

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 752
3369063

BETWEEN NICKOLA MAKING
Applicant

AND ALAN WINDLE
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Noreen Making for the Applicant
Glenn Mason, counsel for the Respondent

Submissions received: 20 October 2025 from the Respondent
12 November 2025 from the Applicant

Determination: 19 November 2025

COSTS DETERMINATION OF THE AUTHORITY

[1] In its substantive determination of 5 March 2025, the Authority upheld four disadvantage claims by Nickola Making against Alan Windle in relation to being suspended from work, regular teasing and joking in workplace, unilateral removal of Ms Making's supervisory duties and failure of the employer to address Ms Making's complaints at the same time as commencing an investigation into her conduct.

[2] Ms Making was not successful with her grievance claims for unjustified dismissal for medical incapacity and discrimination in the workplace on the grounds of disability due to dyslexia.¹

[3] On 2 April 2025, Ms Making lodged an application in the Authority to reopen the investigation that was unsuccessful.² The Authority reserved the issue of costs. Mr

¹ *Making v Windle* [2025] NZERA 137.

² *Making v Windle* [2025] NZERA 626.

Windle subsequently made an application for costs seeking a contribution towards his legal costs in the amount of \$2,250.00. Ms Making seeks an order that costs lie where they fall based on financial circumstances, hardship and power imbalances.

Costs

[4] Costs are a matter of discretion. The discretion is to be exercised in accordance with principle and not arbitrarily. The main principle in the exercise of the discretion is that costs follow the event. If a party is successful, they will be entitled to an award of costs. Mr Windle, the respondent was successful in that a reopening was not granted.

The parties' submissions

[5] Noting the reopening was heard on the papers submissions on Mr Windle's behalf are that an amount equivalent to half the daily tariff for a full day investigation meeting would be appropriate. In arriving at that amount it is noted invoices show that full costs were \$3,487.95, a without prejudice offer was made to Ms Making on 8 July 2025 and it was not responded to, and the length of submissions on Ms Making's behalf increased the work involved in responding to the reopening application. Mr Windle seeks \$2,250.00 as a contribution to his legal costs.

[6] On Ms Making's behalf it is submitted that no costs award be made in favour of Mr Windle, and if an award is made that it be significantly reduced, stayed or payable by small weekly instalments and for Mr Windle to pay the compensation amounts ordered in the Authority's substantive determination in full to Ms Making.

[7] Submissions for Ms Making are:

- (a) Ms Making was partially successful in the substantive matter so Mr Windle should be able to recover costs for time spent on those issues because they were not addressed by the reopening application;
- (b) Mr Windle's change in counsel resulted in unnecessary duplication in and inflated costs;
- (c) Mr Windle has failed to comply with several Authority directions including payment of amounts due under the substantive determination;

- (d) Mr Windle's submission about the length of submissions fails to recognise the existence of Ms Making's disability;
- (e) Ms Making has already borne the cost of direct and indirect expenses from Mr Windle's adversarial approach and there is disparity in legal representation and power imbalances for a "vulnerable worker facing unfamiliar legal settings";
- (f) Ms Making remains on a low fixed income as a social security beneficiary and is medically incapacitated from full time work and is supporting others.

Calderbank offer

[8] When an offer to settle, marked "without prejudice save as to costs" also known as a Calderbank offer is sent by a respondent, the consequence of unreasonably rejecting such an offer for the applicant if they are unsuccessful with their case, is that the offer may be shown to the Authority or Court. The costs they must pay to the successful party may be increased as a result of the decision not to accept that offer. This is on the basis the unsuccessful party would have been in a better position had they accepted that offer at an earlier stage.

[9] The Calderbank offer in this case was an offer let costs lie where they fall if Ms Making withdrew the reopening application in the Authority and concentrated on the challenge in the Court. The letter recorded:

- (a) she had already elected to have the matter heard in the Employment Court by filing the statement of claim in the Court;
- (b) the reopening application in the Authority had not identified a miscarriage of justice and instead disagreed with the Authority determination which was a matter for the Court;

Analysis

[10] The starting point for costs when there is a need to appear in person, based on the Authority's daily tariff, is \$4,500.00. The Authority has in the past taken the approach that a reduction to the daily tariff to arrive at a starting point for matters that

are conducted on the papers is appropriate when legal costs have been incurred despite a matter being heard on the papers. The Authority can from that starting point consider whether there are factors justifying an increase or decrease in costs. This can include whether an effective Calderbank offer was unreasonably refused.³

[11] I consider that one third of the daily tariff in the amount of \$1,500.00 is an appropriate starting point. From there I consider the factors submitted by both parties should either increase or decrease the final amount awarded.

[12] The length of the reopening application and the existence of the Calderbank offer are factors for consideration that go towards increasing the award. However, Ms Making's submission about the length of time given for a response to the Calderbank offer is a point well made. Mr Windle is now well aware of the evidence that exists to support the claims made about Ms Making's dyslexia and three days is a short time frame to consider a confidential offer to halt proceedings and let costs lie where they fall.

[13] Also relevant is that fact Ms Making has been represented by a family member throughout but three days is a short time frame for a representative to give advice and seek instructions when the applicant has a disability such as dyslexia. For that reason there is no increase to the starting point from the failure to engage with the Calderbank offer.

[14] The double approach caused by lodging a challenge in the Court and a reopening in the Authority was discussed at the case management call with Ms Making's representative but the reopening application proceeded. I consider a small uplift would be appropriate for that.

[15] In terms of Ms Making's submissions I give little weight to the submission regarding Mr Windle's change in counsel as he is entitled to a change in counsel. The submission regarding partial success does not advance matters for Ms Making because the costs Mr Windle incurred resulted from his response to the reopening application

³ www.era.govt.nz/determinations/awarding-costs-remedies

that was unsuccessful. This is separate and unrelated to success in the substantive determination of the Authority.

[16] Failure to pay monies owed to Ms Making in accordance with the substantive Authority determination would not generally be a matter taken into account in relation to costs but given Ms Making's submission regarding her ability to pay it does have relevance. However, a challenge is lodged in the Court and without confirmation regarding whether a stay has been applied for the most pragmatic approach will be to settle on an appropriate amount for costs and Ms Making can challenge that in the Court if she wishes.

[17] Although Ms Making's dyslexia is a factor relevant to the total costs award and her ability to pay, given Ms Making was represented throughout I consider an award for costs is appropriate in an amount equivalent to one third of the daily tariff. The concerns about proceeding with both the reopening in the Authority and the challenge in the Court were conveyed to Ms Making's representative by the Authority and Mr Windle's representative.

Order

[17] Ms Making is to pay Mr Windle the sum of \$1,500.00 for legal costs incurred by Mr Windle in relation to the reopening application.

Sarah Kennedy-Martin
Member of the Employment Relations Authority