

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 362
3201559

BETWEEN MELISSA BOWEN
Applicant

AND NATIONAL AUSTRALIA BANK
LIMITED
First Respondent

AND ANTHONY HEALY
Second Respondent

AND ANNIE BROWN
Third Respondent

AND REBECCA LEE
Fourth Respondent

Member of Authority: Peter van Keulen

Representatives: Michael O'Brien and Joseph Plunket, counsel for the Applicant
Rebecca Rendle and Jessica Greenheld, counsel for the First
and Second Respondent
Penny Swarbrick, counsel for the Third and Fourth Respondent

Investigation Meeting: 5 December 2024 by AVL

Submissions and Further Information Received: Up until 23 June 2025 from the Applicant
Up until 23 June 2025 from the First and Second Respondent
Up until 23 June 2025 from the Third and Fourth Respondent

Date of Determination: 23 June 2025

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] There are various non-publication orders that have been made by the Employment Court

and the Authority in respect of Melissa Bowen's employment relationship problem with Bank of New Zealand (BNZ).¹

[2] This employment relationship problem arises out of some of the events that gave rise to Ms Bowen's employment relationship problem with BNZ. It follows that the non-publication orders applying to Ms Bowen's employment relationship problem with BNZ need to be applied to this employment relationship problem.

[3] To abide by the non-publication orders in place, various BNZ employees cannot be identified and various allegations contained in complaints made by Ms Bowen cannot be particularised.

[4] I will refer to one BNZ employee whose name is anonymised in this determination in line with the anonymisation in the determination for Ms Bowen's employment relationship problem with BNZ.²

Employment relationship problem

[5] Ms Bowen was employed by the BNZ from September 2015. In the course of her employment, Ms Bowen made two Protected Disclosures.³ The second of these Protected Disclosures was made on 23 November 2016 when Ms Bowen complained to the BNZ Board about conduct by IWV, and two other BNZ employees (the Second Protected Disclosure).

[6] Ms Bowen alleges that in a meeting in late November 2016 Anthony Healy, BNZ CEO, Annie Brown, BNZ Director of People & Communication, and Rebecca Lee, Head of Audit met with the two other BNZ employees, that Ms Bowen had complained about (the Employees), and advised them of the Second Protected Disclosure and in particular Ms Bowen's identity as the complainant.

[7] Ms Bowen says that this communication was a breach of the applicable BNZ whistleblower policy and the Protected Disclosures Act 2000 and, also a breach of her employment agreement by BNZ. And by their involvement in the breach of her employment agreement each of NAB, Mr Healy, Ms Brown and Ms Lee aided and abetted the breach by

¹ *Bowen & Lewis v Bank of New Zealand* [2017] NZERA Auckland 339; *Bowen v Bank of New Zealand* EMPC 261/2020; *Bowen v Bank of New Zealand* [2021] NZERA 19; *Bowen v Bank of New Zealand* [2023] NZEmpC 29; and *Bowen v Bank of New Zealand* [2024] NZERA 361.

² *Bowen v Bank of New Zealand* [2024] NZERA 361.

³ Pursuant to the Protected Disclosures Act 2000.

BNZ. Ms Bowen seeks penalties against each of NAB, Mr Healy, Ms Brown and Ms Lee for aiding and abetting the breach of her employment agreement.

[8] The respondents have applied:

- (a) To have this employment relationship problem struck out on the basis that the Authority does not have jurisdiction; or alternatively
- (b) To have this employment relationship problem dismissed, pursuant to clause 12A of Schedule 2 of the Employment Relations Act 2000 (the Act) as it is frivolous.

The Authority's investigation

[9] I investigated the application to strike out and/or dismiss by receiving written submissions and holding an investigation meeting on 5 December 2024. In the investigation meeting I heard oral submissions from the parties' representatives.

Do I have jurisdiction?

What are the parties' positions?

[10] The respondents say that I do not have jurisdiction to investigate Ms Bowen's claims against them, for aiding and abetting a breach of her employment agreement, as there was no term of her employment agreement that was breached by the BNZ – significantly this is a finding I have already made in Ms Bowen's employment relationship problem with the BNZ (the BNZ determination).⁴

[11] Counsel for Ms Bowen says the fact that I have already determined that the BNZ did not breach Ms Bowen's employment agreement does not mean I do not have jurisdiction.

[12] Counsel says I do not need to have a finding of breach by BNZ of Ms Bowen's employment agreement to proceed. Counsel says there need only be a contractual provision that was capable of being breached by BNZ based on the allegation made against the respondents. In this regard Counsel says there were contractual obligations imposed on BNZ in Ms Bowen's

⁴ *Bowen v Bank of New Zealand* [2024] NZERA 361.

employment agreement that obligated it to keep her identity as a whistleblower complainant confidential. And counsel says I can make this finding notwithstanding the BNZ determination.

