

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 658
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, counsel for the Respondent

Investigation Meeting: On the papers

Information Received: 31 October, 1 and 5 November 2024 from the Respondent's
counsel
4 November 2024 from the Applicant

Date of Determination: 5 November 2024

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] There are various non-publication orders in place regarding this matter that have been issued by the Authority and Employment Court.

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

[3] The Authority also issued a preliminary determination dated 28 January 2022, relating to disputed admissibility of evidence issues, which contained a non-publication order that was made in order to ensure the confidentiality of privileged material was maintained.²

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

² *Bowen v BNZ* [2022] NZERA 19.

[4] The terms of the Authority's non-publication order were set out in paragraph [2] of the preliminary determination dated 28 January 2022.³ It provided that most of the preliminary 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 was relevant to such discussions.

[5] Paragraph [4] of the 28 January 2022 preliminary 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 preliminary determination.

[7] This non-publication order meant that paragraphs [8]-[91] and the content of Appendix A of the preliminary 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 conditions that had been made.

[8] The Authority has issued two determinations varying the non-publication order that was made in the 28 January 2022 determination.⁴

[9] The Authority has publicly issued two determinations involving these parties that have contained redactions. The first was the preliminary determination dated 28 January 2022.⁵ The second was the substantive determination dated 19 June 2024.⁶

Employment Relationship Problem

[10] The respondent's counsel has asked the Authority to vary its non-publication orders on a strictly limited waiver of privilege basis, to enable most of the redacted parts of the 28 January

³ Above n2.

⁴ *Bowen v BNZ* [2022] NZERA 553 and *Bowen v BNZ* [2023] NZERA 408.

⁵ *Bowen v BNZ* [2022] NZERA 19.

⁶ *Bowen v BNZ* [2024] NZERA 361.

2022 determination to be released, on a strictly limited basis, in connection with a matter involving another jurisdiction. Urgency was sought for this variation application because if the Authority's unredacted (or mostly unredacted) determination dated 28 January 2022 is to be released in accordance with Ms Rendle's request, then that needed to occur by 8 November 2024.

[11] Ms Rendle's concern was to ensure that those involved in the other jurisdiction are able to review the Authority's preliminary determination on the disputed admissibility issues, at least in so far as that related to Ms Bowen. The memorandum requesting to vary the Authority's non-publication order dated 28 January 2022 attached a copy of the version of the preliminary determination that Ms Rendle proposed to release, which still included some limited redactions that related to another person who is not involved in the matter which is currently being dealt with by another jurisdiction.

[12] Paragraph 9 of Ms Rendle's memorandum dated 1 November 2024 also sought an extension of the Authority's existing non-publication order to cover the reasons for this application.

Issue

[13] The issues to be determined include:

- (a) Whether the non-publication order in the Authority's 28 January 2022 preliminary determination should be varied, to enable it to be used in accordance with paragraphs 6 and 7 of Ms Rendle's memorandum dated 1 November 2024?
- (b) If so, should any information in the 28 January 2022 determination that does not relate to Ms Bowen remain redacted, as per attachment A to Ms Rendle's memorandum dated 1 November 2024?
- (c) Should the Authority extend its non-publication order to cover the new matters set out in paragraph 9 of Ms Rendle's memorandum dated 1 November 2024?
- (d) What if any costs should be awarded?

Authority's investigation

[14] The request to vary the non-publication order in the Authority's preliminary determination dated 28 January 2022 was determined 'on the papers'.

[15] The variation request was first raised by Ms Rendle with Ms Bowen (via her counsel) on 21 October 2024. Follow up requests were made by Ms Rendle on 24 and 30 October 2024. The Authority asked Ms Bowen on 31 October 2024 for her views on the variation request that Ms Rendle had raised with the Authority that same day. Ms Bowen's substantive response was provided yesterday.

[16] Ms Rendle's memorandum dated 1 November 2024 requested urgency and set out why that was necessary. It also set out why the variation had been requested, what redactions should remain and how the proposed partially unredacted preliminary determination dated 28 January 2022 would be used if the variation application was successful. Paragraph 9 of the memorandum also sought an extension to the Authority's non-publication order.

[17] Ms Bowen's counsel lodged a memorandum on 4 November 2024, which stated that the variation application was misconceived. Mr O'Brien submitted that the intended use of the unredacted preliminary determination dated 28 January 2022 did not require a variation to the Authority's existing non-publication order, as disclosing it did not amount to publication because those involved in the other jurisdiction (which BNZ's counsel had proposed should receive a copy of the partially unredacted Authority determination) had a genuine interest in receiving it.

[18] Alternatively, Mr O'Brien submitted that if the Authority's non-publication order was going to be varied then it should provide for the release of the entire unredacted preliminary determination, instead of the partially redacted version Ms Rendle had proposed should be released.

[19] Ms Rendle lodged a reply memorandum on 5 November 2024 that addressed Mr O'Brien's memorandum. Ms Rendle pointed out (among other things) that not retaining redactions in the 28 January 2022 preliminary determination about information that related to another individual (not Ms Bowen) could breach other confidentiality obligations that person had with BNZ.

