

**Attention is drawn to the order prohibiting publication of certain information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2026] NZERA 234  
3032274

BETWEEN

MELISSA BOWEN  
Applicant

AND

BANK OF NEW ZEALAND  
Respondent

Member of Authority: Peter van Keulen

Representatives: Michael O'Brien and Joseph Plunket, counsel for the Applicant  
Rebecca Rendle and Jessica Grenheld, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 1 September 2025, 9 February 2026, 23 February 2026 and  
13 March 2026 from the Applicant  
1 September 2025, 15 September 2025, 23 February 2026,  
25 February 2026 and 13 March 2026 from the Respondent

Date of Determination: 20 April 2026

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Non-publication orders**

[1] There are various non-publication orders that have been made by the Employment Court and the Authority in respect of this matter.<sup>1</sup> These orders remain in place and cover this determination.

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<sup>1</sup> *Bowen & Lewis v Bank of New Zealand* [2017] NZERA Auckland 339; *Bowen v Bank of New Zealand* EMPC 261/2020; *Bowen v Bank of New Zealand* [2021] NZERA 19; and *Bowen v Bank of New Zealand* [2023] NZEmpC 29.

[2] This determination deals with the parties' applications for costs. Bank of New Zealand's submissions on costs referenced a Calderbank offer made by Bank of New Zealand dated 13 November 2024 (the Calderbank Offer).<sup>2</sup> Bank of New Zealand has applied for an order for non-publication of the details of the Calderbank Offer.

[3] I granted an interim non-publication order in relation to the Calderbank Offer and advised the parties that I would consider Bank of New Zealand's application for non-publication fully once the parties had made written submissions.

[4] I have now received written submissions from both parties.

[5] In summary, Bank of New Zealand says the Calderbank Offer is privileged, covered by the privilege that attaches to settlement negotiations that are made on a without prejudice basis. And, it says that privilege has not been waived by it because it referenced the Calderbank Offer in its costs submissions – this being the express exception reserved for such correspondence and the limited basis on which the Calderbank Offer can be referenced.

[6] In contrast Ms Bowen says any privilege applied to the Calderbank Offer has been waived by Bank of New Zealand referencing the letter in its costs submissions.

[7] Ms Bowen's counsel has referred to various court decisions that confirm waiver of privilege occurring by a party using privileged material in its conduct of litigation.<sup>3</sup>

[8] Having reviewed the submissions of both counsel and having considered the relevant case law it is my view that Bank of New Zealand has not waived the settlement privilege that attaches to the Calderbank Offer.

[9] Waiver of privilege occurs in connection with legal professional privilege, including litigation privilege, if the party relying on that privilege inserts the privileged material into the litigation by disclosing it in open court. This case presents a different proposition where a communication that has settlement privilege is used as a party intended to use it (for cost submissions) and in circumstances where it reserved the right to do just that. In these circumstances the disclosing party has preserved the settlement privilege by acting within the strictly limited pre-advised manner.

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<sup>2</sup> A Calderbank offer is an offer made by one party to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Authority's attention. This is so that the offer can be used for assessing costs once the claim has been determined.

<sup>3</sup> *Ophthalmological Society of NZ Inc v Commerce Commission* [2003] 2 NZLR 145; *AstraZeneca Ltd v Commerce Commission* [2008] 12 TCLR 116 (HC); and *A Labour Inspector v Temple* [2025] NZEmpC 297.

[10] To conclude that settlement privilege is waived by using a Calderbank offer as intended would undermine one of the key principles of the privilege and one of the useful functions as the other party could then use the privileged material in any appeal – as Ms Bowen seeks to do now. In effect the party with the benefit of settlement privilege would either lose the privilege or not be able to use the Calderbank offer as intended. This cannot be right.

[11] So, I am satisfied that it is appropriate to grant a permanent order for non-publication in respect of the Calderbank Offer as Bank of New Zealand has requested.

[12] Pursuant to Clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act) I make a non-publication order prohibiting the publication of the information contained in the Calderbank Offer and the information at paragraphs 3 and 4 of Ms Bowen’s memorandum on costs dated 23 February 2026. For the avoidance of doubt this order does not prevent publication of the fact that a settlement offer was made in the Calderbank Offer as that will be referenced in my discussion on costs below.

