

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 78
3129534

BETWEEN	WAIKATO EQUINE VETERINARY CENTRE LIMITED Applicant
AND	JULIET MATTHEWS First Respondent
AND	COMPANION VETS LIMITED Second Respondent

Member of Authority: Robin Arthur

Representatives: Fiona Dalziel, counsel for the Applicant
Murray Branch, counsel for the Second Respondent

Submissions received: On 27 January 2021 from the Second Respondent and
on 12 February 2021 from the Applicant and, in reply,
the Second Respondent.

Determination: 26 February 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] Under direction of the Authority, made on an urgent basis, Waikato Equine Veterinary Centre Limited (WEVCL) and Juliet Matthews attended mediation on 18 January 2021. WEVCL had applied to the Authority for orders against Ms Matthews and Companion Vets Limited (CVL). Ms Matthews had recently left her employment with WEVCL and was preparing to take up a new role with CVL. Shortly before WEVCL's application to the Authority, Ms Matthews had lodged her own application about the circumstances that led to her leaving her employment with WEVCL.

[2] By consent CVL was not directed to attend the mediation.

[3] In mediation WEVCL and Ms Matthews resolved their differences. The terms of their resolution were recorded in an agreement certified by an employment mediator on 21 January 2021 under s 149 of the Employment Relations Act 2000 (the Act). WEVCL then withdrew its application against Ms Matthews and CVL and Ms Matthews withdrew her application against WEVCL.

[4] WEVCL and Ms Matthews had agreed the terms of their resolution would, as far as the law allowed, be confidential to them. The confidentiality term included an exception authorising Ms Matthews to disclose some information to CVL about other agreed terms that would affect her work for CVL for a certain period.

[5] In the week after WEVCL and Ms Matthews had reached that agreement counsel for CVL lodged an application seeking an order for costs against WEVCL. CVL submitted it should be awarded indemnity costs for legal fees of \$8,216 incurred in preparing to respond to WEVCL's claim against it. CVL said WEVCL's discontinuation of proceedings against CVL created the presumption WEVCL had, in effect, accepted its case could not succeed, should not have been commenced and was therefore liable for costs.

[6] WEVCL was given and took the opportunity to lodge a reply. The costs memoranda of both WEVCL and CVL canvassed costs principles derived from High Court rules and Employment Court cases. Neither focussed adequately on the appropriate starting point of the Authority's statutory discretion to award costs and the well-established "basic tenets" for exercising that discretion in the particular circumstances of each case.¹ Also relevant was an object of the Act to promote mediation as the primary problem-solving mechanism in order to build productive employment relationships, which includes disputes about how those relationships came to end or how any enduring employment obligations should be dealt with.²

[7] Three of those "basic tenets" were particularly engaged in considering CVL's application for costs. Firstly, costs generally "follow the event", which considers the relative successes of parties in the outcome. Secondly, whether costs sought were

¹ Employment Relations Act 2000. Schedule 2 clause 15(1) and (2) and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 at [44]-[46].

² Employment Relations Act 2000, s 3.

necessary and reasonably incurred is considered. Thirdly, the nature of the case can influence costs and may result in an order for costs to lie where they fall in certain circumstances. The application of each tenet in this case is assessed below.

[8] Firstly, even if CVL's submission regarding a presumption about lack of success flowing from discontinuance were correct, such a presumption was displaced in the particular circumstances of this case by considering what Ms Matthews was authorised to tell her new employer CVL about the outcome in mediation. Setting out those details in this determination which would defeat the term of confidentiality she and WEVCL agreed in their settlement. It was sufficient to say that, from those authorised disclosures, CVL knew or should have known that arrangements made meant the situation was different from what CVL may have understood to have been the case beforehand. As a matter of fact and assessment, from the information available to the Authority from the files on both applications, there was no clear 'event' of relative success that would warrant the award of costs CVL sought.

[9] Secondly, in light of the prompt attendance at mediation by WEVCL and Ms Matthews to seek to resolve their differences, CVL had not established the level of costs said to have been incurred meanwhile was reasonable and necessary. While CVL's costs memorandum set out considerable detail of its view of the merits of its case, if the matter had not been resolved in mediation, the eventual outcome in an Authority determination may not have been as favourable as it asserted would be so.

[10] Thirdly, this was a matter where the Act's promotion of mediation as the primary problem-solving mechanism for employment relationship problems resulted in relatively prompt resolution. WEVCL and Ms Matthews fashioned their own solution on terms tolerable to them. They spared themselves the time and expense of pursuing their respective applications through an Authority investigation. CVL benefited similarly. This was a case where the prompt resolution achieved in mediation favoured an outcome of costs lying where they fell.

[11] CVL's request for an order for costs is declined.

Robin Arthur
Member of the Employment Relations Authority