IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2026] NZERA 159
3316900
3322300
3352600

	BETWEEN	HEALTHALLIANCE N.Z. LIMITED Applicant in 3316900 Respondent in 3322300/ 3352600
	AND	GARTH CUNNINGHAM Respondent in 3316900 Applicant in 3322300/ 3352600

Member of Authority:	Nicola Craig
Representatives:	Richard Upton, counsel for the HealthAlliance N.Z. Ltd Garth Cunningham in person
Investigation Meeting:	20 February 2026 by audio-visual link
Submissions (and further information) received:	20 February 2026 and at the investigation meeting for HealthAlliance N.Z. Ltd 19 and 24 February 2026 and at the investigation meeting for Garth Cunningham
Determination:	18 March 2026

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Garth Cunningham worked for HealthAlliance N.Z. Limited (HealthAlliance or the company). HealthAlliance provided specialist IT services to northern district health boards. Its work is now subsumed under Health NZ Te Whatu Ora.

[2] Mr Cunningham pursued personal grievances against HealthAlliance but was unsuccessful in the Authority (the substantive determination).[1] The company sought costs, and Mr Cunningham was ordered to pay it $10,000 as a contribution to its legal costs (the 2023 costs determination).[2] Both of these determinations have been challenged by Mr Cunningham to the Employment Court. Since that time the Authority has issued a compliance order on the costs sum, which has also been challenged by him.[3]

[3] After the compliance order was issued, Mr Cunningham sought, in the application in file 3322300, to reopen the costs determination from 2023. HealthAlliance opposes the making of such an order.

[4] Mr Cunningham then sought removal in file 3352600. That application refers to removal of issues in file 3316900. File 3316900 concerns the compliance order on the 2023 costs determination. There is still a costs issue to be decided in the compliance application on file 3316900. However, as noted below Mr Cunningham had a different intention with his removal application.

The Authority's process

[5] The Authority decided to hear submissions on the reopening application, the removal application and costs on the compliance application at one time, noting that there could be implications for one application as a result of the decision on another.

[6] The parties agreed that those submissions could be dealt with by way of an investigation meeting held by audio-visual link (AVL). Prior to the meeting written submissions were received from Mr Cunningham.

[7] The Authority held the investigation meeting by AVL on 20 February 2026.

[8] HealthAlliance spoke to its submissions at the meeting and provided them in writing subsequently. As a result, Mr Cunningham sought and was granted permission to lodge written reply submissions after HealthAlliance's submissions were received. Mr Cunningham's reply submissions were received.

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[1] *Garth Cunningham v HealthAlliance NZ Ltd* [2023] NZERA 296.
[2] *Cunningham v HealthAlliance NZ Ltd* [2023] NZERA 771.
[3] *Cunningham v HealthAlliance NZ Ltd* [2024] NZERA 680.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record everything received but states findings and conclusions and specifies orders made as a result.

2023 costs determination and challenge

[10] The 2023 costs determination was issued on 20 December 2023. Mr Cunningham was ordered to pay HealthAlliance $10,000 as a contribution to its legal costs within 28 days of the issuing of the determination.[4]

[11] Mr Cunningham's challenge to the 2023 costs determination was filed on a non-de novo basis. However, the Employment Court decided it will be heard on a de novo basis in connection with the challenge to the substantive determination.[5]

[12] Mr Cunningham later sought severance of the costs challenge from the de novo substantive challenge but that was declined.[6]

[13] The Court has commented on the parties' litigious and adversarial approach.[7]

The current applications

[14] Mr Cunningham applies under clause 4 of Schedule 2 of the Act to reopen the 2023 costs investigation. He specifically identifies that he is not seeking to reopen and investigate in the Authority the substantive personal grievance investigation, with that being dealt with by way of challenge.

[15] The reopening application is based on two issues:

(a) a failure to consider his 14 July 2023 submissions that were invited and filed; and

(b) an error in the way the Authority relied on a 2021 *Calderbank* offer when uplifting costs.

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[4] Above at n 2 at [23].
[5] *Cunningham v HealthAlliance NZ Ltd* [2024] NZEmpC 58.
[6] *Cunningham v HealthAlliance NZ Ltd* [2025] NZEmpC 191.
[7] *Cunningham v HealthAlliance NZ Ltd* [2025] NZEmpC 192.

[16] I was not the Member involved in the substantive determination nor the 2023 costs determination but clause 4(2) of Schedule 2 identifies that would not prevent me from carrying out any reopening investigation into the 2023 costs matter.

[17] Mr Cunningham has recently paid the $10,000 costs sum to Health Alliance although there may remain a question of interest. The payment was a condition of his matters progressing in the Court and he says he is focused on progressing the substantive challenge.

[18] There is also the removal application, which Mr Cunningham sees more as a backup in case the reopening application is unsuccessful.

Reopening principles

[19] The relevant provision of Schedule 2 of the Act is:

> **4 Reopening of investigation**
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> (1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.
>
> (2) The reopened investigation need not be carried out by the same member of the Authority.

[20] This discretionary power enables the Authority to prevent injustice.[8] As noted by the Employment Court in *Randle v The Warehouse Ltd*, the discretion must be exercised according to principle, and the mere possibility of injustice is not enough.[9] There must be an actual miscarriage of justice or at least a substantial risk of such a miscarriage.

