

**Attention is drawn to the Order
Prohibiting Publication of certain
Information (Refer paragraph 7)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 330
3032274**

BETWEEN

MELISSA JANE BOWEN
Applicant

AND

BANK OF NEW ZEALAND
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
Phillipa Muir & Rebecca Rendle, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 17 August 2018 from Applicant
31 August 2018 from Respondent

Determination: 25 October 2018

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Melissa Bowen, claims that she has been unjustifiably disadvantaged by the Respondent, Bank of New Zealand (BNZ), proceeding with the execution of the 4 October 2016 Small Business Change Proposal (the Small Business Change Proposal).

[2] Ms Bowen claims that by proceeding with Small Business Change Proposal BNZ has breached the Stay of Proceedings directed by the Authority in a Minute dated 18 October 2017. Ms Bowen is seeking compliance orders including the enforcement of a Stay of Proceedings pending the outcome of the Human Rights Commissioner's processes.

[3] Ms Bowen further applies that the Authority remove this matter to the Employment Court.

[4] BNZ submits that Ms Bowen has not made an irrevocable election to have her claim heard by the Human Rights Review Tribunal such as to preclude the Authority from hearing her claim.

[5] BNZ does not consider that there are grounds for removing this matter to the Employment Court.

Issues

[6] The issues for determination are whether or not the Authority:

- has jurisdiction to consider the claim by Ms Bowen that she has been unjustifiably dismissed by BNZ's decision to proceed on the Small Business Change Proposal
- should remove the matter to the Employment Court

Non-Publication

[7] The non-publication order issued by the Authority on 31 October 2017 [2017] NZERA Auckland 339 remains in force and is extended to cover the current issue before the Authority.

Background

[8] Ms Bowen lodged a Statement of Problem with the Authority on 4 August 2017 claiming unjustifiable disadvantage arising from a review by BNZ of its original decision to make her role redundant.

[9] Ms Bowen filed a memorandum with the Authority on 22 September 2017 stating that she had already commenced proceedings with the Human Rights Commission by filing a complaint alleging victimisation by BNZ with the Human Rights Commission.

[10] Ms Bowen submits that her election to have the matters of victimisation heard under the Human Rights Act 1993 (the HRA) preceded the application filed in the Employment Relations Authority (the Authority).

[11] The Authority issued a Minute dated 18 October 2018 acknowledging that it could not investigate Ms Bowen's claim on the basis that: "*it is not seized of it, it being before the Human Rights Commission*", and staying the matter in the Authority.

[12] In that Minute the Authority stated that it would take no further proactive steps in the matter until the parties either advised the Authority that the matter had been settled or the Human Rights Commission had completed its process.

[13] The Authority issued a determination on 31 October 2017¹ which granted an application by BNZ for a non-publication order. That determination recorded an agreement by the parties that: “*the Authority’s proceedings should be stayed sine dei whilst the Commissions’ process was ongoing.*”²

[14] BNZ received notice from the Human Rights Commission of Ms Bowen’s complaint on 4 November 2017. Mediation was held with the Human Rights Commission on 19 February 2018, but did not result in a resolution.

[15] Ms Bowen subsequently applied to the Office of Human Rights Proceedings for legal representation to bring proceedings in the Human Rights Review Tribunal (HRRT).

[16] On 8 July 2018 Ms Bowen filed a Statement of Problem with the Authority alleging unjustifiable disadvantage in relation to the continuation of BNZ’s Small Business Change Proposal before conclusion of the HRRT process. Ms Bowen sought compliance orders from the Authority including: “*Enforcement of the Stay of Proceedings pending the outcome of the Commissions’ (HRC/OHRP/HRRT) process.*”

[17] BNZ filed a Statement in Reply on 26 July 2018 denying that its decision to proceed with a decision on the Small Business Change Proposal was in breach of a Stay of Proceedings issued by the Authority in its Minute dated 18 October 2017.

[18] Ms Bowen’s employment ended by reason of redundancy on 31 July 2018. She now seeks to amend her claim before the Authority to that of unjustifiable dismissal.

Has the Authority jurisdiction to consider the claim of unjustifiable disadvantage and/or unjustifiable dismissal by Ms Bowen?

[19] Parties who believe they have a personal grievance have a choice of procedures pursuant to s 112 of the Employment Relations Act 2000 (the Act) which states:

112 Choice of procedures

- (1) Where the circumstances giving rise to a personal grievance by the an employee are also such that that employee would be entitled to

¹ Determination [2017] NZERA Auckland 339.

² Ibid at [4].

make a complaint under the Human Rights Act 1993, the employee may take 1, but not both, of the following steps:

- (a) The employee may, if the grievance is not otherwise resolved, apply to the Authority for the resolution of the grievance;
 - (b) The employee may make, in resolution to those circumstances, a complaint under the Human Rights Act 1993.
- (2) For the purposes of subsection (1) (b), an employee makes a complaint when proceedings in relation to that complaint are commenced by the complainant or the Commission.

