

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2026] NZERA 62  
3344880

BETWEEN	LYN JOHNSTON Applicant
AND	HEALTH NEW ZEALAND – TE WHATU ORA Respondent

Member of Authority:	Helen van Druten
Representatives:	Anne Hayward, advocate for the Applicant Sianatu Lotoaso, counsel for the Respondent
Submissions received:	29 December 2025 from the Applicant 10 December 2025 from the Respondent
Determination:	10 February 2026

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Lyn Johnston lodged an employment relationship problem with the Authority on 6 December 2024. Following two case management conferences with the parties and subsequent directions issued on 18 September and 29 October 2025, Ms Johnston withdrew her claims on 1 December 2025.

[2] Health New Zealand – Te Whatu Ora (HNZ) now seeks a contribution to its costs based on the Authority’s notional daily tariff. It further, separately, seeks an order that aspects of Ms Johnston’s letter of 1 December 2025 and email withdrawing her claim are inadmissible and removed from the Authority’s record on the basis that they are confidential and/or subject to without prejudice privilege. The second matter is addressed separately in this determination.

## **The application for costs**

### *HNZ's submissions*

[3] In a memorandum of 10 December 2025, counsel for HNZ seeks costs of \$2,250 as per the Authority's normal daily tariff approach, noting that its actual costs substantially exceeded that amount.

[4] HNZ submitted that it spent considerable time and effort in considering the Statement of Problem, drafting and lodging its Statement in Reply, preparing for and attending two case management conferences and drafting and lodging comprehensive legal submissions on the preliminary matters.

[5] It further submitted that in good faith it continued to seek resolution of Ms Johnston's complaints. Equally, the refinement of claims by Ms Johnston and need for preliminary matters to be determined involved significant investigation and analysis by HNZ. Ms Johnston's then "eleventh-hour" withdrawal after HNZ had lodged its submission on the preliminary matter unnecessarily increased those costs.

### *Ms Johnston's submission*

[6] Ms Johnston submitted that she has borne her own costs in the process and that HNZ's costs were self-incurred by its own strategic choices. She further submits that awarding costs to HNZ when her decision was not tactical but prompt and principled would be inconsistent with a low-cost, accessible and non-adversarial forum.

[7] Ms Johnston similarly submits that she continued to engage in settlement discussions in good faith and it was HNZ who chose to lodge submissions before confirming whether resolution was possible.

### *Relevant legal principles*

[8] There are well-established principles for awarding costs as outlined in *PBO Ltd (formerly Rush Security) v da Cruz* including:<sup>1</sup>

- a. there is discretion as to whether costs would be awarded and what amount;

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

- b. the discretion is to be exercised in accordance with principle and not arbitrarily;
- c. that costs generally follow the event;
- d. that frequently costs are judged against a notional daily rate; and
- e. costs are not to be used as punishment or as an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[9] I also refer to cases where the matter was withdrawn by the Applicant prior to the investigation meeting. In *Eden v Rutherford & Bond Toyota*, the Court noted:<sup>2</sup>

There is no time limit for withdrawing proceedings that will affect precisely the question of costs. As a matter of commonsense, however, the closer in time that proceedings are withdrawn before a hearing, the greater will probably have been the time put into their preparation by the other party and, therefore, the costs which the other party will have incurred reasonably and which may be the subject of an order.

#### *The Authority's approach*

[10] The decision to withdraw a matter does not exclude a costs award being made. When matters are withdrawn the Authority may still exercise its discretion to make an award for costs which the other party will have reasonably incurred in preparation for an investigation meeting.<sup>3</sup>

#### **Assessment of costs**

[11] As the Authority's daily tariff is based on the length of the investigation this does not necessarily assist when matters are withdrawn before a meeting, other than estimating how much preparation may have been required.<sup>4</sup>

#### *Costs for HNZ*

[12] It is accepted that HNZ incurred initial costs responding to the application lodged with the Authority and at that time raised significant jurisdictional issues arising from Ms Johnston's application.

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<sup>2</sup> *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43 at [8].

<sup>3</sup> Employment Relations Act 2000, sch 2, cl 15.

<sup>4</sup> *Hart v Nupacific RV Ltd & Ors* [2023] NZERA 652 at [9].

