

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 680
3316900

BETWEEN	HEALTHALLIANCE N.Z. LIMITED Applicant
AND	GARTH CUNNINGHAM Respondent

Member of Authority:	Nicola Craig
Representatives:	Richard Upton, counsel for the applicant The respondent in person
Investigation Meeting:	23 September 2024 by audio-visual link
Submissions and further information received:	10 September 2024 and at the investigation meeting for the applicant 23 and 25 September 2024 and at the investigation meeting for the respondent
Determination:	15 November 2024

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

¹ *Garth Cunningham v HealthAlliance NZ Limited* [2023] NZERA 296.

costs and Mr Cunningham was ordered to pay it \$10,000 as a contribution to its legal costs (the costs determination).² Both of these determinations have been challenged by Mr Cunningham to the Employment Court.

[3] HealthAlliance returns to the Authority seeking a compliance order regarding the payment of costs. Mr Cunningham opposes the making of such an order.

The Authority's process

[4] This matter was lodged in the Authority in mid-August 2024. The HealthAlliance sought urgency twice in this matter, essentially on the bases that Mr Cunningham owed it money and had no grounds to argue he should not pay it. Mr Cunningham opposed urgency.

[5] The Authority held case management conferences to discuss the urgency applications, concluding there was no basis to treat this matter more urgently than other matters of a similar type.

[6] Mr Cunningham sought mediation but I concluded that mediation would not constructively contribute to resolving this matter.³

[7] Mr Cunningham also raised the possibility of payment into an Authority account to be held until the challenges were decided although he stated he was not saying this was an option he would take. He was informed that the Authority is not set up to facilitate such arrangements.

[8] The parties agreed that the matter could be dealt with by way of an investigation meeting held by audio-visual link. Prior to the meeting written submissions were received from both parties. Although the meeting was primarily seen as a submissions hearing given that Mr Cunningham did not deny he had not paid the costs sum to HealthAlliance, as indicated in writing before the meeting Mr Cunningham was able to give evidence at the meeting.

[9] The meeting was set to be held on 23 September 2024.

² *Garth Cunningham v HealthAlliance NZ Limited* [2023] NZERA 771.

³ The Act, s 159.

[10] On 11 September 2024 a short unsigned and unsworn affidavit was received from Jayce Huyhn, People Partner lead Data and Digital at Health NZ Te Whatu Ora. By the time of the investigation meeting a sworn version was not available. Another version of the affidavit with some modest changes was provided, signed but not sworn.

[11] Mr Huyhn joined the 23 September 2024 investigation meeting, was affirmed and identified and confirmed the signed version as his evidence. Additionally he answered questions from the Authority and the parties. Mr Cunningham also gave evidence under affirmation. Both parties made concluding submissions

[12] Mr Cunningham was given the opportunity to provide any additional documents after the investigation meeting and did so.

[13] 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.

Costs determination

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

Stay application declined

[15] Mr Cunningham filed a de novo challenge to the Authority's substantive determination in the Court. He also filed a separate non-de novo challenge against the Authority's costs determination. The Court subsequently ruled that the challenge to the costs determination would be heard on a de novo basis at the same time as his challenge to the substantive determination,

[16] In addition Mr Cunningham applied for a stay of execution of the orders against him. The Court declined his application.⁵ The balance of convenience weighed against

⁴ Above at [23].

⁵ *Cunningham v HealthAlliance NZ Limited* [2024] NZEmpC 58.

the granting of his stay application and with inadequate evidential basis to support a stay, the overall interests of justice favoured declining the application.⁶

Submissions for HealthAlliance

[17] The company's representative wrote to Mr Cunningham over half a dozen times from late December 2023 to August 2024 seeking payment. During that period there was no written response.

[18] HealthAlliance emphasises that Mr Cunningham has no defence – the money is owing and he has shown no sign of intending to pay it. The company is part of the public health system.

[19] The company says it took a reasonable approach informing Mr Cunningham that a challenge did not amount to a stay, holding off until after the stay application was decided and further communicating with Mr Cunningham seeking payment before lodging in the Authority in August 2024. HealthAlliance acknowledges Mr Cunningham emailed it a letter on 23 September 2024, the day of the Authority's investigation meeting, more on this below.