[21] Further it was noted to be unusual for the Authority to grant a reopening application when a challenge under s 179 of the Act could have been pursued.[10]

[22] Similarly, in *Alkazaz v Enterprise IT Ltd* the Court referred to a "actual miscarriage of justice or a real or substantial possibility or substantial risk of a miscarriage of justice" being required.[11]

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[8] *Heritage Expeditions Ltd v Fraser* [2010] NZEmpC 85 at [21].
[9] *Randle v The Warehouse Ltd* [2019] NZEmpC 68 at [13] and [17].
[10] Above, at n 17(d).
[11] *AlKazaz v Enterprise IT Ltd* [2020] NZEmp 171.

[23] In *Puna Chambers Inc v Christensen* Judge Inglis, as she then was, noted that the "principle of finality is founded on the desirability of bringing litigation to an end and avoiding re-litigation in the same forum".[12]

Submissions by Mr Cunningham

[24] In his submissions Mr Cunningham accepts that reopening is not meant to be routine, and that finality matters. He describes the issues as going to procedural integrity.

[25] The points he is seeking a reopening on are described as limited points which would not require a full rehearing of the entire case. Costs being discretionary, an incomplete understanding of material put before the Authority, risks the discretion being exercised on the wrong footing.

[26] Mr Cunningham's second argument relates to a 19 May 2021 *Calderbank* offer which is referred to in the 2023 costs determination. He says the context was not properly considered, relying on *Heath v Auckland City Council.*[13]

[27] In addition, in his submissions Mr Cunningham describes his Court challenge pathway as becoming procedurally complicated, effectively by the Court's decision to deal with the 2023 costs determination challenge as a de novo matter, rather than non-de novo. He wishes to have the points raised examined and is concerned that the challenge now being heard de novo may not or will not allow for that.

[28] Mr Cunningham also relies on the Authority's stay power in reopening situations to deal with what he describes as an "enforcement escalation".

Submissions by HealthAlliance

[29] HealthAlliance opposes reopening saying the 2023 costs determination addressed all relevant matters Mr Cunningham had put before the Authority in the 6 and 14 July 2023 submissions. It does not see him as having identified any new material evidence which could form the basis of a reopening application.

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[12] *Puna Chambers Inc v Christensen* [2014] NZEmpC 218 at [17].
[13] *Heath v Auckland City Council*, AA49A/07, Employment Relations Authority, 30 March 2007 (Member L Robinson).

[30] The company denies that there is any potential miscarriage of justice with Mr Cunningham having the opportunity to argue his case in the challenge on the 2023 costs determination. It is concerned about a reopening when the costs question has been the subject of subsequent action.

[31] HealthAlliance does recognise that Mr Cunningham's 14 July 2023 submissions appear not to have been considered by the Authority when the 2023 costs determination was issued.

Analysis on reopening

Failure to consider the 14 July 2023 submissions

[32] From the 2023 costs determination it is not evident that the decision-maker in a busy tribunal had access to Mr Cunningham's second submission on costs, dated 14 July 2023.

[33] Although Mr Cunningham's submissions refer to the issues being about procedural integrity rather than disagreeing with the outcome itself, he also refers to it not being a technicality.

Error in the way the Authority relied on a 19 May 2021 Calderbank offer

[34] Mr Cunningham is critical that the context in which the May 2021 offer could (or could not) reasonably be accepted, given the nature of the remedies being sought, not being dealt with.

Conclusion on reopening

[35] Mr Cunningham's second argument focuses on whether the 2023 costs determination thoroughly considered or provided sufficient reasoning on a question which was examined. Mr Cunningham has filed a challenge, and the *Calderbank* argument may be raised again.

[36] However, in terms of Mr Cunningham's first argument that submissions were not received, although by a fine margin, given the limited nature of the points raised in the 14 July 2023 submissions, I consider it just to reopen the investigation. It is important that parties see their submissions are recognised as being received and considered when

determinations are issued. There is a potential risk of miscarriage of justice if that does not occur.

[37] The reopened investigation will primarily consider the 14 July 2023 submissions. However, if the parties wish to provide any additional relevant submissions they are to do so by **2 April 2026**.

[38] A stay is granted on enforcement of the Authority's 2023 costs determination until the Authority issues a further costs determination on the basis of the reopening. This is anticipated to be available in April 2026.

Removal application

[39] As referred to above on its face it appears Mr Cunningham's removal application concerned the remaining costs issue in the compliance proceeding. I note that had that been the focus, it was unlikely to be successful as it is the Authority's practice to decide costs applications made on its determinations even when the substantive determination is challenged.

[40] However, at the investigation meeting Mr Cunningham clarified that his removal application was intended to be in the nature of a backup option to get the reopening application removed, if it was looking like the reopening application was to be unsuccessful. Brief submissions were provided on that basis.

[41] Given that reopening is granted, there is no need to proceed with Mr Cunningham's back up option. In any event under s 178 of the Act, no ground is established warranting removal.

[42] The removal application is declined.

Costs application on compliance order

[43] The costs application by Health Alliance on file 3316900 should not proceed at this point in light of the reopening application being granted.

Costs on the reopening and removal applications

[1] Costs are reserved regarding the reopening and removal applications. The parties are encouraged to resolve any issue of costs regarding those applications between themselves. Mr Cunningham has been successful in one application but not in the other and has represented himself, so few relevant costs seem likely to have been incurred.

[44] If required to make a costs determination on Mr Cunningham's two applications considered above, the Authority would take into account that the investigation meeting took around one and a half hours and considered all these matters.

Nicola Craig
Member of the Employment Relations Authority