IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 71
EMPC 261/2020

IN THE MATTER OF	an application for special leave to remove proceedings from the Employment Relations Authority
BETWEEN	MELISSA BOWEN Applicant
AND	BANK OF NEW ZEALAND Respondent

Hearing:	24 February 2021 (Heard at Auckland)
Appearances:	M W O'Brien, counsel for applicant R M Rendle and M Bolwell, counsel for respondent
Judgment:	17 May 2021

JUDGMENT OF JUDGE J C HOLDEN

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[1] Ms Bowen applies for special leave to remove her proceedings against the respondent, the Bank of New Zealand (BNZ), to the Employment Court. The Employment Relations Authority (the Authority) declined her application for removal of those proceedings to the Court.[1]

[2] The application for special leave is based on two grounds:

(a) Ms Bowen's claim raises important issues of law that are not incidental to her claim; and

(b) there are related proceedings before the Court.

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1 *Bowen v Bank of New Zealand* [2019] NZERA 11 (Member Robinson).

[3] Ms Bowen's substantive claim is that she was unjustifiably dismissed and unjustifiably disadvantaged by BNZ. She says that she was victimised by BNZ and ultimately forced out of her employment through a purported restructuring because she had raised concerns about BNZ. She says that BNZ's process started after she raised those concerns between March and May 2016. She says that she raised her concerns through a protected disclosure under the Protected Disclosure Act 2000.

[4] Ms Bowen's employment terminated ostensibly for redundancy in July 2018.

[5] BNZ says that the redundancy process was fair and genuine and that there was no unjustifiable disadvantage or unjustifiable dismissal.

[6] The four important issues of law alleged are:

(a) Whether Ms Bowen's disclosures between March and May 2016 constituted a protected disclosure under the Protected Disclosure Act.

(b) Where an individual employment agreement only refers to the employer's policies, whether the policies of related companies are applicable and binding.

(c) Consideration of lost income and other remedies for whistle-blowers, including the societal good of awarding higher levels of lost income damages to a whistle-blower who faces retaliatory action by their employer that adversely impacts their ability to work in their chosen industry.

(d) The inter-relationship between the positive obligation under s 4(1A)(b) of the Employment Relations Act 2000 (the Act) to be active and constructive in establishing and maintaining a productive employment relationship and whether there is a higher onus on an employer to facilitate redeployment:

(i) if the employer is highly profitable; or

(ii) when the employee has made a protected disclosure and the fact of that harms the employee's likelihood of finding work with another employer in the industry.

[7] If the Court finds either that there is an important question of law or that there are related proceedings that warrant removal, Ms Bowen points to three reasons why the Court ought, in its discretion, order the removal:

(a) there is a strong public interest in the outcome of this matter;

(b) Mr Leon Robinson, a former (and now reappointed) Member of the Authority is likely to be a critical witness and his credibility will need to be assessed;

(c) costs and efficiencies.

[8] BNZ opposes the application. It says there is no important question of law that will arise in the case other than incidentally and that related matters in the Court do not involve sufficiently similar or related issues to the matters Ms Bowen seeks to remove.

[9] The related matters currently before the Court are a challenge to the Authority's non-publication order and for further non-publication orders (dealt with in this judgment). There also were an application for the preservation of evidence and an application by BNZ for exclusion of evidence, but there have been judgments on those applications.[2]

[10] BNZ disagrees that there is a strong public interest in the matter. It says the question of whether the issues raised by Ms Bowen between March and May 2016 amount to a protected disclosure will not be determinative of the case and, in any event, would be determined primarily by consideration of the relevant contemporaneous documentary evidence rather than by any evidence Mr Robinson might give relating to this issue. It says that, although Mr Robinson may be a witness,

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2 *Bowen v Bank of New Zealand* [2018] NZEmpC 148; *Bowen v Bank of New Zealand* [2021] NZEmpC 6.

he is not a key witness and did not play a key role in the events that are relevant to the issues for determination. BNZ also notes that Mr Robinson had no involvement in the decision to disestablish Ms Bowen's role and her redundancy, which took effect in July 2018, some seven months after Mr Robinson left his employment with BNZ.

