



contractual terms into evidence. The effect of this would be such that it would face real and substantial harm if this confidential information were to be made available to the public.

[5] IBM is further concerned that the evidence submitted contains sensitive financial data including a breakdown of the weightings that IBM as a business gives to new signings and growing existing contracts with clients, and information in relation to the territory in which Mr Simpson worked, in addition to confidential contractual client terms.

[6] IBM submits that the releasing of this confidential information would place competitors in a position to challenge the pricing and cost margins that IBM operates under in what is a highly competitive market.

[7] The Applicant does not oppose the orders sought by IBM.

### **The Principles**

[8] The principles of open justice and the right to freedom of expression are rights which go to the very existence and vigour of our political and legal institutions<sup>1</sup>

[9] As observed by Lord Hewart in *R v Sussex Justices, Ex parte McCarthy*<sup>2</sup> it is fundamental to our legal system that justice is not only done, but that it is also seen to be done. This is the principle of open justice, which serves a wider purpose than the interest represented in the particular case. It is critical to the maintenance of public confidence in the system of justice<sup>3</sup>

[10] Departure from the general rule of public justice is generally held to be accepted as not being lightly granted, and moreover that public justice requires the identification of all aspects of the litigation. In *Clark v Attorney-General*<sup>4</sup> the Court of Appeal said:<sup>5</sup>

*[T]he principles of open justice and the related freedom of expression create a presumption in favour of disclosure of all aspects of Court proceedings which can be overcome only in exceptional circumstances*

[11] However the Authority is not like other courts and tribunals. It has unique powers of investigation, which the Employment Court has recognised as making the formal principles less applicable:<sup>6</sup>

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<sup>1</sup> *Suppressing Names and Evidence*, New Zealand Law Commission, Report 109, October 2009 at page 7.

<sup>2</sup> [1924] 1 KB 256 at 259

<sup>3</sup> *Lewis v Wilson & Horton Ltd v Others*, CA 131/00, 29 August 2000, para [79]

<sup>4</sup> [2005] NZAR 481 (CA)

<sup>5</sup> *Ibid* at para [42]

*While the principles in Anderson certainly apply to hearings in conventional Courts and tribunals, the flexibility accorded to the Authority to run an investigation and make its own inquiries rather than conducting a formal hearing make these formal principles less applicable. The presumption that all evidence should be given in public and freely reportable may therefore not have the force that it had in relation to the Employment Tribunal.*

[12] Whilst the Authority does have a statutory power pursuant to s 160(1)(e) of the Act to decide that an investigation meeting should not be in public or should not be open to certain persons, this is a discretionary power and must be exercised in accordance with the Authority's other statutory obligations, notably of complying with the principles of natural justice and of acting reasonably.

[13] I am satisfied that in the present case the information contained in the briefs of evidence and the supporting documentation, which contains commercially sensitive trade secrets, have the necessary character of confidentiality such that it would be an appropriate use of the Authority's powers pursuant to s 160(1)(e) of the Act to issue the orders as set out in clauses A, B and C of this determination.

[14] The application for closure of the Investigation Meeting held on 1 to 3 April 2014 to members of the public was not submitted by IBM until the commencement of the Investigation Meeting on the opening day and was therefore not considered prior to that meeting.

[15] However whilst the initial Investigation Meeting was not attended by members of the public, I consider this to have been fortuitous given the amount of commercially sensitive financial information traversed during the course of the three days.

[16] I accept that it would not be fair to allow a competitor via whatever guise to have access to IBM's confidential information through attendance at the resumed investigation meeting to be held on 28 May 2014, and that there is real potential for harm to IBM should a competitor gain access to this confidential information by doing. I therefore consider that it would not be in the public interest for the otherwise open administration of justice to be open to misuse by allowing public attendance at the resumed Investigation Meeting.

[17] I accordingly find that there is a sufficiently real and substantial reason for excluding members of the public from the Investigation Meeting to be resumed on 28 May 2014 and/or any subsequent dates.

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<sup>6</sup> *Davis v BNZ* [2004] 2 ERNZ at para [16] per Shaw J

[18] I further find that there is a sufficiently real and substantial reason for prohibiting publication of IBM's confidential information and identification of IBM clients referred to in the proceedings given the potential for harm to IBM's legitimate business interests.

#### **Determination**

- A. Pursuant to s160(1)(e) of the Act, the Authority's Investigation Meeting to be held on 28 May 2014 and/or any subsequent dates in respect of this matter shall not be open to any person (other than the Authority Member, the parties, their counsel and such witnesses that the Authority member considers should be present at the time).**
  
- B. Pursuant to clause 10 (1) of Schedule 2 of the Act, the evidence given or pleadings filed in this matter (which includes briefs of evidence, the statement of problem, the statement in reply and all associated documents) are prohibited from publication until this order is revoked or varied by further orders of the Authority.**
  
- C. Pursuant to Schedule 2 clause 10(1) of the Act the names of IBM's clients referred to in this matter are not be published. The IBM client names are to be referred to by letters bearing no relationship to their actual names.**

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