

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 582
3360724 & 3360763

BETWEEN	NEW ZEALAND PUBLIC SERVICE ASSOCIATION TE PŪKENGĀ HERE TIKANGA MAHI Applicant
AND	HEALTH NEW ZEALAND – TE WHATU ORA Respondent

Member of Authority: Shane Kinley

Representatives: Peter Cranney and Angus Wilson, counsel for the applicant
Rebecca Rendle and Alana Harrison, counsel for the respondent

Investigation Meeting: On the papers

Submissions: Up to 5 September 2025

Determination: 19 September 2025

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 14 July 2025 I made findings in favour of Health New Zealand – Te Whatu Ora (HNZ) in relation to claims raised by the New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (PSA).¹ The PSA’s claims involved a number of interpretation issues related to collective agreements between

¹ *New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi v Health New Zealand - Te Whatu Ora* [2025] NZERA 415 (the substantive determination).

HNZ and the PSA.² The PSA also raised claims that HNZ had breached the duty of good faith under s 4(1A)(c) of the Employment Relations Act 2000 (the Act) and the Code of Good Faith for the public health sector in schedule 1B of the Act (the Code), and a question about whether HNZ is required to comply with expectations in Te Mauri o Rongo – the New Zealand Health Charter (the Charter), being a statement of values, principles and behaviours made under ss 56(2) and 57 of the Pae Ora (Healthy Futures) Act 2022 (the Pae Ora Act).

[2] In the substantive determination, costs were reserved in the hope that the parties would be able to settle this issue between themselves.³ Unfortunately, they have been unable to do so, and HNZ sought costs on the basis it had been the wholly successful party in the substantive determination.

[3] These matters involved an investigation meeting of two days. I indicated my preliminary view was that costs should lie where they fall, given these matters had elements of a dispute under s 129 of the Act. As HNZ sought and the PSA accepted costs should be reserved⁴, I indicated if the parties were unable to resolve costs between themselves and HNZ sought an order of costs, then my preliminary view was that the notional daily rate for two days was the appropriate starting point for a determination of costs.⁵

The Authority's investigation

[4] The claims raised by the PSA had their genesis in restructuring processes which have been underway at HNZ since late 2024. At the time of the substantive determination in July 2025, ten matters had been lodged and served since February 2025, with near identical statements of problem. Four of the matters had resolved between the parties, the substantive determination addressed two matters and four other matters were at that time at various stages in the Authority's processes, although appear to have also been resolved between the parties.

[5] This costs determination has been determined on the papers, based on submissions from HNZ and the PSA.

² The two collective agreements were the Policy Advisory knowledge and Specialist Workers Collective Agreement (the PAKS CA) and the National Health Administration Workers Collective Agreement (the Admin CA).

³ Above n 1 at [118].

⁴ Ibid at [115] and [116].

⁵ Ibid at [120].

Contribution to Costs

[6] The power of the Authority to award costs is contained in cl 15 of schedule 2 of the Act. The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.⁶

[7] The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

[8] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁷ as confirmed in *Fagotti v Acme and Co Limited*⁸. The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

[9] The Authority's presumption, however, in relation to disputes about the application, interpretation or operation of a collective agreement is parties will bear their own costs.⁹

Submissions

[10] HNZ says an award of costs in its favour is appropriate, given it was the wholly successful party and due to the PSA's "consistent failure to provide clarity on the compliance orders sought, the specific breaches that were alleged, and whether the [PSA's] claims should proceed as disputes under section 129 of the [Act]". HNZ says the PSA's actions caused it to incur substantial and unnecessary costs.

[11] HNZ referred also to the PSA's failures to comply fully with Directions of the Authority to clarify its claims and what compliance orders were appropriate. HNZ

⁶ For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/>

⁷ [2005] 1 ERNZ 808.

⁸ [2015] NZEmpC 135 at 114.

⁹ Employment Relations Authority, *Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi*, February 2024, page 5, paragraph 6, bullet ii, available at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>.

disputed claims from the PSA that its “failure to particularise the claims had no material impact on [HNZ]”.

[12] HNZ went on to say that it:

... maintains that the clauses in question are extensive and complex. Even if [HNZ] could generally discern which clauses were being referenced, it remained unclear which specific provisions within those clauses were alleged to have been breached—leaving [HNZ] without sufficient detail to properly address the claims.

