



# Employment Court of New Zealand

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## Bowen v Bank of New Zealand [2021] NZEmpC 119 (3 August 2021)

Last Updated: 6 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 119](#)

EMPC 335/2017

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority  
AND IN THE MATTER OF an application for costs relating to  
application for an order to preserve  
evidence  
BETWEEN MELISSA BOWEN  
Plaintiff  
AND BANK OF NEW ZEALAND  
Defendant

**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 costs  
BETWEEN MELISSA BOWEN  
Applicant  
AND BANK OF NEW ZEALAND  
Respondent

Hearing: On the papers

Appearances: M W O'Brien, counsel for Ms Bowen  
R M Rendle and M Bolwell, counsel for  
BNZ

Judgment: 3 August 2021

COSTS JUDGMENT OF JUDGE J C HOLDEN

MELISSA BOWEN v BANK OF NEW ZEALAND [\[2021\] NZEmpC 119](#) [3 August 2021]

[1] Ms Bowen unsuccessfully sought special leave to remove her proceedings from the Employment Relations Authority (the Authority) to the Employment Court (the Court).<sup>1</sup> The respondent, the Bank of New Zealand (BNZ), now seeks an order for costs.

[2] While the application for special leave was the main matter before the Court, BNZ also raises:

- (a) an application by Ms Bowen for an order to preserve evidence (in respect of EMPC 335/2017);<sup>2</sup>
- (b) an application by BNZ to exclude evidence and prohibit publication of evidence contained in Ms Bowen's affidavits;<sup>3</sup> and
- (c) an application by Ms Bowen for a stay of proceedings.<sup>4</sup>

[3] BNZ seeks costs on a Category 2B basis, being the categorisation identified by the Court.<sup>5</sup> It seeks costs for second counsel.<sup>6</sup>

[4] BNZ says:

- (a) Ms Bowen's application for removal was unsuccessful;
- (b) the application to preserve evidence was unnecessary;
- (c) its applications in relation to Ms Bowen's affidavits were necessary; and
- (d) the application for a stay required further preparation.

[5] It says it was successful in each judgment – this is not a case where each party enjoyed a comparable level of success.

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

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

3 *Bowen v Bank of New Zealand (No 2)* [2021] NZEmpC 16.

4 *Bowen*, above n 1, at [54]-[57].

5 *Bowen*, above n 1, at [58].

6. "Employment Court of New Zealand Practice Directions" <[www.employment.govt.nz](http://www.employment.govt.nz)> at No 16, Schedule 4.

[6] BNZ also notes that Ms Bowen had unsuccessfully sought removal from the Authority on three previous occasions.

[7] BNZ calculates costs based on the Court's Guideline scale of \$57,658.75, which is less than its actual costs.<sup>7</sup>

[8] That figure includes sums for the preparation of affidavits for the interlocutory applications and for written submissions in reply for the applications in relation to Ms Bowen's affidavits, which are not specified steps in the Guideline scale. BNZ says costs for those steps are appropriate given the work required and makes its claim by analogy to "Appearance for challenge".

[9] Ms Bowen's primary submission is that costs should lie where they fall given the evidence of extreme hardship that a costs award would place on Ms Bowen.

[10] Ms Bowen has provided evidence of her financial position. She is unemployed and on a benefit. She says she has not been able to obtain employment since her employment with BNZ ended.

[11] She says the "significant disparity in resources" between her and BNZ also supports the Court exercising its discretion to order costs lie where they fall.

[12] Alternatively, Ms Bowen points to her measure of success, saying, on that basis also, costs should lie where they fall or should be significantly reduced.

[13] Finally, Ms Bowen says BNZ has claimed inappropriate items in its calculation of scale costs, including claiming for items not specified in the Guideline scale, claiming in total 6 days of preparation time for the one hearing and seeking costs for second counsel at the hearing. She suggested BNZ is using the costs procedure to prevent Ms Bowen from continuing with her proceedings. Ms Bowen's calculation of costs according to the Guideline scale is \$25,692.50.<sup>8</sup>

7 See Appendix 1.

8 See Appendix 2.

[14] In reply, the BNZ points to the availability of legal aid and to the fact Ms Bowen continues to incur costs, including making another application for removal in the Authority and applying for leave to appeal the Court's judgment on the application for removal to the Court of Appeal. It strongly disputes that its use of the costs procedure is to prevent Ms Bowen from continuing with her proceedings.

