

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 553
3032274

BETWEEN MELISSA JANE BOWEN
 Applicant

AND BANK OF NEW ZEALAND
 Respondent

Member of Authority: Rachel Larmer

Representatives: Michael O'Brien, counsel for the Applicant
 Rebecca Rendle and Mary Breckon, counsel for the
 Respondent

Investigation Meeting: On the papers

Submissions and Further 21 October 2022 from the Respondent
Information Received: 26 October 2022 from the Respondent
 27 October 2022 from the Applicant

Date of Determination: 28 October 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] The substantive matter is currently under investigation by the Authority (Member van Keulen).

[2] The Authority (Member Appleton) in a determination dated 31 October 2017 issued non-publication orders that remain in force and have been extended to cover various other interlocutory matters that have arisen since then.¹

¹ *Bowen and Anor v BNZ* [2017] NZERA 339.

[3] The Authority (Member Larmer) has also issued an interlocutory determination, relating to admissibility of evidence issues, that contained a non-publication order that was made to ensure the confidentiality of privileged material was maintained.²

[4] The terms of the Authority's most recent non-publication order were set out in paragraph [2] of the determination dated 28 January 2022.³ It provided that most of the interlocutory determination (regarding admissibility issues) was subject to a non-publication order until further order of the Authority, subject to the condition that it did not apply to:

- (a) The employment institutions;
- (b) Catherine Barclay; and
- (c) BNZ and/or National Australia Bank (NAB) executives who may be directly involved in potential resolution discussions, to the extent that the content of this determination is relevant to such discussions.

[5] Paragraph [4] of the 28 January 2022 interlocutory determination provided that the parties could apply to the Authority for a variation of the non-publication order.

[6] The Authority also expressly provided that a variation could be applied for if an individual, other than those identified in paragraph [4] above, had a legitimate reason for needing to see an unredacted version of the interlocutory determination.

[7] This non-publication order meant that paragraphs [8]-[91] and the content of Appendix A of the interlocutory determination was redacted before it was uploaded to the public online employment law database, to ensure the privileged evidence that was discussed in detail in that determination was kept confidential to the parties, subject to the condition that had been made.

Employment Relationship Problem

[8] The respondent has applied for a variation of the non-publication order made in the Authority's interlocutory determination dated 28 January 2022.

Issue

[9] The issue to be determined is:

² *Bowen v BNZ* [2022] NZERA 19.

³ *Supra*.

- (a) Should the non-publication order issued on 28 January 2022 be varied?

Authority's investigation

[10] The application was made by the respondent on 21 October 2022. The proposed terms and purpose of the variation was set out and supporting documents were also provided. The respondent also confirmed on 26 October 2022 that the application was not affected by matters that involved the Employment Court.

[11] The request to vary the non-publication order was determined 'on the papers'. The applicant was given an opportunity to comment on the respondent's variation application. She informed the Authority, via counsel, that she did not oppose the requested variation.

Should the non-publication order be varied?

[12] The respondent sought a variation of the non-publication order issued on 28 January 2022 to enable individual (D) and her counsel to see a copy of the unredacted version of the Authority's interlocutory determination.

[13] D is legally represented in connection with a related Employment Court matter involving these parties, so the respondent asked that D and her counsel be able to see the Authority's full unredacted interlocutory determination.

[14] D already has knowledge of the matters that were determined by the Authority in its 28 January 2022 determination due to her previous role with the respondent. She is also referred to in the interlocutory determination.

[15] The Authority accepted the respondent's submission that there would be no prejudice involved with D being provided with an unredacted copy of the 28 January 2022 determination. It also agreed that there were also good reasons for D to have that information.⁴

[16] The Authority's 28 January 2022 determination made a factual finding in D's favour, and recorded that it did not accept the applicant's evidence or submissions regarding adverse allegations that had been made about D's actions.

[17] The Authority also described the allegation that had been made against D personally as "*inflammatory*".⁵ That finding may be of interest to the people and company named in

⁴ See paragraphs 7, 8 and 9 of the respondent's variation application.

⁵ Above n 1 at [82].

paragraph 7, and to the organisation named in paragraph 9, of the respondent's variation application.

Outcome

[18] The Employment Court currently has a matter before it involving these parties, so the Authority records that the non-publication orders it has issued (including this variation) may be varied or rescinded by the Court, if it considered that appropriate to do.

[19] The non-publication order made on 28 January 2022 is varied to include D and her counsel as people to whom it does not apply. D is also given leave to seek a further variation of the non-publication order if necessary.

[20] The Authority also varies the 28 January 2022 non-publication order to (if requested by D) permit the respondent to provide the people/company named in paragraph 7, and/or the organisation named in paragraph 9 of the respondent's variation application dated 21 October 2022, with a copy of paragraph 8 of its variation application without breaching the terms of the non-publication orders that have been made by the Authority.

[21] The Authority considered that additional variation in paragraph [20] above was necessary in fairness to D, so that the redaction of the Authority's findings did not unduly prejudice her, in light of allegations the applicant and/or her supporters have conveyed to others about D.

What if any costs should be awarded?

[22] Costs should lie where they fall.

Rachel Larmer
Member of the Employment Relations Authority