process, applying their specialist knowledge and expertise to ensure a just outcome between parties. The concern is particularly acute in circumstances where parties wish

to exercise their legal rights in the low level, non-technical, investigative, merits-based, expeditious and inexpensive jurisdiction of the Authority. The point is reinforced in respect of the Court by the flexibility injected by s 189(2).

[169] I agree with a submission made by Ms Dalziel, counsel for the Privacy Commissioner (as sixth intervener), that access to justice issues, acute in this area of the law, are relevant to a consideration of the broader interests of justice when considering the approach to non-publication; so too is the economic and social importance of employment both at an individual and a broader community level. As has been observed:[222]

> Employment law, perhaps more than any other field of law, is the area of law… that has the most obvious, continuing daily impact on people's lives. It is from employment that, directly or indirectly, the great majority of New Zealanders derive their economic security and consequently their ability to participate in society more generally.

*The evidence in this case*

[170] Fourth, the evidence that was before the Court (an affidavit filed by the Employers and Manufacturers Association, as seventh intervener) supports the concern about the impact of name publication on future job prospects. The affidavit sets out survey responses of 294 of the Association's members. The following salient points emerge:

(a) Around 70 per cent of employers surveyed considered it either highly relevant or essential for a prospective employer to be aware that a prospective employee had "been involved in previous employment-related litigation", regardless of the outcome of that litigation; and

(b) Approximately 69 per cent of employers surveyed used online database name search results to "identify the previous involvement of a prospective employee in employment-related litigation" at least

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[222] Gordon Anderson and Dawn Duncan *Employment Law in Aotearoa New Zealand* (3rd ed, LexisNexis, Wellington, 2022) at 3.

"sometimes", while around 30 per cent used the results either "often" or "always".[223]

[171] The Court has not been asked to say anything about the propriety or otherwise of accessing the information and using it in this way.[224] The purpose of referring to the material here is because it helpfully reinforces the point that there is indeed a risk (apparently quite a high risk) of prospective employers undertaking internet searches on the name of a prospective employee to determine whether they have taken proceedings against a former employer (regardless of outcome) and that information is likely to be regarded as useful (if not "essential") by many in their decision-making processes. I pause to note that this appears to be consistent with concerns raised by the previous Chief of the Employment Relations Authority (cited in a number of judgments) about the impact of publication on future job prospects, referencing correspondence he had received from ex-employees who had struggled to find alternative work, even where they had been successful in their claims.[225] I consider that the material put before this Court by the Employers and Manufacturers Association is precisely the sort of information the Court may have regard to under s 189(2) when considering how to exercise its broad discretionary powers going forward.

[172] I also note the affidavit evidence filed by the New Zealand Council of Trade Unions (first intervener) which outlines the deponent's knowledge of the mediation process obtained through their various legal roles in prominent unions. The deponent describes an "often"-used practice of mediators drawing to an employee's attention the risks associated with progressing with their claim beyond mediation, including the likelihood that they will be named and that this may damage their future job prospects. The affidavit was filed without objection and I did not understand any counsel

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223 Mr Harrison made the salient point that these survey results may only be the "tip of the iceberg" in terms of the prevalence of this practice given the likelihood that some (or many) the employers surveyed could be utilising recruitment consultants who undertake online database searches.

224 See the concerns about privacy identified in the University of Otago research paper: Gavaghan, Knott and Maclaurin, above n 216. See also the restriction on blacklisting practices contained within The Employment Relations Act 1999 (Blacklists) Regulations 2010 (UK) and a discussion of why the regulations were introduced in Rebecca Zahn "Recent Developments in Blacklisting" (2014) 124 Greens Employment Law Bulletin 4.

225 See Crichton, above n 102; as cited in *JGD v MBC Ltd*, above n 21, at [8]; *WN v Auckland International Airport Ltd*, above n 103; and *GF v New Zealand Customs Service*, above n 103.

appearing before the Court to take issue with the contents of it; nor was the deponent required to attend Court to answer questions in respect of it. I see this evidence as reinforcing the concerns articulated by the previous Chief of the Employment Relations Authority, and I see it as the sort of information that may usefully inform the approach going forward.

*Primacy of mediation, but at what cost?*

[173] While mediation is the primary form of dispute resolution under the Act, I agree with Mr Cranney (counsel for the New Zealand Council of Trade Unions) that there are significant difficulties associated with using the threat of name publication in the context of mediated discussions as an incentive for employees to settle at mediation instead of pursuing their claim to the Authority and beyond. It seems to me to be at odds with the statutory requirement that employers advise employees in plain language how to pursue a personal grievance through the various resolution services available (which includes the Authority, if it does not settle at mediation). More fundamentally, it would likely encourage perverse behaviours and outcomes within a framework for employment relations based on good faith.[226] The present case appears to me to represent a graphic example of this.

[174] As Miller J pointed out extra-judicially when addressing a "Barriers to Participation in the Employment Institutions" symposium in 2019, it is desirable that mediation does not unduly inhibit the range of cases coming through for adjudication, and that a high quantity of settlements is not seen as the hallmark of a well-functioning system. He observed that the *quality* of mediated settlements is important and that:[227]

> A quality settlement [at a compulsory mediation] is one that is not distorted by the combination of an imbalance of power between the parties and the inaccessibility of adjudication.

[175] Miller J went on to make the broader point, which I respectfully agree with, that it is no part of a court's function to convey the message that there are no principles

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226 See *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [48] per Glazebrook, Ellen France and Arnold JJ: interpretation of the Act should "avoid outcomes that would undermine or not incentivise good faith dealing between employers and employees."

227 Forrest Miller "Barriers to participation in employment litigation: what might make a difference and would it work?" (paper presented to AUT and Victoria University Symposium, Wellington, 22 May 2019) at 2.

worth standing on; and nothing that should not be bargained away. I would add that what the Act promotes is durable settlements arrived at in good faith on level ground: the approach to non-publication should support this objective.

[176] I have significant doubts as to whether a settlement of a genuine employment dispute, brokered under threat of potential detriment to future job prospects, is a "quality" settlement. In my view, such a settlement does not sit well with the scheme and purpose of the Act. Nor does it align with principles of access to justice for employees to face a long-term punishment for exercising their legal right to pursue a claim against their employer, by having their future job prospects unfairly compromised, or under the realistic threat of compromise.[228] Rather, it seems to me to undermine the objects of the Act to allow a system which *deters* employees from pursuing their legal rights if they cannot be resolved through good faith mediated discussions. I return to access to justice and its role below.

