

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 369  
3254600

BETWEEN	LEAH MCCANN Applicant
AND	WINTON CAPITAL LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Emma Butcher, counsel for the applicant Stephen Langton, counsel for the respondent
Investigation meeting:	On the papers
Information and Submissions received:	7 May 2025 from the applicant 22 May 2025 from the respondent
Determination:	1 July 2025

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 21 March 2025, the Authority found Leah McCann had a personal grievance for unjustified dismissal on a constructive dismissal basis. Her employer Winton Capital Limited (Winton) was ordered to pay compensation, lost wages and part payment of a penalty to her for a breach of good faith.<sup>1</sup> The Authority declined a breach of employment agreement claim and associated penalty claim. The Authority reserved the issue of costs.

[2] At the request of the parties the Authority extended the costs timetabling in the determination. They were unable to resolve costs and Ms McCann has made an application for costs. Counsel for Ms McCann wrote to Winton on 9 April 2025, proposing costs be resolved by Winton paying \$14,799.86, this being half of Ms

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<sup>1</sup> *McCann v Winton Capital Limited* [2025] NZERA 171.

McCann's actual legal costs. Ms McCann now seeks an order of costs at that amount. She submits an uplift from the daily tariff is warranted on the basis there is a relevant Calderbank offer and Winton's conduct increased her costs unnecessarily. Winton submits that at the most, the daily tariff amount should be awarded.

[3] Winton has filed a challenge in the Employment Court in relation to the Authority's substantive determination. There is no reason before me why the issue of costs in the Authority cannot be dealt with now. Having received costs submissions from both parties, they are now determined on the papers.

### **Costs principles**

[4] The Authority has power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. This power is discretionary and must be used in a principled manner.<sup>2</sup> Principles guiding the Authority's approach to costs include:

- the statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction
- equity and good conscience are to be considered on a case-by-case basis
- costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award
- costs generally follow the event
- awards of costs will generally be modest
- frequently, costs are judged against a notional daily tariff.

[5] The starting point for costs based on the Authority's daily tariff is \$4,500 for the first day of an investigation meeting.

### **Ms McCann's submissions**

*Without prejudice save as to costs offer*

[6] It is common ground that on 19 September 2023, Ms McCann made an offer by letter to Winton through her then representative, to settle all matters arising in relation

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<sup>2</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808, and *Faggotti v Acme & Co Limited* [2015] NZEmpC 135.

to her employment. Her employment had not ended at that point. Because the Authority's substantive determination has been challenged, the actual terms of the offer are not recorded in this determination.

[7] The letter was headed "without prejudice save as to costs", outlined the recent events between the parties, that there was no justification for Winton's conduct, and stated that if the offer was not accepted, Ms McCann was "prepared to formally raise personal grievances". She proposed settlement by Winton paying an amount in compensation under s 123(1)(c)(i) of the Act, a modest salary amount and legal costs. The offer was not accepted. Ms McCann says the offer was reasonable and made prior to the proceedings and, if accepted, would have avoided almost all her legal costs. Ms McCann says she was ultimately awarded remedies in excess of the offer made.

*Conduct said to unnecessarily increase costs*

[8] Ms McCann says Winton's conduct unnecessarily increased her costs.

[9] First, in March 2024 the matter was set down for an investigation meeting on 3 October 2024. In August 2024 Winton's counsel requested it be rescheduled due to Winton's chief executive Mr Meehan's plans to travel overseas to attend a sporting event. The investigation meeting was later rescheduled to November 2024. Ms McCann says the rescheduling resulted in Ms McCann incurring unnecessary costs.

[10] Second, Ms McCann says Mr Meehan's evidence departed from his witness statement in key respects. Oral evidence he gave at the investigation meeting about what he said to Ms McCann during a 14 September 2023 phone call was said to require additional questioning and preparation of submissions.

**Winton's submissions**

[11] Winton opposes the claim for increased costs, and even at the daily tariff level.

*Without prejudice save as to costs offer*

[12] Winton submits that the 19 September 2023 offer was not an effective Calderbank offer nor a basis to award increased costs.

[13] It did not contain any timeframe for acceptance. Nor was there an expiry date on it.

[14] Winton cited case law in other jurisdictions indicating that courts are cautious when assessing the effectiveness of an early-stage Calderbank offer, including when it has been made prior to proceedings being issued. That is because, at that stage, the recipient of the offer would not ordinarily have the information they require to assess the reasonableness of the offer, including what the offeror's claim (if the plaintiff makes the offer) or defence might be (if the defendant makes it), the relative strengths and weaknesses of the claim, the nature of the remedies being claimed, and actual loss suffered.

