

**Attention is drawn to the Order  
Prohibiting Publication of certain  
Information (Refer paragraph 8)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2021] NZERA 347  
3143663**

BETWEEN MELISSA BOWEN  
Applicant  
AND BANK OF NEW ZEALAND  
Respondent

Member of Authority: Eleanor Robinson  
Representatives: Michael O'Brien, Counsel for Applicant  
Rebecca Rendle & Meghan Bolwell, Counsel for Respondent  
Investigation Meeting: 3 August 2021 at Auckland  
Submissions received: 9 July and 3 August 2021 from Applicant  
16 July and 3 August 2021 from Respondent  
Determination: 06 August 2021

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**THIRD PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Ms Melissa Bowen, claims that she was unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, the Bank of New Zealand (BNZ).

[2] BNZ denies that Ms Bowen was either unjustifiably dismissed or unjustifiably disadvantaged and claims that it has complied with its statutory and contractual obligations and has acted in accordance with its policies.

[3] Ms Bowen has previously and unsuccessfully has sought removal of this matter to the Employment Court.<sup>1</sup> Ms Bowen now seeks removal on the basis that there has been a significant change in circumstances which justify a further application for removal.

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<sup>1</sup> *Bowen v Bank of New Zealand* [2019] NZERA 11; *Bowen v Bank of New Zealand* [2018] NZERA Auckland 330; *Bowen v Bank of New Zealand* [2017] NZERA Auckland 229.

[4] The significant change in circumstances is submitted to be that since the date of the Member's Minute dated 13 November 2020 Mr Leon Robinson, a potential witness in this case, has been reappointed to the Authority in Auckland. The Applicant considers Mr Robinson may be a necessary witness in her case. Since Mr Robinson is now a colleague of mine as a fellow Authority Member, the Applicant submits that it is appropriate that she raises the removal issue again.

[5] BNZ opposes the new application for removal.

[6] Ms Bowen also applies for a stay of proceedings. This is opposed by BNZ.

### **Non-Publication**

[7] The non-publication order issued by the Authority on 31 October 2017 [2017] NZERA Auckland 339 remains in force and is now extended to cover the current issue before the Authority.

### **Issue**

[8] The issue for determination is whether or not this matter should be removed to the Employment Court, and if the removal application is unsuccessful, whether or not a stay on proceedings in the Authority should be granted.

### **Should the matter be removed to the Employment Court?**

[9] The Authority may, pursuant to s 178 of the Employment Relations Act 2000 (the Act) order removal of a matter to the Employment Court without the Authority hearing it provided that the Authority is satisfied that one of the grounds of s 178(2) of the Act have been met. The grounds as set in s 178(2)(d) of the Act include at (d): "the Authority is of the opinion that in all the circumstances the court should determine the matter."

[10] The Applicant has submitted two main grounds on which removal is appropriate, and I shall address each of these as follows:

(i) *Recusal*

#### *Applicant's submissions*

[11] The Applicant submits that Mr Robinson will be a key witness for the Applicant because Mr Robinson investigated the complaints made by Ms Bowen in March 2016. Ms

Bowen claims that the restructure proposal and her ultimate termination were carried out as a retaliation against her for making the March 2016 complaints.

[12] It is submitted by the Applicant that regardless of whether or not Ms Bowen's March 2016 complaint is found to be a protected disclosure, the Authority will be required to assess the issue of retaliation when determining whether the restructure proposal and termination were what a fair and reasonable employer could have done in all the circumstances.

[13] The Applicant submits that in 2017: "Member Crichton recognised the difficulty involved of a former Authority Member giving evidence and directed that the claim be determined by an Authority Member with no connection to Mr Robinson."<sup>2</sup> Since Mr Robinson is now a Member of the Authority it is submitted that there is a real possibility for apparent bias on the part of the Authority Member hearing the matter.

[14] Counsel for the Applicant refers to the Authority decision in *Leov v Board of Trustees of Rai Valley School* in which case it is submitted that the Authority Member recognised the inappropriateness of one Authority Member hearing evidence from another Authority Member and removed the case to the Court.<sup>3</sup>

[15] The Applicant further submits that in the Employment Court judgment arising from Ms Bowen's application for special leave for removal, although the Employment Court declined to remove the proceedings from the Authority, it opined that the fact that a Member of the Authority would be investigating a matter in which another Authority Member would be a witness would be a factor supporting removal to the Court.<sup>4</sup>

#### *Respondent's submissions*

[16] The Respondent submits that it is appropriate that I continue with hearing this matter.