[11] BNZ also disagrees that costs and efficiencies favour a removal to the Court.

The Court's consideration comes from s 178(2) of the Act

[12] Where the Authority declines to remove a matter to the Court, and the party applying for the removal seeks special leave, the Court applies the criteria set out in s 178(2)(a)–(c).[3] The criteria relied on by Ms Bowen are in s 178(2)(a) and (c):

> …
>
> (a) an important question of law is likely to arise in the matter other than incidentally; or
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> …
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> (c) The court already has before it proceedings which are between the same parties and which involve the same or similar or related issues;
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> …

[13] The Court does not have the broader power that the Authority has whereby the Authority may order the removal of a matter if it is of the opinion that in all the circumstances the Court should determine the matter.[4]

The central issue is whether the claim raises an important question of law

[14] The other proceedings before the Court are preliminary and/or subsidiary ones and do not require any determination on Ms Bowen's substantive claims. The matters to be considered are not an intrinsic part of the factual matrix pertinent to the dismissal claim; they do not involve similar or related issues.[5] Ms Bowen's argument under s 178(2)(c) does not succeed. The central issue, therefore, is whether there is any important question of law that is likely to arise in the matter other than incidentally.[6]

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3 Employment Relations Act 2000, s 178(3).
4 Employment Relations Act 2000, s 178(2)(d).
5 *Randwick Meat Co Ltd v Burns* [2015] NZEmpC 188 at [27].
6 Employment Relations Act 2000, s 178(2)(a).

[15] A question of law arising in the 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.[7] It is not necessary that the question of law is difficult or novel.[8] It need not have an impact beyond the particular parties.[9]

[16] While Mr O'Brien, counsel for Ms Bowen, has identified four potential questions of law, there really is only one that needs detailed consideration.

[17] I do not accept that the question of whether policies of related companies are applicable and binding on an employee's employment involves an important question of law. Rather, it turns on the facts of the case and the degree to which the policies of the related company are incorporated into an employee's employment agreement with their employer.

[18] Likewise, I do not consider that the issue of compensation for whistle-blowers raises an important question of law. Compensation is not punitive but, as the descriptor makes clear, compensatory. The amount to be awarded is to be assessed in an individualised way based on the circumstances. The employee's actual loss sets the upper ceiling and is the starting point for the assessment.[10]

[19] In that context, the extent to which an employee has their prospects of employment harmed because they were a whistle-blower is a question of fact and will be relevant in assessing loss. Where warranted, the Court or Authority can award compensation well above the three months' remuneration referred to in s 128(2) of the Act.[11]

[20] The onus to be placed on an employer in a redundancy situation where the employer is highly profitable and the employee has made a protected disclosure is not

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7 *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 (EmpC) at 7.

8 *Hall v Dionex Pty Ltd* [2013] NZEmpC 27, [2013] ERNZ 32 at [12]; *Kazemi v Rightway Ltd* [2018] NZEmpC 3 at [11].

9 *Johnston v Fletcher Construction Ltd* [2017] NZEmpC 157, [2017] ERNZ 894 at [22].

10 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [80]-[81].

11 See for example *Hawkins v Commissioner of Police* [2008] ERNZ 284 (EmpC); *Hayashi v SkyCity Management Ltd* [2018] NZEmpC 14, [2018] ERNZ 27 at [80]; *Roach v Nazareth Care Charitable Trust Board* [2018] NZEmpC 123, [2018] ERNZ 355 at [80].

an important question of law, but again goes to the facts and whether the employer has behaved in a way that is open to a fair and reasonable employer in all the circumstances, those circumstances including the two factors raised here.

Is the nature of Ms Bowen's disclosures an important question of law?

