ORDER FOR NON-PUBLICATION OF INFORMATION CONTAINED AT [31] AND [39] OF THIS JUDGMENT

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 29
EMPC 51/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an appearance under protest to jurisdiction
AND IN THE MATTER OF	an application to dismiss proceedings
AND IN THE MATTER OF	an application for non-publication
BETWEEN	MELISSA BOWEN Plaintiff
AND	BANK OF NEW ZEALAND Defendant

Hearing:	13 September 2022 (Heard at Auckland)
Appearances:	M W O'Brien, counsel for plaintiff R M Rendle and M Breckon, counsel for defendant
Judgment:	28 February 2023

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE J C HOLDEN
(Appearance under protest to jurisdiction; application to dismiss proceedings; application for non-publication)

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[1] Ms Bowen filed her statement of problem in the Employment Relations Authority (the Authority) in 2017. She claims she was unjustifiably dismissed and

unjustifiably disadvantaged by the Bank of New Zealand (BNZ) in retaliation for her raising concerns about what she considered to be serious wrongdoing by BNZ.

[2] The Authority has previously set the substantive matter down for an investigation meeting, most recently to start on 14 November 2022. Interlocutory matters have delayed the investigation.

[3] In her evidence filed with the Authority, Ms Bowen included material that BNZ says is privileged. BNZ says this material is inadmissible.

[4] The Authority considered the issue and issued a determination in which it accepted BNZ's position and ordered Ms Bowen to refile statements of evidence that do not contain reference to privileged material.[1]

[5] Ms Bowen has filed a challenge to the Authority's determination seeking declarations that the evidence in issue either is not subject to any without prejudice privilege or that any without prejudice privilege has been lost.

[6] Ms Bowen's amended statement of claim refers to three matters:

(a) a facilitated meeting held on 31 January 2017 (the January 2017 meeting);

(b) a document dated 31 May 2018, referred to as exhibit MB3 in the Authority's determination (MB3);

(c) a meeting on 4 July 2019 (the July 2019 meeting).

[7] The Authority's determination does not mention the July 2019 meeting. It was referenced for the first time in Ms Bowen's statement of claim in this Court, dated 25 February 2022.

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1 *Bowen v Bank of New Zealand* [2022] NZERA 19 (Member Larmer).

[8] BNZ filed an appearance under protest to jurisdiction and then an application to dismiss the proceeding on the ground that the Court has no jurisdiction to hear and determine it. It says the Authority's determination in relation to the January 2017 meeting and MB3 relates to a matter of procedure to which s 179(5) of the Employment Relations Act 2000 (the Act) applies. Accordingly, it says the Employment Court does not have jurisdiction to determine Ms Bowen's claims about those two matters and the claims should be dismissed.[2] It says that, as the Authority has not issued a determination on the admissibility of evidence in relation to the July 2019 meeting, Ms Bowen's claim in relation to it is not a challenge to a determination, as required by s 179(1) of the Act.

[9] BNZ also has applied for non-publication orders over the evidence that is in issue in this challenge as well as the name and identity of a witness who has previously been referred to as "Witness D" in the Authority.

[10] In the substantive case, Ms Bowen contends that when she first raised her concerns, she did so as a protected disclosure under the Protected Disclosures Act 2000. BNZ does not dispute that Ms Bowen raised concerns in the period March to May 2016, but it says they were not a protected disclosure. It accepts that Ms Bowen made a protected disclosure later, in November 2016.

[11] Ms Bowen says the contested evidence is relevant to the issue of whether she made a protected disclosure in the period March to May 2006, and that, by excluding the evidence, the Authority's determination will have a significant impact on the determination of her substantive claim.

[12] Mr O'Brien, counsel for Ms Bowen, points to the lengthy investigation proposed in the Authority with its associated costs. He also points to the position being advanced by BNZ that, had the Authority determined that the without prejudice privilege had been lost, the determination would have been challengeable because it would create an irreversible consequence for BNZ but that, because the Authority found that the without prejudice privilege had not been lost, the matter is procedural.

