

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 164
EMPC 261/2020**

IN THE MATTER OF	an application for special leave to remove proceedings from the Employment Relations Authority
AND IN THE MATTER OF	an application for access to court documents by Manas Kumar on behalf of Optimizer HQ Ltd
BETWEEN	MANAS KUMAR Applicant
AND	MELISSA BOWEN First Respondent
AND	BANK OF NEW ZEALAND Second Respondent

Hearing: On the papers

Appearances: Applicant in person
M O'Brien, counsel for first respondent
R Rendle, counsel for second respondent

Judgment: 14 October 2020

**JUDGMENT OF JUDGE J C HOLDEN
(Application for access to court documents)**

[1] Mr Manas Kumar has applied for access to the affidavit of Ms Bowen in support of her application for special leave to remove her proceedings to the Employment Court. The Bank of New Zealand (BNZ) was Ms Bowen's employer and is the respondent in relation to her application for special leave.

[2] The affidavit that Mr Kumar sought to have access to has now been replaced by an amended affidavit removing matters that were the subject of a claim of privilege by BNZ. The Court operates on the basis that Mr Kumar's application is for the amended affidavit.

[3] Mr Kumar is the Director of Optimizer HQ Limited (Optimizer). Optimizer has filed an appeal in the Court of Appeal against a High Court judgment striking out Optimizer's causes of action in proceedings brought against BNZ and SmartPay Limited (SmartPay).¹

[4] Mr Kumar believes that some of the matters in Ms Bowen's affidavit are of material significance to Optimizer's appeal. He says he intends to submit the affidavit to the Court of Appeal as eye-witness evidence in support of Optimizer's case. At this stage, it appears that Optimizer has not yet satisfied security for costs in the Court of Appeal. SmartPay has applied for an order striking out Optimizer's appeal on the basis that the appeal has little prospects of success and that security for costs was not paid by the due date of 3 August 2020. Optimizer has applied for an order dispensing with security for costs but a determination of that application has not yet been made by the Court of Appeal. In the meantime, Optimizer's counsel has applied to withdraw and no replacement counsel is in place. No counsel was involved in the application for access to the affidavit in this Court.

[5] Ms Bowen has no objection to the application, provided it is on the condition that the material in the affidavit is only to be used and disclosed as part of the Court of Appeal proceedings referred to (and the related High Court proceedings).

[6] BNZ opposes the application, submitting it is not in the public interest for the Court to grant it. It points to the following grounds:

- (a) The case is at an early stage and well prior to any substantive hearing, so the principle of open justice has less weight at this time.

¹ *Optimizer HQ Ltd v Bank of New Zealand* [2020] NZHC 1253.

- (b) The pleadings are incomplete; BNZ has not yet filed an affidavit responding to Ms Bowen's affidavit and there are significant disputed facts. The affidavit from Ms Bowen presents an imbalanced picture.
- (c) Ms Bowen's affidavit contains references to:
 - (i) information that is subject to ongoing non-publication orders from the Employment Relations Authority (the Authority);² and
 - (ii) confidential and commercially sensitive information which requires protection.³
- (d) There is no legitimate purpose for Mr Kumar to have access to the affidavit. Optimizer's appeal is the subject of an unresolved strike-out application for non-payment of security for costs.
- (e) The affidavit is irrelevant to Optimizer's appeal, which will be determined based on the evidence before the High Court, which includes a separate affidavit from Ms Bowen.

The Court can allow access

[7] Access to the Employment Court's file is not addressed expressly in the Employment Relations Act 2000 (the Act) or the Employment Court Regulations 2000 (the Regulations). Therefore, pursuant to reg 6(2), the Employment Court looks to the provisions of the High Court Rules 2016 affecting any similar case or, if there are no relevant provisions there or in the Act or Regulations, in such manner as the Court considers will best promote the object of the Act in the interests of justice.

[8] Applications such as this have been considered by the Court under previous Part 3, subpart 2 of the High Court Rules, which has been revoked and replaced by the

² *Bowen v Bank of New Zealand* [2017] NZERA Auckland 339.

³ BNZ also pointed to aspects of Ms Bowen's affidavit that it said were privileged but those parts are not in the replacement affidavit.

Senior Courts (Access to Court Documents) Rules 2017. It is appropriate to use the Senior Court Rules by analogy.⁴

[9] The relevant considerations in the present application are:⁵

- (a) the orderly and fair administration of justice:
...
- (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
- (d) the protection of other confidentiality and privacy interests ... and any privilege held by, or available to, any persons:
- (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
- (f) the freedom to seek, receive, and impart information:
...
- (h) any other matter that the Judge thinks appropriate.

[10] Open justice has the greatest weight during a substantive hearing; prior to that, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to documents be limited.⁶

Access declined

[11] The points by the BNZ are well made.

[12] At this stage, the Court is hearing a preliminary issue regarding whether the matter should be removed to the Court. Documentation is incomplete. Providing Mr Kumar with access to Ms Bowen's affidavit would present a one-sided picture.

[13] In any event, Optimizer's appeal will be based on the evidence that was before the High Court, including the separate affidavit from Ms Bowen.

⁴ *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2019] NZEmpC [7] at [8].

⁵ Senior Courts (Access to Court Documents) Rules 2017, r 12.

⁶ Rule 13.

[14] Ms Bowen's affidavit in the Court covers matters that are the subject of non-publication orders and that are commercially sensitive.

[15] In this case the issues of confidentiality and privacy, and the interests of justice, outweigh the principles of open justice.

[16] Mr Kumar's application for access to Ms Bowen's affidavit is declined.

J C Holden
Judge

Judgment signed at 9.30 am on 14 October 2020