



# Employment Court of New Zealand

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## GF v OO [2022] NZEmpC 1 (21 January 2022)

Last Updated: 25 January 2022

**ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES  
IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI**

**[\[2022\] NZEmpC 1](#)  
EMPC 292/2021**

|                      |  |
|----------------------|--|
| IN THE MATTER OF     | an application for special leave to remove proceedings to the Employment Court |
| AND IN THE MATTER OF | an application for costs   |
| BETWEEN              | GF<br>Applicant  |
| AND                  | OO<br>Respondent   |

Hearing: On the papers  
Appearances: Applicant in person  
H Kynaston, counsel for respondent  
Judgment: 21 January 2022

### **COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS**

#### **Introduction**

[1] This judgment resolves an issue of costs which has arisen in the context of a claim brought by an employee whose employment was terminated following a decision not to get vaccinated. The applicant had filed a statement of problem in the Employment Relations Authority; unsuccessfully sought to have it removed to the Court; and filed an application for special leave to remove the matter to the Employment Court, which was subsequently withdrawn. The respondent seeks a contribution to costs on the withdrawn application.

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[2] The application for costs is declined, for reasons informed by the background context.

#### **The background context**

[3] The applicant's employer is a public sector organisation.

[4] It brought in a mandatory vaccination policy for some of its workers following the passing of an Order made under the [COVID-19 Public Health Response Act 2020](#).<sup>1</sup> The applicant did not get vaccinated and their employment was terminated on 30 April 2021.

[5] Prior to termination of employment, the applicant filed a statement of problem in the Authority seeking interim

reinstatement and, in the alternative, a finding that the requirement to be vaccinated altered their terms and conditions to the point that redundancy arose. The applicant also filed an application in the Authority for leave to remove the matter to the Court. The application for removal was dealt with on the papers, the first set of submissions being filed on 19 April 2021.

[6] The application for leave to remove the matter from the Authority to the Court was supported by the respondent, which argued that because the case involved the first time an employee had challenged an employer's decision to dismiss "on the basis they chose not to be vaccinated", it must involve "novel and important legal issues" that may be of future guidance to employers.<sup>2</sup> The Authority Member did not accept that this was so,<sup>3</sup> or that it was in the broader public interest to remove the matter to the Court.<sup>4</sup> Nor did the Authority Member consider that removal would necessarily expedite matters or contain costs.<sup>5</sup>

[7] On 14 June 2021 the Authority Member issued a determination declining the application to remove the matter to the Court for hearing.<sup>6</sup>

1 [COVID-19 Public Health Response \(Vaccinations\) Order 2021](#).

2 *GF v OO* [2021] NZERA 251 (Member Beck) at [20].

3 At [24] and [28].

4 At [26].

5 At [27].

6 At [29].

[8] The Authority's investigation meeting into the matter took place on 24, 25 June and 6 August 2021.

[9] The applicant became concerned about delays in progressing the matter and on 23 August 2021 filed an application for special leave to remove the matter to the Court. The application was coupled with an application for a stay of proceedings in the Authority and for urgency. A telephone conference with a Judge was convened the next day. The Authority Member issued a minute advising that he anticipated delivering his determination on or before 6 September 2021.

[10] On 27 August 2021 the parties filed a joint memorandum requesting that the Court amend the timetabling directions it had made, and advising that the applicant intended to withdraw their application for special leave in the event that the Authority confirmed that its determination would be issued by 6 September 2021.

[11] On 30 August 2021 the Authority Member confirmed by minute that a determination would be issued on or before 6 September 2021 and the applicant duly withdrew their application for special leave, as they had indicated they would do.

[12] In the event, the Authority Member issued a determination on 1 September 2021, dismissing the applicant's grievance<sup>7</sup> (the Authority Member referred to difficulties in the way in which the applicant's claim had been progressed, which were said to have delayed matters).<sup>8</sup> The applicant then filed a challenge to the Authority's determination, seeking an order of reinstatement, which is currently before the Court.

[13] Legal aid has been granted to the applicant in respect of their challenge and they are now represented by senior counsel. The applicant has represented themselves in respect of costs, and was represented by an advocate in the Authority and on the application for special leave.

7 *GF v OO* [2021] NZERA 382 (Member Beck) at [117].