[13] In her statement of problem Ms Bowen sets out the terms of her employment agreement that BNZ breached, through the actions of the respondents, as:⁵

- (a) A term incorporating the relevant BNZ whistle blower policy.
- (b) An implied term that BNZ would not, without reasonable cause conduct itself in a manner likely to destroy or damage the employment relationship with Ms Bowen.
- (c) An implied term that BNZ would comply with all employment related legislation, including the Protected Disclosures Act 2000.

The Authority's jurisdiction

[14] The Authority's jurisdiction is set by the Act, and this is the limit of my powers to investigate claims. I can only investigate employment relationship problems within the Authority's jurisdiction. The fact that I have investigatory powers that require me to establish facts and determine matters based on the substantial merits and without regard to technicalities does not empower me to investigate matters that are not within the Authority's jurisdiction.

[15] The starting point for the Authority's jurisdiction is s 161 of the Act. Specifically for this employment relationship problem s 161(1)(m)(i) of the Act provides that the Authority has jurisdiction to make determinations about the recovery of penalties for a breach of an employment agreement. Section 134 of the Act prescribes penalties for inciting, instigating, aiding or abetting any breach of an employment agreement by any person.

[16] It follows that for there to be a basis for a penalty for inciting, instigating, aiding or abetting a breach there must be a basis for alleging a breach of contract by one party.

[17] This means, to establish if I have jurisdiction, I need to decide if there is a contractual obligation in Ms Bowen's employment agreement that could be breached by BNZ through the alleged actions of the respondents in identifying Ms Bowen as a whistleblower complainant to the Employees. I am not satisfied that I need to have a finding of an existing breach by BNZ or

⁵ Sections 2.3 and 2.4 of Ms Bowen's third amended statement of problem dated 2 March 2023.

that the BNZ determination precludes me from determining if there is a term of Ms Bowen's employment agreement that could have been breached by BNZ based on the alleged actions of the respondents.

[18] There were no specific contractual provisions in Ms Bowen's employment agreement imposing an obligation on BNZ not to disclose Ms Bowen's identity as a whistleblower complainant. So, I must consider if any of the three terms Ms Bowen identifies were incorporated or implied into her employment agreement.

Was the relevant BNZ whistleblower policy a term of Ms Bowen's employment agreement?

[19] The obligation not to disclose Ms Bowen's identity as a whistleblower complainant arose under the relevant BNZ whistleblower policy and the Protected Disclosures Act 2000.

[20] For the obligations under the relevant BNZ whistleblower policy to become contractual obligations for the BNZ, the relevant whistleblower policy needed to be incorporated into Ms Bowen's employment agreement.

[21] Whether the relevant BNZ whistleblower policy was incorporated into Ms Bowen's employment agreement was an issue that arose for determination in Ms Bowen's employment relationship problem with the BNZ.

[22] I resolved this issue in the BNZ determination finding that the relevant BNZ whistleblower policy was not an incorporated term of Ms Bowen's employment agreement.⁶ This was a finding I made after hearing evidence and legal submissions. This finding was not challenged by Ms Bowen.

[23] I am not persuaded that a new employment relationship problem raised by Ms Bowen against the respondents means I should revisit this. The same evidence and legal submission will apply to resolving this issue and I will reach the same conclusion.

[24] The relevant BNZ whistleblower policy was not incorporated into Ms Bowen's employment agreement. Therefore, an alleged breach of that policy by BNZ through the respondents cannot give rise to a breach of contract claim against BNZ or an aiding or abetting claim against the respondents.

⁶ *Bowen v Bank of New Zealand* [2024] NZERA 361 at [196].

Did the obligation on BNZ not to conduct itself in a manner calculated to destroy or damage the employment relationship imply terms into Ms Bowen's employment agreement?

[25] The obligation on BNZ not to conduct itself in a manner calculated to destroy or damage the employment relationship is a statement of the contractual principle of repudiation. The statement arose in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* in the context of constructive dismissal – the reference being to one of three grounds, this one being a breach of contract or duty which is sufficiently significant that the employee can treat it as an action bringing the employment agreement to an end.⁷

[26] Counsel for Ms Bowen submits that this obligation sounds as an implied duty of good faith and/or an implied duty of fair dealing, both of which arise in *Ford v New Zealand Dental Partners Limited Partnership (in Liquidation) & Ors* and *Nicholson v Ford*.⁸

[27] In the Authority, Mr Nicholson as a director of New Zealand Dental Partners was liable for a penalty for aiding and abetting a breach of Mr Ford's employment agreement when he failed to carry out a fair and justifiable restructuring process. This was upheld on challenge in the Employment Court.

