



# Employment Court of New Zealand

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## Bowen v Bank of New Zealand [2021] NZEmpC 16 (22 February 2021)

Last Updated: 2 March 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 16](#)

EMPC 261/2020

IN THE MATTER OF	an application for special leave to remove proceedings
AND IN THE MATTER OF	an application to exclude evidence
BETWEEN	MELISSA BOWEN Applicant
AND	BANK OF NEW ZEALAND Respondent

Hearing: On the papers

Appearances: M O'Brien, counsel for applicant  
P Muir and R Rendle, counsel for respondent

Judgment: 22 February 2021

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE J C HOLDEN

### (Application to exclude evidence)

[1] Ms Bowen has applied for special leave to remove her matter to the Employment Court, which is to be heard this coming Wednesday, 24 February 2021. In that context, the parties have filed affidavit evidence. The Bank of New Zealand (BNZ) now has applied for an order excluding certain evidence included in Ms Bowen's affidavit in reply dated 11 December 2020. This judgment resolves that application.

[2] The matter, currently before the Employment Relations Authority (the Authority), arises in the context of the disestablishment of Ms Bowen's role with the

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BNZ at the end of July 2018. The issues, as identified by the Authority, cover various unjustified disadvantage and unjustified dismissal claims arising from allegations of:

- bullying behaviours by a senior manager;
- retaliatory conduct in respect of Ms Bowen's protected disclosures;
- being threatened with dismissal for seeking legal advice on the BNZ's restructuring proposal;
- the BNZ failing to comply with its policy on whistleblowing;
- no consideration of redeployment options in light of the redundancy proposal;
- breaches of express and implied terms of Ms Bowen's employment agreement; and
- good faith breaches.

[3] The Authority also has noted that there is a 90-day issue in respect of two of these issues.

[4] The principal grounds on which Ms Bowen has applied to the Court for special leave are that her claims raise important issues of law that are not incidental to the claims:

- (a) Whether her disclosures made through March–May 2016 constituted a protected disclosure under the [Protected Disclosures Act 2000](#).
- (b) Where an employment agreement only references the employer’s policies, whether the policies of related companies are applicable and binding.
- (c) Consideration of lost income and other remedies for whistleblowers, including the societal good of awarding higher levels of lost income to a whistleblower who faces retaliatory action by their employer that

adversely impacts their ability to work in their chosen industry. Ms Bowen says this necessarily entails a consideration of:

- (i) The applicability of the principle of moderation in these circumstances.
  - (ii) The applicability of common law developments to the statutory remedies regime.
- (d) The interrelationship between the positive obligation under [s 4\(1A\)\(b\)](#) of the [Employment Relations Act 2000](#) (the Act) to be active and constructive in establishing and maintaining a productive employment relationship and whether there is a higher obligation on the employer to facilitate redeployment:
- (i) If the employer was highly profitable; or
  - (ii) when the employee has made a protected disclosure which harms the employee’s likelihood of finding employment with another employer in the industry.

### **The parties have opposing views on Ms Bowen’s affidavit in reply**

[5] In applying for the order excluding evidence, the BNZ says:

- (a) The evidence in Ms Bowen’s affidavit to which it objects is not in reply to evidence provided by the BNZ in an affidavit from Ms Daly.
- (b) The evidence is not relevant to the issues before the Court or the Authority.

[6] Ms Bowen says the contested paragraphs relate to issues raised by Ms Daly in her affidavit and are relevant, including providing background material and rebutting statements or inferences made by the BNZ.

[7] She also says the application for exclusion of evidence was unduly delayed, which will mean that, if granted, she will not have an opportunity to file a replacement affidavit.

[8] She relies on the Court’s equity and good conscience jurisdiction in relation to evidence under [s 189](#) of the Act and says the Court should allow the affidavit to remain in full.

### **Affidavit is to be limited to reply evidence**

[9] As the form and content of affidavits in reply are not addressed in the Act or the [Employment Court Regulations 2000](#), the Court looks to the [High Court Rules 2016](#) for guidance.<sup>1</sup> Under the [High Court Rules](#), affidavits must be confined to matters that would be admissible if given in evidence.<sup>2</sup> Affidavits in reply are to be limited to new matters raised in the notice of opposition or in an affidavit filed by the respondent.<sup>3</sup>

[10] The inquiry, therefore, is twofold:

- (a) Would the contested evidence included in Ms Bowen’s affidavit in reply be admissible in the Employment Court?
- (b) Is the evidence limited to new matters raised in the affidavit filed by Ms Daly?

