NOTE: SUPPRESSION OF DETAILS OF PRIVILEGED MATERIAL, OF ALL IDENTIFYING PARTICULARS OF INDIVIDUALS NAMED IN THE PROTECTED DISCLOSURES AND THE DETAILS OF THE PROTECTED DISCLOSURES AND OF [8]–[91] OF [2021] NZERA AUCKLAND 19. SEE [2017] NZERA AUCKLAND 339 AT [28]–[29] AND [2023] NZEMPC 29 AT [31] AND [39].

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA163/2023
[2023] NZCA 512

BETWEEN	MELISSA JANE BOWEN Applicant
AND	BANK OF NEW ZEALAND Respondent

Court: French and Wylie JJ

Counsel: M W O'Brien for Applicant
R M Rendle and M B Breckon for Respondent

Judgment: (On the papers) 24 October 2023 at 2 pm

JUDGMENT OF THE COURT

A The application for leave to appeal the determination of the Employment Court, [2023] NZEmpC 29, under s 214 of the Employment Relations Act 2000 is declined.

B The Court declines to consider the respondent's application to strike out the applicant's application for leave to appeal.

C The applicant must pay costs to the respondent for a standard application on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The applicant, Melissa Bowen, seeks leave pursuant s 214 of the Employment Relations Act 2000 (the Act) to appeal a determination of the Employment Court given on 28 February 2023.[1]

[2] The grant of leave is opposed by the respondent, the Bank of New Zealand (the BNZ). It has also filed an application for an order striking out the application for leave to appeal, on the grounds that the application for leave is frivolous, vexatious, or otherwise an abuse of the processes of the Court.

[3] Ms Bowen has filed a notice of opposition to the strike out application.

Background

[4] The background to this matter is summarised by Judge Holden in the Employment Court's decision and in two affidavits, one filed by Ms Bowen and the other by Sally Beale, the BNZ's employee relations manager.

[5] The dispute between Ms Bowen and the BNZ has been ongoing for some years. An initial statement of problem under the Act was lodged by Ms Bowen with the Employment Relations Authority (the ERA) in 2017. She claimed that she was unjustifiably dismissed and unjustifiably disadvantaged by the BNZ because she had raised concerns about what she considered was serious wrongdoing by the BNZ.

[6] The ERA has set the dispute down for an investigation meeting pursuant to s 160(1) of the Act on numerous occasions. The interlocutory matters raised by Ms Bowen have caused the investigation meeting to be adjourned on a number of occasions.

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1 *Bowen v Bank of New Zealand* [2023] NZEmpC 29 [Employment Court judgment].

[7] Ms Bowen has, in addition:

(a) made four unsuccessful applications to the ERA to remove the dispute to the Employment Court;[2]

(b) unsuccessfully applied to the Employment Court for special leave to remove the dispute to that Court after an application referred to in (a) was declined;[3]

(c) unsuccessfully argued jurisdictional issues, namely whether her claim should proceed in the ERA or in the Human Rights Review Tribunal;[4]

(d) made unsuccessful interlocutory applications for the preservation of evidence;[5] and

(e) unsuccessfully sought leave to appeal a decision of the Employment Court to this Court.[6]

[8] Relevantly, on 24 September 2020, the ERA issued timetabling directions for the filing of evidence. Ms Bowen's evidence was due to be filed on 20 November 2020. She failed to comply with that timetable direction. Rather Ms Bowen filed her evidence on 18 November 2021, almost a year after it was due. BNZ filed its evidence on 9 December 2021. Ms Bowen then filed her evidence in reply on 21 December 2021. In her evidence in reply, she sought to put privileged communications in evidence — namely (jointly referred to as the disputed material):

(a) a draft "without prejudice until signed by the parties" settlement agreement that had been signed on behalf of the BNZ on 31 May 2018, but had not been signed by Ms Bowen (document MB3);

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2 *Bowen v Bank of New Zealand* [2017] NZERA Auckland 299; *Bowen v Bank of New Zealand* [2018] NZERA Auckland 330 [2018 Authority decision]; *Bowen v Bank of New Zealand* [2019] NZERA Auckland 11; and *Bowen v Bank of New Zealand* [2021] NZERA Auckland 347.

3 *Bowen v Bank of New Zealand* [2021] NZEmpC 71.

