



# Employment Court of New Zealand

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## Bowen v Bank of New Zealand [2021] NZEmpC 165 (1 October 2021)

Last Updated: 7 October 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 165](#)  
EMPC 261/2020

IN THE MATTER OF	an application for special leave to remove a proceeding to the Employment Court
AND IN THE MATTER OF	an application for orders in respect of privileged communications
AND IN THE MATTER OF	an application for costs
BETWEEN	MELISSA BOWEN Applicant
AND	BANK OF NEW ZEALAND Respondent

Hearing: On the papers  
Appearances: MW O'Brien, counsel for applicant  
PM Muir and RM Rendle, counsel for defendant  
Judgment: 1 October 2021

### COSTS JUDGMENT OF JUDGE KATHRYN BECK

[1] These proceedings are part of a larger proceeding involving Ms Bowen who unsuccessfully sought special leave to remove her proceedings from the Employment Relations Authority to the Employment Court.<sup>1</sup> Those proceedings have been concluded in the Court and the respondent, the Bank of New Zealand (BNZ), was awarded costs.<sup>2</sup>

1 *Bowen v Bank of New Zealand* [\[2021\] NZEmpC 71](#).

2 *Bowen v Bank of New Zealand* [\[2021\] NZEmpC 119](#).

MELISSA BOWEN v BANK OF NEW ZEALAND [\[2021\] NZEmpC 165](#) [1 October 2021]

[2] This judgment resolves the matter of costs following the successful application by BNZ for orders in respect of its privileged communications.<sup>3</sup>

#### The parties' arguments

[3] BNZ seeks costs on a Category 2B basis, being the categorisation identified by the Court.<sup>4</sup>

[4] BNZ says:

- (a) It was required to make its application after Ms Bowen filed an affidavit including privileged communication.
- (b) It attempted to reach an agreement with Ms Bowen's counsel before making the application on the basis that it

had not waived privilege but was unable to do so.

(c) Ms Bowen filed an amended affidavit with references to the privileged material removed but maintained that privilege had been waived, and in a memorandum from counsel appeared to indicate that she contemplated filing further evidence relating to the privileged material.

(d) On that basis it considered there remained a live and justiciable issue to be decided and successfully sought orders from the Court that the material was privileged, and privilege had not been waived.

(e) Its application in relation to Ms Bowen's affidavit was necessary.

[5] It says it was wholly successful and there are no exceptional circumstances warranting the reversal of the normal rule that costs should follow the event.

[6] In exercising its discretion to award costs, BNZ also says the Court should have regard to the importance to BNZ of protecting its privileged information, its attempt to reach agreement with Ms Bowen, her conduct in covertly recording a conversation

3 *Bowen v Bank of New Zealand* [2021] NZEmpC 6, [2021] ERNZ 12.

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

between it and its previous legal representative,<sup>5</sup> the need to file three affidavits to support its claim, and the fact that there is no evidence that granting the order would cause financial hardship.<sup>6</sup>

[7] BNZ calculates costs based on the Court's Guideline Scale of \$11,711.00, which is less than its actual costs.

[8] That figure includes sums for the preparation of affidavits for the interlocutory application and for written submissions in reply for the application, 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". It says that reply submissions were necessary to respond to 14 pages of submissions filed by counsel for Mrs Bowen.

[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 her. She says it would be unconscionable to make an award of costs in the certain knowledge that she would be unable to meet them.<sup>7</sup>

[10] Ms Bowen has provided evidence of her financial position. She says she has not been able to obtain employment since her employment with BNZ ended and is in receipt of the Job Seeker Benefit through Work and Income NZ.

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

[12] Ms Bowen submits that she acted responsibly by replacing the disputed affidavit with one that did not contain the privileged material and the Court should be reluctant to impose costs when it was not a live issue between the parties.

5 Who was not associated with the current representative firm, Simpson Grierson.

6 Which it says should not be determinative in any case.

7 Relying on *IHC New Zealand Inc v Fitzgerald* EmpC Wellington WC7/07, 28 February 2007.

[13] Alternatively, she points to what she considers to be a measure of success,<sup>8</sup> saying, on that basis also, that costs should lie where they fall or should be significantly reduced.

[14] In reply, BNZ points to the availability of legal aid and to the fact that Ms Bowen continues to incur costs, including making another application in the Authority for removal 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. It says it is using the process as intended – to recoup its own costs which are in excess of those claimed.

[15] BNZ says it succeeded entirely on the application dated 18 September 2020. It withdrew from the application its request that the communications be removed from the affidavit once the applicant had filed a new affidavit. It also noted that the Court was satisfied that there was still a justiciable issue to be decided.

## **The Court's discretion**

[16] Under cl 19 of sch 3 to 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.

[17] As accepted by both parties, the Guideline Scale adopted by the Court is not intended to replace the Court's ultimate discretion but assists it in the exercise of that discretion.<sup>9</sup> The starting point is that costs generally follow the event.

[18] 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>

8 The application for an order for destruction was unsuccessful.

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].

#### **BNZ is entitled to costs**

[19] BNZ was successful in its application and it is reasonable that it be awarded costs. The request for an order that Ms Bowen destroy any copies of the recorded conversation was peripheral to the questions surrounding privilege and waiver. I do not consider that there is a basis to let costs lie where they fall.

[20] Despite filing a new affidavit, Ms Bowen chose not to remove the first affidavit from the Court file and continued to maintain her position that privilege had been waived. I agree that the application was necessary to protect BNZ's privileged information.

[21] As noted by the Court in its earlier costs decision,<sup>11</sup> in circumstances where Ms Bowen chooses to pursue her case in a way that brings with it significant cost implications for both parties, 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.

[22] The Costs Guideline Scale adopted by the Court assists it in fixing costs. 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>12</sup> However, while I accept that there was additional work required beyond that identified in the Scale,<sup>13</sup> it was not significant and I do not consider that it necessitates departing from the Scale to the extent sought by BNZ.

[23] 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 \$6,931.00 payable by Ms Bowen to BNZ.

[24] The steps allowed for in this amount are as follows:

11 *Bowen*, above n 2.

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

13 Preparation of affidavits and submissions in reply.

Item	Step	Time		Cost (2B)
28	Filing interlocutory application	0.6		\$1,434
30	Preparation of written submissions	1		\$2,390
	Preparation of affidavits	1		\$2,390
34	Obtaining judgment without appearance	0.3		\$717
	<b>Total</b>	<b>2.9</b>		<b>\$6,931</b>

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

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

Kathryn Beck Judge

Judgment signed at 3 pm on 1 October 2021

