

**Attention is drawn to the Order
Prohibiting Publication of certain
Information (Refer paragraph 8)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2019] NZERA 11
3045732**

BETWEEN

MELISSA BOWEN
Applicant

AND

BANK OF NEW ZEALAND
Respondent

Member of Authority: Eleanor Robinson

Representatives: Michael O'Brien, Counsel for Applicant
Phillippa Muir & Rebecca Rendle, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 11 December 2018 from Applicant
20 December 2018 from Respondent

Determination: 11 January 2019

SECOND PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Melissa Bowen, claims that she was unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, the Bank of New Zealand (BNZ).

[2] Specifically Ms Bowen claims that she was victimised and forced out of her employment with BNZ in an unlawful manner because she raised issues of fraud and wrongdoing with BNZ.

[3] BNZ denies that Ms Bowen was either unjustifiably dismissed or unjustifiably disadvantaged and claims that it has complied with its statutory and contractual obligations and has acted in accordance with its policies.

[4] Ms Bowen seeks an order for removal of the matter to the Employment Court pursuant to s 178(2)(a) – (d) of the Employment Relations Act 2000 (the Act) on the basis that (a) the case involves important questions of law; (b) is of such a nature and urgency that it is in the public interest that it should be removed immediately to the Employment Court; (c) there is a related matter already before the Employment Court; and (d) it should be removed at the discretion of the Authority.

[5] BNZ opposes removal on the grounds that the requirements of s 178(2)(a) –(d) of the Act have not been satisfied.

Issues

[6] The issue for determination is whether or not the Authority should remove this matter to the Employment Court.

The Law

[7] The Authority may, pursuant to s 178 of the Act order removal of a matter to the Employment Court without the Authority hearing it provided that the Authority is satisfied that one of the grounds of s 178(2) of the Act have been met. The grounds as set in s 178(2)(a) (b) and (d) of the Act are

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties; and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

Non-Publication

[8] The non-publication order issued by the Authority on 31 October remains in force and is extended to cover the current issue before the Authority.¹

¹ *Melissa Bowen & Jessica Lewis v Bank of New Zealand* [2017] NZERA Auckland 339.

Submissions of the Applicant

[9] Mr O'Brien, on behalf of the Applicant, submits that there are grounds in s 178(2)(a) – (d) of the Act to provide a basis to remove this matter as follows:-

(a) *Important questions of law*

[10] It is submitted as relevant to this issue is the fact that the factual background to the matter gives rise to a number of important questions of law. In *Lloydds v Diagnostic Medlab Services Ltd* Travis J stated:²

Whether the question of law raised is important is to be measured in relation to the case in which it arises. “A question of law arising in a matter would be important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision of it or a material part of it” *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1, at p7 Chief Judge Goddard.

This view was echoed in the judgement of the Employment Court in *Hall v Dionex Pty Ltd* in which the Court stated:³

On an application for special leave the onus is on the applicant to establish that an important question of law is likely to arise in the matter other than incidentally. It is not necessary that the question of law is difficult or novel.

[11] It is submitted that the Applicant's case involves novel issues of law and these issues of law will either be decisive of her case, or some important aspect of it, including issues of breach and remedies. Specifically:

- i. The issue of retaliatory action under s 17 of the Protected Disclosures Act 2000 (the PDA) is an important issue of law which has not previously been addressed by the Employment Court;
- ii. The Applicant's 'whistle-blowing' is well-known in the New Zealand banking industry and her evidence is that she is no longer employable in that industry which should result in a significant period of lost income remedies;⁴
- iii. The application of stigma damages and whether such damages fall within the heads of damages under s 103 of the Act, or are available as a separate head of damages for breach of contract. Whilst there has been passing comment to this principle in the Employment Court, it is submitted that it has not been squarely addressed; and

² *Lloydd v Medlab Diagnostic Services Ltd* [2009] ERNZ 42 at [17].

³ *Hall v Dionex Pty Ltd* [2013] NZEmpC 27 at [12].

⁴ *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 at [7] to [83].

iv. A further important issue to arise is the size and extreme profitability of the Respondent and that this affects the positive obligation to be: “active and constructive in maintaining a productive employment relationship” pursuant to s4 (1A) of the Act, and the test of: “in all the circumstances” pursuant to s 103A(2) of the Act.