Should the non-publication order in the Authority's 28 January 2022 determination be varied, to enable it to be used in accordance with paragraphs 6 and 7 of Ms Rendle's memorandum dated 1 November 2024?

[20] The purpose of redacting most of the content of the Authority's publicly available preliminary determination dated 28 January 2022 was to ensure that the confidentiality of

without prejudice material was preserved. That was particularly important because that material had to be kept away from the Authority Member who would be determining the substantive claims and from the Employment Court, should there be a challenge made to the Authority's substantive determination once it had been issued.

[21] The Authority's preliminary determination anticipated that variations may be required to the non-publication orders made on 28 January 2022, so the right to apply for that to occur was specifically reserved to the parties. It is therefore appropriate that the variation application was brought back to the Authority to determine, given the Authority's substantive investigation has not been completed, with remedies yet to be determined next year.

[22] The Supreme Court in *ASG v Hayne* recognised that "it is necessary for the courts to work out the scope of the prohibition [on publication] on a case by case basis."⁷ It was therefore necessary and appropriate for the Authority at this stage in its investigation process to retain control over how inadmissible and confidential without prejudice material that had been recorded in its preliminary determination was to be used outside of its investigation process, particularly while this matter was still under active investigation.

[23] Accordingly, Mr O'Brien's submission that no variation of the non-publication order dated 28 January 2022 was required was not accepted.

[24] The parties are required to apply for a variation of the non-publication order if they want to use/disclose the Authority's unredacted preliminary determination outside of the specific conditions recorded in that order. That is particularly important while the Authority's investigation process remains ongoing, to ensure that privileged material is not inadvertently disclosed by another jurisdiction in a manner that could undermine the Authority's current investigation.

[25] The Authority was satisfied that those identified in paragraph 7 of Ms Rendle's memorandum dated 1 November 2024 had an objectively legitimate interest in reviewing a mostly unredacted version of the Authority's preliminary determination dated 28 January 2022, at least in so far as it related to Ms Bowen.

[26] The circumstances were such that the interests of justice required those involved in another jurisdiction to be more fully informed about the content of the Authority's preliminary

⁷ *ASG v Hayne* [2017] NZSC 59 at [69].

determination than would be the case if they were required to rely solely on the publicly available versions of that determination.

[27] Accordingly, the non-publication order dated 28 January 2022 should be varied to permit the use of the Authority's preliminary determination in accordance with Ms Rendle's memorandum dated 1 November 2024.

Should any information in the Authority's preliminary determination dated 28 January 2022 remain redacted, as per attachment A to Ms Rendle's memorandum dated 1 November 2024?

[28] It is appropriate for the redactions that Ms Rendle identified in attachment A to her memorandum dated 1 November 2024 to remain in place when the Authority's preliminary determination dated 28 January 2022 is released to those Ms Rendle has identified in paragraph 7 of her memorandum. The particular paragraphs Ms Rendle recommended should remain redacted all related to another individual, and not Ms Bowen.

[29] Based on the currently available information, the Authority was not satisfied that there was any legitimate need for information relating to that other person to also be disclosed as per paragraph 7 of Ms Rendle's memorandum. Accordingly, there was no good reason for the confidentiality obligations that this other person had with BNZ to be breached.

Should the Authority extend its non-publication order to cover the new matters set out in paragraph 9 of Ms Rendle's memorandum dated 1 November 2024?

[30] Mr O'Brien did not address this in his memorandum, so the Authority assumed that meant that Ms Bowen did not take a view on this request.

[31] On that basis, and in order to preserve the current position in the interim, the Authority has extended the non-publication order dated 28 January 2022 to also cover the two matters identified in paragraph 9 of Ms Rendle's memorandum dated 1 November 2024, until further order of the Authority.

[32] However, this 'extended' interim non-publication order has been made subject to the following conditions:

- (a) It may be amended, rescinded or replaced by orders made in any other jurisdiction, including but not limited to the jurisdiction identified in paragraph 7 of Ms Rendle's memorandum and/or by any other Courts of New Zealand;
- (b) The parties may apply for it to be reviewed by the Authority when it determines the other non-publication related issues set out in Ms Rendle's memorandum dated 21 June 2024; and
- (c) Leave is reserved for the parties to apply for a variation, in the event that there is some legitimate purpose for that to occur.

Orders

[33] The non-publication order in the Authority's preliminary determination dated 28 January 2022 is:

- (a) Varied to facilitate the limited disclosure/publication that was proposed in Ms Rendle's memorandum dated 1 November 2024; and
- (b) Extended on an interim basis in accordance with paragraph 9 of Ms Rendle's memorandum, subject to the conditions the Authority has identified in paragraph [35] above.

What if any costs should be awarded?

[34] Costs should lie where they fall.

Rachel Larmer
Member of the Employment Relations Authority