8 At [14]-[16].

## Analysis

[14] A respondent is generally entitled to a contribution to their costs on the discontinuance of a claim against them.<sup>9</sup>

[15] The respondent seeks an order of costs against the applicant of \$3,824, calculated according to the Court's guideline scale.<sup>10</sup> The guideline scale has been developed to assist with assessing what a reasonable contribution to costs might be, having regard to the steps taken and the time reasonably involved in taking those steps. The steps in this case involved preparation of a memorandum setting out the respondent's position in advance of a telephone conference (held on 24 August 2021), and preparation for and attendance at the telephone conference. The respondent does not seek a contribution to the costs associated with preparation of a joint memorandum requesting an amendment to the timetable for filing documents (dated 27 August 2021) and a notice advising of the withdrawal of the application.

[16] The guideline scale is just that – a guideline. It does not override the Court's broad discretion to allocate costs as it considers reasonable having regard to the particular features of the case.<sup>11</sup>

[17] The application for special leave arose against the backdrop of perceived delays in the Authority and in the context of a case involving the mandatory vaccination of workers under a statutory Order. The legality of the Order has now been the subject of a number of priority fixtures and judgments in the High Court.<sup>12</sup> The nature and scope of the steps that might appropriately be required of a fair and reasonable employer in terminating a worker's employment (including in respect of

9. *Direct Auto Importers (NZ) Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 39 at [7]; *Kelleher v Wiri Pacific Ltd* [2012] NZEmpC 98, [2012] ERNZ 406 at [11].

10 "Employment Court of New Zealand Practice Directions" <[www.employment.govt.nz](http://www.employment.govt.nz)> at No 16.

11 *Employment Relations Act 2000*, sch 3 cl 19; *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120, [2017] ERNZ 72.

12 See *GF v Minister of COVID-19 Response* [2021] NZHC 2526; *Four Aviation Services Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012; and *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064.

good faith obligations) in light of the Order has not yet been the subject of substantive judicial consideration in the Employment Court.<sup>13</sup>

[18] In the event, the application did not need to be dealt with and was promptly withdrawn in light of the Authority's subsequent indication as to the timeframe within which its determination would be issued.

[19] The applicant's financial position is clearly perilous. The applicant is an undischarged bankrupt, whose employment has been terminated because they decided against getting vaccinated and who remains unemployed. The respondent says that it does not intend to enforce any costs award made in its favour until the challenge has been concluded but wishes to have certainty as to costs going into the challenge. The reality is that the applicant is not in a position to pay a contribution to the respondent's costs and ordering costs against them (whether or not they are enforced at this stage) would likely cast a heavy shadow on the applicant going forward.

[20] While I agree with counsel for the respondent that there are factors which weigh in favour of a costs award, I consider it to be in the broader interests of justice to let costs lie where they have fallen having regard to the particular circumstances. More generally, I consider it to be in the interests of public sector organisations such as the respondent that cases involving COVID-19 and the intersection of employment rights and obligations be permitted to come before the Court without unnecessary impediment, to enable a degree of clarity to be given to impacted, or potentially impacted, workers; and affected, or potentially affected, employers.<sup>14</sup> That comes at a cost but it is a cost which, in my view, is most fairly shouldered by the respondent public sector organisation in this case.

13 These issues have, so far, only been considered on an interim basis: see *WXN v Auckland International Airport Ltd* [2021] NZEmpC 205.

14 *Four Midwives v Minister for COVID-19 Response (No 2)* [2021] NZHC 3420 at [6] and [8], a recent High Court case involving an application for judicial review directed at the legality of the Order. Justice Palmer declined to award costs against the unsuccessful plaintiffs, primarily because the proceedings concerned matters of genuine public interest, while noting that the plaintiffs had acted reasonably in pursuing the proceedings. See too *NZDSOS Inc v Minister for COVID-19 Response* [2021] NZSC 189 at [7], a recent Supreme Court judgment declining to award costs on an application for leave to appeal directly to the Supreme Court because the proceeding concerned a matter of public importance and the applicants acted reasonably in seeking leave for a direct appeal.

## Conclusion

[21] In all of the circumstances I consider it to be in the interests of justice for costs on the application for special leave to lie where they have fallen. The respondent's application for costs is accordingly declined.

Christina Inglis Chief Judge

Judgment signed at 11.30 am on 21 January 2022