### **Evidence goes beyond the question before the Court**

[11] Under [s 189](#) of the Act, the Court “may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not”. Ultimately the Court’s task is to do justice as a matter of equity and good conscience. The Court is not bound by the [Evidence Act 2006](#), although the principles expressed in that Act assist the Court in its assessment.<sup>4</sup>

<sup>1</sup> [Employment Court Regulations 2000](#), reg 6(2)(a)(ii).

2 [High Court Rules 2016](#), r 9.76(1)(d).

3 Rule 7.26(2).

4 *Lyttelton Port Company Ltd v Pender* [\[2019\] NZEmpC 86](#), [\[2019\] ERNZ 224](#) at [52]–[53].

[12] There are clearly a number of matters involving the BNZ with which Ms Bowen is concerned. There are processes in other fora that are dealing with some of those issues. However, in the context of these proceedings, the issues before the Authority are those identified above.<sup>5</sup>

[13] The Court's enquiry is focussed on whether there are grounds to grant special leave to remove Ms Bowen's matter to the Court.

[14] Both parties acknowledge that the Employment Court may accept evidence that would not comply with the [Evidence Act 2006](#). An example of that, identified by the Chief Judge in *Lyttelton Port Company Ltd*, is hearsay evidence which might be accepted if the circumstances meant that doing so was consistent with equity and good conscience.<sup>6</sup>

[15] However, it is expected that evidence will be relevant to the issues in contest, that is, that it tends to prove or disprove anything that is of consequence to the determination of the proceeding.<sup>7</sup> Some evidence of the background context also is likely to be admitted by the Court, as it was in *Lyttelton Port Company Ltd*.<sup>8</sup> However, equity and good conscience is not served by putting substantive matters before the Court that are not relevant to its consideration.

[16] Ms Bowen has already provided a detailed affidavit in support of her application, including covering the background to her claim in the Authority and to her application for leave in the Court. The evidence in her affidavit in reply goes further, and into matters that are not relevant to, and will not assist the Court on the application for leave.

<sup>5</sup> See above at paras [2]–[3].

<sup>6</sup> *Lyttelton Port Company Ltd*, above n 4, at [54].

<sup>7</sup> [Evidence Act 2006](#), s7(2); in the employment context, see also the [Employment Court Regulations 2000](#), reg 38(1).

<sup>8</sup> At [56].

### **Evidence goes further than replying**

[17] Affidavits in reply are intended to give the applicant the opportunity to address any new matters; they are not an opportunity for the applicant to provide substantive new evidence, to which the respondent's witnesses cannot respond.

[18] I acknowledge that Ms Bowen's affidavit refers to paragraphs of Ms Daly's affidavit. Nevertheless, Ms Bowen's affidavit of 11 December 2020, including the attachments to her affidavit, go well beyond a reply. Rather, Ms Bowen has picked up on mentions in Ms Daly's affidavit and taken the opportunity to introduce new and detailed evidence, including substantial exhibits.

### **Parts of affidavit to be excluded**

[19] While I do not accept that the BNZ has unreasonably delayed filing its application to exclude evidence, I have taken into account the point made by Mr O'Brien, for Ms Bowen, that orders at this stage would not allow time for Ms Bowen to file an amended affidavit.

[20] In those circumstances, in the exercise of my discretion, I have endeavoured to strike a balance and now make orders on the contested paragraphs as follows:

(a) The commencing words in paragraph 7(b) of Ms Bowen's affidavit of

11 December 2020 are permitted to remain in but subparagraphs 7(b)(i)–(vi) are excluded.

(b) Paragraph 7(c) may remain in but paragraphs 7(d) and (e) are excluded.

(c) Paragraphs 11–17 are excluded.

(d) The opening sentence in paragraph 19 is permitted to stay in but paragraphs 19(a)–(b) are excluded.

(e) Paragraphs 20–25 are excluded.

(f) Paragraph 43(b) may remain in.

(g) Paragraphs 44–45 are excluded.

[21] Any exhibits referred to in the excluded paragraphs also are likewise excluded.

[22] Finally, I note that Ms Bowen has filed a further affidavit in reply, this time in respect of her application for a stay of the Authority's proceedings (effectively for a stay of the Authority's timetabling directions). The BNZ has indicated it objects to that affidavit, essentially for the same reasons it objects to parts of the affidavit of 11 December 2020.

[23] The application for stay is very limited in its scope, much more so than the application for leave. On its face, the affidavit in reply traverses many matters of substance that almost certainly will not be relevant to that application for a stay.

[24] Ms Bowen is invited to work with Mr O'Brien and refile her affidavit so it is limited to matters in reply and that are relevant to Ms Bowen's application for a stay. In the event there remain issues in respect of Ms Bowen's affidavit in reply on the application for stay, those will be dealt with at the hearing on Wednesday 24 February 2021.

[25] Costs are reserved.

J C Holden Judge

Judgment signed at 11.30 am on 22 February 2021

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