[17] The Respondent submits that in the Supreme Court decision in *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd* the Supreme Court confirmed that the test for disqualification of a Judge on the grounds of apparent bias was whether a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question.<sup>5</sup>

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<sup>2</sup> *Bowen and Lewis v Bank of New Zealand* [2017] NZERA Auckland 299.

<sup>3</sup> *Leov v Board of Trustees of Rai Valley School* CA210/90.

<sup>4</sup> *Bowen v Bank of New Zealand* [2021] NZEmpC 71 at [33].

<sup>5</sup> *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 76 (SC).

[18] On this basis the Respondent submits that a fair-minded lay observer informed of the relevant circumstances surrounding Ms Bowen's application currently being investigated would not apprehend bias on my part for the following reasons:

- i. In his former capacity as a senior manager of BNZ, Mr Robinson conducted an investigation in March – May 2016. The substantive issues to be determined do not include re-investigating or determining the substance of the matters raised by Ms Bowen at that time.

On that basis it is submitted that Mr Robinson will not be a key witness, noting that the claim of retaliation is part of the factual background to Ms Bowen's substantive claim as noted in the Employment Court judgment:

If the Authority or the Court considers the issue of whether the complaints in March to May 2016 constituted a protected disclosure, its finding will not resolve the case. The consideration then would turn to whether BNZ's actions leading to Ms Bowen's redundancy in 2018 were because of Ms Bowen's actions in March to May 2016. That would be the case whether or not there was a protected disclosure.<sup>6</sup>

- ii. Accepting the Applicant's allegations of unconscious bias would be inconsistent with the principle that suggestions of appearance bias should not be acceded to too readily.<sup>7</sup> There is no evidence to suggest that Member Robinson would do anything other than decide the case impartially and without prejudice.

[19] In response to the Applicant's submission regarding *Leov v Board of Trustees of Rai Valley School* it is submitted by the Respondent that in that case both parties consented to the removal to the Court and an order was made under s 178(2)(d) of the Act on that basis. However the Authority's determination does not contain any analysis of relevant law in relation to the appearance of bias.

### *Conclusion*

[20] I have carefully considered the submissions made the parties. I find the arguments advanced by the Applicant for removal fail on two grounds.

[21] Firstly, the prospect that Mr Robinson would be needed as a witness in any Authority investigation, let alone be a key witness, is advanced on a flawed ground.

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<sup>6</sup> Above n 4 at [25].

<sup>7</sup> *Nisha v LSG Sky Chefs New Zealand Limited* [2013] NZEmpC 162 at [34] citing *Re JR, ex parte CJL* [1986] HCA 39, (1986) 161 LR 342 (HC).

[22] The Authority is an investigative body, not a court operating on principles and procedures followed in that adversarial forum. In the Court it is left to the parties to decide who are the necessary witnesses to “call”. In the Authority, by contrast, it is not up to any one party to simply declare a witness is necessary and that is the end of any consideration on relevance or necessity. In the Authority parties may propose necessary witnesses. If the need for evidence from those people is established, usually in discussion at a case management conference with the parties’ representatives, directions are then given for preparation of witness statements or at least the attendance of a person to answer questions.

[23] On what is apparent from the pleadings and submissions made so far in this case, the prospect that Mr Robinson is likely to be needed for an investigation is slim. Matters of background fact that might involve him have not been put in contest by the Respondent. At least the question of whether he might be needed as a witness is clearly premature and not grounds for removal at this stage. The situation is different from the circumstances referred to in the *Leov* determination in 2009 where an Authority member, in a different capacity, had been directly involved in issues relevant in that case.

[24] In the circumstances of this case, when deciding upon the relevance of witnesses to the investigation I will be conducting, I am not persuaded at this stage that the involvement of Mr Robinson is sufficiently proximate to the events which form the nexus of this matter.

[25] Secondly it is important to note that the test for bias must be further qualified in that apprehended bias is to be assessed by how it would appear to an ordinary sensible member of the public with appropriate knowledge of all the relevant circumstances, including the general workings of the legal system, rather than of a particular party to the proceedings who may not be disinterested or objective.

[26] There must moreover be an apprehension of real, not remote, possibility of bias. The test therefore requires further the identification of what it is said might lead a judicial officer to decide a case other than on its legal and factual merits, and second, an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The apprehension of bias must therefore be founded on proper principles having a real and not fanciful connection to the possibility of bias.<sup>8</sup>

[27] Even with the appointment of Mr Robinson to the Authority I do not accept that I would be lead to decide the case other than on its legal and factual merits.