[21] The issue then is whether the first question posed by Ms Bowen, determining the nature of her disclosures between March and May 2016, constitutes an important question of law.

[22] There is a difference of view between the parties as to whether Ms Bowen's communications between March and May 2016 constituted a protected disclosure.[12] I accept that is a mixed question of fact and law. The issue is whether the legal question involved is important.

[23] At its heart, Ms Bowen's case is about whether her dismissal for redundancy in July 2018 was justifiable. If it was not genuinely for redundancy and/or was in retaliation for Ms Bowen's complaints in March to May 2016, it would not be justifiable.[13]

[24] It is difficult to see how the definition of the March to May 2016 complaints – either as a protected disclosure or simply complaints – would affect this consideration. If an employee is dismissed or disadvantaged unjustifiably in retaliation for making a protected disclosure under the Protected Disclosures Act, the way to a remedy for that claimed wrong is by raising a personal grievance. So the appropriate statutory response for retaliation for making a protected disclosure is the same as for any other statutory personal grievance.[14]

[25] This will mean that, in considering whether the actions of BNZ in relation to the redundancy were ones that were open to a fair and reasonable employer in the circumstances, the Court or Authority would need to examine the rationale and/or

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12 The parties agree that Ms Bowen made a protected disclosure in November 2016.

13 *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494, [2014] ERNZ 129 at [85].

14 *Young v Bay of Plenty District Health Board* [2013] NZEmpC 235 at [46].

genuineness for the restructure and the considerations that were taken into account by BNZ. If the Authority or the Court considers the issue of whether the complaints in March to May 2016 constituted a protected disclosure, its finding will not resolve the case. The consideration then would turn to whether BNZ's actions leading up to Ms Bowen's redundancy in 2018 were because of Ms Bowen's actions in March to May 2016. That would be the case whether or not there was a protected disclosure.

[26] For this reason, the legal issue of whether the complaints constituted a protected disclosure would not be decisive of the case or of an important aspect of it. Nor would it be strongly influential in bringing about a decision or a material part of it.

[27] This means that Ms Bowen's claim does not meet the threshold of raising important issues of law that are not incidental to her claim.

[28] Accordingly, her proceedings are not removed to the Court.

If there had been important questions of law, there are several factors that would have supported the Court removing this matter

[29] If Ms Bowen had succeeded in any of her arguments under s 178(2), the Court could nonetheless, in its discretion, decline to remove the matter to the Court.

[30] There are a number of factors here that would have counted against exercising the discretion in that way.

[31] BNZ's main point on discretion was that removing the proceedings would deprive it of its important right to challenge the Authority's determination in the Court. That is not a strong argument. Section 178 clearly envisages removal without a hearing in the Authority, which would bring with it the result that the case would be heard for the first time in the Court. That is a consequence that has been acknowledged several times by the Employment Court in previous decisions as one that must have been regarded as an acceptable consequence by the legislature.[15]

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15 *Transpacific Industries Group (NZ) Ltd v Harris* [2012] NZEmpC 17 at [24]; *Johnston*, above n 9, at [33]-[34].

[32] I also accept the point made by Ms Bowen that there will be extra costs for both parties in having the matter dealt with in the Authority in the first instance, in the present circumstances, where the positioning of the parties is such that it is very likely that Ms Bowen's case will end up in the Court. That factor would be part of the mix and would support removal, if the Court had been satisfied that one of the grounds in s 178(2)(a)-(c) was made out and then was considering whether or not to grant leave, as part of its discretion.[16]

[33] Finally, the fact a Member of the Authority would be a witness in the case to be heard by one of his now colleagues would be a factor supporting the removal of the proceedings to the Court.

Non-publication application

[34] BNZ seeks an order prohibiting the publication of any pleadings or evidence filed by the parties in these proceedings (and any related or parallel proceedings in the Court) on an indefinite basis, in respect of:

(a) details of Ms Bowen's protected disclosure made on 23 November 2016 (including information that identifies or could lead to the identification of the individuals named in the protected disclosure who are not parties to these proceedings); and

(b) various paragraphs of Ms Bowen's affidavits filed in this matter that include other allegations she has made against BNZ and its current and former employees.