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[2] Employment Relations Act 2000, s 179(5).

Mr O'Brien says such a situation would be a nonsense. In any event, he submits that the determination may have an irreversible and substantive effect on Ms Bowen.

The issue turns on s 179

[13] The issue for the Court is whether it has jurisdiction to consider the challenge. That issue turns on s 179 of the Act, which relevantly provides:

> **179 Challenges to determinations of Authority**
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> (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority… (or any part of that determination) may elect to have the matter heard by the court.
>
> …
>
> (5) Subsection (1) does not apply—
>
> (aa) …
>
> (a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and
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> (b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[14] Two questions arise. First, there is the question of whether the Authority made any findings in respect of the July 2019 meeting; second, there is the question of whether the determination was about the procedure that the Authority has followed, is following, or is intending to follow.

The July 2019 meeting was not the subject of a determination

[15] The July 2019 meeting can be dealt with quite briefly. It was not referred to before the Authority; the Authority did not refer to it in its determination and, in particular, made no findings in respect of it. There is nothing to challenge.

[16] This judgment, however, will provide guidance on the issues raised in the statement of claim.

Otherwise, the issue is whether the determination was about the procedure the Authority followed

[17] As noted, whether Ms Bowen can challenge the determination otherwise turns on whether it is about the Authority's procedure.

Matters of procedure are for the Authority

[18] It is an express object of the Act to ensure that decisions of the Authority are not inhibited by technicalities.[3] The policy reasons for this are to increase speedy and non-legalistic decision-making, to keep costs down and avoid delays.[4] To that end, the general principle is that Authority proceedings should not be interrupted by challenges at a predetermination stage.[5]

[19] The Authority effectively drives the investigation process. It is not a function of the Court to advise or direct the Authority in relation to the exercise of its investigative role, powers, and jurisdiction.[6] The Authority may call for, and take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.[7] This is consistent with the design of the Authority, which is premised on a fact-oriented, merits-based approach.[8]

[20] During the Authority's investigation, there are limits to challenge rights, including that a challenge is not available in respect of a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow.[9]

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3 Section 157(1).
4 *Gill Pizza Ltd v Labour Inspector* [2021] NZSC 184, [2022] 1 NZLR 1 at [64(a)].
5 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [17].
6 Section 188(4); see also *Dollar King Ltd v Jun* [2020] NZEmpC 91, [2020] ERNZ 246 at [9].
7 Sections 160(1)(a) and 160(2); see also *Dollar King*, above n 6, at [8].
8 Section 160(3); see also *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, at [58].
9 Section 179(5)(a).

The meaning of s 179(5) is ascertained from its text in light of its purpose and context

[21] Statutory interpretation is guided by s 10 of the Legislation Act 2019, which provides that the meaning of legislation must be ascertained from its text and in the light of its purpose and context. I recently reviewed s 179(5), saying:[10]

> *The text*
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> [12] The key word in s 179(5) is "procedure". No statutory definition is provided for that word, but dictionary definitions refer to the steps taken in a legal action and the mode of conducting judicial proceedings.[11] Those definitions are consistent with the use of the words "followed" or "adopted" in s 179(5).
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> [13] Other legislation that specifically deals with procedure describes the proper mode of conducting judicial proceedings.[12]
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> [14] Within the Act itself, the word "procedure" is used in a number of situations. Unions are described as having "rules or procedures";[13] union representatives and Labour Inspectors are required to comply with safety, health and security "procedures and requirements" in workplaces;[14] the "procedure" for notifying the public of various union actions is set out;[15] the object of pt 9 of the Act is to recognise that access to both information and mediation services is more important than "adherence to rigid formal procedures".[16] In all these instances, the word "procedure" is used in the sense of rules or the proper way of doing things.
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> [15] In pt 10 of the Act, which establishes the Authority, s 143 identifies the object of the part being to establish "procedures and institutions" that recognise "that the procedures for problem-solving need to be flexible".[17] Section 160 gives the Authority the power to do specific things in its investigation, including to follow "whatever procedure the Authority considers appropriate". Section 173 is specifically headed "Procedure" and requires the Authority to act in a manner that is reasonable, having regard to its investigative role. Section 173(4) includes the power of the Authority to make ex parte orders. Further matters of procedure are included in the Employment Relations Authority Regulations 2000, which were promulgated under s 237 of the Act under which regulations may be made prescribing the procedure in relation to the conduct of matters before the Authority.[18]