[13] It is also accepted that it further incurred costs responding to claims that were later withdrawn by Ms Johnston. At the initial case management conference on 16 September 2025, the Authority identified as a preliminary issue whether the personal grievance claims were raised within the requirements of s 114 of the Employment Relations Act 2000 (the Act).

[14] By direction of the Authority on 18 September 2025, Ms Hayward, as the representative for Ms Johnston, was asked to clarify whether the personal grievances were raised within the employee notification period required by the Act. Ms Hayward sought further instruction and subsequently revised the claims.

[15] Following further discussion with the parties on 29 October 2025 and as confirmed in Authority directions issued, the parties agreed that other jurisdictional concerns raised by HNZ then needed to be determined as a further preliminary matter. It was agreed these would be determined on the papers. The parties were asked to provide submissions and the Authority received those submissions from HNZ on 1 December 2025. While Ms Johnston withdrew her application on 1 December 2025, those costs were already incurred by HNZ.

[16] From that date, it is unlikely that HNZ incurred further significant costs. No witness statements were filed. The matter was timetabled for an investigation meeting on 19 February 2026 and HNZ witness statements were due to be lodged and served by 30 January 2026.

### **Analysis**

[17] In her submissions, Ms Johnston implies that it was HNZ's decision to raise jurisdictional objections and therefore increase the complexity of issues. While technically correct, it would be remiss for HNZ not to raise jurisdictional matters and compliance with the Act where this was in doubt and directly impacted the substantive claims made.

[18] Whether the conduct of a party unnecessarily increased the costs of another party is a reason to increase costs. Based on the limited information before the Authority, Ms Johnston did initially cast the net wide on possible claims and this made it unnecessarily time consuming to determine the issues for investigation and determination. However, I am not persuaded that Ms Johnston deliberately set out to

maximise HNZ's costs by the timing of her withdrawal, rather I consider that Ms Johnston had not considered the jurisdictional issues raised when making her initial claims. During discussion on those preliminary matters, Ms Johnston determined that the process was not in line with her principles, decided to withdraw her application, and she communicated this promptly to the Authority.

[19] The initial lodgement of claims must be balanced against this conduct, the timing of the application withdrawal, the intended hearing date and steps taken by the party in preparation for the hearing.<sup>5</sup> The matter was withdrawn ten weeks before the investigation meeting and no witness statement preparation or other witness costs were incurred. Even when weighted against the costs incurred by HNZ preparing its submission on the preliminary matter, this is a case where it would not be unreasonable for costs to lie where they fall.

### **Conclusion on costs**

[20] This matter was withdrawn more than ten weeks prior to the investigation meeting. I consider costs should lie where they fall and decline to make an award for costs.

### **Application to remove information held by the Authority**

[21] HNZ also seeks an order that aspects of Ms Johnston's letter of 1 December 2025 and email withdrawing her claim are inadmissible and removed from the Authority's record on the basis that they are confidential and/or subject to without prejudice privilege. The specific clauses were detailed in its submissions.

[22] Ms Johnston's objection to this is noted. She submits that the clauses referenced in her correspondence with the Authority were about her experience, not content of any mediation or settlement discussions and should therefore remain as a matter of procedural record.

[23] Having considered the without prejudice nature of mediation agreed by the parties, requirements of the Act, Ms Johnston's submissions on this point and the detail of the specific clauses in issue, I make the following orders:

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<sup>5</sup> As discussed in *Data Group Limited v Gillespie* NZ EmpC Auckland 16/04, 22 March 2004.

- a. Paragraph 1 of the letter of 1 December 2025 references the nature and content of mediation discussions. This paragraph will be redacted and the Authority's record updated accordingly.
- b. Paragraph 3 of the letter of 1 December 2025 also references Ms Johnston's position in relation to an aspect of the mediation discussion. While I accept that her references to her mana are her own experience and opinion, that material cannot reasonably be retained without divulging the nature of those mediation discussions. This paragraph will therefore be redacted and the Authority's record updated accordingly.
- c. Paragraph 2 of the email of 1 December 2025 is also redacted for the same reasons as above.
- d. All other paragraphs remain.

[24] The Authority will make these changes on its records.

Helen van Druten  
Member of the Employment Relations Authority