[35] Interim orders were made at the hearing of this matter prohibiting publication pending further order of the Court.

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16 *Visagie v WorkSafe New Zealand* [2020] NZEmpC 8 at [13].

[36] BNZ says:

(a) the allegations contained in the pleadings and evidence are currently untested and strongly disputed by BNZ;

(b) the substance of the allegations over which non-publication are sought will not be determined by the Authority (or Court);

(c) publication of these matters has the potential to cause serious commercial and reputational harm to BNZ and to individuals who are not party to these proceedings; and

(d) a prohibition of publication order in relation to these matters will not be contrary to the principles of open justice.

[37] Ms Bowen opposes the proposed orders. She says BNZ has not established there will be specific adverse consequences to it should the order not be made.

[38] She also says that BNZ could have responded to her affidavit but did not do so. She says the case turns on the application of the Protected Disclosures Act and the evidence is relevant to that, so the Authority or Court would need to form a view about whether Ms Bowen has reasonable grounds for forming her belief of serious wrongdoing in making her protected disclosure.

[39] Ms Bowen points out that her name is public, as a whistle-blower, so she says equilibrium would have her allegations made public too. Finally, she says, there is public interest in making her allegations known.

The Court may make non-publication orders

[40] In considering an application for non-publication orders, the Court recognises that such orders are a departure from the fundamental principle of open justice. While the person applying for non-publication orders does not need to show exceptional circumstances, they must establish sound reasons for the presumption favouring publication to be displaced, showing that, if non-publication is not granted, there will

be specific adverse consequences that are enough to justify an exception to the fundamental principle.[17]

[41] The Court must strike a balance between the principle of open justice and the interests of the person seeking non-publication orders, noting that the standard for departing from the principle of open justice is high.

[42] Where the application is for an interim non-publication order, the principle of open justice has less weight than at a later stage in the proceedings. The Courts are cautious about permitting public opinion to be formed based on allegations rather than a determination of the Court.[18]

[43] The Court is more likely to grant non-publication orders over disputed evidence that would not be the subject of judicial findings.[19]

There already are non-publication orders in place

[44] There are non-publication orders already on foot in the High Court and in the Authority covering details of Ms Bowen's protected disclosure made on 23 November 2016.[20]

[45] In respect of the present proceedings, BNZ seeks non-publication over limited and specific paragraphs that detail allegations made by Ms Bowen. Accordingly, the fact that Ms Bowen has made allegations against BNZ is not subject to the application for non-publication orders. Further, some of the matters underlying the case are included in the High Court judgment in the *Optimizer* proceedings. Non-publication orders are not sought and would not be granted over the matters included in that judgment.

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17 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13]; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [96].

18 *Morgan Roche Ltd v Registrar of Companies* (1987) 2 BCR 299 (HC) at 308-309.

19 *Nel v ASB Bank Ltd (No 4)* [2018] NZEmpC 64 at [4]; *Crimson Consulting Ltd v Berry*, above n 17, at [127]-[129].

20 *Bowen v Bank of New Zealand* [2017] NZERA Auckland 339 at [28]; *Optimizer HQ Ltd v Bank of New Zealand* [2020] NZHC 1253 at [49].

[46] I accept that Ms Bowen has included a great deal of evidence on matters that are not relevant to the matters presently before the Court, and covering contentious matters that would not be the subject of findings in the Authority or the Court. As previously noted, even in her affidavit in relation to the application for a stay of the Authority's timetabling directions, Ms Bowen gave significant evidence on matters of substance, irrelevant to her application for a stay.[21] This is consistent with the pattern generally of Ms Bowen's proceedings before the Court, both before and since her engaging counsel.