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10 *Bird v Vice-Chancellor of the University of Waikato* [2023] NZEmpC 16.

11 Michael Proffitt (ed) "Procedure" (June 2007) Oxford English Dictionary <www.oed.com>; and Peter Spiller *New Zealand Law Dictionary* (10th ed LexisNexis, Wellington, 2022) at 245.

12 For example, the Criminal Procedure Act 2011 and the Judicial Review Procedure Act 2016.

13 Employment Relations Act 2000, s 18A(1)(a).

14 Sections 21(2)(c) and 233(1).

15 Sections 93 and 94.

16 Section 101.

17 Section 143(d).

18 Section 237(d).

Purpose and context

[16] When s 179(5) was introduced, s 143(fa) was also inserted into the Act. That sub-section provides that the object of pt 10 is to establish procedures and institutions that "ensure that investigations by the specialist decision-making body are, generally, concluded before any higher court exercises its jurisdiction in relation to the investigations". The Act makes it clear, albeit in different ways, that the general policy of the Act is against supervision being exercised in relation to procedural rulings. Sections 179(5) and 184(1A) are intended to prevent challenge or review processes disrupting unfinished Authority investigations.[19]

[17] The policy reasons for this are to increase speedy and non-legalistic decision-making, to keep costs down, and avoid delays. Those matters are prioritised over any temporary impact on a party caused by a procedural determination.

[18] Access to justice considerations are dealt with through the right of challenge or review once the Authority has made a substantive determination on the matter before it.[20] A challenge, which is able to be brought on a de novo basis, allows a party's concern over a procedural decision to be addressed through the hearing in the Court. Where there is a challenge, that is commenced by way of a fresh statement of claim in the form required by the Employment Court Regulations 2000.[21] During the challenge proceedings, questions about the admissibility of any evidence that the Authority has refused to consider may be re-argued before the Court.[22]

[19] The Court has also previously found that certain determinations will not fall within s 179(5) when the determination has an irreversible and substantive effect on the rights of the parties.[23] However, it is not enough that an order has an impact on the parties. Any decision will have some impact on the parties.[24]

[20] The Court can consider questions of jurisdiction. These are distinguishable from procedural questions in that they concern whether the Authority has the power to do something and not how it goes about it.[25]

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19 *Employment Relations Authority v Rawlings* [2008] NZCA 15, [2008] ERNZ 26 at [23] and [26]; and *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [17].

20 *H v A Ltd*, above n 19, at [23].

21 Employment Court Regulations 2000, reg 7 and form 1; compare Employment Relations Authority Regulations 2000, regs 5, 6 and form 1.

22 *Austin v Youbee Ltd* [2014] NZEmpC 105, [2014] ERNZ 699 at [4].

23 *H v A Ltd,* above n 19, at [25]; and *Johnstone v Kinetic Employment Ltd* [2019] NZEmpC 91, [2019] ERNZ 250 at [27(c)].

24 *Fletcher v Sharp Tudhope Lawyers* [2014] NZEmpC 182 at [18].

25 *Keys v Flight Centre (NZ) Ltd* [2005] ERNZ 471 (EmpC) at [55]; and *Oldco PTI (New Zealand) Ltd v Houston* [2006] ERNZ 221 (EmpC) at [47]–[52].

Ms Bowen is still able to progress her claim

[22] Ms Bowen's claims relate to matters that occurred in 2016. Although Mr O'Brien has suggested the contested material is relevant to the issues, the case for Ms Bowen is still able to be argued without it.

