

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 19
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 and Meghan Bolwell, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions and further Information Received: 5 January 2022 from the Respondent
6 January 2022 from the Applicant
7 January 2022 from the Respondent
10 - 17 January 2022 from Applicant and Respondent
18 January 2022 from Applicant
21 January 2022 from Respondent

Date of Determination: 28 January 2022

DETERMINATION OF THE AUTHORITY

Non-publication order

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

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

[2] This interlocutory determination, relating to admissibility of evidence issues, should also be subject to a non-publication order to ensure the confidentiality of privileged material is maintained.

[3] The Authority therefore exercises its discretion under clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act) to order that this determination is subject to a non-publication order until further order of the Authority, subject to the condition that it does 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 is relevant to such discussions.

[4] Either party may apply to the Authority for a variation of this non-publication order, provided the application explains the reasons for it and identifies what has changed since the order was made. A variation may be applied for if an individual, other than those identified in paragraph [3] above, has a legitimate reason for needing to see an unredacted version of this determination.

[5] This non-publication order means that paragraphs [8]-[91] and the content of Appendix A in this determination shall be redacted before it is uploaded to the online employment law database.

Employment Relationship Problem

Respondent's claims

[6] The respondent claims the applicant has submitted evidence of privileged communications in support of her substantive claims ("*the substantive matter*"). The respondent has not waived privilege, so seeks orders that such evidence is inadmissible.

The respondent has listed the evidence it says should be ruled inadmissible in Appendix A (this is referred to as "*the disputed material*").

The disputed material

[7] The disputed material has been withheld from the Authority Member investigating the substantive matter (referred to in this determination as "*the Presiding Member*") pending the outcome of this determination.²

² Member van Keulen.

[Paragraphs [8]-[91] and the content of Appendix A are redacted as per the non-publication order that relates to this determination.]

Outcome

[92] The respondent's application for orders that the disputed material identified in Appendix A is privileged and should be withheld from the Presiding Member succeeds.

[93] The applicant within 14 days of the date of this determination is directed to refile statements that do not contain references to privileged material.

What if any costs should be awarded?

[94] The respondent as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to resolve costs by agreement. If that is not possible, the respondent has seven days within which to file its cost submissions, with the applicant having seven days within which to file her response.

[95] The Authority is likely to adopt its usual notional daily tariff-based approach to assessing costs for this interlocutory application. Although this matter was dealt with on the papers, it involved a considerable amount of information and it was conducted under significant urgency.

[96] For the purposes of assessing costs, the Authority considers it appropriate to treat this matter as if it involved a one day investigation meeting. The notional starting tariff for assessing costs in this matter will therefore be \$4,500. The parties are invited to identify any factors they say should result in the notional starting tariff being adjusted to reflect the particular circumstances of this case.

Rachel Larmer
Member of the Employment Relations Authority

**Attention is drawn to orders
prohibiting publication of certain
information in this determination**

APPENDIX A

**Melissa Bowen v Bank of New Zealand
File No: 3032274**

List of disputed evidence

[Content redacted in accordance with the non-publication order in this determination]