4 2018 Authority decision, above n 2.

5 *Bowen v Bank of New Zealand* [2018] NZEmpC 148.

6 *Bowen v Bank of New Zealand* [2021] NZCA 598.

(b) a settlement agreement that was signed on 1 June 2018 under s 149 of the Act between the BNZ and another former employee;

(c) a covert recording made by Ms Bowen of a confidential facilitated meeting held with the BNZ and others on 31 January 2017;

(d) parts of a "will say" statement that the other employee referred to in (b) above was directed to file as a summonsed witness in the substantive matter; and

(e) evidence that referred to the content of document MB3 and the facilitated 31 January 2017 meeting.

[9] The BNZ applied to the ERA for urgent orders that the disputed material was privileged and inadmissible.

[10] The ERA heard the application and issued its determination promptly on 28 January 2022.[7] It held that the material was privileged and inadmissible.[8]

[11] Ms Bowen filed proceedings in the Employment Court on 25 February 2022 challenging the ERA's determination. She also sought to introduce a further privileged communication — namely detail of what was said at a without prejudice meeting held between her, the BNZ and their respective representatives on 4 July 2019. This meeting was not referred to before the ERA, and it made no findings in respect of it. As such, there was nothing regarding this meeting for Ms Bowen to challenge in the Employment Court.[9]

[12] The BNZ filed a protest to the jurisdiction of the Employment Court to hear and determine Ms Bowen's challenge. This was followed by an application to dismiss the proceeding.

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7 *Bowen v Bank of New Zealand* [2022] NZERA Auckland 19 [ERA determination].
8 At [92].
9 Employment Court judgment, above n 1, at [15].

[13] The challenge proceeded to hearing on 13 February 2023. In a reserved decision issued on 28 February 2023 Judge Holden dismissed Ms Bowen's challenge to the ERA's determination. Ms Bowen then applied for leave to appeal to this Court on a question of law.

The decisions

The ERA's determination

[14] The ERA noted that the privilege that attaches to settlement negotiations, mediations and without prejudice communications is well established and that recognising and upholding privilege is both an important element in encouraging settlement and is consistent with the object stated in s 3 of the Act to promote mediation and reduce the need for judicial intervention in employment disputes.[10] It noted that it has a wide discretion under s 160(2) of the Act to take into account such information as in equity and good conscience it thinks fit, whether strictly legal evidence or not and commented that this gives it the power to consider privileged evidence if the circumstances so require.[11] It also observed that it is not covered by the Evidence Act 2006 but noted that, as this Court has recognised, the ERA must be guided by settled principles of common law and by the relevant provisions in the Evidence Act. It accepted that the Evidence Act provides it with helpful guidance on matters relating to the admissibility of evidence.[12]

[15] The ERA held that the without prejudice settlement agreement, document MB3, was privileged information and that the privilege had not been lost or waived by the BNZ.[13] It also noted that in any event the document did not contain an admission and that it was neither relevant nor material to Ms Bowen's substantive claim.[14] It considered that another settlement agreement with a former BNZ employee did not contain relevant or material information either.[15] It considered that the covertly

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10 ERA determination, above n 7, at [10].
11 At [11].
12 At [12], citing *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713.
13 At [24] and [35].
14 At [36].
15 At [44]–[45].

recorded meeting was subject to mediation privilege and held that this privileged information was neither relevant nor material to Ms Bowen's claims.[16]

[16] The ERA was not satisfied that there was good reason for admitting any of the disputed material. It was not convinced that the disputed material supported the points that Ms Bowen wanted to make about them, or that even if it did, that such evidence was material to the substantive dispute.[17] It held that there were no compelling countervailing reasons that warranted overriding the privilege that attached to the disputed material and that all of the disputed material was inadmissible.[18]

The Employment Court's determination

[17] The issue in the Employment Court was whether the ERA's determination that the disputed material was privileged and inadmissible was a substantive determination or a determination relating to a matter of procedure. If it was a determination about the procedure that the ERA was following or intending to follow, pursuant to s 179(5) of the Act, the Employment Court did not have jurisdiction to hear the challenge.[19]