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<sup>8</sup> Cf. Justice Toogood in *Siemer v Attorney-General* [2013] NZHC 1111.

[28] I see no basis in principle arising from any of the grounds presented by the Applicant for recusing myself, or from continuing with and completing, the investigation in this case.

[29] I also decline to exercise any discretion I might have to step aside from this case of my own volition.

*(ii) Cost savings contingent on removal*

*Applicant's submissions*

[30] It is submitted by the Applicant that the Employment Court also held that the inevitability of a challenge, and the cost savings that removal would bring were also factors that justified removing the matter to the Employment Court.<sup>9</sup>

[31] It is submitted by the Applicant that the current estimate is that the investigation meeting will take a minimum of 10 days which represents both a significant cost to the parties and to a significant amount of time for the Authority.

[32] It is also submitted that it is inevitable that either party will challenge the determination.

[33] On that basis it is submitted that the overall cost savings justify removal to the Employment Court.

*Respondent submissions*

[34] The Respondent in submissions refers to the Court of Appeal decision in *A Labour Inspector v Gill Pizza Limited* in which the Court of Appeal observed that particular caution is expected in cases that have not been fully investigated by the Authority.<sup>10</sup>

[35] Moreover in the application by the Applicant for special leave to remove this matter to the Court the recent decision by Judge Holden stated:

The Authority is essentially ready to proceed with its investigation. If it did so, the parties would have a right to challenge the resulting determination so the matter could be heard on a de novo basis in the Court. While Ms Bowen's choice to vigorously pursue having her proceedings heard in the Court, without prior investigation by the Authority, is a course that is open to her, it does bring with it significant costs implications for both parties.<sup>11</sup>

[36] In a preliminary determination dated 25 October 2018 in which I declined Ms Bowen's application to remove the matter to the Court, I stated that a case management call would be held to: "progress the application".

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<sup>9</sup> Above n4 at [32].

<sup>10</sup> *A Labour Inspector v Gill Pizza Limited* [2020] NZCA 192 at [48].

<sup>11</sup> *Bowen v Bank of New Zealand* [2021] NZEmpC 119 at [19].

[37] In the 33 months that have passed since that determination dates to progress Ms Bowen's application have been addressed in Minutes issued by the Authority on 6 May 2019, 13 August 2020, 24 September 2020, 13 November 2020, 18 December 2020 and 3 February 2021. The dates were set for the filing of witness evidence have been consistently disregarded by the Applicant.

[38] The Authority is essentially ready to proceed and on that basis I decline to order removal.

**Should a Stay on Proceedings be granted?**

[39] Ms Bowen has applied for leave to bring an appeal of the Employment Court's judgment declining leave to remove the matter in the Court of Appeal and seeks a stay of proceedings until the Court of Appeal has determined her appeal. Ms Bowen is seeking an order from the Court of Appeal that the matter is removed to the Employment Court.

[40] The Applicant accepts that an appeal does not operate as a stay of proceedings but submits that the principle of judicial comity applies and the Authority should not continue in circumstances where an appeal about the proper manner in which to proceed is currently before the Court of Appeal.

[41] In addition it is submitted that the key factor in determining whether if no stay is granted, the applicant's right of appeal will be rendered ineffectual.

[42] It is further submitted that the prejudice to the Respondent that would occur if the stay was granted, is not significant and should not override Ms Bowen's right of appeal.

[43] The Respondent notes that leave has not been granted for the applicant to bring an appeal in the Court of Appeal. Further that the Applicant has failed to comply with the Court of Appeal (Civil) Rules 2005 for filing submissions. Accordingly no principle of judicial comity applies and the respondent should not be further prejudiced by the applicant's own delay in those proceedings.

[44] I decline to order a stay on proceedings. I have indicated that the Authority is ready to proceed. However should the situation with Ms Bowen's application for leave to appeal to the Court of Appeal change, this application for a stay could be addressed then.

## **Next Steps**

[45] Directions will be issued shortly setting down a relatively short timetable for the filing of witness statements and with a view to the matter being ready to be investigated in late January 2022.

[46] In the Minute of the Authority dated 6 May 2019 I stated that the parties were encouraged to keep talking to each other with a view to reaching a resolution to this matter. I encourage the parties to reconsider this option. If the parties consider that further mediation would assist in this process, the Authority would facilitate this.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**