

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

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

**[2023] NZEmpC 220  
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 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, counsel for Defendant

Judgment: 4 December 2023

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**COSTS JUDGMENT OF JUDGE J C HOLDEN**

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[1] In the Employment Court's judgment of 28 February 2023, the Court said that, if costs could not be agreed between the parties, Bank of New Zealand could apply for an order.<sup>1</sup>

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<sup>1</sup> *Bowen v Bank of New Zealand* [2023] NZEmpC 29 at [40].

[2] Agreement was not reached, and an application was made.<sup>2</sup> BNZ seeks costs in accordance with the Court's Guideline scale using category 2, band B, except in respect of the affidavits filed (for which band A is proposed).<sup>3</sup> The amount sought is \$24,497.50.

[3] BNZ also seeks costs of \$717 in respect of preparing its application for costs, which have been calculated on a category 2, band A basis.

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

[4] The Court has a discretion as to costs.<sup>4</sup> The primary principle is that costs follow the event. An award should represent a reasonable contribution to costs actually and reasonably incurred.<sup>5</sup> Beyond that, in assessing costs, the Court balances the interests of the parties.

### **Ms Bowen raises various matters**

[5] Ms Bowen does not dispute BNZ's proposed categorisation of 2B but does not agree that costs for second counsel are justified. She also accepts that the \$5,000 (plus interest) currently held by the Court as security for costs should properly be released to BNZ, but says no further award should be made, in the interests of justice.<sup>6</sup>

[6] Ms Bowen submits that hers was a test case. That suggestion has not previously been raised, and I do not accept it. As noted by the Court of Appeal in declining leave to appeal, the position taken by the Court is clear, and the issue Ms Bowen sought to raise is well-settled.<sup>7</sup>

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<sup>2</sup> The application was later stayed pending the Court of Appeal's consideration of Ms Bowen's application for leave to appeal the judgment of 28 February 2023: *Bowen v Bank of New Zealand* [2023] NZEmpC 66. The Court of Appeal declined leave on 24 October 2023: *Bowen v Bank of New Zealand* [2023] NZCA 512.

<sup>3</sup> Employment Court of New Zealand Practice Directions <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 18.

<sup>4</sup> Employment Relations Act 2000, sch 3 cl 19; and Employment Court Regulations 2000, reg 68.

<sup>5</sup> *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

<sup>6</sup> *Bowen v Bank of New Zealand* [2022] NZEmpC 97 at [20].

<sup>7</sup> *Bowen v Bank of New Zealand* (CA), above n 2 at [27].

[7] Ms Bowen raises matters of substance regarding the ongoing litigation, but the Court has already found that BNZ is entitled to costs on this challenge, which was a discrete matter.

[8] Ms Bowen also points to her limited financial means and compares those to BNZ's financial position. I accept that Ms Bowen has limited financial means. However, the point has previously been made to Ms Bowen that, although it was open to her to adopt the litigation strategy she has chosen, it brings with it significant costs implications for both parties. 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.<sup>8</sup>

[9] I accept the schedule of costs provided by BNZ, except in two respects. First, I do not consider that it is appropriate for there to be costs for obtaining the judgment without an appearance in circumstances where there is a claim in respect of the preparation of submissions.<sup>9</sup> I also agree with Ms Bowen that second counsel was not required at the hearing. I accept, however, that BNZ is entitled to costs on its application for costs, recognising it had to file the application and then respond to the matters raised by Ms Bowen in her memorandum on costs and affidavit. With those adjustments, and a small allowance made to recognise Ms Bowen's limited success in defending the application for security for costs and a stay,<sup>10</sup> and her financial position, the Court orders Ms Bowen to pay costs of \$21,000.<sup>11</sup>

[10] Finally, Ms Bowen seeks an order that any costs award is to be paid by instalments of \$28 per month. No submissions were received from either party on whether the Court can make such an order, and the issue remains unsettled.<sup>12</sup> In any event, I would not make an order that would need to be in effect for many decades. The parties may be able to agree a payment arrangement, but that is left to them.

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<sup>8</sup> *Bowen v Bank of New Zealand* [2021] NZEmpC 165 at [21]; *Bowen v Bank of New Zealand* [2021] NZEmpC 119 at [19]-[20].

<sup>9</sup> Although a claim for costs for obtaining a judgment without an appearance was in the Court's Guideline scale at the time the application for costs was made, it is no longer in those guidelines.

<sup>10</sup> *Bowen v Bank of New Zealand* [2022] NZEmpC 97.

<sup>11</sup> Inclusive of any costs on Ms Bowen's application for a stay pending the outcome of her Court of Appeal proceedings; Above n 2.

<sup>12</sup> *Lal v The Warehouse Ltd* [2017] NZEmpC 93 at [8].

[11] The Registrar is directed to pay BNZ the amount currently held as security for costs, including any interest arising from that sum. Absent any arrangement agreed between the parties, the balance of the costs award is to be paid by Ms Bowen to BNZ by 4 pm on Thursday 29 February 2024.

J C Holden  
Judge

Judgment signed at 3 pm on 4 December 2023