### **The Court has a discretion as to costs**

[15] Under sch 3 cl 19 of the [Employment Relations Act 2000](#), the Court has the discretion to order any party to pay to any other party such costs and expenses as the Court thinks reasonable.

[16] The Guideline scale adopted by the Court is not intended to replace the Court's ultimate discretion but assists the Court in the exercise of that discretion.<sup>9</sup> The starting point is that costs generally follow the event.

[17] Financial hardship is a matter that the Court can and does take into account in its assessment of what costs are reasonable in the circumstances. However, it is not decisive.<sup>10</sup>

### **BNZ is entitled to a costs award**

[18] Here, BNZ was largely successful in the matters before the Court and its expectation that it be awarded costs is not unreasonable.

[19] The Authority is essentially ready to proceed with its investigation. If it did so, the parties would have a right to challenge the resulting determination so the matter could be heard on a de novo basis in the Court. While Ms Bowen's choice to vigorously pursue having her proceedings heard in the Court, without prior investigation by the Authority, is a course that is open to her, it does bring with it significant cost implications for both parties.

9 *Xtreme Dining Ltd, (T/A Think Steel) v Dewar* [2017] NZEmpC 10; [2017] ERNZ 26 at [25].

10 *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2; [2015] ERNZ 196 at [16];

*Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137; [2015] ERNZ 1080 at [33].

[20] In those circumstances, her claim of financial hardship carries less weight than it would if the costs of the proceeding were the inevitable consequence of taking the case.

[21] I am not satisfied that there is a basis to let costs lie where they fall. BNZ is entitled to an order for costs.

[22] The Guideline scale adopted by the Court assists it in fixing costs. However, where other costs are necessarily incurred for steps that are not expressly identified in the Guideline scale, they may be included in the calculation of a costs award.<sup>11</sup>

[23] I accept that there was additional work required beyond that identified in the Guideline scale and that this was in large part due to the need to respond to matters raised by Ms Bowen. I also accept, however, that there would have been some duplication between the various applications that would warrant less time being recognised than is sought, and that Ms Bowen had some limited success.

[24] I accept too that second counsel at the hearing is a senior solicitor at Simpson Grierson who made a substantial contribution to the preparation and running of the hearing. Nevertheless, this is a case that appropriately would warrant a costs assessment based on only one counsel at the hearing.

[25] On balance, considering the work required in these matters, the outcomes achieved and Ms Bowen's financial position, I make an order for costs for \$33,000 payable by Ms Bowen to BNZ.

[26] I encourage the parties to reach agreement as to the arrangements for satisfying this costs award.

[27] There was no application for costs on this application, and no additional costs are ordered.

11 "Employment Court of New Zealand Practice Directions", above n 6, at No 16, sch 3 cl 1(b).

[28] Finally, I note BNZ's request for an order removing Ms Bowen's affidavits dated 18 February and 24 February 2021 from the Court file. I do not consider such an order is required, as the affidavits are not accessible by a third party without the leave of the Court.<sup>12</sup>

J C Holden Judge

Judgment signed at 3 pm on 3 August 2021

12 See *TPT Forests Ltd v Penfold* [2021] NZEmpC 105, at [12]-[17].

### APPENDIX 1

#### **SCHEDULE OF COSTS (2B)**

Item	Step	Time	Cost (2B)
<b><i>Opposition to interlocutory application for freezing order to preserve evidence</i></b>			
29	Filing opposition to interlocutory application	0.6	\$1,434

