

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 97
EMPC 51/2022**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for security for costs

BETWEEN MELISSA BOWEN
 Plaintiff

AND BANK OF NEW ZEALAND
 Defendant

Hearing: On the papers

Appearances: M W O'Brien, counsel for plaintiff
 R M Rendle and M Bolwell, counsel for defendant

Judgment: 2 June 2022

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for security for costs)**

[1] Ms Bowen has challenged a preliminary determination of the Employment Relations Authority (the Authority) relating to the admissibility of evidence.¹

[2] The disputed material comprises evidence of communications that Ms Bowen has submitted in support of her substantive claims, which the Bank of New Zealand (BNZ) says is subject to without prejudice privilege.

¹ *Bowen v Bank of New Zealand* [2022] NZERA 19 (Member Larmer).

[3] The BNZ now applies for orders that:

- (a) Ms Bowen give security for costs to the satisfaction of the Registrar of the Court at Auckland by payment of the sum of \$10,000;
- (b) all further steps in this proceeding be stayed until security has been given and Ms Bowen has paid outstanding costs awarded to the BNZ by the Employment Court² and the Court of Appeal³ in the total amount of \$41,285.50; and
- (c) costs.

These proceedings are part of a larger issue

[4] Ms Bowen worked for the BNZ between 1979 and 1999 and recommenced employment with the BNZ in September 2015. Ms Bowen's employment terminated ostensibly for redundancy in July 2018.⁴

[5] Ms Bowen claims she was unjustifiably dismissed and unjustifiably disadvantaged by the BNZ. She has had proceedings on foot since August 2017.⁵

[6] The background to the determination that is the subject of the current challenge is as follows:

- (a) the parties filed witness statements in the Authority in late 2021 in preparation for an investigation meeting set down for 1 February 2022 (subsequently adjourned);
- (b) on 21 December 2021 Ms Bowen submitted the disputed evidence;

² *Bowen v Bank of New Zealand* [2021] NZEmpC 119; *Bowen v Bank of New Zealand* [2021] NZEmpC 165.

³ *Bowen v Bank of New Zealand* [2021] NZCA 598.

⁴ *Bowen v Bank of New Zealand* [2021] NZEmpC 71 at [4].

⁵ *Bowen v Bank of New Zealand* [2017] NZERA 299 (Member Crichton).

- (c) the BNZ filed a memorandum seeking urgent orders in relation to that material.
- (d) the Authority issued a determination on 28 January 2022 granting the orders sought by the BNZ;
- (e) the Authority also determined that its interlocutory determination, relating to the admissibility of evidence issues, should be subject to a non-publication order to ensure the confidentiality of privileged material is maintained.⁶

The Court can order security for costs

[7] The Court has jurisdiction to order security for costs and does so in accordance with r 5.45 of the High Court Rules.⁷

[8] If the Court does order security for costs, it may also order a stay of the proceedings until payment has been made.⁸

[9] The relevant threshold question in these proceedings is whether the Court is satisfied that there is reason to believe that Ms Bowen will be unable to pay the costs awarded to the BNZ if she is unsuccessful in her proceeding.⁹

[10] If that threshold is established, the Court will consider whether it is just in all the circumstances to make the order.¹⁰ Common considerations include the interests of the parties, the merits of the case, whether any impecuniosity results from the defendant's actions, and any delay. The Court also will consider whether there are access to justice issues that suggest security for costs ought not be ordered, or ought be ordered at a lesser level than might generally be expected.¹¹ In particular, the Court is hesitant to ascribe any significant weight to impecuniosity, especially where that

⁶ *Bowen*, above n 1, at [2].

⁷ Through Employment Court Regulations 2000, reg 6(2)(a)(ii).

⁸ *Quality Consumables Ltd v Hannah (No 2)* [2017] NZEmpC 155 at [11].

⁹ High Court Rules 2016, r 5.45(1)(b).

¹⁰ High Court Rules 2016, r 5.45(2).

¹¹ *Koia v Attorney-General* [2004] 1 ERNZ 116 (EmpC) at [32].

impecuniosity has been caused by the loss of employment that the plaintiff wishes to challenge.¹²

There is reason to believe Ms Bowen will be unable to pay costs should the BNZ be the successful party

[11] Ms Bowen has previously given evidence of her financial position. She is currently unemployed, is on a job seeker benefit and has no cash assets or reserves. She is not legally aided. She has already been ordered to pay costs in the broader proceedings in the total sum of \$41,285.50. It seems she has not made any payment in reduction of those cost awards; nor has she, or Mr O'Brien on her behalf, provided any explanation for not doing so, including in the context of this application. The threshold has been met.

The relevant factors point toward ordering security for costs

[12] The challenge in this case cannot be said to be compelling. Assuming her challenge is not precluded by s 179(5) of the Employment Relations Act 2000 (the Act), Ms Bowen says it is strongly arguable that some of the disputed evidence was not subject to without prejudice privilege and otherwise argues that any privilege in the disputed evidence has been lost. The Authority's discussion of the disputed evidence is subject to non-publication orders but its finding that it is protected by privilege seems sound.

