

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2026] NZERA 268  
3340000

BETWEEN                      DIANNE OLIVE KELSO  
   Applicant  
  
AND                                HEALTH NEW ZEALAND - TE  
   WHATU ORA  
   Respondent

Member of Authority:        David G Beck  
  
Representatives:              Elizabeth Lambert, advocate for the Applicant  
   Anne Wilson, counsel for the Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions Received:        14 April 2026 from the Applicant  
   31 March 2026 from the Respondent  
  
Date of Determination:        1 May 2026

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     On 3 March 2026, in a preliminary determination the Authority found Dianne Olive Kelso had not raised a personal grievance with Health New Zealand – Te Whatu Ora (HNZ) within the relevant 90 day time frame as required in s 114(2) of the Employment Relations Act 2000 (the Act) and had not made out exceptional grounds to require the Authority exercise its discretion to let the personal grievance proceed out of time as provided for in s 114(4) of the Act.<sup>1</sup>

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<sup>1</sup> *Dianne Olive Kelso v Health New Zealand – Te Whatu Ora* [2026] NZERA 124.

## Submissions

[2] HNZ's counsel suggested as the successful party in the preliminary matter an award of costs should be made in their client's favour of \$3,000 as a reasonable contribution to the costs HNZ incurred in making submissions and prior to that in responding to an amended application to the Authority on a matter HNZ viewed as having little merit.

[3] Ms Kelso's advocate's submission asserted that in exercising its discretion the Authority should have regard to disputes during the Covid period raising novel and unprecedented issues and suggested this leaned to a position that costs should lie where they fall. In support of this proposition, Ms Lambert referenced the Employment Court case of *GF v OO*.<sup>2</sup>

## Cost Principles

[4] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Act. The discretion, it is accepted, is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup> including those costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.<sup>4</sup>

[5] A starting point is that costs normally follow the event and as HNZ was wholly successful in contesting Ms Kelso's application to have her grievance heard out of time, an award of costs is appropriate.

## Applying the notional daily rate

[6] The Authority's approach is to apply a notional daily rate and only adjust that rate if persuaded that circumstances or other factors require an upward or downward adjustment.<sup>5</sup> The current daily rate is \$4,500 for the first day of an investigation meeting and \$3,500 for each day thereafter. This approach reinforces the Authority's unique jurisdiction and fact that successful parties cannot expect to be awarded court level costs.

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<sup>2</sup> *GF v OO* [2022] NZEmpC 292/2021

<sup>3</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

<sup>4</sup> Section 160(2) Employment Relations Act 2000.

<sup>5</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)

[7] This investigation was by agreement, dealt with by submissions from both parties and did not require an investigation meeting.

### **Assessment**

[8] The Authority in applying discretion is also mindful that costs cannot be awarded as a punishment or disapproval of an unsuccessful parties conduct unless conduct is identified that led to a significant increase in wasted time and costs during the course of the litigation process. I do not consider in the current circumstances that the Applicant's conduct of the investigation was in question. The investigation 'on the papers' dealt with a relatively straightforward situation. If any time was wasted, it could only be attributed to the applicant's advocate's conduct of initially drafting the application and pursuing an element of an action (breach of contract) that was well settled law as being unfeasible.

[9] I have also assessed whether costs should lie where they fall but do not see a parallel with Covid cases such as the cited *GF v OO*, as the Court dealt with a substantive matter in that case. In this application, nothing novel arose in the Authority's consideration of whether or not the personal grievance of Ms Kelso should proceed out of time.

[10] While I do have regard to the additional costs HNZ has incurred in defending the application made by the applicant, I find that only a modest costs award is warranted in all the circumstances. I find that a costs contribution of \$1,500 should be made by Ms Kelso.

### **Order**

[11] Dianne Olive Kelso is to pay Health New Zealand – Te Whatu Ora within 28 days of this determination being issued the sum of \$1,500 (inclusive) as a contribution to costs incurred.

David G Beck  
Member of the Employment Relations Authority