[28] Specifically, in *Ford* the Authority found that the employer had breached its duty of fair dealing and, by failing to deal with Mr Ford on a good faith basis, breached his contractual right to fair treatment.⁹

[29] These findings were made in the context of specific contractual provisions in Mr Ford's employment agreement relating to consultation in a restructuring and redundancy process. It follows, in my view, that the Authority was not referencing implied terms in making these findings – the Authority does not identify the obligations as implied terms – but rather it appears to be paraphrasing the express contractual terms in relation to consultation.

[30] In the Employment Court, on challenge, Mr Nicholson conceded that his actions fell within the ambit of s 134 of the Act, conceding that Mr Ford's employment agreement had been breached.¹⁰ When discussing penalties the Court goes on to say "*Mr Nicholson was well aware*

⁷ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* 2 NZLR 372.

⁸ *Ford v New Zealand Dental Partners Limited Partnership (in Liquidation) & Ors* [2018] NZERA Auckland 68; and *Nicholson v Ford* [2018] NZEmpC 132.

⁹ *Ford v New Zealand Dental Partners Limited Partnership (in Liquidation) & Ors* [2018] NZERA Auckland 68 at [17] and [18].

¹⁰ *Nicholson v Ford* [2018] NZEmpC 132 at [4].

*of the terms on which Mr Ford was employed and deliberately set about to undermine them”.*¹¹ Again, my view is the Court is referencing the specific contractual rights contained in Mr Ford’s employment agreement and not some implied terms.

[31] More generally it is clear that the duty of good faith arising out of s 4 of the Act is not an implied term of an employment agreement. If this was the case, then there would be no need for the Act to prescribe penalties for a breach of the duty of good faith, as penalties could be pursued based on a breach of an employment agreement.¹² Further, the currently topical issue of whether damages can be awarded for the breach of a duty of good faith would not be relevant as damages could be sought for a breach of the employment agreement.¹³ I note also that in recent Employment Court decisions and Authority determinations, attempts to obtain penalties for aiding and abetting a breach of the duty of good faith have been declined.¹⁴

[32] Likewise, I do not accept that there is a duty of fair dealing owed to an employee that is implied into the employment agreement. Any right to fair dealing arises in line with the duty of good faith and the obligations imposed on employers in relation to the justification of their actions.¹⁵ These duties arising under the Act are not implied into an employment agreement and in the case of Ms Bowen are not specifically stated as clauses or referenced so as to be incorporated.

Was the obligation to comply with employment related legislation an implied term of Ms Bowen’s employment agreement?

[33] The obligation to comply with employment related legislation is an obligation that arises under the legislation – it is not an implied term of an employment agreement. This is a settled principle of New Zealand law.

[34] There was no implied term in Ms Bowen’s employment agreement that the BNZ would comply with employment related legislation.

¹¹ *Nicholson v Ford* [2018] NZEmpC 132 at [8].

¹² Section 4A of the Act.

¹³ *Harte v Midwifery Employee Representation and advisory Service Incorporated* [2025] NZEmpC 5.

¹⁴ *Carrington Resort Jade LP v Grant* [2024] NZEmpC 127; *Kazemi v RightWay Ltd* [2019] NZEmpC 73; *Fan v JKD Fitness East Auckland Ltd* [2023] NZERA 69; and *Webley v Bish Automotive (South Island) Ltd* [2020] NZERA 519.

¹⁵ Section 103A of the Act.

Summary

[35] I find that:

- (a) The relevant BNZ whistle blower policy was not a term incorporated into Ms Bowen's employment agreement.
- (b) The duty of good faith and any duty of fair dealing were not implied terms of Ms Bowen's employment agreement.
- (c) An obligation on BNZ to comply with all employment related legislation, including the Protected Disclosures Act 2000, was not an implied term of Ms Bowen's employment agreement.

[36] On this basis there were no specific, incorporated or implied term in Ms Bowen's employment agreement capable of being breached by BNZ through the alleged acts of the respondents in disclosing Ms Bowen's identity as a whistleblower complainant to the Employees.

Conclusion on jurisdiction

[37] Section 134(2) of the Act provides for a penalty for aiding and abetting a breach of an employment agreement. For this to be operative and enforceable against a party there needs to be a basis for a breach of an employment agreement. If there is no relevant term of an employment agreement that can be breached there is no basis for a penalty to be imposed. This is the case here and this means I have no jurisdiction and Ms Bowen's claim must be struck out.¹⁶

Is Ms Bowen's employment relationship problem frivolous?

[38] As I have determined that I do not have jurisdiction to investigate Ms Bowen's employment relationship problem, the question of whether I should dismiss the problem as it is frivolous is moot. However, I will address this question in the alternative.

[39] The ability to dismiss a matter is set out in Clause 12A of Schedule 2 of the Act:

¹⁶ This follows the same reasoning I applied in *Riddler v Meridian Energy Ltd* [2022] NZERA 474.