[13] While an order for security for costs would likely be a hindrance to this challenge proceeding, Ms Bowen may still proceed with her substantive claim in the Authority. The matters raised in this challenge would still be available to her should she challenge a substantive determination of the Authority.

¹² *Tupe v Board of Trustees of Te Manawa O Tuhoë Trust* [2022] NZEmpC 26 at [22].

[14] It also is relevant that, since commencing proceedings, Ms Bowen has:

- (a) made four unsuccessful applications in the Authority to remove the matter to the Employment Court;¹³
- (b) been unsuccessful in respect of jurisdictional issues over whether her claim should proceed in the Employment Relations Authority or Human Rights Review Tribunal;¹⁴
- (c) made unsuccessful interlocutory applications for preservation of evidence in the Employment Court;¹⁵
- (d) unsuccessfully applied to the Employment Court for special leave to remove the matter;¹⁶ and
- (e) unsuccessfully sought leave to appeal the decision of the Employment Court to the Court of Appeal.¹⁷

[15] The BNZ is entitled to be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.¹⁸ That seems applicable here where Ms Bowen has repeatedly resisted the Authority investigating her claims.

[16] In all the circumstances, the interests of justice merit an order for a modest amount for security for costs.

[17] The BNZ has sought security for costs in the amount of \$10,000, which it says is approximately half scale costs at Category 2B.¹⁹

¹³ *Bowen v Bank of New Zealand* [2021] NZERA 347; *Bowen v Bank of New Zealand* [2019] NZERA 11; *Bowen v Bank of New Zealand* [2018] NZERA Auckland 330; *Bowen v Bank of New Zealand* [2017] NZERA Auckland 299.

¹⁴ *Bowen v Bank of New Zealand* [2018] NZERA Auckland 330.

¹⁵ *Bowen v Bank of New Zealand* [2018] NZEmpC 148.

¹⁶ *Bowen v Bank of New Zealand* [2021] NZEmpC 71.

¹⁷ *Bowen v Bank of New Zealand*, above n 3.

¹⁸ *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [16].

¹⁹ "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

[18] However, this is a challenge to a preliminary determination. The matter was determined on the papers in the Authority and likely would be in the Court as well. The issues have been ventilated before the Authority; numerous sets of submissions and other material were filed. This should assist the parties in their submissions to the Court.

[19] In the circumstances, I consider that an order for \$5,000 for security for costs is appropriate. This is the minimum I would expect to be payable by Ms Bowen should she be unsuccessful in her challenge. Such an order provides reasonable protection to the BNZ without being unduly onerous on Ms Bowen.

[20] I therefore order the plaintiff, Ms Bowen, to give security for costs for \$5,000 by paying that sum into Court. That is to be done within 21 days of the date of this judgment. The Registrar is to place the sum paid on interest-bearing deposit as soon as practical thereafter, where it will remain pending further order of the Court. This proceeding is stayed until payment of the security for costs is made.

An order for a stay pending payment of previous costs award is unusual

[21] As Mr O'Brien, counsel for Ms Bowen, says, the other order sought, being for a stay until other costs judgments are satisfied, is very unusual. The Court generally expects parties to undertake enforcement of monetary judgments, if they wish to do so.

[22] The BNZ relies on r 15.1(3), s 189 of the Act, and on this Court's judgment in *Lorigan v Infinity Automotive Ltd.*²⁰

[23] Rule 15.1(3) presents an alternative to the Court striking out proceedings under r 15.1(1). There is no suggestion here that Ms Bowen's proceedings are such that a strike out is appropriate. I do not consider that r 15.1(3) is of assistance.

²⁰ *Lorigan v Infinity Automotive Ltd* [2019] NZEmpC 118.

[24] In *Lorigan*, the Court exercised its powers under s 140(6)(a) of the Act, in circumstances where Mr Lorigan had failed to comply with a compliance order. Here there is no compliance order in place and s 140(6) has no application.

[25] I do not consider that s 189 assists. It is open to the BNZ to enforce the costs awards in the usual way;²¹ it is not appropriate for the Court to deny access to Ms Bowen where the BNZ has chosen not to do so.²²

[26] The BNZ's application for an order that the proceeding be stayed until Ms Bowen has paid the outstanding costs awarded to the BNZ is unsuccessful.

Costs are reserved

[27] Costs are reserved pending resolution of Ms Bowen's substantive challenge to the preliminary determination.

J C Holden
Judge

Judgment signed at 1.30 pm on 2 June 2022

²¹ *Mani v Sharma* [2018] NZEmpC 155 at [20]; Employment Relations Act 2000, s 180.

²² *Young v Bay of Plenty District Health Board* [2011] NZEmpC 89 at [11].