[177] For completeness, I make the point that in warning of the risks of damage to reputation, MBIE mediators are simply advising of the approach that the Authority and the Court currently take to non-publication. It is the approach adopted by the Authority and the Court that I consider needs to be revisited, including to ensure that settlements achieved at mediation are not unnecessarily distorted or weighted in favour of the party with inherently greater bargaining strength.

[178] The point might also be made that if, as appears to be common ground, MBIE mediators do routinely adopt the practice of advising parties of the risk of publication and its potential consequences, that reflects a clear acknowledgment, by one of the employment institutions, that the adverse consequences do indeed exist in this jurisdiction.

[179] Finally, the Supreme Court's observation in *Erceg*, that there has never been a right to be protected from the consequences that may accompany the open

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[228] A recent study from the United Kingdom identified that groups of workers who are most vulnerable to labour market abuses (including the youngest workers, those on temporary contracts, those working in the smallest businesses and the lowest-paid workers) are least likely to take action through the employment tribunals or courts: Lindsay Judge and Hannah Slaughter "Enforce for good: Effectively enforcing labour market rights in the 2020s and beyond" (April 2023) Resolution Foundation <www.resolutionfoundation.org>.

administration of justice, such as publicity and the potential for reputational damage,[229] must be read in light of the particular dynamics at play in the employment jurisdiction and the social purpose of the legislation.

*The relevance of technological developments and the pace of change*

[180] There have been significant changes that have occurred in society and technology since earlier judicial observations about the appropriate approach to non-publication of names in the employment jurisdiction.[230] One example is the emergence of artificial intelligence (AI) in the employment context to assist in making management decisions, such as recruitment.[231]

[181] While Business New Zealand (tenth intervener) submitted that its members (and more generally employers in New Zealand) do not have access to, nor the desire to access, these types of AI resources,[232] the technological potential, when viewed alongside the evidence that it is relatively common for employers to utilise previous employment dispute records to screen job applicants, suggests that it would be timely to grapple with this issue now.[233]

[182] Developments overseas reinforce the point. By way of example, one group of leading academics observe that machine learning algorithms may learn from patterns in previous employment disputes and use that to inform hiring decisions (which could lead to bias being baked into or exacerbated by automated decisions).[234] A concern about a developing "justice gap" for workers, compounded by the lack of transparency characterising most automated or semi-automated decision-making processes, has

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229 *Erceg*, above n 13, at [14]; citing *John Fairfax Group Pty Ltd v Local Court of New South Wales*, above n 54, per Kirby P; and noted with approval in *XYZ v ABC* [2017] NZEmpC 40, [2017] ERNZ 175 at [71].

230 See, for example, *FVB v XEY*, above n 84, at [13] as to the risk of weaponised public shaming through social media associated with publication; citing *X v R*, above n 108.

231 See Adams, Adams-Prassl and Adams-Prassl, above n 107, at 52; and Jeremias Adams-Prassl "What if your boss was an algorithm? Economic incentives, legal challenges, and the rise of artificial intelligence at work" (2020) 41 Comparative Labor Law and Policy Journal 123 at 132.

232 A recent study of 200 senior business leaders in New Zealand organisations with more than 100 employees revealed that almost half of those organisations are currently using artificial intelligence: Datacom "AI Attitudes in New Zealand – Datacom Research Report, August 2023" (August 2023) <www.datacom.com>. There does not appear to be any publicly available data as to what artificial intelligence is being used to achieve within organisations.

233 For a recent example of non-publication issues arising from a technological "anomaly", see *C v P*, above n 106.

234 Adams, Adams-Prassl and Adams-Prassl, above n 107, at 52.

increased the information asymmetries in the already imbalanced employment relationship. A related concern is that algorithmic opacity may conceal the violation of the rights of those workers subject to algorithmic tools (including reducing the likelihood of discrimination being perceived).[235] As Ms Dalziel submitted, due to the significant advances in AI and the expanding breadth of information readily available online, the potential for its use (and misuse) is likely to also expand.

*MW's evidence*

[183] Finally, MW was plainly very concerned about the prospect of publication, and the impact they feared it would have on their family, business interests, future job prospects within a small industry and standing within a close-knit community. That evidence, although compelling, was subjective, largely expressed in a general way and was not corroborated. I agree with Mr Nilsson, counsel for Stuff Ltd, NZME Publishing Ltd and Radio New Zealand Ltd (collectively herein referred to as the "Media Organisations", as ninth intervener), that this evidence would not meet the high standard for proving specific adverse consequences. These circumstances usefully invite reflection upon the approach to date.

## What of access to justice?

[184] It is true that access to justice is not an express object of the Act. However, I consider access to justice considerations to be inextricably woven into the objects and broader scheme and purpose of the Act. By way of example, s 3 acknowledges the inherent inequality of bargaining power between employees and employers; and employment agreements are required to contain a plain language description of the services available for the resolution of employment relationship problems,[236] reflecting a statutory intention that parties be informed of, and thus able to access, the relevant dispute resolution pathways available to them. The point is also reflected in the statutory provision of access to free, and specialist, mediators; the requirement that the Authority investigate without undue regard to technicality; and the power on the

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235 Giovanni Gaudio "Litigating the Algorithmic Boss in the EU: A (Legally) Feasible and (Strategically) Attractive Option for Trade Unions?" (2024) 40(1) The International Journal of Comparative Labour Law and Industrial Relations at 95–98.

236 Employment Relations Act, ss 54 and 65.

Authority and the Court to find a grievance other than pleaded. All this is reinforced by the Court's statutory jurisdiction to act in equity and good conscience, unless contrary to a statute (notably not common law), and the Authority is similarly directed.[237]

[185] Finally, s 237B gives the (access to justice) value explicit standing in the Act, allowing for filing fees to be waived or reduced in order to "promote access to justice". The implication is clear: Parliament considered that potential litigants should not be unduly prevented from commencing or continuing proceedings because of financial or other barriers.[238]

[186] In summary, I see access to justice as a relevant contextual factor for the exercise of the discretionary power to make orders of non-publication. There is also force in Mr Cranney's submission, that if justice is being pushed underground by improper pressures associated with accessing the institutions, that risks further increasing employer power and, it might be added, increasing the imbalance between employees and employers and undermining the "levelling" objective of the Act, described by the Supreme Court in *FMV*.

