

**Attention is drawn to orders  
prohibiting publication of certain  
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 408  
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 Jess Dellabarca, counsel for the  
Respondent

Investigation Meeting:      On the papers

Information Received:      3 July 2023 from the Respondent  
26 July 2023 from the Applicant

Date of Determination:      1 August 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**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.<sup>1</sup>

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<sup>1</sup>     *Bowen and Anor v BNZ* [2017] NZERA 339.

[3] The Authority (this Member) 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.<sup>2</sup>

[4] The terms of the Authority's most recent non-publication order were set out in paragraphs [1] to [5] of the determination dated 28 January 2022.<sup>3</sup> It provided that most of that 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. The Authority also expressly provided that a variation could be applied for if an individual, other than those identified in paragraph [4] of the Authority's determination dated 28 January 2022 had a legitimate reason for needing to see an unredacted version of the interlocutory determination.

[6] The Authority issued a first variation on 28 October 2022, involving a former BNZ employee identified as "D".<sup>4</sup>

[7] This application is therefore the second request that has been made to the Authority to vary the non-publication order in the determination it issued on 28 January 2022.

### **Employment Relationship Problem**

[8] Ms Bowen has engaged in what was referred to in the memorandum lodged by Bank of New Zealand's ("*BNZ's*") counsel as "*the NAB proceedings*", which involves four respondents (referred to in this determination as "*the Respondents*"). Simpson Grierson represents the first and second respondents and SBM Legal represents the third and fourth respondents.

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<sup>2</sup> *Bowen v BNZ* [2022] NZERA 19.

<sup>3</sup> Above n1.

<sup>4</sup> *Bowen v BNZ* [2022] NZERA 553.

[9] The Respondents have applied to have Ms Bowen's claims in the NAB proceedings dismissed. Ms Bowen filed an affidavit dated 9 May 2023 in support of her opposition to that application.

[10] BNZ's position is that Ms Bowen's affidavit refers to matters which fall within the Authority Non-Publication Orders and the Employment Court Non-Publication Orders (collectively referred to as "*the Non-Publication orders*").

[11] BNZ referred the Authority to paragraphs 12 to 14, 49 and 50 of Ms Bowen's affidavit dated 9 May 2023 and to the affidavit from a BNZ employee dated 2 January 2022 that Ms Bowen referred to in paragraph 49 of her affidavit, and which she had exhibited to her affidavit as Exhibit "E".

[12] BNZ seeks a variation to the Authority's non-publication order dated 28 January 2022, to allow disclosure of Ms Bowen's 9 May 2023 affidavit to the Respondents.

[13] The purpose of disclosure is for the Respondents' counsel to provide them with legal advice and for the Respondents to be able to give their respective counsel instructions on the issues of admissibility of the disputed material in the NAB proceedings.

[14] The variation application was not objected to by the Applicant.

### **Issue**

[15] The following issues are to be determined:

- (a) Should the non-publication order in the Authority's determination dated 28 January 2022 be varied?
- (b) What if any costs should be awarded?

### **Authority's investigation**

[16] The request to vary the non-publication order was determined 'on the papers'.

[17] The variation application was made by the BNZ in a memorandum dated 3 July 2023.

[18] Ms Bowen was given an opportunity to comment on that request. On 26 July 2023 she informed the Authority, via an email from her counsel, that she did not object to the requested variation.

**Should the non-publication order be varied?**

[19] The Authority was satisfied there was a legitimate reason for varying, and that it was appropriate to vary, its non-publication order to ensure the Respondents in the NAB proceedings could be properly advised regarding disputed material in that proceeding.

[20] Accordingly, the Authority's non-publication order in its 28 January 2022 determination is varied to add:

- (a) A new paragraph [3](d) that names the National Australia Bank Limited, its counsel and professional advisors; and
- (b) A new paragraph [3](e) that names the three former BNZ employees who are identified in paragraph [5] of the BNZ's memorandum to the Authority dated 3 July 2023 and their counsel.

[21] The Authority records that the variation made in paragraph [3](d) and (e) of the non-publication order referred to in paragraphs [1] to [5] of the Authority's determination dated 28 January 2022 covered the Respondents and their counsel (and if need be other professional advisors) in respect of the NAB proceedings.

**What if any costs should be awarded?**

[22] Costs should lie where they fall.

**Rachel Larmer**  
**Member of the Employment Relations Authority**