[47] I also accept that, at this stage of the proceeding, the principle of open justice has less weight than it will have when the substantive case proceeds. However, BNZ still needs to establish that there will be specific adverse consequences to it and/or to the individuals for whom it seeks non-publication of their names.

[48] In a sense, Ms Bowen's argument on that issue is somewhat contradictory; she opposes the non-publication orders because she considers the matters she alleges are serious and should be in the public arena so that BNZ faces the consequences of its alleged actions. However, she argues that no specific adverse consequences are demonstrated. Despite that contradiction, I am sympathetic to the second point.

[49] The evidence of specific adverse consequences from BNZ is surprisingly light, with just general statements from BNZ's Chief People Officer concerning the environment in which BNZ operates and concluding that the allegations made by Ms Bowen "will be highly prejudicial and have the potential to cause irreparable reputational damage to BNZ if made public". The individuals for whom non-publication orders are sought have not provided any evidence.

[50] Where a party is seeking non-publication orders, it is expected that it will provide cogent evidence from a witness with the appropriate knowledge as to what specific adverse consequences are likely to flow from publication. Here BNZ is seeking orders that would prohibit Ms Bowen from discussing matters because she has deposed to them in her affidavit. That presents a significant restraint on Ms Bowen.

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[21] *Bowen v Bank of New Zealand* [2021] NZEmpC 16 at [22]-[24].

[51] The evidence before the Court does not reach the threshold needed to overturn the presumption of open justice or to justify imposing a restraint on Ms Bowen's ability to discuss matters of concern to her.[22]

[52] The Court recognises, however, there are non-publication orders in place in the High Court and in the Authority. Those orders remain in effect. To the extent the evidence given by Ms Bowen in this Court in substance replicates the evidence she has given in the High Court and/or the Authority over which non-publication orders have been made, those orders should not be undermined. For this reason, an interim non-publication order is made prohibiting publication of:

(a) details of Ms Bowen's protected disclosure made on 23 November 2016, (including information that identifies or could lead to the identification of the individuals named in the protected disclosure who are not parties to these proceedings); and

(b) any further statements in the pleadings or in the affidavits of Ms Bowen sworn on 31 August 2020, 25 September 2020, 11 December 2020, 18 February 2021 and 24 February 2021 that replicate in substance the evidence given by her in in her affidavit dated 22 May 2020 filed in respect of the *Optimizer* proceedings.

[53] This order replaces the interim orders made at the hearing effective from 4 pm on 24 May 2021 and applies until further order of the Court.

No stay of Authority directions

[54] The Authority has issued timetabling directions for the filing of evidence. Those directions required Ms Bowen to file her witness statements by 1 February 2021. Ms Bowen is in breach of the directions and has applied to the Court for an order granting a stay.

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[22] Recognising that the law on defamation of course applies.

[55] BNZ opposed the application, including on the grounds that the Employment Court has no jurisdiction to grant the order sought.

[56] At the hearing Mr O'Brien, counsel for Ms Bowen, accepted that the application would effectively be moot, as it would not be dealt with separately from the remainder of the hearing. On that basis Ms Bowen did not take the matter further.

[57] Given the outcome of Ms Bowen's application for special leave to remove the proceedings, her proceeding remains in the Authority with a consequence that her statements of evidence are overdue, a matter that I expect will be quickly rectified.

Costs are reserved

[58] Costs on these matters are reserved. The parties should endeavour to agree costs on all matters that have been dealt with by the Court to date, calculated on a Category 2B basis, but recognising the mixed result in this judgment.[23] If the parties are unable to agree on costs, BNZ may make application by memorandum filed and served within 20 working days of the date of this judgment. Ms Bowen then must file and serve her memorandum in response within a further 15 working days and any reply from BNZ is to be filed and served within a further five working days. The application for costs then will be dealt with on the papers.

J C Holden
Judge

Judgment signed at 2.30 pm on 17 May 2021

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23 "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.