[187] A further point might usefully be made at this juncture. The Authority and the Court are required by statute to consider a direction to mediation throughout the life cycle of litigation. Declining non-publication during the life cycle of the litigation runs the risk of undermining the mediation process, namely enabling the parties to enter into a fully confidential settlement signed off by a mediator under s 149. It also runs the risk of undermining the Authority and Court's powers to make consent orders under sch 2 cl 10(2) and sch 3 cl 12(2).

## What of open justice?

[188] The Court was urged to confirm that open justice is the starting point. A number of interveners (notably the Media Organisations, New Zealand Law

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237 See the references to access to justice in *W v Auckland District Health Board* [2007] NZCA 227, [2007] ERNZ 441 at [15]. See also *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA); and *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) for consideration of access to justice in the context of costs.

238 Employment Relations Act, s 237B(2).

Society/New Zealand Bar Association, Business New Zealand and the Employers and Manufacturers Association), submitted that it must be given pre-eminent status in the multi-factorial mix.

[189] As I have said, I see the statute as the starting point. The Act confers exclusive jurisdiction on the Authority and the Court in respect of employment matters, and broad powers to enable them to effectively exercise that jurisdiction as in equity and good conscience they see fit. The Act confers express powers on the Authority and Court to make orders of non-publication at their discretion – the Act says nothing of open justice, nor does it specify any starting point.

[190] I do not consider that the *Erceg* general rule applies unless directly limited by the statute. That is not to say that concerns about open justice are irrelevant to the discretionary exercise – I accept that they are. It is, however, necessary to clarify what the principle of open justice entails in cases involving an application to prohibit publication of a name and why the principle is asserted to be of pivotal importance in investigations in the Authority and hearings in this Court.

[191] The principle of open justice was summarised by the majority in *H v A Ltd* as involving two foundations, namely the need for transparency of process and the need for accountability of members of the judiciary for their decisions, providing an incentive for the sound and principled exercise of judicial power.[239] It does not logically follow that where an order prohibiting publication of a name is made, the two foundations are seriously undermined. The foundational underpinnings of open justice are undoubtedly firmly engaged in a case involving an application to hear a case in closed court or to permanently suppress the reasons for a judgment or a determination. They are engaged to a lesser extent where, for example, an order is made by the Authority or the Court prohibiting publication of the name of a party, a witness or another person caught up in a garden variety personal grievance, the hearing has taken place in open Court and a reasoned judgment has issued. Justice has, to a significant extent, been done in public and in an open, as opposed to closed, way.

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[239] *H v A Ltd*, above n 7, at [34]. See also *Johns v Director of Proceedings*, above n 60, at [172] per Moore J for a discussion of the purposes served by the principle of open justice in the context of professional disciplinary tribunals.

[192] I acknowledge that publishing the name of a party, a witness or another person supports transparency of process and accountability of the judiciary, but it should not be overlooked that there are other avenues via which transparency and accountability are promoted, for example, by hearing the case in open court.[240] Reasoned judgments record the procedural history and the Court's analysis of the issues, and are able to be challenged via appeal and are subject to public scrutiny.[241] I do not consider that the integrity of the employment institutions is necessarily imperilled by adopting a different approach to non-publication.

[193] Recently, the Supreme Court has referred to open justice and *Erceg* in two non-publication judgments.[242] The first was *M v R*, in the context of the Criminal Procedure Act 2011. It is notable that the Court did not refer to open justice as creating a presumption against suppression for the purposes of the Criminal Procedure Act, or more generally. Rather it referred to open justice as "a strong and important value because it is fundamental".[243] The Court concluded that open justice is the starting point under the Criminal Procedure Act (unsurprisingly, given the scheme of that Act makes this clear[244]) and the framework within which various factors in a particular case are to be weighed. However, the Court went on to confirm that on a case-by-case basis, open justice and the underlying interests that principle serves can be overcome by counter-balancing factors.[245]

[194] The second judgment of the Supreme Court, *Farish v R*, also considered the approach to suppression in criminal proceedings. The Court traversed the general policy rationales for publication of court proceedings, including that "openness sustains public acceptance of processes and outcomes"[246] and that the principle

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240 A list of the Court's scheduled hearings for the upcoming two weeks is published on a weekly basis on the Court's website.

241 Cases subject to non-publication orders over names are still posted to the Court's website in anonymised format.

242 *M v R*, above n 47; and *Farish*, above n 55.

243 *M v R*, above n 47, at [39].

244 See generally the emphasis on the important role of media reporting in the Criminal Procedure Act at [41]; the comments regarding open justice in the determination of criminal charges at [43]; and the rejection of a governing presumption in favour of name suppression because it would not fit with the statutory scheme at [65]. See too at [66]: "The framework of the Criminal Procedure Act reflects, as we have said, that open justice is the starting point in determining questions of name suppression."

245 At [44].

246 *Farish*, above n 55, at [35].

"assumes that the public should be the judges of what happens in the courts".[247] Those comments align with the analysis of the twin pillars of open justice contained in *H v A Ltd*, but for reasons I have explained, I do not consider it takes the open justice point any further – open justice is clearly an important principle. There are other important values at play in this jurisdiction, as I have sought to explain, and statutory imperatives (discharging discretionary powers consistently with equity and good conscience, unless contrary to statute).

[195] Even had I accepted the submission that open justice was the starting point in this jurisdiction, it would not take the discussion much further having regard to what I see as the underlying statutory intent and range of interests involved. As the Supreme Court observed in *Erceg,* "the proper administration of justice" must be construed broadly, accommodating the particular circumstances of individual cases as well as considerations going to the broader public interest. Kirby P's important observation in *John Fairfax Group v Local Court of New South Wales* was cited:[248]

> The common justification for these special exceptions is a reminder that the *open administration of justice serves the interests of society and it is not an absolute end in itself.*

[196] I agree with the observation that what is at stake in relation to non-publication in the context of employment relations is not simply how to strike an appropriate balance between the public and the private interest; rather the issue is how to ensure that the principles of open justice and access to justice can be reconciled in practice:[249]

> Different contexts may well require distinct balances to be struck. Employment Tribunal judgments provide a particularly salient case study in this regard, given the inequality of bargaining power between employer and employee, and the social significance of work to the individual.
>
> Indeed, *whilst the publication of data extracted from tribunal judgments serves, at first glance, unequivocally to further the principle of open and equal justice, upon closer inspection, the ensuing datasets may also be used to undermine it – from evading employment law and exacerbating existing labour market inequalities to creating new barriers to access to justice.*

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247 At [73].