[20] Submissions for HealthAlliance argue that it is consistent with the Authority's equity and good conscience approach to ensure that its orders are complied with.⁷

Submissions for Mr Cunningham

[21] HealthAlliance is criticised for mostly having demanded full payment of the \$10,000 outstanding within a short period of time, or else enforcement or compliance action will be commenced immediately. Mr Cunningham describes finding this somewhat intimidating, with the company's representative said to be aware of his situation and Mr Cunningham not really sure of how to respond.

[22] Mr Cunningham denies that he has done nothing in response to the Authority determinations. He was involved in the stay application and judicial settlement conferences.

⁶ Above at [28].

⁷ The Act, s 157(3).

[23] Mr Cunningham also sent an undated letter to HealthAlliance on the day of the Authority's investigation meeting in this application. It expresses his view that the Authority and Court have a preference to have matters resolved between the parties if possible and saying that he understands there are generally accepted options available in these situations. He indicates a willingness to have open and without prejudice direct discussion or other communication.

[24] In addition Mr Cunningham gave evidence that he did not have the amount of cash at the ready to pay the costs sum. Similar evidence is referred to in the April 2024 Court judgment, namely that he had options (to ensure payment) but they were not short term options.⁸ There is little to indicate that decisive steps have been taken to get Mr Cunningham closer to that position.

Compliance order

[25] A challenge to a determination does not operate as a stay.

[26] Mr Cunningham has concerns about the cost determination. These are matters which he is pursuing in his challenge of that determination, as he is entitled to do. The Court has decided to approach both challenges on a de novo basis. However, until any such time as the costs determination is set aside, it remains a valid determination of the Authority.

[27] Mr Cunningham's application to stay the determination was unsuccessful. HealthAlliance is thus entitled to seek a compliance order.

[28] Under the costs determination Mr Cunningham owes Health Alliance \$10,000.⁹ He accepts he has made no payments towards that total. From at least the time of the Authority case management conferences, Mr Cunningham was aware of the possibility of making part payments. On the evidence before the Authority no specific proposal regarding a payment plan has been made. Even the letter sent on the day of the investigation meeting contains no specific proposal or even a commitment to make such a proposal.

⁸ Above, n 5 at [11].

⁹ Above, n 2 at [23].

[29] The time for payment expired many months ago in January 2024. Mr Cunningham has breached the costs determination.

[30] The Authority has discretion whether to make a compliance order. I have looked at whether there is sufficient reason to decline to make a compliance order.

[31] Mr Cunningham has referred to his financial position. The Authority is in a similar position to the Court in the stay application, having little detailed evidence of Mr Cunningham's actual financial position. He says he had made enquiries about getting a loan but was reluctant to say whether or not he had actually made an application.

[32] I have considered whether there is sufficient purpose in issuing a compliance order in these particular circumstances. It had seemed that the Court was about to hear the challenge in October 2024 but the parties advise that that hearing was adjourned due to documents questions with no 2024 date set. A judgment thus seems not to be imminent.

[33] Given what has occurred there is little sign that Mr Cunningham intends to fully, or even partially, make payment despite a long period having elapsed.

[34] Standing back and considering the matter overall, a compliance order should be made.

Interest

[35] HealthAlliance seeks interest on the outstanding sum from 19 January 2024 being the day after the date the debt was due.

[36] The Authority is able to award interest.¹⁰ HealthAlliance has been deprived of money which it was entitled to and interest should be awarded. Taking into account equity and good conscience considerations, interest is awarded from 10 April 2024, being the day after the Court's judgment informing Mr Cunningham that his stay application was unsuccessful. The interest is to be paid under the Interest on Money Claims Act 2016 calculated using the Ministry of Justice civil debt calculator.¹¹

¹⁰ The Act, Sch 2, cl 11.

¹¹ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

Orders

[37] Within 14 days of the date of this determination Garth Cunningham is to:

- (a) comply with the costs determination by paying HealthAlliance N.Z. Limited \$10,000; and
- (b) pay HealthAlliance N.Z. Limited interest on the costs sum outstanding from 10 April 2024 until payment is made in full.

Costs

[38] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[39] If the parties are unable to resolve costs, and an Authority determination on costs is needed, HealthAlliance may lodge, and then serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Cunningham would then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

Nicola Craig
Member of the Employment Relations Authority