(b) *Public Interest and Urgency*

[12] It is submitted that having an effective whistle-blower policy was seen as critical as commented upon in a recent review of the Financial Markets Authority and Reserve Bank of New Zealand entitled ‘Bank Conduct and Cultural Review’.

[13] There is a real public interest in accountability in the banking sector, and an acknowledgment of employees being free to speak out on any nefarious activity. It is submitted that the facts of the Applicant’s case are likely to give rise to an important judicial discussion of these issues and provide guidance over the proper protection of whistle-blowers.

[14] Further, because the banks have to provide feedback on the Bank Conduct and Cultural Review by March, there is an associated urgency to this issue.

(c) *Related matter already before the court*

[15] It is submitted that whilst the Employment Court has delivered judgment on an application for a preservation order (and there are ongoing orders from that judgment), the challenge to non-publication orders of the Authority remains.⁵

[16] The challenge to the non-publication order subsists and it appropriate that the Employment Court manages the conduct of the substantive case alongside any issues around non-publication.

(d) *Authority’s discretion*

[17] It is submitted that it is a strong likelihood that either party will challenge the Authority’s determination should the application for removal be refused. The Applicant is unlikely to accept any adverse finding by the Authority given her resoluteness in making her protected disclosures. Similarly the Respondent is unlikely to accept any adverse finding against it.

⁵ *Melissa Bowen v Bank of New Zealand* [2018] NZEmpC 148.

[18] It is further submitted that the issues in the case will give rise to significant issues around discovery and cross-examination of numerous witnesses, and the Court has a better legislated arsenal to deal with the myriad of issues at play, namely:

- The case management regime contained in regulations 55-59 of the Employment Court Regulations (EC Regulations);
- The disclosure regime in regulations 37 -52 EC Regulations; and
- The Employment Court’s recording of witnesses and transcription service,

Therefore a hearing in the Employment Court will most likely provide a quicker route.

Submissions of the Respondent

[19] Ms Muir and Ms Rendle, on behalf of BNZ, submit that the requirements of s178(2)(a) – (d) of the Act have not been satisfied as follows:

(a) *Important questions of law*

[20] It is submitted that there are no questions of law that meet the threshold as identified by the Employment Court in *McAlister v Air New Zealand Limited* in which the Court noted in relation to the need to identify an important question of law:

The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of the case or a material part of it.⁶

[21] The correct test to be applied under s 103A of the Act for justification for dismissal on grounds of redundancy is well-established, as are the principles for exercising discretion in the award of remedies.

[22] The Court of Appeal confirmed the correct test and the principles to be applied in *Grace Team Accounting Limited v Brake*⁷ This was a case in which s 103A of the Act was: “*the provision at the heart of the case*”. Similarly it is submitted that the alleged factual matters in this case are not likely to give rise to a number of important issues of law.

⁶ *McAlister v Air New Zealand Limited* AC 22/05 at [9].

⁷ *Grace Team Accounting Limited v Brake* [2014] NZCA 541.

[23] Moreover the Authority is well placed to consider and determine the legal and factual matters in applying s 103A test on the basis firstly that the Authority routinely deals with claims that restructuring processes are not genuine and/or due to ulterior motives, and secondly the size of the employer and its earnings is not a novel or complex question of law.

[24] Addressing the specific points noted by the Applicant it is submitted that:

- i. The Respondent's Change Proposal for Small Business (which effectively impacted upon the Applicant's continuity of employment) was communicated to the Applicant on 4 October 2016 which was prior to the Applicant making her protected disclosure on 23 November 2016. Accordingly the issue of retaliatory action under the PDA does not apply. The Court has fully considered the application of the PDA in the context of a personal grievance, notably in *Young v Bay of Plenty District Health Board*.

The PDA was also considered and applied by the Employment Court in *Bracewell v Richmond Services Limited*⁸ and *Hutchinson v Nelson City Council*.⁹ Notably in *Hutchinson* the Employment Court referred in a footnote to paragraph [76] that a full analysis of the PDA was carried out in *Bracewell*.¹⁰

- ii. The principles to be applied in determining lost remuneration are set out by the Court of Appeal in *Telecom New Zealand Ltd v Nutter*¹¹ as reaffirmed in *Sam's Fukuyama Food Service Limited v Zhang*.¹² It is submitted that the Court of Appeal does not set any cap on the level of lost remuneration that can be awarded and expressly held that it is: "*perfectly clear that compensation that exceeds the equivalent of 12 months remuneration can be awarded*" although: "*the longer the period in respect of which compensation sought, the more uncertain and speculative the assumption underlying the eventual award become.*"¹³

⁸ *Bracewell v Richmond Services Limited* [2014] NZEmpC 111 at [13] – [20].