[13] HNZ sought an order that the PSA contribute at least \$8,000 to its costs, based on my preliminary view that the notional daily rate for two days was the appropriate starting point for a determination of costs.¹⁰

[14] The PSA in response says there is no proper foundation for a claim for costs. It says there were ten materially identical proceedings, of which nine settled with no issue as to costs, and there can be no claim for “90% of the pre-hearing costs”.

[15] The PSA also says “The issues were throughout were well understood by [HNZ]. Any fluidity was the result of rapidly developing and changing circumstances, not poor litigation conduct” and that it followed the Authority’s directions.

[16] The PSA concluded:

The [PSA] makes no apology for the mass nature of the litigation it undertook. All its members in the hospital system were entitled to use the relationship problem resolution mechanisms and did so. The system worked well and proved accessible and flexible. In cases such as this there are and were minor irritations, but nothing to displace the “no-costs” approach when disputed terms are the main issue.

Analysis

[17] The key question for this costs determination is whether, given these matters involved elements of a dispute under s 129 of the Act but also other claims, the parties bear their own costs or is an award of costs appropriate to HNZ as the successful party in the substantive determination.

[18] I have considered carefully HNZ’s submissions that the PSA’s conduct including failures to clarify claims, particularly about what breaches of collective agreements had occurred and what actions HNZ should be required to take to correct those breaches. In Directions dated 6 May 2025 I encouraged the PSA to “present [its]

¹⁰ Above n 1 at [120].

claims including any compliance orders sought with as much specificity as is possible, including identifying whether any issues are disputes in terms of s 129 of the [Act]”. In the Directions of 19 June 2025, I expressly left the issues list to be discussed between the parties, did not make any specific directions and encouraged the PSA to “clarify which provisions of the collective agreements between the [PSA] and HNZ are alleged to have been breached, what the PSA considers those provisions require HNZ to do, and what compliance orders are sought in relation to each alleged breach “.

[19] While I recognise HNZ were frustrated by the lack of specificity in the PSA’s claims until a late stage, shortly before the investigation meeting for these matters, I am not convinced HNZ was unduly hampered in its ability to respond to the PSA’s broadly presented claims of breaches of the PAKS CA and the Admin CA. I do not consider this provides grounds to displace the presumption from the Authority’s Practice Direction that parties should bear their own costs associated with the dispute elements of these matters.

[20] I have also considered whether the PSA’s initial position in its amended statement of problem that it wished to seek costs is sufficient to displace the presumption from the Authority’s Practice Direction. Again, I am not satisfied that this presumption is displaced as the principle underpinning the presumption is that there are benefits to both parties from gaining clarity where there is a dispute related to a collective agreement, hence the parties bear their own costs. In this case I consider both parties have benefited from gaining clarity over the disputed elements of the PAKS CA and the Admin CA’s provisions.

[21] The other elements of the PSA’s claims related to HNZ’s alleged breaches of the duty of good faith under s 4(1A)(c) of the Act and the Code, and a question about whether HNZ is required to comply with expectations in the Charter. The PSA said these claims overlapped with the claims about the collective agreements.

[22] I consider this is partially correct. The evidence presented certainly involved overlaps and was generally presented in a narrative format describing what had broadly occurred in relation to HNZ’s restructuring process, rather than separating out the facts related to each claim.

[23] The claimed breaches of the duty of good faith under s 4(1A)(c) of the Act related to HNZ’s decisions to allocate funding envelopes to various departments or

directorates, given the likelihood those decisions would have an adverse effect on the continuation of employment of HNZ's employees, including the PSA's members.

[24] I found in the substantive determination that:¹¹

HNZ were not required to consult over the setting of budgets and has met the duty of good faith under s 4(1A)(c) of the Act when consulting over the change proposals ..., including proposed budgets and savings.

[25] I consider claims of breaches of the duty of good faith connected to disputes about what HNZ was required to do when consulting over change proposals could arguably be captured by the presumption from the Authority's Practice Direction. I am not satisfied, however, that this clearly applies to the claimed breaches related to the setting of budgets. In this respect, I consider HNZ have a reasonable argument that costs should follow the event.