[23] It is for the Authority, as part of its investigative role, to determine how it investigates an employment relationship problem before it. That includes determining what evidence and other information it needs to receive and who it needs to hear from. It would be inconsistent with the scheme of the Act for the Authority's determination that it should not, and need not, hear the disputed evidence as part of its investigation to be able to be challenged.

[24] If she is unhappy with the Authority's substantive determination, Ms Bowen remains able to challenge it, including on a de novo basis, at which time evidential matters are for the Court and can be considered afresh. Accordingly, there is no irreversible or substantive effect on Ms Bowen's rights.

[25] Although Mr O'Brien points to the apparent inconsistency in the position taken by BNZ that a determination that had gone the other way would have been challengeable, that is not a matter that is before the Court. Consideration of such an argument is best left to a case where a party seeks to challenge an evidential determination based principally on its irreversible or substantive effect.

[26] In conclusion, the Authority's determination was on a matter of procedure. It concerned the way in which it would investigate the employment relationship problem before it.

[27] It is not able to be challenged before the Court, and accordingly the claim brought by Ms Bowen is dismissed.

Non-publication orders are made

[28] The grounds upon which BNZ seeks non-publication orders are:

(a) the orders sought are in relation to confidential and privileged information, publication of which is likely to cause significant adverse consequences to BNZ and to the individual for whom they are sought;

(b) the overall interests of justice favour the granting of non-publication orders.

[29] In respect of the material that is the subject of this judgment, Ms Bowen consents to an interim order, except that she says it should not extend to the fact of meetings and attendees at those meetings.

[30] The Authority's determination refers to the fact of the January 2017 meeting and document MB3, it does not refer to the attendees. Non-publication orders are in place in relation to most of the detail of the argument made before the Authority.

[31] In the circumstances, I consider an order should be made. Accordingly, there is a non-publication order prohibiting the publication of all details as to:

(a) the January 2017 meeting;

(b) document MB3; and

(c) the July 2019 meeting.

[32] The fact of the meetings is not subject to non-publication. For the avoidance of doubt, the identity of the attendees at the meetings (apart from Ms Bowen) is included in the non-publication order.

[33] Ms Bowen opposes a non-publication order in relation to the identity of the witness ("Witness D").

[34] Initially, Ms Bowen submitted BNZ had failed to show, with any specificity, the harm it was alleging Witness D would suffer that would justify departure from

usual principles of open justice. Subsequently, affidavit evidence was provided by Witness D, and despite objection from Ms Bowen, that evidence was admitted.[26]

[35] Ms Bowen then filed a supplementary memorandum. Ms Bowen appears to suggest that Witness D is sufficiently protected by the orders made in respect of the disputed material.

[36] **[Redacted pursuant to [39]].**

[37] The serious allegations that have been made about Witness D are strongly contested and currently untested. Reference to them is not confined to the two meetings and document MB3 covered by the non-publication order made above. They have been repeated by Ms Bowen and another witness, including in Ms Bowen's most recent affidavit in this matter.

[38] As noted, Witness D's identity is already the subject of non-publication orders in the Authority, and I consider it appropriate for an order to be made by the Court in parallel.

[39] Accordingly, an interim non-publication order is made prohibiting the publication of the name or other identifying information of Witness D pending further order of the Court or of the Authority. In addition, there is a non-publication order prohibiting the publication of paragraph [36] above as publication of that paragraph would undermine the non-publication order.

Costs

[40] If BNZ seeks costs on Ms Bowen's challenge, and they cannot be agreed between the parties, it may apply to the Court by memorandum filed and served within 20 working days of this judgment. Ms Bowen may respond by memorandum filed and served within a further 15 working days, with BNZ entitled to file and serve a

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[26] *Bowen v Bank of New Zealand* [2022] NZEmpC 193.

memorandum in reply within a further five working days. Costs then would be determined on the papers.

J C Holden
Judge

Judgment signed at 11 am on 28 February 2023