

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2026] NZERA 261
3032274

BETWEEN MELISSA BOWEN
Applicant

AND BANK OF NEW ZEALAND
Respondent

Member of Authority: Philip Cheyne

Representatives: Michael O'Brien, counsel for the Applicant
Philip Skelton KC, counsel for the Respondent

Submissions: 31 March 2026 from the Applicant
1 September 2025, 2 March 2026 and 7 April 2026 from the
Respondent

Date of Determination: 30 April 2026

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] During the course of the Authority's investigation of her employment relationship problem, Ms Bowen twice applied to admit evidence of discussions during a July 2019 without prejudice meeting.

[2] Both applications were considered by me, rather than Member van Keulen who had responsibility for the substantive investigation and determination. By directions on 28 March 2025 and 9 January 2026, I declined to admit the without prejudice evidence and reserved costs.

[3] The parties have not agreed costs. Member van Keulen could not determine costs in relation to the admissibility applications, without becoming aware of the substance of the

inadmissible evidence. Therefore, costs with respect to this part of the investigation are dealt with by me. Member van Keulen's costs determination has now been released.¹

Non-publication

[4] Non-publications orders have been made by the Authority and the Employment Court.²

[5] Those orders continue and this determination does not vary them.

Principles

[6] I adopt the recent summary of relevant principles set out by the Authority in *Labour Inspector v NQX Limited* (footnotes omitted):³

The Authority has a broad discretion to award such costs and expenses as the Authority thinks fit. The discretion must be exercised on a principled basis. Established principles include:

- the Authority's discretion extends to both whether costs will be awarded and, if so, the amount;
- costs are not to be punitive or an expression of disapproval of a party's conduct, although conduct which has increased costs unnecessarily can be taken into account in considering an award;
- costs will generally follow the event;
- the Authority may assess costs against a notional daily rate, applied flexibly with regard to the particular characteristics of the case;
- the nature of the case can influence questions of costs; and
- awards will generally be modest.

Assessment

[7] BNZ was found liable and Ms Bowen was entitled to remedies.⁴ Regardless of that substantive outcome, BNZ successfully resisted both Ms Bowen's applications to admit the without prejudice evidence. For the issues covered by this determination, BNZ can be treated as the successful party.

¹ *Bowen v Bank of New Zealand* [2026] NZERA 234.

² See *Bowen v Bank of New Zealand* [2025] NZERA 380 at [1].

³ *Labour Inspector v NQX Limited and Ors* [2026] NZERA 97 at [26].

⁴ *Bowen v Bank of New Zealand* [2024] NZERA 361 (liability); *Bowen v Bank of New Zealand* [2025] NZERA 380 (remedies).

[8] Ms Bowen submits that the daily tariff model should not apply to narrow preliminary matters; or if costs are awarded, based on the narrow issues and limited work, \$1,600.00 would be appropriate.

[9] BNZ says that the daily tariff model is an appropriate basis for assessing costs on both applications, but with an uplift.

[10] I note that an earlier and different admissibility issue between these parties was resolved by Authority determination, following which costs were set by reference to the daily tariff approach.⁵ Given that background, there is no sufficient reason to depart from the daily tariff approach here.

[11] Several points should be mentioned. In related litigation in 2023 BNZ had objected to reference to the July 2019 without prejudice meeting, although on different grounds.⁶ Then shortly before the Authority's April 2025 investigation meeting to consider remedies following its 2024 liability finding, Ms Bowen applied to admit that evidence. To preserve the scheduled investigation meeting dates, I required BNZ to provide submissions under some urgency. BNZ also needed to instruct counsel given the disputed evidence. I accept that these factors increased BNZ's costs to some extent.

[12] However, costs should not be used to punish or express disapproval of a party's conduct. My accounting for urgency should not be read as criticism of the timing of Ms Bowen's application. In any event, BNZ would have needed to instruct counsel even if the application had been made at an early stage.