30	Preparation of written submissions	1	\$2,390
	Preparation of respondent's affidavit	2	\$4,780
34	Obtaining judgment without appearance	0.3	\$717
	Sub-total	3.9	\$9,321
<b><i>Interlocutory application to exclude evidence</i></b>			
28	Filing interlocutory application (half allocation as combined with application for non-publication orders)	0.3	\$717
30	Preparation of written submissions	1	\$2,390
	Preparation of affidavit (half allocation as combined with affidavit in support of application for non-publication orders)	1	\$2,390
	Preparation of written submissions (in reply)	1	\$2,390
34	Obtaining judgment without appearance	0.3	\$717
	Sub-total	3.6	\$8,604
<b><i>Opposition to application for special leave to remove to Court</i></b>			
6	Filing opposition to application for special leave to remove matter	1	\$2,390
11	Preparation for first directions conference	0.4	\$956
13	Appearance at first directions conference	0.2	\$478
	Respondent's preparation of affidavit	2	\$4,780
39	Preparation for hearing	2	\$4,780
40	Appearance at hearing of defended application for principal representative, Ms Rebecca Rendle	0.75	\$1,792.50
41	Appearance at hearing of second representative, Ms Meghan Bolwell	0.375	\$896.25
	Sub-total	6.725	\$16,072.75
<b><i>Interlocutory application for non-publication orders</i></b>			
28	Filing interlocutory application (half allocation as combined with application to exclude evidence)	0.3	\$717
30	Preparation of written submissions	1	\$2,390
	Respondent's preparation of affidavit (half allocation as combined with affidavit in support of application to exclude evidence)	1	\$2,390
	Preparation for hearing	2	\$4,780
	Sub-total	4.3	\$10,277
<b><i>Opposition to interlocutory application for stay and application seeking urgency</i></b>			
29	Filing opposition to interlocutory application for stay	0.6	\$1,434
	Respondent's preparation of affidavit	2	\$4,780
30	Preparation of written submissions	1	\$2,390
	Preparation for hearing	2	\$4,780
	Sub-total	5.6	\$13,384
	<b>TOTAL</b>	<b>24.125</b>	<b>\$57,658.75</b>

**SCHEDULE OF COSTS (2B) – WITH UNACCEPTED ITEMS DELETED**

<b>Item</b>	<b>Step</b>	<b>Time</b>	<b>Cost (2B)</b>
<b><i>Opposition to interlocutory application for freezing order to preserve evidence</i></b>			
29	Filing opposition to interlocutory application	0.6	\$1,434
30	Preparation of written submissions	1	\$2,390
	Preparation of respondent's affidavit	2	\$4,780
34	Obtaining judgment without appearance	0.3	\$717
	Sub-total	3.9 1.9	\$9,324 \$4,541
<b><i>Interlocutory application to exclude evidence</i></b>			
28	Filing interlocutory application (half allocation as combined with application for non-publication orders)	0.3	\$717
30	Preparation of written submissions	1	\$2,390
	Preparation of affidavit (half allocation as combined with affidavit in support of application for non-publication orders)	1	\$2,390
	Preparation of written submissions (in reply)	1	\$2,390
34	Obtaining judgment without appearance	0.3	\$717
	Sub-total	3.6 1.6	\$8,604 \$3,824
<b><i>Opposition to application for special leave to remove to Court</i></b>			
6	Filing opposition to application for special leave to remove matter	1	\$2,390
11	Preparation for first directions conference	0.4	\$956
13	Appearance at first directions conference	0.2	\$478
	Respondent's preparation of affidavit	2	\$4,780
39	Preparation for hearing	2	\$4,780
40	Appearance at hearing of defended application for principal representative, Ms Rebecca Rendle	0.75	\$1,792.50
41	Appearance at hearing of second representative, Ms Meghan Bolwell	0.375	\$896.25
	Sub-total	6.725 4.35	\$16,072.75 \$10,396.50
<b><i>Interlocutory application for non-publication orders</i></b>			
28	Filing interlocutory application (half allocation as combined with application to exclude evidence)	0.3	\$717
30	Preparation of written submissions	1	\$2,390
	Respondent's preparation of affidavit (half allocation as combined with affidavit in support of application to exclude	1	\$2,390

	evidence)		
	Preparation for hearing	2	\$4,780
		4.3 1.3	\$10,277
	Sub-total		\$3,107
<b><i>Opposition to interlocutory application for stay and application seeking urgency</i></b>			
29	Filing opposition to interlocutory application for stay	0.6	\$1,434
	Respondent's preparation of affidavit	2	\$4,780
30	Preparation of written submissions	1	\$2,390
	Preparation for hearing	2	\$4,780
		5.6 1.6	\$13,384
	Sub-total		\$3,824
		<b>24.125</b>	<b>\$57,658.75</b>
	<b>TOTAL</b>	<b>10.75</b>	<b>\$25,692.50</b>