[26] The claimed breaches of the Code were presented as potential stand-alone breaches, with the PSA saying the Code went beyond the requirements of a normal employment relationship. The PSA acknowledged an overlap between its claim the Code had been breached and other claims, however, stressed the obligation to "search for solutions" in the Code required a qualitatively higher level of engagement than what had occurred. In the substantive determination I was "not satisfied however that any such standalone breach [was] established on the facts or that sufficient evidence [had] been provided of obligations in the Code which go beyond those in the PAKS CA and the Admin CA."¹²

[27] In these circumstances, in relation to the claimed breaches of the Code, I consider the overlap was such that there are not sufficient grounds to displace the presumption from the Authority's Practice Direction that parties should bear their own costs associated with the dispute elements of these matters.

[28] In relation to the PSA's claims HNZ was required to comply with expectations in the Charter and had breached those requirements, the PSA acknowledged overlap with the:

... Code and obligations in the PAKS CA and the Admin CA, the PSA said there was a theme of all being "in it together", which "should have affected the quality of consultation obligations".

¹¹ Ibid at [84].

¹² Ibid at [95].

[29] While I considered there was a reasonable argument that co-design was expected under the Charter, it was not explicitly required under the PAKS CA and the Admin CA, and I found the Charter does not impose binding obligations on HNZ.¹³ In this context, I consider as the PSA was seeking a declaration there were additional obligations beyond those in the PAKS CA and the Admin CA, this is another aspect of the PSA's claims which is not clearly captured by the presumption from the Authority's Practice Direction. In respect of this claim, I consider HNZ have a reasonable argument that costs should follow the event.

Summary of analysis

[30] I have found the majority of the PSA's claims are captured by the presumption from the Authority's Practice Direction that parties should bear their own costs associated with the dispute elements of these matters. In two respects, however, the PSA's claims are not clearly captured by the presumption from the Authority's Practice Direction, and I consider HNZ have a reasonable argument that costs should follow the event, in relation to those parts of these matters.

Implications for costs

[31] I have reviewed other Authority determinations where there have been claims the presumption that parties should bear their own costs should be displaced, including *Tertiary Education Union v Te Pūkenga, New Zealand Institute of Skills & Technology*¹⁴ and *Maritime Union of New Zealand Incorporated v Qube Ports NZ Limited*.¹⁵ While neither of those determinations involved directly comparable findings, I consider these determinations support the need to carefully consider applications where an argument is made to displace the presumption that parties should bear their own costs.

[32] In the *Tertiary Education Union* determination, the Authority found a collective dispute about policies rather than collective agreements was not excluded from a costs consideration.¹⁶ In the *Maritime Union of New Zealand Incorporated* determination, the Authority found the claims were not solely based on collective bargaining issues.¹⁷

¹³ Ibid at [105] to [108].

¹⁴ *Tertiary Education Union v Te Pūkenga, New Zealand Institute of Skills & Technology* [2024] NZERA 524.

¹⁵ *Maritime Union of New Zealand Incorporated v Qube Ports NZ Limited* [2025] NZERA 499.

¹⁶ Above n 14 at [23].

¹⁷ Above n 15 at [19].

In both determinations the successful party was awarded costs based on the daily tariff.¹⁸

[33] In these matters HNZ was wholly successful, but only parts of its success related to claims which are not clearly captured by the presumption from the Authority's Practice Direction that parties should bear their own costs. I consider it appropriate, applying by analogy the approach endorsed by the Court in *Coomer v JA McCallum and Son Limited*¹⁹ to cases of mixed success, to adopt a proportional approach to the assessment of costs.

[34] The Court in *Coomer* observed "it was appropriate to consider costs in this case by standing back and looking at things "in the round" and, in doing so, to conclude there had been mixed success".²⁰ The Court's approach in *Coomer* was "to adopt the tariff in the Authority, but to reduce it to reflect the measure of success McCallum & Son had".²¹

[35] I have assessed the proportion of these matters which was the subject of the claims which are not clearly captured by the presumption from the Authority's Practice Direction. Most of the investigation meeting and substantive determination were focussed on matters covered by the presumption. In the circumstances, I assess the matters not clearly covered by the presumption amounted to approximately 25 per cent of the overall investigation process. Applying this proportion to the daily tariff for a two-day investigation meeting results in a costs award of \$2,000.00. I consider this to be appropriate in the circumstances of these matters.

Orders

[36] The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi is ordered to pay to Health New Zealand – Te Whatu Ora within 28 days of the date of this determination the sum of \$2,000.00 as a contribution to costs.

Shane Kinley
Member of the Employment Relations Authority

¹⁸ Above n 14 at [26] and above n 15 at [26].

¹⁹ *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

²⁰ *Ibid* at [43].

²¹ *Ibid* at [45].