[18] The Employment Court concluded that the ERA's determination was in relation to a matter of procedure — it concerned the way in which the ERA was going to investigate the dispute before it.[20] The Court considered that procedure was a matter for the ERA and observed that in general, the manner in which the ERA investigates a claim should not be interrupted by challenges at the predetermination stage.[21] The Court noted that Ms Bowen could still argue the issues relevant to her claim without the disputed material and that, if she was not satisfied with the ERA's final substantive determination, she could challenge it de novo, at which point any evidential issues could be considered afresh.[22]

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16 At [71] and [76].
17 At [76].
18 At [82]–[83].
19 Employment Relations Act 2000, s 179(5)(a).
20 Employment Court judgment, above n 1, at [26].
21 At [18], citing *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [17].
22 Employment Court judgment, above n 1, at [22] and [24].

[19] The Court held that the effect of the ERA's determination as to the admissibility of the disputed material was neither irreversible nor substantive. Rather it was a matter of procedure and therefore not susceptible to challenge.[23]

The application for leave to appeal

[20] Relevantly, s 214 of the Act provides as follows:

> **214 Appeals on question of law**
>
> (1) A party to a proceeding under this Act who is dissatisfied with a decision of the court (other than a decision on the construction of an individual employment agreement or a collective employment agreement) as being wrong in law may, with the leave of the Court of Appeal, appeal to the Court of Appeal against the decision; and section 56 of the Senior Courts Act 2016 applies to any such appeal.
>
> …
>
> (3) The Court of Appeal may grant leave accordingly if, in the opinion of that court, the question of law involved in that appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.
>
> …

[21] Ms Bowen seeks to raise on appeal the following question:

> For the purposes of s 179(5) of the Act, what is the appropriate test for determining whether a determination of the ERA is about the procedure that the ERA has followed, is following, or is intending to follow?

She submitted that leave should be granted because of the Act's extensive coverage, inconsistent approaches to and conflicting judgments on the ambit of s 179(5)(a), the likelihood of increased costs and time in litigation due to the uncertainty created by the inconsistency and that the ERA's determination "demotes" the issue of privilege to one of mere procedure.

[22] The BNZ submitted that there is no question of general or public importance and that the Employment Court correctly stated and applied the appropriate test to s 179(5)(a). It submitted that the approach to and application of s 179(5)(a) is well

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[23] At [24] and [26]–[27].

settled and uncontroversial and that it is not genuinely arguable that the ERA's determination in relation to the privileged material at issue in this case is anything other than procedural, given the Act's objectives and the investigatory role of the ERA.

Analysis

[23] Relevantly s 179 of the Act provides as follows:

> **179 Challenges to determinations of Authority**
>
> (1) A party to a matter before the Authority who is dissatisfied with a written determination of the Authority under section 174A(2), 174B(2), 174C(3), or 174D(2) (or any part of that determination) may elect to have the matter heard by the court.
>
> …
>
> (5) Subsection (1) does not apply—
>
> …
>
> (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
>
> …

[24] Section 179(5) was introduced into the Act in 2004.[24] There were differing interpretations of the provision in the Employment Court and, in 2014, a full bench of the Employment Court was convened to consider the application of the provision.

[25] The Full Court was dealing with a challenge to a decision made by the ERA to prohibit publication of a plaintiff's name. Its decision was not however confined to this context. It so noted and recorded why a full bench had been convened:[25]

> [1] This case relates to the narrow, but important issue, of the sort of matters that give rise to a right to challenge a determination of the Employment Relations Authority during the course of its investigation. The particular issue relates to a determination of the Authority declining to prohibit publication of the plaintiff's name and identifying details, but the principles that apply to determining the scope of the right of challenge, and when it may be exercised, have more general application. It is for this reason,

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24 Employment Relations Amendment Act (No 2) 2004, s 59.

25 *H v A Ltd*, above n 21 (footnote omitted).

> and against the backdrop of differing approaches that have been adopted in this Court, that a full bench was convened.

