

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2026] NZERA 100
3326843

BETWEEN SARAH BREWER
Applicant

AND CANOPY CANCER CARE
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Liz Lambert and Erika Whittome, advocates for the
Applicant
Marie Wisker, counsel for the Respondent

Costs Submissions 18 February 2026 from the Applicant
30 January 2026 from the Respondent

Determination: 24 February 2026

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 16 January 2026 ([2026] NZERA 24), the Authority found that the Applicant, Sarah Brewer, had not raised her personal grievance claims for unjustifiable disadvantage and unjustifiable dismissal with the Respondent, Canopy Cancer Care Limited (CCC) within the requisite statutory time limit.

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately despite attempts to do so on the part of the Respondent, they have been unable to do so, and both parties have filed submissions in respect of costs.

[3] This was a preliminary matter and was determined on the papers.

[4] Ms Wisker, on behalf of CCC, submits that CCC has incurred actual costs in excess of \$31,000.00 in this matter and that a contribution to costs award in the sum of \$2,250.00 is

appropriate. Ms Lambert, on behalf of Ms Brewer, submits that imposing a costs award at any level would result in Ms Brewer facing severe financial hardship.

Submissions for the Respondent

[5] Ms Wisker submits that, whilst acknowledging that financial hardship is a factor that the Authority can take into account when making a determination on costs, no reduction should be made in this case.

[6] The fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not decisive, and other considerations must be weighed by the Authority when exercising its discretion, including the interests of both parties, and the broader public policy considerations. *Toma v Checkmate Precision Cutting Tools Ltd* is cited in support. In that case the Employment Court stated:¹

However, a balance must be struck between reducing – including to nil – an otherwise appropriate costs award due to impecuniosity and the countervailing interests of the successful party. A total reduction of costs would not be appropriate - Ms McLeod must pay something towards Sun Court’s costs, notwithstanding her financial position. There are broader public policy considerations in the successful party having a costs award in its favour.

[7] It is submitted that substantially reducing Ms Brewer’s cost liability, on the basis of her current financial situation, denies CCC, as the successful party, the ability to make decisions as to whether or not, and when, to enforce an award to which it would otherwise be entitled.²

[8] However if a costs award is considered appropriate, CCC considers that a reasonable instalment plan should be considered instead of any reduction in a costs award.

[9] CCC submits that the Applicant, despite CCC arguing that her claims had not been raised within the statutory time frame, continued with pursuing them which resulted in CCC expending significant time and money defending itself.

[10] It also is submitted that the Applicant’s actions caused delays in processing the matter through the Authority in a timely manner including:

- An Amended Statement of Problem being directed by the Authority as being required to articulate a breach of contract claim. This required the Respondent needing to lodge an Amended Statement in Reply;

¹ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZ EmpC 2 at [22].

² *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105 at [38]

- The Applicant was directed to contact the Authority post-mediation to advise whether or not the claim was to progress but despite mediation being held on 17 February 2025, the Applicant did not advise the Authority until 10 June 2025 that she wished to have her claims heard in the Authority;
- The Applicant made a very belated request to reply to the Respondent's submissions on the preliminary issues. This resulted in further extensions to the overall timeframe for resolution.

Submissions for the Applicant

[11] It is submitted by Ms Lambert that Ms Brewer's conduct was not in question, and that she believes her claims have merit.

[12] It is submitted that Ms Brewer is to all intents impecunious, largely as a result of losing her job, and that although a modest amount is being sought by the Respondent, she cannot pay without incurring severe hardship. In support of this, Ms Brewer has provided an affidavit containing her earnings summaries from the IRD.

[13] It is submitted that although Ms Brewer has specialist skills, she was not able to put them to use up to 18 December 2024 when health providers finally withdrew their requirement for a vaccinated workforce.

[14] It is submitted that Ms Brewer has explored starting up as a sole trader in her own business but without success as very poor returns were indicated, and her MSD benefit has been her sole form of income as a solo mother with two young children.

[15] It is submitted that *Tomo* can be distinguished because Ms Brewer has not embarked on 'doomed' proceedings free from any spectre of costs.

[16] It is further submitted that Ms Brewer was in a no fault situation. The law in the area of vaccination legislation is still developing and cases before the Authority will for that reason be less than perfectly presented. Ms Brewer should not be penalised on that basis.

Principles

[17] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[18] Costs are at the discretion of the Authority³. The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*⁴.

[19] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[20] It is a principle set out in *Da Cruz* that costs are modest. Principles also include that costs are reasonable and that they normally follow the event. In this matter, CCC was the successful party.

[21] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing.

[22] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

[23] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, I note the observation of Judge Inglis that:

... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account.⁵

[24] Having weighed all these considerations, I find that CCC as the successful party is entitled to an award of costs, but accept that even a modest award will present difficulties for Ms Brewer given her current financial circumstances. Therefore the suggestion of payment by means of a reasonable instalment plan seems an acceptable suggestion.

³ *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

⁵ *Tomo v Chekmate Precision Cutting Tools Ltf* [2015]EmpC 2 at [22]

[25] Accordingly Ms Brewer is ordered to pay Canopy Cancer Care Limited the sum of \$2,500.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000. It will be for the parties to discuss a reasonable instalment plan. Leave is reserved for the parties to revert to the Authority for future orders if such arrangements are agreed and not adhered to.

Eleanor Robinson
Member of the Employment Relations Authority