⁹ *Hutchinson v Nelson City Council* [2014] NZEmpC 117 at [76] – [77].

¹⁰ "A full analysis of that statute was recently carried out by this Court in *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111".

¹¹ *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ (CA) at [70] – [81].

¹² *Sam's Fukuyama Food Service Limited v Zhang* [2011] NZCA 608.

¹³ Above at n 9 at [80].

The principles in *Nutter* already allow the Authority and Court to assess compensation in a way that is: ‘*individualised to the circumstances of the case*’. In addition, compensation awards and claims of reputational damage are regularly considered and determined by the Authority.

- iii. There is no important question of law in relation to stigma damages. The Employment Court squarely addressed this issue in the New Zealand context in *Pivott & O’Sullivan v Southern Adult Literacy Inc & Literary Aotearoa Inc.*¹⁴
- iv. The size of the employer (and its earnings) is not a novel or complex area of law in relation to redeployment issues. It forms part of “*all the circumstances*” in the Authority’s assessment of whether the Respondent’s actions were reasonable.

(b) *Public Interest and Urgency*

[25] There is no public interest or urgency necessitating the immediate removal of this matter to the Employment Court. The Authority’s decision on this matter can be expected on or about mid-February 2019. There is therefore no prospect of a hearing and decision on this matter (whether in the Authority or the Court) before March 2019.

[26] Moreover, it is submitted that this case has no relevance to the Bank Conduct and Culture Review and is to be determined on the facts.

(c) *Related matter already before the court*

[27] It is submitted that the matters before the Employment Court are discrete issues, namely:

- a) A challenge to the Authority’s non-publication order. This matter is currently subject to a stay of proceedings (by agreement); and
- b) An application for preservation of documents/evidence. This matter has now been decided by the Employment Court.

¹⁴ *Pivott & O’Sullivan v Southern Adult Literacy Inc & Literary Aotearoa Inc.* [2011] NZEmpC 67 at [28].

[28] Both matters before the Employment Court relate to procedural matters, neither of which require the court to hear evidence, or make any determination on the Applicant's substantive claims.

[29] In this case the remaining matter before the Employment Court does not: "*involve the same or similar or related issues*" as set out in s 178(2)(c) of the Act. There is no overlap between the substantive matters to be determined by the Authority and the only outstanding matter currently before the Employment Court (a challenge to the Authority's non-publication order) is subject to a stay of proceedings.¹⁵

[30] At a substantive hearing the Authority can determine whether or not the non-publication orders should be made final, which may mean that a substantive hearing in the Employment Court on this issue will not be necessary.

[31] In relation to the judgment on the application for preservation of evidence/documents, there are no 'ongoing orders' as submitted by the Applicant. The only order made in the judgment is that the devices held by the Court are to be returned to BNZ.¹⁶

(d) *Authority's discretion*

[32] It is submitted that a challenge to the determination of the Authority cannot be said to be inevitable, noting the Employment Court's comments in *Pivott & O'Sullivan v Southern Adult Literacy Inc & Literary Aotearoa Inc*:¹⁷

Despite Mr O'Sullivan's submission to the contrary, this case is essentially one of personal grievances, albeit hotly contested, which is only at a very preliminary stage of investigation by the Employment Relations Authority. I do not think that the outcome can be predicted with sufficient accuracy that either party can be said inevitably to challenge that outcome.

[33] It is submitted that the Authority should decline to exercise its discretion regarding removal for the following reasons:

- a) No useful purpose would be served by ordering the removal of the proceedings to the Employment Court as the matter involves factual disputes which are more appropriately determined by the Authority in the first instance;¹⁸

¹⁵ *Department for Courts v Crofts* (unreported) 14 August 2008, AA 118/01.

¹⁶ Above at n 4.

¹⁷ Above at n 13 at [14].

¹⁸ See *NZ amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey* [2002] 1 ERNZ 74.