The Court went on to consider the issue in detail and then held as follows:[26]

> [26] A refusal to make a non-publication order does not fall within s 179(5), not because such an order directly impacts on a party's rights or obligations but rather because the denial of such an order has an irreversible and substantive effect. It cannot have been Parliament's intention that a litigant in the plaintiff's shoes would have such an important issue (non-publication) determined at first and last instance by the Authority, with no recourse to the Court to review the Authority's refusal.
>
> [27] In this regard, it is evident that the new sections introduced by the 2004 amendments are not intended to deny a party access to justice, but are rather intended to facilitate the resolution of employment relationship problems through providing a forum that is not unduly preoccupied with legal technicalities. Section 179(5) operates to *defer*, in order to give effect to the important policy imperatives underlying the provisions, but not *deny* access to the Court. To apply subs (5) to the circumstances of this case would be to deny access to justice.
>
> [28] Accordingly, a determination of the Authority will be amenable to challenge where it has a substantive effect, which cannot otherwise be remedied on a challenge or by way of review.

The Court further held that the ERA's investigative procedures should generally be uninterrupted by challenges.[27]

[26] In our view, Judge Holden, in the present case, applied the test as expounded by the Full Court. She found that the ERA's determination did not have an irreversible or substantive effect on Ms Bowen's rights, that as a result whether or not the disputed material was privileged and inadmissible was a matter of procedure, and that the ERA's determination could not therefore be challenged before the Employment Court.

[27] Notwithstanding the submissions made for Ms Bowen to the contrary, the position taken by the Employment Court is clear and the issue Ms Bowen seeks to raise is well-settled. In so far as we can glean, the position taken by the Full Court has been consistently applied since its decision, albeit on occasion with some minor and inconsequential variations in expression.[28]

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26 Footnote omitted.

27 *H v A Ltd,* above n 21, at [17].

28 *Kennedy v Employment Relations Authority* [2022] NZCA 12, [2022] ERNZ 99; and *ABC v DEF* [2022] NZCA 148, [2022] ERNZ 279.

[28] The approach taken by the Full Court is workable and principled, and in any event, a dissatisfied party has the right to challenge the final determination of the ERA de novo, including any evidential matters, in the Employment Court. While this Court has in the past been prepared to hear appeals as to whether certain determinations, such as a direction to mediation, are procedural in nature, there has been no indication that the underlying test requires attention.[29]

[29] Ms Bowen's application appears to be premised on the proposition that a test looking for a substantial and irreversible effect on the parties is qualitatively different than a test looking for such an effect on the parties' rights. We do not consider this line of argument to be seriously arguable. That Ms Bowen is able to point to slight variations in the expression of the test does not undermine its logic or clarity. While the Employment Court has variously expressed the test, this is understandable, in light of its application to the facts of each particular case. This is not a reason to revisit the test itself.

[30] The requirements of s 214 are stringent.[30] They must be satisfied and the determination of what constitutes a question of law or a question of general or public importance, is not to be diluted.[31]

[31] In the circumstances of this case, we do not consider that the proposed question of law put forward by Ms Bowen is one which, by reason of its general or public importance, or for any other reason, should be submitted to this Court for decision. The proposed appeal does not raise a novel question that can, any longer, be said to be of general or public importance. It has been resolved by the decision of the full bench of the Employment Court. Further, given the ERA's view (which was supported by the Employment Court) that the disputed material is in any event neither relevant nor material to Ms Bowen's claims against the BNZ, it is difficult to see that the question she seeks to put before this Court could materially affect her substantive proceeding.

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29 *Kennedy v Employment Relations Authority*, above n 28; and *ABC v DEF*, above n 28.

30 *Yong t/a Yong & Co Chartered Accountants v Chin* [2008] NZCA 181, (2008) 6 NZELR 399 at [10].

31 *R v Slater* [1997] 1 NZLR 211 (CA) at 215; and *New Zealand Employers Federation Inc v National Union of Public Employees (NUPE)* [2001] ERNZ 212 (CA) at [27].

In this regard it is noteworthy that Ms Bowen only sought to introduce the disputed material either in her reply evidence or later.

[32] As a result of our decision, it is not necessary for us to go on and consider the BNZ's application to strike out Ms Bowen's application for leave and we decline to do so.

Result

[33] The application for leave to appeal the determination of the Employment Court, [2023] NZEmpC 29, under s 214 of the Employment Relations Act is declined.

[34] The Court declines to consider the respondent's application to strike out the applicant's application for leave to appeal.

[35] The applicant must pay costs to the respondent for a standard application on a band A basis, together with usual disbursements.

Solicitors:
Beattie Rickman Legal, Hamilton for Applicant
Simpson Grierson, Auckland for Respondent