248 *Erceg*, above n 13, at [18]; citing *John Fairfax Group Pty Ltd v Local Court of New South Wales*, above n 54, at 141 (emphasis added).

249 Adams, Adams-Prassl and Adams-Prassl, above n 107, at 44 (emphasis added).

[197] Further, I agree with Mr Harrison KC, counsel appointed to assist the Court, that it is distinctly arguable that the "constitutional importance" attached to open justice considerations is significantly reduced when consideration is given to characteristics of the Authority as an investigative body. The same point (statutory design) can be made, albeit with somewhat less force, in respect of the Court.

[198] I also perceive an awkwardness in the Court insisting on the one hand that justice in employment cases must presumptively be done in full public gaze by identifying parties by name, while at the same time engaging with the statutory invocation to require the parties to make full use of confidential mediation services provided under to Act to seek to resolve their differences away from the full public gaze.

[199] A more fundamental point might usefully be made. If access to justice is effectively compromised by the way in which the Authority and Court approach the exercise of their discretionary powers, the concept of open justice is likely to ring hollow. Without access to justice there can be no justice at all (open or otherwise).

## What of freedom of expression?

[200] The right to freedom of expression must also be considered when assessing the appropriate approach to non-publication in this jurisdiction.[250] As Mr Nilsson said, the media act as the eyes and ears of the public and prohibiting publication of the name of a party, a witness or another person would constrain (to some degree) the ability to report on proceedings, creating a "little private offence" that restricts freedom of expression for both parties and non-parties to a dispute. He sought to emphasise the role of the media, not the Courts, in deciding what is newsworthy, and made the point (which I accept) that names and personal details may well have interest beyond the courtroom which a judge may not perceive, or perceive as unimportant.[251]

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250 *M v R*, above n 47, at [42]. The Supreme Court emphasised that the right is "highly relevant".

251 See too the *Farish*, above n 55, at [35]: "A secondary general rationale is that publication relies on the media, who may find cases less newsworthy, or more burdensome to report, when someone involved in the proceeding cannot be named."; and citing a passage from *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697; quoting *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

[201] But the right to freedom of expression is not absolute. It is subject, as with all rights recognised in the New Zealand Bill of Rights Act 1990, to justified limits,[252] informed by the statutory context and the circumstances of the particular case.[253] As Mr Harrison observed, by conferring on the Authority and Court the power to prohibit publication, Parliament has imposed a plainly overriding justified limit on the right, to be exercised to promote the policy and objects of the Act.

[202] Further, while I do not doubt that there may be a public interest in many employment cases and the human stories behind them, it does not follow that it is *in* the public interest (or in the broader interests of justice) to name parties, witnesses or others who become entangled in employment disputes.[254] Nor does it follow that naming such people is essential to understanding the background or outcome of the case (which are, I accept, clearly matters of genuine public interest).[255]

[203] In summary, I accept that freedom of expression is a relevant consideration but it must be considered with other relevant considerations, including privacy interests which I turn to next.

## What of privacy interests?

[204] Individuals have a high privacy interest in employment information and there is a broader public interest in maintaining privacy interests. Privacy clearly carries important value in our legal system[256] and has been described as an aspect of (or as having a particularly close nexus with) human autonomy and dignity.[257]

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252 New Zealand Bill of Rights Act 1990, s 5.

253 See *Siemer*, above n 36, at [157] per McGrath, William Young, and Glazebrook JJ. The majority made this point in the context of considering the Court's inherent power to make non-party suppression orders.

254 See, for example, *Chief of New Zealand Defence Force v Darnley* [2021] NZEmpC 40, [2021] ERNZ 123 at [5]. See also *Newspaper Publishers*, above n 213, where a distinction was drawn between cases of mere curiosity and cases where the press seeks to publish information or comment about a matter of genuine public interest.

255 A point made by the Court of Appeal in *Jay v Jay*, above n 11, at [120].

256 See *Hosking v Runting* [2005] 1 NZLR 1 (CA).

257 *Brooker v Police*, above n 75, at [123] per McGrath J, and [182] per Thomas J. Compare *X v New Zealand Police*, above n 80, at [12] where human dignity was described as a fundamental human right that is increasingly protected by the evolving right to privacy.

[205] I agree with Ms Dalziel that there is a strong connection between employment law and privacy law, and that privacy is an important interest which tends to weigh in favour of a more expansive approach to non-publication in this jurisdiction. The reality is that the sort of information which comes before the Authority and the Court is often intensely personal, for example, claims of workplace bullying, inappropriate conduct and emotional/mental/physical harm. Indeed it is notable that Parliament has recently extended the time within which employees can raise personal grievances for sexual harassment to recognise the impact that harassment of that nature can have on its victims.[258] I regard those special legislative provisions as an additional indication that a protective approach is appropriate, and likely required.[259]

[206] At this point it is convenient to refer to observations directed at the interest an employer might legitimately have in public access to information about a prospective employee's past, including whether (for example) adverse findings have been made against them in the Authority or the Court. Putting to one side potential issues about the misuse of private information, and discriminatory recruitment practices, I do not see the point as informing the approach to non-publication. There are other steps an employer can take (for example, asking questions of the prospective employee about their employment history, or asking for and checking references). And, as the Supreme Court observed in *ASG v Hayne*, a non-publication order does not operate as an impermeable shield.[260] Consequently, I do not see a more protective approach as undermining the objects of the Act or unduly compromising the ability of employers to source information about prospective employees.

[207] Also relevant is the fact that once information relating to an employee, a witness, an employer, or a non-party caught up in the matter is posted online, it has the potential to reach a much wider audience and remain available for an indefinite amount of time through the circulation and/or manipulation and/or reproduction of that information in multiple (and global) forms. As the Court of Appeal pointed out

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258 Employment Relations (Extended Time for Personal Grievances for Sexual Harassment) Amendment Act 2023.

259 The Court has long recognised that in most cases a protective approach should apply to the name of a grievant in a complaint of sexual harassment; that approach is likely to advance the public interest by encouraging others to come forward. See *Z v A*, above n 83, at 495.