[13] BNZ refers to my directions where I described the application as being made at the very last minute without explanation and contrary to the Member's directions, in support of its uplift submission. The point being made in the directions was to answer Ms Bowen's submission that BNZ "elected" not to contest the evidence of the July 2019 exchanges. The cited passage adds little to the point above about urgency.

[14] Similarly, the comment in the directions that I disagreed with Ms Bowen's submission that the without prejudice evidence was relevant to fixing remedies, adds little now. BNZ being

⁵ *Bowen v Bank of New Zealand* [2022] NZERA 55.

⁶ *Bowen v Bank of New Zealand* [2023] NZEmpC 29; *Bowen v Bank of New Zealand* [2023] NZCA 512.

treated as the successful party sufficiently accounts for the unpersuasive reasons advanced by Ms Bowen.

[15] I am referred to the Authority's cost determination at an earlier point of this employment relationship problem.⁷ The Member's view of Ms Bowen's approach there led to a 50% uplift in costs awarded. Ms Bowen's approach here was similar to her approach in the earlier case. It is reasonable to apply the same uplift percentage here, without being punitive but still consistent with the principle that costs in the Authority will generally be modest.

[16] What differs is the appropriate starting point. I take from the Member's description that substantially more was required of BNZ to successfully defend the earlier admissibility matter. By comparison, in the present matter Ms Bowen applied to admit evidence about exchanges during a single meeting, BNZ's views were sought and it lodged a notice of opposition, there was a case management conference, BNZ needed to review then draft and lodge submissions, and an issue about non-publication was raised and answered. Directions were issued in time to allow the scheduled investigation meeting to proceed. I would fix costs for those steps at half of the daily rate, using the rate for the first day of an investigation meeting as this was a discrete matter, rather than part of the investigation meeting.

[17] Applying the 50% uplift brings costs with respect to the directions dated 28 March 2025 to \$3,375.00.

[18] Ms Bowen's second application to admit the July 2019 without prejudice evidence was dismissed for reasons given in my 9 January 2026 directions. Costs were reserved. BNZ seeks costs of \$4,500.00, based on the daily tariff. For the reasons given above, it is appropriate to apply the daily tariff approach.

[19] The second application sought to have the evidence admitted as part of Member van Keulen's consideration of costs. It was wholly unmeritorious, largely attempting at a very late stage to relitigate the earlier directions which had decided that there were no grounds to set aside the without prejudice rule. I accept that less was required of BNZ to successfully oppose the second application, but it is reasonable to apply a higher uplift to reflect the circumstances just mentioned.

⁷ *Bowen v Bank of New Zealand* [2022] NZERA 55.

[20] Balancing these factors, I would fix a further \$3,375.00 in costs as appropriate.

[21] Together, costs would be \$6,750.00.

[22] Often the Authority does not separate out costs regarding preliminary matters, leaving such costs to be part of an overall assessment following the substantive determination. Even less frequently would the Authority consider separate awards for overlapping preliminary applications. However, the interlocutory approach taken by Ms Bowen to advancing this employment relationship problem leaves no other option.

[23] Ms Bowen submits that no costs should be ordered as she is unable to pay, a state of affairs she attributes to BNZ's wrongful actions. However, the only information available to me is reference to her not working since her dismissal by BNZ, her being unable to work and her being on a sickness benefit, circumstances for which BNZ has been found liable.⁸ Ms Bowen did not refer me to any information showing her overall financial position. Against that, BNZ has paid sums to Ms Bowen and into court as set out in a consent judgment.⁹ The parties have also agreed to an off-setting arrangement. It is not appropriate to adjust the assessment of costs based on ability to pay.

Summary and order

[24] BNZ is entitled to costs, having successfully opposed Ms Bowen's two applications to admit evidence of the July 2019 without prejudice communications.

[25] Melissa Bowen is to pay Bank of New Zealand costs of \$6,750.00 within 28 days of this determination.

Philip Cheyne
Member of the Employment Relations Authority

⁸ *Bowen v Bank of New Zealand*, above n 4.

⁹ *Bowen v Bank of New Zealand* [2025] NZEmpC 204.