12A **Power to dismiss frivolous or vexatious proceedings**

- (1) The Authority may, at any time, in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.
- (2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[40] In *Lumsden v Sky City Management Ltd*,¹⁷ Judge Inglis considered the power of the Employment Relations Authority to dismiss a matter pursuant to cl 12A. After reviewing the relevant case law, Judge Inglis drew the following conclusions:

[37] The present matter falls for determination under clause 12A, not r15.1. However, the scope of clause 12A is usefully informed by the judicial decisions I have referred to. It seems to me that a matter is not frivolous simply because it has no reasonable prospect of success. Something more is required. A matter is frivolous where it trifles with the Authority's processes, lacking the degree of seriousness required to engage the attention of the Authority in the sense referred to in the *Shipwrights* case. A matter may be said to trifle with the Authority's process where it is, to use Chief Goddard's terminology, impossible to take seriously.

[38] Relevantly, Parliament has chosen to limit the circumstances in which the Authority may dismiss a proceeding without investigating it under clause 12A, to matters which are either frivolous or vexatious. There is, for example, no reference to dismissal of a matter which discloses no reasonably arguable cause of action or defence. While the dismissal of cases with little or no merit appears to have been contemplated at a relatively early stage of the legislative process, the wording did not find its way into the section or clauses as enacted. The rationale for limiting the scope for dismissal may well reflect the special characteristics of this jurisdiction and the underlying policy thrust of the Act, empowering employees to pursue claims and have them determined on their substantive merits, without undue regard for legalities, and in an efficient, non-technical manner. Dismissing claims without full investigation on broad grounds relating to an assessment of legal merits does not sit comfortably with this.

[39] I conclude that the Authority's power to dismiss is limited. The threshold is high. Dismissing a claim is a serious step, and not one to be taken lightly. It cuts a claim off at the knees and, because of its draconian effects and having regard to the scheme and the purpose of the legislation, it is reserved for clear cut cases. This is not one of them.

[41] There are therefore two aspects of Judge Inglis' decision in *Lumsden* that are relevant to the application to dismiss:

¹⁷ *Lumsden v Sky City Management Ltd* [2015] NZEmpC 225

- (a) Whether a matter is frivolous is to be determined objectively. A matter is not simply frivolous because it has no reasonable prospect of success. The matter must trifle with the Authority's processes; as an example a matter may be said to trifle with the Authority's processes if it is impossible to take seriously.
- (b) The Authority's power to dismiss is limited and the threshold is high.

[42] Ms Bowen's employment relationship problem has the following issues that make it frivolous:

- (a) Ms Bowen's employment relationship problem is an attempt to hold the second, third and fourth respondents personally liable for actions undertaken as employees. Personal liability for employees acting in the course of their employment is rare.¹⁸ *Nicholson* shows the rare circumstances where such personal liability might be imposed – where a director with knowledge of the specific contractual rights to consultation deliberately acted to deny an employee of those rights. An assessment of the alleged actions by the second, third and fourth respondents in this matter shows their conduct does not reach this high threshold making the imposition of a penalty against them extremely unlikely.
- (b) It is difficult to see how the first respondent as the parent company of the BNZ can be liable for the action of BNZ employees. To find it has induced a breach of contract by the BNZ in this matter stretches the basic principles of company law, particularly in connection with piercing the corporate veil. On this basis imposing a penalty against the first respondent is extremely unlikely.
- (c) Ultimately any penalties imposed, if I were to do so, would be payable to the Crown. There is no direct benefit to Ms Bowen of a successful outcome in this matter – it appears therefore to be an unnecessary attempt to pressure and punish employees who were carrying out their duties as employees of BNZ.

¹⁸ See, *George v Auckland Council* [2013] NZEmpC 179 in the context of an employer pursuing an employee for breach of contract.

- (d) Overall, I see this matter as being frivolous with no prospect of success and having no serious purpose or value – it trifles with the Authority’s processes and is an unnecessary use of resource.

[43] Ms Bowen has been treated unjustifiably by BNZ and she has suffered as a result, she has pursued litigation to remedy that. But her treatment by BNZ does not extend to individual employees aiding and abetting breaches of her IEA.

[44] This employment relationship problem is frivolous, and it is dismissed pursuant to Clause 12A of Schedule 2 of the Act.

Conclusion and orders

[45] I do not have jurisdiction to investigate Ms Bowen’s employment relationship problem against the respondents and it is struck out.

[46] Ms Bowen’s employment relationship problem against the respondents is frivolous and it is dismissed pursuant to Clause 12A of Schedule 2 of the Act.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[48] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondents may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms Bowen will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[49] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁹

Peter van Keulen
Member of the Employment Relations Authority

¹⁹ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1