260 *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777 at [70] and [79].

in *X v R*, the Courts have yet to fully grapple with the ramifications of social media, which is not subject to the same professional constraints and oversight of the courts as mainstream media (such as the Media Organisations intervening in this case).[261] And, as the Supreme Court has observed, the development of the internet and social media raises different issues than those at play at the time the non-publication provisions were enacted; that development may support the view that a more flexible (and I would say protective) approach is appropriate.[262]

[208] I consider these points support an approach which sufficiently recognises the desirability of protecting the individual privacy interests at stake, and do not consider the current approach does that.

## What of the right to work, and to protection against unemployment?

[209] The right to work has been recognised both domestically[263] and at international law. Article 23 of the Universal Declaration of Human Rights provides that:[264]

> Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

[210] Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (ratified by New Zealand) provides:[265]

> The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work he freely chooses or accepts, and will take appropriate steps to safeguard this right.

[211] The General Comment on art 6 of the ICESCR states that it "includes the right of every human being to decide freely to accept or choose work" and that it also "implies the right not to be unfairly deprived of employment".[266]

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261 *X v R*, above n 108, at [48]–[49].

262 *ASG v Hayne*, above n 260, at [67]. These comments were made in the context of criminal non-publication provisions, but are also applicable to the Employment Relations Act.

263 See, for example, *Horsburgh v NZ Meat Processors Industrial Union of Workers* [1988] 1 NZLR 698 (CA); *X v Y Ltd* [1991] 1 ERNZ 863 (EmpC); and *Hill v NZ Rail Ltd* [1994] 1 ERNZ 113 (EmpC).

264 *Universal Declaration of Human Rights* GA Res 217A (1948), art 23(1).

265 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 6(1).

266 Committee on Economic, Social and Cultural Rights *General Comment No. 18 – The Right to Work* E/C.12/GC/18 (2006) at [6]. The Supreme Court has recently referred to a general comment to explain a right in *M v* R, above n 47, at [57].

[212] Also relevant are conventions of the International Labour Organisation (ILO) that have been ratified by New Zealand.[267] One such convention is the Employment Policy Convention 1964 (No 122). The preamble[268] refers to the right to work and art 1 provides that "each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment".[269]

[213] While not dealt with in submissions, it seems to me to be arguable that implicit in a right to work is a negative duty not to unduly block access to the labour market.[270] While this might most graphically be seen in relation to, for example, unlawful discrimination in terms of recruitment, the underlying point may be said to apply in respect of the approach most appropriately adopted to non-publication in this jurisdiction. Namely that approach should tend to support, rather than undermine, the right to work and the human dignity inherent in that right, a point that I will return to.

[214] An example might serve to illustrate the underlying point I am endeavouring to make.[271] A prohibition against dismissing pregnant women is necessary in order to make it possible, in practice, for women to enter the labour market; it ensures that their freedom to enter the labour market is not merely formal, but substantive. Unjustifiably dismissed employees have a formal ability to proceed past mediation and seek to assert their legal rights in the Authority and the Court. The concern I have is the extent to which the current approach supports a substantive, as opposed to formal, right to do so. In other words, the Court (and the Authority) has a role in supporting – rather

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267 Compare *Lowe v Director-General of Health, Ministry of Health* [2017] NZSC 115, [2018] 1 NZLR 691 at [37]. It also needs to be noted that generally conventions are not directly enforceable in domestic law unless they are incorporated into New Zealand law: *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475; and *Attorney-General v Fleming* [2024] NZCA 92 at [82]. See, for example, Employment Relations Act, s 3(b). See too the Court of Appeal's acknowledgement of this practice in *Mount Cook Airline Ltd v E Tū Inc* [2024] NZCA 19 at [10]–[11]; and *Nathan v C3 Ltd* [2015] NZCA 350, [2015] ERNZ 61 at [36]. For the avoidance of doubt, I refer to conventions by way of context.

268 Preambles are part of the relevant context for interpreting treaties: Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31; referred to, for example, in *Attorney-General v Zaoui* [2005] NZSC 38, [2006] 1 NZLR 289.

269 Employment Policy Convention 1964 (No 122) (signed 15 July 1965, entered into force 15 July 1966), preamble and art 1.

270 See too Joe Atkinson "Human Rights as Foundations for Labour Law" in H Collins, G Lester and V Mantouvalou (eds) *Philosophical Foundations of Labour Law* (Oxford University Press, Oxford, 2018) 122 at 129: "The right to work might also include a right to non-discriminatory access to work".

271 The example is drawn from Guy Davidov *A Purposive Approach to Labour* Law (Oxford University Press, Oxford, 2016) at 67.

than minimising – the capacity of parties to employment relationships to exercise their statutory rights.

[215] As recently reaffirmed by the Supreme Court, legislation should be interpreted in a manner consistent with New Zealand's obligations under applicable international instruments.[272] I consider that New Zealand's commitment to the right to work, and the policy embedded in that international obligation, is relevant to determining the nature and scope of the discretionary non-publication provision in the Act, and supports an approach that does not undermine future job prospects.

## What of Tikanga?

[216] I agree with the majority that tikanga is relevant to the general approach the Authority/Court takes, and that tikanga must be engaged with in a way that upholds its mana and integrity.[273] I make the three additional points.

[217] As a preliminary matter, I record that all interveners appeared to accept that tikanga was relevant. And almost all interveners indicated that they were content to defer to the submissions made on Te Hunga Rōia Māori's behalf as to the applicable tikanga/tikanga legal norms. The interveners in favour of what I refer to as the traditional approach (*Erceg/Crimson Consulting*) said tikanga should be considered on a case-by-case basis, and that this should occur within the parameters of the traditional approach. Te Hunga Rōia Māori submitted that tikanga can inform the approach at a general (framework) level, and is also relevant at case-specific level – I agree with this submission.

[218] My first point is that I see tikanga as telling against open justice being accorded primary weight in respect of the approach to non-publication in this jurisdiction.

[219] The framework for employment law and practice is characterised by deeply embedded duties of good faith and mutual obligations of fair dealing, trust and confidence. As I have explained, resolution through mediated discussions is a theme

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272 *M v R*, above n 47, at [54].
273 See above at [62]–[68] of the majority judgment.

running through the Act, and the life-cycle of employment disputes. These features, as Ms Stephens (who prepared a pūkenga report and gave evidence at the hearing) observed, often resonate with tikanga legal norms. Tikanga, as Ms Siciliano (counsel for Te Hunga Rōia Māori) submitted, can be "… a means or a mechanism to further the objectives of an employment relationship and of the wider jurisdiction".

[220] I have no difficulty accepting the proposition that the Authority/Court's approach to the publication of names ought to be one that considers the mana of the people and institutions involved and the relationships which may be impacted, returning (where possible) to a state of ea. I agree with Ms Siciliano's submission that a more holistic and purposive approach is required to account for the relational and specialist nature of this jurisdiction, and I consider that points squarely away from open justice being given pre-eminent status.

[221] Second, while I accept that the role tikanga plays in the exercise needs to be determined on a case-by-case basis, I understood Ms Stephens's evidence to be that the engagement of some tikanga norms is inevitable because of the considerations and values which will almost always arise in non-publication cases (for example, privacy and reputational concerns). For example, as Ms Stephens pointed out, whakamā is likely to be relevant in almost any case concerning publication of someone's personal identity. I draw from Ms Stephens' evidence, which I accept, that it is highly unlikely that tikanga will be irrelevant to the exercise of the discretion to make orders of non-publication; although, the extent to which the various tikanga norms may be engaged will vary on a case-by-case basis.

[222] I note too that tikanga norms do not always point to the same outcome. As Ms Siciliano submitted, applicable tikanga norms in a particular case may sometimes tell in favour of, or against, non-publication in the discretionary exercise. For example, Ms Stephens explained in evidence that where (as here) there has been a breach of a settlement agreement (a hara), ea may have particular significance. She made the point that ea may, for example, be achieved through publication of the defaulter's name and protection from publication of the harmed party's name. The point was also made in relation to whakamā; Ms Stephens said that in some cases whakamā might be

appropriate, or even necessary, as part of the response to a wrong. The norms will have to be tied to what is proportionate, appropriate and necessary.

[223] My third point relates to consideration of tikanga within the evidential standard or test said to apply. As Ms Siciliano submitted, consideration of tikanga in a particular case will require the Court to be satisfied (on an appropriate basis) of the applicable tikanga, and then consideration as to how it is relevant in the specific context.[274] By way of example, the Court was advised that whakamā is broader than the concept of embarrassment and that it is an experience that affects more than the individual concerned, often affecting their whānau and descendants.[275] Ms Siciliano submitted that means it is difficult to adequately acknowledge whakamā (along with other tikanga norms of relevance to non-publication) within the current threshold requirement of specific adverse consequences. I see the point, which I accept, as telling against the imposition of an evidential standard or test. I am also conscious that it may be difficult to accommodate, and be inappropriate to attempt to fit, tikanga norms within an evidential standard or test of specific adverse consequences.

[224] Finally, I refer to Mr Nilsson's submission that a change in approach may undermine the mana of the employment institutions. He sought to emphasise the connection between open justice and protecting the integrity of the justice system, and that non-publication affects the relationship between the judiciary and the general public. While I accept the point on a general level, it needs to be unpicked. I do not see the integrity of the Authority/Court being seriously called into question in terms of my preferred approach once the roles of those institutions, and the statutory scheme, is fully understood. I agree with the majority that the mana of the decision-maker falls for consideration on a case-by-case basis, and the Court must be cognisant of context and the interconnectedness of tikanga norms, including as they relate to the parties, and other people and bodies when called on to exercise its discretionary powers.[276]

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274 That may, or may not, require evidence (in the strict sense of the word): see *Ellis*, above n 94, at [125] per Glazebrook J, and [273] per Williams J.

275 Stephens, above n 85, at 9.

276 See *Ellis*, above n 94, at [180] and [254]. See too Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [1.2].

## What of the different principles/rights/interests/values?

[225] As will be apparent, I consider that a number of principles, rights, interests and values fall for consideration in determining the proper interpretation and application of the power to make non-publication orders; some of which sit uncomfortably with one another. That underscores, to my mind, the importance of understanding the scheme and purpose of the statutory provisions within the legislative and broader context; most particularly its social, protective purpose.

[226] I have no difficulty accepting that there may be cases where disclosure of a name is desirable in the broader public interest, for example to protect or inform the public or encourage other potential complainants to come forward,[277] or (as Ms Stephens observed) where whakamā might be an appropriate consequence, or to move towards a state of ea. Even then, much will depend on a consideration of all of the circumstances.

[227] It may be helpful to stand back and consider the issue in terms of proportionality of the risks and benefits.[278] On the one hand there is a generally recognised broader public benefit in publication of names;[279] on the other there is what I would describe as an appreciable risk that publication of the name of an employee who seeks to exercise their legal rights through the specialist institutions will result in long-lasting reputational damage impacting on future job prospects via an indelible global footprint and diminution of their mana and standing within their communities (notably the sort of harm MW described). There is a risk too that an employer who seeks to exercise their legal rights, including to defend an action brought against them, through the specialist institutions will also attract an indelible global footprint. And the risks associated with publication extend beyond the parties, to witnesses and non-parties. I agree with a point made by Andrew Beck in an article on non-publication:[280]

> A question that impinges on human rights needs to be dealt with in a consistent way that recognises the importance of what is at stake.

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277 See *Jay v Jay*, above n 11, at [121].

278 *Farish*, above n 55, at [36].

279 See, for example, *Farish*, above n 55, at [35]. However, it is worth noting that the public interest is not inevitably synonymous with open justice (or the publication of names), see *Erceg*, above n 13, at [18]; citing *John Fairfax Group Pty Ltd v Court of New South Wales*, above n 54.

280 Andrew Beck "Privacy Rights in the Courts" [2016] NZLJ 179 at 183, as cited in *Y v Attorney-General* [2016] NZCA 474, (2016) 23 PRNZ 452 at [33].

## A recalibration?

[228] I consider that the approach generally adopted to applications for non-publication in this jurisdiction should be recalibrated. A recalibration would, in my view, be timely because of developments in the way in which information relating to employment history is searched, distributed and utilised, because determinations and judgments of the specialist institutions have become more readily accessible via their respective websites, and because our appreciation of the role of tikanga in this jurisdiction, and how it might inform the exercise of the Authority/Court's discretionary powers, has significantly developed.[281]

[229] More fundamentally I consider a recalibration is consistent with, if not required by, the empowering statutory provisions, the Act's objectives, the institutional design and the interests of justice more generally.

