

**Attention is drawn to the Order  
Prohibiting Publication of  
certain Information (Refer  
paragraph 4)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 142  
3032274

BETWEEN	MELISSA BOWEN Applicant
AND	BANK OF NEW ZEALAND Respondent

Member of Authority: Eleanor Robinson

Representatives: Michael O'Brien, Counsel for the Applicant  
Phillippa Muir & Rebecca Rendle, Counsel for the  
Respondent

Submissions received: 7 March 2019 from Applicant  
8 February 2019 from Respondent

Determination: 11 March 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In a determination dated 11 January 2019 ([2019] NZERA 11), the Authority declined an application for removal made by the Applicant, Ms Melissa Bowen, in respect of her claim against the Respondent, the Bank of New Zealand (BNZ).

[2] In that determination I indicated at paragraph [51] that I was minded to reserve the issue of costs until resolution of the substantive matter. However I invited the parties to file memoranda on the issue of costs if they were minded to do so, and the Respondent has filed a memorandum seeking costs.

[3] Ms Muir and Ms Rendle, on behalf of BNZ, citing actual costs of \$5,525.43 (excluding GST) are seeking a contribution to costs in the sum of not less than \$2,250.00 and submits that a contribution to costs in the sum of \$4,500.00 is appropriate.

### **Non-Publication**

[4] The non-publication order issued by the Authority on 31 October remains in force and is extended to cover the current issue before the Authority.<sup>1</sup>

#### *Submissions of the Respondent*

[5] The Respondent submits that determination [2019] NZERA 11 is the third unsuccessful application by the Applicant for removal of this matter to the Employment Court, although the previous decisions relied upon different grounds for removal.<sup>2</sup>

[6] The Respondent also incurred costs in relation to *Bowen v Bank of New Zealand*<sup>3</sup> which was an unsuccessful application by the Applicant for prohibition from publication orders, which was opposed by the Respondent.

[7] Costs in relation to the first two determinations for removal and the non-publication issue have been reserved until resolution of the substantive matter. In addition costs have been reserved in respect of an unsuccessful application made by the Applicant to the Employment Court for orders in relation to the preservation of evidence.<sup>4</sup>

[8] The Respondent submits that, whilst acknowledging that the Authority indicated in its determination on 14 January 2019 that it was minded to leave costs to be determined pending resolution of the substantive matter, it is appropriate to signal, through an award of costs, that there are consequences in continuing to bring unmeritorious interlocutory applications.

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<sup>1</sup> *Bowen & Jessica Lewis v Bank of New Zealand* [2017] NZERA Auckland 339.

<sup>2</sup> *Bowen v Bank of New Zealand* [2017] NZERA Auckland 299; *Bowen v Bank of New Zealand* [2018] NZERA 330.

<sup>3</sup> Above n 1.

<sup>4</sup> *Bowen v Bank of New Zealand* [2018] NZEmpC 148.

[9] The Respondent submits that it has incurred costs of \$5,525.43 (excluding GST and disbursement) as supported by invoices. Taking \$2,250.00 as a starting point, it is submitted that the following factors support an uplift:

- a) This is the Applicant's third unsuccessful application to have the same matter removed to the Employment Court;
- b) The Respondent's legal costs have been reasonably and properly incurred;
- c) The Applicant relied upon wide-ranging grounds under each of the subsections 178(2)(a) – (d) of the Act, requiring legal research and detailed submissions in order to rebut each of the grounds relied on. In particular the Applicant responded to claims that there were purportedly important questions of law in respect of the Protected Disclosures Act, “*stigma damages*”, and the principles applying to awards for lost remuneration. The Respondent addressed each of these by reference to relevant case law.
- d) The questions of law raised by the Applicant were, it is submitted, entirely without merit, as supported by the Authority's findings in *Bowen v Bank of New Zealand*;<sup>5</sup>
- e) This was a preliminary matter of real importance to the Respondent given that there are numerous disputed factual matters and removal to the Employment Court would have deprived it of a right of challenge on matters of fact.

[10] The Respondent submits in conclusion that a starting point for costs in the sum of \$2,250.00 is appropriate and that the Authority should exercise its discretion to uplift this in light of the above factors to \$4,500.00.

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<sup>5</sup> *Bowen v Bank of New Zealand* [2019] NZERA 11 at paras [39] and [41].

*Submissions of the Applicant*

[11] The Applicant accepts that there are costs consequences for bringing unmeritorious claims, but submits that it is proper, and fair and reasonable, for those issues to be considered at the conclusion of the substantive matter.

[12] Further that whilst the Respondent refers to the determination regarding the prohibition on publication, it has not referenced the fact that that determination is subject to a challenge in the Employment Court.<sup>6</sup>

[13] The Applicant submits that the Respondent has provided a breakdown of costs but has not provided accompanying supporting evidence as required by the Authority.<sup>7</sup> Further that the breakdown does not provide how many authors were involved and their respective rates.

[14] It is submitted that there is no basis for an uplift in costs: the Applicant's application was not frivolous and whilst the application was declined it involved, in part, an exercise of the Authority's discretion. The matter was a minor interlocutory matter and the Respondent's claim for \$4,500.00 is extreme and any unsupported by any principle.

[15] It is submitted that the Applicant has not found alternative work since her dismissal. The Respondent is a national bank, and it has not been suggested that the Respondent will suffer any detriment by having costs deferred.

[16] The Applicant submits in summary that if the Authority is minded to address and determine costs at this time, then it should decline to award any costs given the Respondent has failed at the first step by failing to provide accompanying evidence. If it had done so, the Applicant's position would have been that a costs award of \$850.00 was appropriate for this minor interim matter.

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<sup>6</sup> Above n 1.

<sup>7</sup> Above n 5 at para [51].

## **Costs Award**

[17] The Authority's power to award costs is at the discretion of the Authority pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[18] The principles the Authority applies in respect of costs are well-settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>8</sup>. The principles include that costs generally follow the event and that costs will be modest and reasonable.

[19] As noted by the Respondent in submissions, the Applicant has applied on more than one occasion to remove her substantive claim to the Employment Court. She has not been successful in these applications and I am cognizant of the fact that on each occasion the Respondent has had to prepare and present evidence in support of its opposition to the application.

[20] This clearly has a cost implication for the Respondent and for the Applicant. Costs normally follow the event and the Respondent has also been the successful party in this case.

[21] While the matter was determined by the Authority on the papers by way of timetabled submissions and the parties were not put to the expense of attending at an investigation meeting, I accept that the Respondent was required to undertake a greater level of preparation than is usual in such matters.

[22] I note the submissions of the Applicant regarding the Respondent's lack of supporting documentation. I have also considered the Applicant's submission that the Respondent will not suffer any detriment by having the costs deferred pending the resolution of the substantive matter.

[23] I accept that the Respondent is, in general perception, in a better position to support financially a deferment of the costs that the position of the Applicant may be

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<sup>8</sup>*PBO v Da Cruz* [2005] 1 ERNZ 808.

to make a costs payment at this time. However I must be careful to balance that consideration with the fact that the Respondent has incurred costs by opposing another unsuccessful application by the Applicant for removal.

[24] Having fully considered the matter, I think it is appropriate that the costs in this matter are deferred pending the conclusion of the matter, but I consider it very important to remind the Applicant that she should be mindful of the costs implications associated with unsuccessful claims in the Authority, and that at some stage these will have an impact on an ultimate costs award.

**Eleanor Robinson**

**Member of the Employment Relations Authority**