

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 255
3210099

BETWEEN

HELEN WIN
Applicant

AND

TE WHATU ORA/HEALTH
NEW ZEALAND, CAPITAL
COAST AND HUTT VALLEY
Respondent

Member of Authority: Michael Loftus

Representatives: Karen Glass and Erika Whittome, advocates for the
Applicant
Hamish Kynaston, counsel, and Rhona Wallace,
advocate, for the Respondent

Submissions Received: 1 May 2023 from the Respondent
15 May 2023 from the Applicant

Date of Determination: 22 May 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] On 27 March 2023 I issued a determination which saw Ms Win fail with an application for interim reinstatement.¹ Costs were reserved and as the successful party Te Whatu Ora/Health New Zealand now seeks a contribution toward those it incurred.

[2] The Authority's jurisdiction to order a contribution toward a party's costs is exercised by applying well-established principles.² Those principles recognise that:

¹ *Win v Te Whatu Ora/Health New Zealand* [2023] NZERA 149

² *Employment Relations Act 2000, Schedule 2, clause 15, Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 and www.era.govt.nz/assets/Uploads/practice-note-2.pdf

- (a) a successful party should receive a contribution toward reasonably incurred costs and expenses;
- (b) costs should generally be modest and may not be used to punish the substantive conduct of the unsuccessful party;
- (c) the nature of a case may allow for an order that costs lie where they fall; and
- (d) the Authority may use a notional daily tariff as its starting point. From there adjustment may occur either up or down depending on the circumstances of the case. Such adjustment may be to take account of settlement offers, particularly “calderbanks,” the financial means of the liable party and whether or not a party unnecessarily increased the costs incurred by the other.

[3] The current tariff is \$4,500 for a one day investigation and Te Whatu Ora is using that as the basis for its claim of \$2,250 for a half day investigation.

[4] In support of its claim Te Whatu Ora says the costs being sought are conservative given:

- (a) It is the tariff given the investigation essentially took half a day, finishing just before lunch;
- (b) Actual costs exceeded the tariff; and
- (c) A greater claim might well be warranted given the principle an uplift can be justified by the taking of a claim that lacked merit which this did as there was an obvious impediment to its success, namely the fact Ms Win’s employment was casual. Not only was she put on notice of this prior to the investigation, she was given an opportunity to address it which she did not take.

[5] For Ms Win it is argued a consideration of costs should await the conclusion of her substantive claims as the costs liability to date can then be offset against those she will get as a result of her assumed success with the substantive claims.

[6] There then follows a lengthy submission about the substantive issues before arguing against the submission Ms Win did not avail herself of the opportunity to amend her pleadings when the obvious impediment to success was pointed out.

[7] It is then suggested employment law is similar to planning law. Having cited a planning case “... where social and economic cost effects are apparent costs should not be awarded” it

is submitted the social implication of guidelines to lock out unmasked nurses is immense especially given a significant nurse shortage.

[8] Finally reference is made to *GF v OO* and the comments about public bodies potentially carrying the cost so as to allow cases involving COVID-19 and the intersection of employment rights and obligations to come before the Court (Authority) without unnecessary impediment.³

[9] For a number of reasons I prefer Te Whatu Ora's approach. In doing so I accept the submission Ms Win did not avail herself of the opportunity to address the obvious impediment in her case. Her evidence, albeit affidavit evidence, was not amended to address the issue of her employment status. All that occurred was the addition of a submission reliant on a case which was not on point given it considered fixed term as opposed to casual employment.

[10] That meant the interim reinstatement claim remained one that had no realistic chance of success. It should not have been taken in the form it was and, as a result, put the respondent to costs that should have been avoided. In turn that means I will not await the substantive outcome as at present the evidence is such the substantive case remains one with little chance of success though it is accepted that may yet change. A casual employee cannot be dismissed from a possible future engagement.

[11] The arguments tendered about the substantive claims are irrelevant to a costs consideration and, as already said, have little chance of having to be considered given the evidence about Ms Win's employment status as it currently stands.

[12] I also fail to see the relevance of planning law to employment law, at least in this setting. It is well established that in employment law costs follow the event with the event being a parties success. In this instance Te Whatu Ora was wholly successful.

[13] Finally there is the reference to *GF v OO*. While the Court made the comments referred to, I note the quote missed the opening phrase in which the Court said it agreed with counsel for the respondent that there are factors which weigh in favour of a costs award. Perhaps more importantly I also note three other points which distinguish *GF*. The first is that at that point in time the Court was yet to consider COVID related issues on other than an interim basis. Second the matter was withdrawn at a relatively early stage. Thirdly, and perhaps most

³ *GF v OO* [2022] NZEmpC 1 at [20]

importantly, GF was an undischarged bankrupt who was in no position to pay and comments in the decision show that clearly influenced the Court.

Conclusion

[14] For the above reasons I order Helen Win pay Te Whatu Ora/Health New Zealand, Capital and Coast the sum of \$2,250.00 (two thousand, two hundred and fifty dollars) as a contribution toward the costs Te Whatu Ora incurred defending Ms Win's claim. Payment is to be made within 28 days of this determination.

Michael Loftus
Member of the Employment Relations Authority