- b) The Applicant will have the right to challenge the Authority's substantive determination in the Employment Court if she is dissatisfied with it;
- c) Granting the application would effectively result in the loss of the parties' appeal rights as leave is needed on a question of law to proceed with an appeal to the Court of Appeal. Given the disputed facts in this case it is submitted that it is in the interests of justice to preserve a right of challenge on factual matters; and
- d) Removal to the Employment Court for a hearing at first instance would result in a later hearing date.

[34] The Respondent denies that the case will give rise to significant issues relating to discovery and cross-examination of numerous witnesses. The proceedings in relation to the Applicant's claims are to determine whether or not her dismissal for redundancy was justified. They are not concerned with an allegations made by the Applicant relating to fraud and cover-ups by the Respondent.

Removal Application and discussion

General Principles of Removal

[35] The Authority is constrained in its ability to remove proceedings before it to the Court by s 178(2) of the Act which sets out the tests upon which the Authority must be satisfied prior to removal.

[36] In the event that the party or parties applying for removal satisfy the tests set out in s 178 (2) of the Act, the Authority has residual authority to determine whether or not the matter should be removed to the Employment Court. In doing so the Authority must determine whether or not there are any relevant factors against removal of proceedings to the Employment Court¹⁹.

[37] I am not satisfied that there is an important question of law that is likely to arise in this case.

[38] Ms Bowen's claim of unjustifiable dismissal and unjustifiable disadvantage has its foundation in the implementation of the Small Business Change Proposal which resulted in

¹⁹ *NZAEPMU Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 at p [83].

the termination of her employment with BNZ. Consideration and determination of justification for dismissal in redundancy situations is not a unique occurrence in the Authority which regularly investigates such matters and I find do not represent important questions of law.

[39] The timing of the Small Business Change Proposal and Ms Bowen's protected disclosures indicates at this stage that the one did not influence the other, however even if this proves to be mistaken, I find that the PDA has been fully considered by the Employment Court in *Bracewell* and I do not find that there is an important question of law arising in relation to that legislation.

[40] I find that the size and profitability of the Respondent is a factor to be taken into consideration of all the circumstances pursuant to s 103A (2) of the Act. I note also the requirement to consider the resources available to the employer when determining justifiability for dismissal or action pursuant to s 103A (3)(a) of the Act. I do not find it to present an important question of law.

[41] In regard to remedies encompassing loss of future earnings and 'stigma' damages, I find that compensation awards for loss of earnings and reputational damages are also a feature of Authority determinations and these do not present an important question of law. The principles for determining lost remuneration and stigma damages have been well traversed by the Court Of Appeal in *Nutter*²⁰ and *Pivott & O'Sullivan*.²¹

[42] I am not persuaded that there is any public interest or urgency in removing this matter to the Employment Court. The Authority is unlikely to be able to hear the substantive matter before May 2019, and even if this preliminary determination is appealed, that appeal may not be heard prior to March 2019 when feedback on the Bank Conduct and Cultural Review is expected.

[43] I find no grounds for removal on pursuant to s 178(2)(c) of the Act. Although the appeal in respect of the Authority's non-publication order remains before the Employment Court, it is stayed, and it is a discrete matter to the removal application which can be heard on its facts. There are no significant outstanding orders that impact on this decision contained in the Employment Court judgment on the application for a preservation order.²²

[44] I note that Mr O'Brien observes in his submissions that Ms Bowen is unlikely to accept the Authority's finding in the substantive matter of it is adverse to her claims.

²⁰ Above at n 9.

²¹ Above at n 12.

²² Above at n 4.

[45] It is not unusual for a party, dissatisfied with the finding in a determination of the Authority, to exercise its right to appeal that determination. That right includes the right to appeal on a *de novo* which traverses both appeals based on the facts and the law.

[46] As submitted by Ms Muir and Ms Rendle that right is unavailable should this matter be removed to the Employment Court for a first hearing of the substantive claims by Ms Bowen. Nor is it inevitable that Ms Bowen (or indeed any party who appears before the Authority) would choose to exercise her right to appeal should the findings of a determination be adverse to her.

[47] In summary it is my view that the Authority is a cost-effective forum properly equipped to resolve employment relationship problems based upon unjustifiable dismissal and unjustifiable disadvantage resulting from a restructure and consequent redundancy situation as affected Ms Bowen.

[48] I do not find that the grounds for removing a matter to the Employment Court pursuant to s 178(2)(a) to (d) of the Act have been satisfied.

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

Next Steps

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

Costs

[51] 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.

[52] 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