[230] A recalibration would also better accommodate the sometimes competing considerations at play such as access to justice, open justice, our domestic and international obligations, privacy interests, tikanga and the values embedded in each of those considerations.

[231] While some interveners strongly supported a retention of the *Erceg/Crimson Consulting* approach, I have formed the clear view that to do so sits uncomfortably with the legislation when interpreted in context. I agree with the submission advanced by Te Hunga Rōia Māori that the current approach is unnecessarily narrow in terms of the specialist jurisdiction of the Court and the Authority, having regard to the relation-centric and behaviour-focused nature of this area of the law and the underlying objectives of the legislation that the Authority and the Court are charged with supporting. Further, it unduly constrains the Authority and the Court's equity and good conscience jurisdiction conferred by statute. I summarise my preferred approach as follows.

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[281] Legislation Act 2019, s 11. See generally *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5 at [172]. I suggest that the approach to non-publication in this jurisdiction also ought not to stand still in the face of change.

## My preferred approach

[232] The Authority and the Court each has a broad statutory discretionary power to make orders prohibiting publication, including of the name of a party, a witness or other person. The discretion is to be exercised in a way that recognises and supports the objects of the Act, and the values underpinning it. Those include to promote and facilitate employees and employers to resolve employment relationship problems in good faith, at a low level and between themselves; to address the inherent inequality of power between employees and employers; and to recognise and uphold the dignity of employees and the right to work. The discretion is to be exercised in a way that supports successful employment relationships and good faith behaviour on a relationship-specific and general level, and that promotes access to justice via the employment institutions without fear of undue consequence. The tikanga legal norms I have referred to are part of the overarching framework and consideration of them will be interwoven in the exercise.

[233] Absent an order made by the Authority or Court, the names of parties, witnesses and non-parties may be published. But there is no presumption against non-publication. The Authority or Court may make an order of non-publication where they consider it appropriate to do so. That may involve, but does not necessitate, evidence to be filed, including having regard to the "unusual" powers and specialist knowledge of the two institutions.

[234] In considering whether to make an order of non-publication, it will be appropriate to consider what is at stake[282] and what the interests of justice require,[283] viewed through the lens of the objectives of the legislation. Equity and good conscience is, as the Act makes clear, the ultimate touch-stone.

[235] When non-publication in relation to the name of a party, a witness or other person is in issue, it is likely to engage consideration of a range of factors, the following of which are likely to be of particular relevance:

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[282] The point made by Andrew Beck, above n 280.

[283] The point made by Kirby P in *John Fairfax Group Pty Ltd v Local Court of New South Wales*, above n 54.

(a) The nature of the case and the stage of the proceedings;

(b) the extent to which private interests are engaged and why, given the individual circumstances (including of any party, witness or other person);

(c) the potential impact of publication, including on third-parties;

(d) any public interest in identifying the name of the party, witness or other person (including whether the name of the party, witness or non-party is central to an understanding of what the Authority/Court must decide); and

(e) any other rights and interests which are engaged.

[236] It is neither possible nor desirable to set out a list of the sort of cases in which non-publication orders might appropriately be made. However, what can be said at a general level is that the Authority/Court may be reluctant to make an order of non-publication of party name in the following sort of cases: an interpretation dispute pursued by a Union on behalf of its members; and in respect of an employer, where that employer has deliberately breached an employee's entitlements, or where adverse findings have been made in respect of a breach of minimum employment standards or poor workplace practices. There may be a public interest in identifying the name of an employer in such cases, or where an employer has been found to have sexually harassed or bullied an employee, to enable other complainants to come forward. Likewise, there may be a public interest in identifying the name of an employee who has been justifiably dismissed for fraudulent misconduct, also depending on the level of public interest in that conduct. But even where a public interest in naming has been identified, that should never be the start and end point of the exercise. A proportionate approach will need to be adopted in terms of the weighing exercise.

*Is statutory amendment required?*

[237] I do not consider that a change in approach requires statutory amendment; my preferred approach is predicated on what I regard as a proper interpretation of the

statute, and consideration of factors likely to be relevant to the exercise of the Authority/Court's broad discretionary powers. It does not go as far as being a governing presumption against publication.[284]

[238] Nor do I agree with a submission advanced on behalf of Business New Zealand that adopting a different approach to non-publication would go beyond the Court's constitutional role. The submission stands at odds with the current approach which effectively recognises a presumption in favour of publication (although it is not expressed in the cases in this Court in this way[285]) despite that presumption not being expressly legislated for (or, in my view, impliedly legislated for).

[239] As I have said, the wording of the empowering provisions is wide, they are to be ultimately guided by equity and good conscience, and are not limited in the way contended for – either expressly or by necessary implication.

*A different approach in the Court and the Authority?*

[240] I have considered whether a different approach ought to apply in both the Authority and the Court, recognising the unique powers conferred on the Authority and the way in which Parliament expects it to carry out its business, including that it may, where it considers it appropriate, hold its investigations in private.[286] I see strength in that point. However, also relevant is the flexibility of approach conferred on the Court in the exercise of its jurisdiction, including as to the evidence and information it may accept, admit and call for, and its expansive equity and good conscience jurisdiction.[287]

[241] Further, it is notable that the Court may hear challenges from Authority determinations afresh, essentially standing in the shoes of the Authority.[288] It would be odd if an applicant had secured a non-publication order in the Authority according

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284 See generally *M v R*, above n 47, at [65] and [66].
285 Compare *Peter T Rex LLC v NZME Publishing Ltd*, above n 195, at [33].
286 Employment Relations Act, s 160(1)(e). While the Court may order that it sit behind closed doors (hearing in camera) in exceptional circumstances, that threshold will only be reached on rare occasion: *Q v Commissioner of Police*, above n 44, at [20]–[23]; and *Crimson Consulting Ltd v Berry*, above n 16, at [142]–[144].
287 Employment Relations Act, s 189.
288 Section 182(1).

to one approach and then a different approach applied on the de novo hearing of precisely the same claim in this Court, or where an applicant's claim had been removed to the Court for hearing at first instance.[289] I see it as unnecessarily complicated, and problematic from both a procedural and substantive (access to justice) standpoint, to adopt an approach that differs at each stage, and nor do I see a different approach as mandated under the Act. The point is essentially one of institutional comity.

*Do parties need to front-foot an application in the Authority?*

[242] The Court was told that the Authority's usual practice is to wait for a party to advance an application for non-publication, either on their own behalf or on behalf of a proposed witness or other named person, rather than exercising its own initiative to draw a potential order to the party's attention or to make an order on its own motion. While cognisant of the statutory constraint on the Court advising the Authority on the procedure it is to follow, or has been following,[290] it is, in my view, entirely open to the Authority to go on the front foot in respect of non-publication.

[243] In some circumstances it may be particularly important that it do so, in order to do justice and meet the underlying objectives of the legislation. Both the Authority and the Court are empowered to make such orders on their own motion, as cl 10 of sch 2 and cl 12 of sch 3 make plain, and they may initiate such a step where it appears appropriate to do so. It may well be appropriate to go on the front foot where a party appears on their own behalf, or without the benefit of an experienced representative who may be expected to be aware of developments in the law, the availability of such protective orders, and when and how they should be sought. I make this point because the Court is well aware that such matters are often overlooked, or unknown, or regarded as too technical or difficult to navigate by litigants and some representatives.[291]

[244] It is not uncommon for employees and employers to be unrepresented in the Authority, and experience suggests that many Court users do not have a good

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289 Section 178.
290 Section 188(4).
291 Noting that in this jurisdiction, parties are entitled to be represented by any other person, including advocates who are unregulated and may be unqualified: Employment Relations Act, s 236.

understanding of the orders that might be available to them or how they might go about getting one made in their favour. And, as the Act makes clear, the Authority, in its investigative role, is entitled to drive the process without waiting for issues to be raised. I consider that the Court is entitled to front-foot the issue too, and note that neither cl 10 of sch 2 nor cl 12 of sch 3 requires an application to be advanced by an affected person, in contrast to other provisions in the Act.[292]

*A different approach at different stages: interim and permanent?*

[245] I consider that the same approach should apply at an interim and permanent stage, but that the weight of particular factors will vary depending on the stage. The desirability of protecting an employer's or employee's name from publication having regard to the potential damage to reputation may sometimes weigh more heavily at an interim stage, when the claim is untested, than at a permanent stage. The fact that the statute requires the Authority and the Court to direct the parties to mediation where appropriate throughout the lifecycle of proceedings, and may make consent orders prohibiting publication of "all or part of the contents of that settlement" (so including party names), also supports non-publication at an interim stage, pending final determination of the matter.

[246] *C v Air Nelson Ltd* offers a useful cautionary tale in this regard. An airline pilot (C) was dismissed for sexually harassing a colleague. C applied for interim orders of non-publication pending determination of a personal grievance claim. The application was declined after weighing up the particular parties' positions and the public interest in open justice.[293] C applied for leave to appeal to the Court of Appeal; an interim non-publication order was made to preserve the position. The Court of Appeal declined to grant leave, but the interim order was extended pending an application for leave to appeal to the Supreme Court.[294] The Supreme Court dismissed the application for leave to appeal, but further extended the interim order of the Court of Appeal to enable the Employment Court to reconsider whether the present state of

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[292] Compare matters which expressly require an application, for example, for a rehearing or urgency: Employment Relations Act, sch 3 cls 5 and 21.
[293] *C v Air Nelson Ltd* [2010] NZEmpC 18.
[294] *S (CA179/10) v Airline Ltd* [2010] NZCA 263, (2010) 7 NZELR 553.

the case justified suppression.[295] In the event, C's claim of unjustified dismissal succeeded; permanent orders of non-publication were then made.[296]

## Anonymisation v non-publication

[247] I prefer not to express a view as to an increased use of anonymisation of party and witness names, other than to say that I see potential issues with such an approach. Those include the concerns said to weigh against non-publication (transparency/open justice) and the way in which such an approach would sit with the express statutory power of non-publication of party and witness names conferred on the Authority/Court.

## Application of preferred approach to MW's case

[248] The way in which I would answer the questions raised by MW's challenge will be readily apparent. The Authority erred in declining to make the non-publication orders sought by MW. The refusal to make an order undermined, rather than supported, the objectives of the legislation, particularly those within s 149 itself. There was a failure to adequately consider the potential impact of publication on MW and the private interests involved, including business interests and future job prospects.

[249] While I note that MW did not directly speak about a risk or fear of experiencing whakamā and nor did Ms Stephens comment on the particular evidence that MW gave, I would not see the absence of evidence about such matters as a hurdle. The potential impacts of publication on MW seem to me to be sufficiently obvious that they could readily have been inferred.

[250] Hara, ea and whakamā are relevant to the present case. Spiga's breach of the settlement was a hara, and something is required to return to a state of ea. Publication risks diminution of MW's mana, and/or MW experiencing whakamā, in circumstances where MW experienced the hara or, in other words, was the victim of the breach. That supports non-publication of MW's name being ordered.

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295 *C v Air Nelson Ltd* [2010] NZSC 110.
296 *C v Air Nelson Ltd* [2011] NZEmpC 27, [2011] ERNZ 207 at [78].

[251] The concerns said by some interveners to weigh against non-publication, namely about the information being in the public domain and the "horse having bolted", were overstated. There was a limited pool of people who were aware of the employment relationship problem that had given rise to the confidential settlement agreement and the subsequent proceedings.

[252] In any event I agree with Mr Mapu; the fact that some people in MW's industry were aware of MW's dispute should not override his wider interests in confidentiality. In addition, and as Mr Harrison observed, the extent of the confidentiality provisions in the settlement agreement is not decisive (they were said not to cover MW's name): the Court must still exercise its discretion by considering the different factors in the particular case with regard to the underlying statutory objectives. If it were otherwise, it would likely create perverse incentives.

[253] Lastly, open justice and the policy imperatives underlying it apply with much less force in the particular circumstances as there was a mediated settlement of the employment relationship problem and the Court has not determined the substantive merits of each party's position.[297] There is nothing to suggest there is genuine public interest in MW's identity. In these circumstances, the limitation placed upon freedom of expression appears to be proportionate and appropriate when viewed against the interests and objectives a non-publication would support.

[254] I have no difficulty concluding, on the material before the Court on MW's de novo challenge, that the factors supporting non-publication outweigh those against it.

[255] I agree with the majority as to the orders to be made in this case.

Christina Inglis
Chief Judge

Judgment signed at 9.25 am on 8 August 2024

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[297] I have previously made this observation under the traditional approach in *X v A District Health Board* [2013] NZEmpC 160 at [15].