[20] The HRA contains a similar provision in s 79A which states:

79A Choice of Procedures

- (1) If the circumstances giving rise to a complaint under Part 2 are such that an employee would also be entitled to pursue a personal grievance under the Employment Relations Act 2000, the employee may take 1, but not both, of the following steps:
 - (a) The employee may make, in relation to those circumstances, a complaint under this Act:
 - (b) The employee may, if the grievance is not otherwise resolved, apply to the Employment Relations Authority for the resolution of the grievance under the Employment Relations Act 2000.
- (2) To avoid doubt, a complaint referred to in subsection (1) includes, but is not limited to, a complaint about sexual harassment or racial harassment.
- (3) For the purposes of subsection (1)(a), an employee makes a complaint when proceedings about that complaint are commenced by the complainant or the Commission.
- (4) If an employee makes a complaint under subsection (1)(a), the employee may not exercise or continue to exercise any rights relating to the subject matter of the complaint that the employee may have under the Employment Relations Act 2000.
- (5) If an employee applies to the Employment Relations Authority for a resolution of the grievance under subsection (1)(b), the employee may not exercise or continue to exercise any rights relating to the subject matter of the grievance that the employee may have under this Act.

[21] Ms Bowen is seeking the Authority to issue a compliance order *inter alia* in respect of an enforcement of a Stay of Proceedings pending the outcome of the Commission's HRRT proceedings.

[22] I find that the determination dated 31 October 2017 did not order a Stay of Proceedings: it recorded an agreement by the parties that the Authority's process should be stayed *sine dei* whilst the Commission's process was ongoing. Accordingly there is no order of the Authority which can be enforced by a compliance order.

[23] Turning to the more substantive issue for determination I observe that the Authority may only proceed in relation to Ms Bowen's claim of unjustifiable dismissal if it is seized of the matter.

[24] I note that Ms Bowen filed a complaint with the Human Rights Commission which was acknowledged in the Authority's Minute dated 18 October 2017 as acting as a stay on matter proceeding in the Authority.

[25] That complaint was the subject of mediation on 19 February 2018; it was attended by the parties, but resulted in no resolution.

[26] The issue is whether or not the matter is now able to proceed in the Authority, or if Ms Bowen is precluded from seeking the assistance of the Authority by virtue of her complaint to the Commission.

[27] The case of *Wang v Hamilton Multicultural Services Trust* in which the Employment Court considered the point at which the election is made to proceed under the Employment legislation or the Human Rights legislation and is pertinent to this issue.³

[28] In *Wang* the Court considered s 112 of the Employment Relations Act 2000 (the ERA) and s 79A of the Human Rights Act 1993 (the HRA) which refer to a choice of procedures.

[29] The then Chief Judge Colgan noted that s 112(1) of the ERA and s 79A (1) of the HRA both define the point at which irrevocability arises. In the Employment jurisdiction it arises when an employee applies to the Authority for a resolution of the grievance in accordance with s 112 (1)(a) of the ERA, and in the Human Rights jurisdiction by the applicant making a complaint under the HRA in accordance with the HRA s 79A(1)(a).

[30] His Honour noted that:

[10] ...The making of such a complaint is further and importantly defined by s 122(2) of the ERA and s 79A(3) of the HRA as being "*when proceedings in relation to the complaint are commenced by the complainant or the Commission*".

...

[12] it is important to note that s 122(2) of the ERA defines the point of election not as being the making of a complaint (to the Human Rights Commission) but, rather, "*when proceedings in relation to that complaint are commenced by the complainant or the Commission*". That is the process addressed in s92B of the HRA referred to in that Act as "*Civil proceedings arising from the complaints*"⁴

³ *Wang v Hamilton Multicultural Trust* [2009] ERNZ 322.

⁴ *Wang*.

[31] In *Wang* the Court noted that Mr Wang had attempted to resolve his dispute by mediation with the assistance of the Human Rights Commission after a complaint to the Commission. However he had not applied to the HRRT for relief which, had he done so, would have precluded any access to the Authority.

[32] In this case, Ms Bowen has similarly made a complaint to the Commission which resulted in a mediation which has not resolved the issue. Ms Bowen states that she has elected to proceed under the Human Rights jurisdiction; however the Wellington Tribunals Unit has confirmed that Ms Bowen has not to date filed any proceedings in the HRRT.

[33] Accordingly I find that Ms Bowen has not made an irrevocable election precluding her from pursuing her claims in the Authority.

[34] I determine that Ms Bowen is entitled to pursue her claims as personal grievances in the Authority.

Should the matter be removed to the Employment Court?

[35] In her memorandum dated 22 October 2018 Ms Bowen applies that this matter be removed to the Employment Court on the basis that the Authority would be unable to determine her claims free from bias.

[36] The issue of bias arises from the fact that one of the persons involved in the issues affecting Ms Bowen in her employment at BNZ was formerly a Member of the Authority.

[37] This issue of perceived bias and application for removal on that basis was addressed by the Chief of the Authority in a determination dated 28 September 2017 and removal declined.⁵

[38] I find no further basis for a claim of bias in this matter and I have found that the Authority has jurisdiction to hear this matter.

[39] In these circumstances I decline to order the removal of this matter to the Employment Court.

⁵ *Bowen & Lewis v Bank of New Zealand* [2017] NZERA Auckland 299.

Next Steps

[40] The Authority will contact the parties shortly to arrange a case management call to progress the application.

Costs

[41] I am minded to reserve the issue of costs until resolution of the substantive matter. However if the parties wish to seek costs on this interlocutory matter, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[42] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority