



Employment Court of New Zealand

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Bowen v Bank of New Zealand [2022] NZEmpC 193 (25 October 2022)

Last Updated: 28 October 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 193](#) EMPC 51/2022

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF an application for leave to adduce further

evidence in support of the defendant's application for non-publication orders

BETWEEN MELISSA BOWEN

Plaintiff

AND BANK OF NEW ZEALAND

Defendant

Hearing: On the papers

Appearances: M W O'Brien, counsel for plaintiff

R M Rendle and M Breckon, counsel for defendant

Judgment: 25 October 2022

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE J C HOLDEN

(Leave to adduce further evidence in relation to the defendant's application for non-publication orders)

[1] This judgment resolves the application by Bank of New Zealand (BNZ) for leave to file further evidence in support of its application for non-publication orders.

The process so far

[2] Shortly before the hearing of BNZ's application to strike out Ms Bowen's challenge, it filed a notice of application for non-publication orders and a memorandum in support.

MELISSA BOWEN v BANK OF NEW ZEALAND [\[2022\] NZEmpC 193](#) [25 October 2022]

[3] The application for non-publication orders covered details of meetings and communications between Ms Bowen and BNZ and also the name and identity of one of the witnesses in the proceeding. An interim order in terms of the application was made at the hearing, with timetabling made for the filing of further documents for the

application. In particular:

- (a) Ms Bowen was to file her notice of opposition and memorandum in opposition by 19 September 2022; and
- (b) BNZ was to file any reply by 23 September 2022.

[4] It was anticipated that the application for non-publication would be dealt with in the judgment on the application to strike out.

[5] Ms Bowen duly filed her notice of opposition and memorandum. One key point made by Ms Bowen was that BNZ had failed to provide any evidence of the harm the witness allegedly would suffer that would justify a departure from the usual principles of open justice. Ms Bowen pointed to comments in a previous judgment between the parties on the need for evidence of specific adverse consequences.¹

[6] BNZ then sought to file an affidavit from the person for whom non-publication orders are sought. Ms Bowen objected to that request, and BNZ was directed to file an application to adduce further evidence, which it did. It is that application that is now dealt with in this judgment.

[7] The grounds on which BNZ seeks an order allowing the witness to file her affidavit are that:

- (a) The affidavit contains evidence relevant to the application for non- publication orders;
- (b) It is in the interests of justice that the affidavit be adduced;

¹ *Bowen v Bank New Zealand* [2021] NZEmpC 71 at [49]- [51].

(c) The affidavit pertains to the specific adverse consequences that the witness says publication and identification would have for her, and there is no identified prejudice to Ms Bowen.

(d) BNZ also relies on the affidavit, which was attached in draft form to the application.

[8] Ms Bowen opposes the application, in particular, because she says no explanation has been provided regarding the failure to provide the evidence at the proper time.

Court can permit further evidence

[9] I agree with Ms Bowen that it was not anticipated that further evidence would be filed in support of the application for non-publication orders; the timetabling was to allow Ms Bowen to file her opposition to the application.

[10] I likewise agree that there is no real explanation as to why the affidavit was not provided with the application. Ms Bowen's current challenge has been on foot for several months, and the broader matter is one which has been ongoing for some years. As noted by Mr O'Brien for Ms Bowen, BNZ was on notice that applications for non-publication needed to be supported by evidence.

[11] Nevertheless, the Court is able to admit the further evidence; the application for non-publication orders has not closed. If it had, the Court would be guided by the [Evidence Act 2006](#), which allows courts covered by the [Evidence Act](#) to grant permission to adduce further evidence at any time until judgment is delivered, provided that any unfairness caused to any other party by the granting of permission cannot be remedied by an adjournment or an award of costs, or both.²

[12] Ultimately, the issue will turn on the interests of justice, taking into account the Court's equity and good conscience jurisdiction.

² [Evidence Act 2006, s 98](#).

[13] While the application was made by BNZ, the person in respect of whom non- publication orders were sought is not employed by BNZ and is now separately represented. While I accept that the affidavit in support of the application for non- publication orders ought to have been filed with the application, that is a failure by BNZ, which I do not consider should be to the detriment of the proposed witness.

[14] In those circumstances, the affidavit dated 5 October 2022 is accepted for filing.

[15] In order to ensure that Ms Bowen is not unduly prejudiced by the late filing of the affidavit, leave is granted to

her to file a further memorandum and, if necessary, affidavit evidence in response to the affidavit filed, noting that this is not an opportunity for Ms Bowen to file substantive evidence on the matters in contention between the parties but is simply an opportunity for her to address the specific evidence raised by the witness in support of the application for non-publication orders. The further memorandum and any affidavit evidence is to be filed within 14 days of this judgment.

[16] Costs on this application are reserved, noting that this application by BNZ, and the late filing of the affidavit, will have resulted in additional costs for Ms Bowen.

Judgment signed at 4.15 pm on 25 October 2022

J C Holden Judge

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