### **The determinations subject to a costs assessment**

[13] In a determination dated 19 June 2024 I found that Bank of New Zealand breached the duty of good faith owed to Ms Bowen, acted unjustifiably toward her causing disadvantage to her employment and unjustifiably dismissed her.<sup>4</sup> In a second determination dated, 1 July 2025 I determined remedies.<sup>5</sup> These two determinations resolved the substantive employment relationship problem.

[14] During the Authority’s investigation and determination of the substantive employment relationship problem Ms Bowen made five applications that were unsuccessful:

- (a) An application for removal to the Employment Court determined in 2017.<sup>6</sup>
- (b) An application for interim non-publication orders determined in 2018.<sup>7</sup>
- (c) A second application for removal to the Employment Court determined in 2018.<sup>8</sup>
- (d) A third application for removal to the Employment Court determined in 2019.<sup>9</sup>

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<sup>4</sup> *Bowen v Bank of New Zealand* [2024] NZERA 361.

<sup>5</sup> *Bowen v Bank of New Zealand* [2025] NZERA 380.

<sup>6</sup> *Bowen v Bank of New Zealand* [2017] NZERA Auckland 249.

<sup>7</sup> *Bowen v Bank of New Zealand* [2018] NZERA Auckland 339.

<sup>8</sup> *Bowen v Bank of New Zealand* [2018] NZERA Auckland 380.

<sup>9</sup> *Bowen v Bank of New Zealand* [2019] NZERA 11.

- (e) A fourth application for removal to the Employment Court and an application to stay proceedings, determined in 2021.<sup>10</sup>

[15] In each of the relevant determinations costs were reserved so that the parties could try to agree costs once the substantive employment relationship problem was resolved. The parties have been unable to agree costs. Ms Bowen seeks an order for costs for the substantive employment relationship problem being resolved in her favour. Bank of New Zealand seeks costs for the five preliminary applications being resolved in its favour.

### **Ms Bowen's application for costs**

[16] The investigation into the substantive employment relationship problem took twelve days - ten days for liability including submissions and two days for remedies with submissions.

[17] Ms Bowen seeks an award of costs based on the application of the Authority's daily tariff for twelve days with an uplift.<sup>11</sup> Ms Bowen says an uplift is justified based on the Bank of New Zealand's conduct of this case and the nature of the claim; Ms Bowen suffered retaliation from the Bank of New Zealand for making a protected disclosure and Bank of New Zealand continually denied that Ms Bowen had made a protected disclosure, which was a seriously flawed position.

[18] Ms Bowen says the daily tariff should not be reduced for her mixed success – Ms Bowen was not successful with four unjustified action causing disadvantage grievances and two breach of contract claims. Ms Bowen says she was successful with her employment relationship problem and the elements she was unsuccessful on arose from the same factual background that informed the employment relationship problem. So, it is neither practical to separate out the successful and unsuccessful elements when considering the overall outcome and, in any event, the unsuccessful elements did not on their own materially increase the amount of work or time required for the investigation of this problem.

[19] Ms Bowen also seeks GST on any award made, relying on previous Authority determinations and the principle in *Judea Tavern Ltd v Jesson*.<sup>12</sup>

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<sup>10</sup> *Bowen v Bank of New Zealand* [2021] NZERA 347.

<sup>11</sup> The normal practice of the Authority when setting costs, is to apply a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff.

<sup>12</sup> *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120.

[20] Overall Ms Bowen seeks the daily tariff rate totalling \$44,000.<sup>13</sup> And then she seeks an uplift of 50% for the reasons outlined above – so \$66,000, plus disbursements totalling \$407.36.

[21] Bank of New Zealand says:

- (a) There is no basis for the uplift sought by Ms Bowen. Bank of New Zealand says its position on the protected disclosure was of no consequence to the justification of its actions – ultimately my determination that Ms Bowen was subject of a restructure which was in retaliation, and this was unjustified, stands as a personal grievance regardless of the nature of the complaint Ms Bowen made that caused the retaliation. It was entitled to maintain its position that Ms Bowen's complaint was not a protected disclosure based on its assessment of the events at the time.
- (b) In contrast the daily tariff should be reduced to reflect Ms Bowen's mixed success and her failure to obtain more in remedies than the Calderbank Offer. In this regard I am satisfied that the Calderbank Offer was a valid Calderbank offer, that Ms Bowen did not accept the settlement offer contained in it and then failed to beat the amount offered by the Bank of New Zealand in the remedies I awarded her.

