

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2018] NZEmpC 148
EMPC 335/2017**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for a freezing order to
 preserve evidence

BETWEEN MELISSA JANE BOWEN
 Plaintiff

AND BANK OF NEW ZEALAND
 Defendant

Hearing: On the papers

Appearances: M Bowen, plaintiff
 P Muir and R Rendle, counsel for defendant

Judgment: 10 December 2018

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for freezing order to preserve evidence)**

[1] The plaintiff, Ms Bowen, applies for orders restraining the Bank of New Zealand (BNZ) from removing certain devices and files from New Zealand or from disposing of, dealing with or diminishing the value of those devices and files. The focus of Ms Bowen’s application is the laptop and iPhone that she used while employed at the BNZ (the devices), together with files saved and stored on her devices and in the BNZ network system relating to her login. The devices are currently held by the Employment Court registry, pending resolution of Ms Bowen’s application.

[2] Ms Bowen has described her application as an “Application for Freezing Order to Preserve Evidence”. It is, in effect, an application for interim orders for the preservation of property, as provided for in r 7.55 of the High Court Rules 2016, the

purpose of which is to preserve property or a fund involved in the litigation itself, or evidence relating to the litigation.¹ The Employment Court (the Court) can make such orders through reg 6(2) of the Employment Court Regulations 2000.²

[3] The principal reason for the application is that Ms Bowen believes that there is a risk that the BNZ will destroy evidence that is critical and relevant to protected disclosures she has made and to the proceedings that she has pending in the Human Rights Review Tribunal and in the Employment Relations Authority (the Authority).

[4] The BNZ has identified the proceedings currently filed in the Court and the Authority as:

- (a) A statement of problem filed in the Authority in August 2017 alleging unjustified disadvantage in relation to a review of a restructure by a named senior BNZ executive. Ms Bowen claims that this review was in breach of a memorandum dated 3 February 2017.
- (b) A statement of claim filed in the Court on 23 November 2017 challenging a determination of the Authority granting non-publication orders.
- (c) A statement of problem filed in the Authority in July 2018 alleging unjustified disadvantage in relation to the continuation of the BNZ's Small Business Change Proposal. After Ms Bowen's employment ended by reason of redundancy, she sought to amend these proceedings to include a personal grievance for alleged unjustified dismissal.

[5] The BNZ has advanced a proposal that it says should address Ms Bowen's concerns and make any formal Court orders unnecessary. The steps identified in that proposal are:

- (a) The BNZ will instruct its information technology team to ensure that no documents saved and stored in the BNZ network under Ms Bowen's

¹ *Rapid Metal Developments (NZ) Ltd v Rusher* (1987) 2 PRNZ 85 at 92 (referring to previous HCR 331).

² *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2016] NZEmpC 174 at [4].

login are deleted pending the resolution of proceedings before the Court and Authority.

- (b) If proceedings are also filed in the Human Rights Review Tribunal, the BNZ will provide an additional instruction that no documents saved and stored in the BNZ Network under Ms Bowen's login are deleted pending the resolution of proceedings before the Human Rights Review Tribunal.
- (c) Campbell McKenzie, Director at PwC New Zealand (PwC) (or another PwC representative nominated by him and advised to the Court in advance), will collect the devices from the Court, on production of photo identification.
- (d) Before returning the devices to the BNZ, PwC will make a copy of all information saved and stored on the devices including all emails, documents and audio files. PwC may need the assistance of the BNZ's staff (for example, to ensure that a BNZ-compatible USB is provided). A PwC representative will be present at all times while any assistance is provided by any staff member of the BNZ.
- (e) Ms Bowen will then meet with a representative of PwC to identify the information that she seeks copies of on the devices (which must be limited to information relevant to the proceedings).
- (f) PwC will then copy this information to a USB and provide a copy of this to both Ms Bowen and the BNZ.

[6] As part of its proposal the BNZ also said that, at the conclusion of the proceedings, the USB must be returned to the BNZ together with a statutory declaration from Ms Bowen that no copies have been retained or distributed (whether electronically or in hardcopy). I assume that the BNZ is saying that PwC would provide the USB to Ms Bowen as per [5](f), provided she agrees to this requirement.

[7] In setting out its proposal the BNZ notes:

- (a) Ms Bowen's post-employment confidentiality obligations (clause 16 of her employment agreement) continue to apply. Therefore, the

information on the USB must be treated as strictly confidential and must only be used for the purposes of presenting her case in the proceedings. Ms Bowen will ensure that the USB is stored securely to protect against unauthorised access or loss.

- (b) The BNZ reserves its rights to require the immediate return of the USB if there is any breach of confidentiality.
- (c) The BNZ also reserves its rights to oppose the admissibility of any evidence, where appropriate (for example, if it is in relation to without prejudice communications/mediation).

[8] At a directions conference convened to progress Ms Bowen's application, I asked Ms Bowen to identify in her submissions:

- (a) why the evidence she seeks to have preserved is relevant to the proceedings before the Authority and/or Court; and
- (b) why the BNZ's proposal to preserve evidence did not meet her requirements.

[9] Ms Bowen has filed detailed submissions. These principally deal with the substantive concerns that she has arising out of her employment with the BNZ and her protected disclosures. However, the matters that are before the Authority and/or the Court are limited in scope. Any order that I was to make would have to be directed to evidence relevant to those matters.

[10] Most of the documents that Ms Bowen wishes to preserve do not relate to the review of the restructure that the senior BNZ executive undertook, the non-publication orders made by the Authority, or the BNZ's Small Business Change Proposal.

[11] Because a preservation order is invasive in nature, the Court must be satisfied that the grounds for making such an order are established.³ I acknowledge that Ms Bowen has concerns about the conduct of various people within the BNZ. However,

³ *Lewis v Poultry Processors (Holdings) Ltd* (1988) 3 PRNZ 167 (HC) at 171, 173; *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 14 at [7].

the devices belong to the BNZ and, absent proper grounds being established, it ought to be able to have those and use them in its business, which it cannot do while they are being held by the Employment Court Registry.

[12] Having carefully reviewed Ms Bowen's affidavit and submissions, I am not persuaded she has provided a proper evidential foundation for finding that there is a real risk that the BNZ will destroy or dispose of the files and other material on the devices or presently stored under Ms Bowen's BNZ employee login, including any such material that may relate to matters before the employment institutions.

[13] Further, I am satisfied that the proposal put forward by the BNZ⁴ properly addresses any concern that Ms Bowen may have in relation to the possible deletion of information held on the devices. The proposal includes the involvement of an intermediary PwC representative to copy all information saved and stored on the devices and to provide a copy of the information sought by Ms Bowen to her and to the BNZ.

[14] In conclusion, the devices currently held by the Employment Court Registry are to be returned to the BNZ, through Mr Campbell McKenzie, director at PwC, or another PwC representative advised by him to the Court. No other order is made, in the expectation that the BNZ will do what it says it will do in its proposal.

[15] The BNZ also seeks a direction that Ms Bowen disclose details of any audio recordings made by her or by her support people. Ms Bowen opposes such a direction. I make no direction to that effect at this stage; but I do note that if audio recordings exist, they should not be destroyed as Ms Bowen may be required to disclose them as relevant documents as her cases proceed.

[16] In the usual course, the BNZ would be entitled to costs on this interlocutory application. However, in the circumstances, given the embryonic nature of the proceedings, I direct that costs (including any issue in relation to the costs and

⁴ As set out in [5] and [6].

disbursements incurred by the BNZ in preserving the evidence) be reserved at this stage.

J C Holden
Judge

Judgment signed at 11.30 am on 10 December 2018