#### *Costs in the Authority*

[22] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in the Authority's practice note on costs.<sup>14</sup>

#### *Costs for Ms Bowen*

[23] The starting point is that costs should follow the event. Ms Bowen was successful with the substantive employment relationship problem and is entitled to an award of costs for this success.

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<sup>13</sup> I note here that in her submissions Ms Bowen incorrectly calculated the daily tariff total at \$47,500 and I have assumed she meant that figure to be \$44,000 which is the correct total based on the application of the daily tariff to the investigation of the substantive employment relationship problem.

<sup>14</sup> For further information about the factors considered in assessing costs, see:

[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).

### *Applying the daily tariff*

[24] I accept that it is appropriate to apply the daily tariff to quantifying costs in this matter. So, based on the application of the daily tariff to the two investigation meetings, the starting point for an award of costs is \$44,000.

### *Adjusting the daily tariff*

[25] Having considered the parties' submissions, I find:

- (a) The daily tariff should not be increased based on Bank of New Zealand's conduct or the nature of the claim.
- (b) The daily tariff should be reduced to reflect Ms Bowen's mixed success and her failure to obtain higher remedies than the offer contained in the Calderbank Offer. I will apply a \$500 reduction per day to the daily tariff for mixed success for the ten days of the investigation meeting on liability and then I will apply a \$1,000 per day reduction for the two days of the remedies investigation.

### *GST*

[26] The Employment Court's position in respect of the application of GST to its awards of costs does not directly apply to the Authority's costs awards as the Authority uses a daily tariff.

[27] The exercise of the Authority's discretion to award costs under cl 15(1) of the Act as that relates to the addition of GST is that the daily tariff is an all-inclusive, GST neutral figure.

[28] Consequently, Ms Bowen's claim for an uplift for GST is declined.

### *Conclusion*

[29] Ms Bowen is entitled to an award of costs for her success with the substantive employment relationship problem. The costs award is based on the daily tariff applied to two investigation meetings with a total of twelve days – this is \$44,000. The daily tariff amount is then reduced by \$500 per day for ten days and \$1,000 per day for two days, so a reduction of \$7,000.

[30] Ms Bowen is awarded \$37,000 as a contribution to her costs. I am satisfied that the disbursements Ms Bowen seeks should also be awarded to her – this is \$407.36.

### **Bank of New Zealand's application for costs**

[31] Bank of New Zealand has applied for costs for all five of the preliminary applications made by Ms Bowen, which it successfully opposed. Bank of New Zealand says:

- (a) The starting point for quantification of costs is to apply a half day of the daily tariff for each application.
- (b) The daily tariff should then be increased due to Ms Bowen's conduct that necessarily increased costs. Bank of New Zealand says the uplift should apply to the second, third and fourth attempts by Ms Bowen to have the employment relationship problem removed to the Employment Court.

### *Costs for Bank of New Zealand*

[32] The starting point is that costs should follow the event. So Bank of New Zealand is entitled to an award of costs for each of the preliminary applications.

### *Applying the daily tariff*

[33] I accept that it is appropriate to apply the daily tariff to quantifying the order for costs in this matter and this should be a half day of the daily tariff.

[34] So the starting point for Bank of New Zealand's award for costs is \$11,250.

### *Adjusting the daily tariff*

[35] I am satisfied that it is appropriate to increase the daily tariff for the second, third and fourth applications to remove the employment relationship problem to the Employment Court.

[36] I will increase the tariff by \$1,000 for each of the three applications.

### *Conclusion*

[37] Bank of New Zealand is entitled to an award of costs for the five preliminary applications made by Ms Bowen. The quantum is calculated by applying a half day of the daily tariff to each application with an overall uplift of \$1,000 per application for the second, third and fourth removal applications.

[38] Bank of New Zealand is awarded \$14,250 as a contribution to its costs of the preliminary applications.

### **Orders**

[39] Bank of New Zealand is to pay Ms Bowen \$37,000 plus \$407.36 as a contribution to her costs in the substantive investigation and determination of the employment relationship problem.

[40] Ms Bowen is to pay Bank of New Zealand \$14,250 as a contribution to its costs in the preliminary applications made in the investigation and determination of the employment relationship problem.

Peter van Keulen  
Member of the Employment Relations Authority