[15] Winton says it was impossible to make an assessment of the strength of Ms McCann's claims, relative to the offer, particularly as Ms McCann had not made an unjustified dismissal claim at that stage and she not resigned. Ms McCann had also not signalled she would make a breach of employment agreement claim and penalty claim.

[16] Winton says it did not know at the date of the offer that Ms McCann would resign, claim constructive dismissal, lose six months' remuneration, and then make a claim for that amount. This was all evidence that would be crucial in order to assess the quantum and strength of a lost income claim, and the reasonableness of a Calderbank offer. Winton says all that was foreseeable at the date of the offer was that Ms McCann made it clear she was not resigning, and that she had suffered loss compensable under s 123(1)(i)(c)(i).

[17] A contribution towards costs was included in Ms McCann's Calderbank offer. Winton says these were not litigation costs and no claim for special damages for legal costs up to and including the date of the offer was made or awarded. Winton says that leaves the Authority award under s 123(1)(c)(i) of \$25,000, which was less than the amount offered.

[18] Winton says the Calderbank offer was ineffective for these reasons.

*Investigation meeting delay and Mr Meehan's evidence*

[19] Winton denies its conduct increased Ms McCann's costs. In respect of both grounds relied on, it says the particulars of the actual time, and corresponding costs incurred by Ms McCann associated with the two issues has not been provided.

[20] In relation to the delay of the investigation meeting, Winton submitted that although Mr Meehan was unavailable on the original October 2024 investigation

meeting date, Winton tried to avoid delay by saying it (and he) was available for an earlier date. Winton further requested the investigation meeting proceed on the original date, and that Mr Meehan's evidence be taken at a later date.

[21] With regards to Mr Meehan's oral evidence, Winton says he denied the extent to which Ms McCann says he swore during the call, and that he had always denied swearing at Ms McCann.

*Winton says it incurred unnecessary costs*

[22] Winton submits the Authority should take into account the extent to which Ms McCann's conduct put it to unnecessary costs. It says Ms McCann did not quantify her lost wages claim in her witness statement, sought to produce a calculation of this loss on the day of the investigation meeting, and made changes to the part of her statement that addressed when she started to look for work. Winton says preparation time spent on the basis that evidence was missing, was wasted. Counsel was not able to put an actual value on the time and corresponding costs incurred.

[23] Finally, Winton suggests a reduction should be made for costs incurred in preparing and filing its costs memorandum. Winton says if the Authority accepts that no more than the daily tariff should be awarded, then Ms McCann's rejection of its offer at the daily tariff amount is relevant to the assessment of (and reduction to) the final award.

**Costs assessment**

[24] Some invoicing information has been provided indicating Ms McCann incurred \$23,261.77 in costs with her current representatives. The amount of \$6,337.96 is said to have been incurred with her previous representative, although information has not been provided in relation to that amount.

[25] Costs should follow the event in this matter. As the successful party, Ms McCann is entitled to an award of costs.

[26] The Authority's investigation meeting took close to a full day, so the starting point is \$4,500. It is correct that fulsome written submissions were lodged after the investigation meeting. A modest uplift of \$1,000 is justified to reflect this.

[27] Four Authority determinations were cited on Ms McCann's behalf as supporting an uplift in costs on the basis of an early-stage Calderbank offer. However, only one of them supported a finding that a pre-Authority application offer of settlement could be an effective Calderbank offer.<sup>3</sup> Although I do not discount the possibility that in appropriate cases an offer made prior to lodging an application in the Authority could be taken into account when assessing costs, this is not such a case.

[28] The Authority agrees that it was not possible for Winton to have the information it required to make an informed assessment of the strength of Ms McCann's claims at the time of the offer. Additionally, Ms McCann's claims were expanded some months after lodgement, by way of an amended statement of problem, and even at the investigation meeting where the period of the lost wages claim was widened. These matters were not foreseeable at the time the offer was made. Additionally, the proposed compensation amount considerably exceeded the compensation amount ultimately awarded by the Authority. I find it was not unreasonable for Winton to decline the offer at the time in these circumstances.

[29] As the offer did not contain any timeframe for acceptance, the offer probably would not have amounted to an effective Calderbank offer because there was no time specified for its acceptance or rejection.

[30] Taking these matters into account, I am not satisfied the September 2023 letter was an effective Calderbank offer. No other later Calderbank offers have been put before me for consideration.

[31] For completeness, I do not accept Winton's argument that because offer was expressed to be subject to a settlement agreement being certified by a mediator, that it was a conditional Calderbank offer, and ineffective on that basis.

[32] I am prepared to allow a small increase for additional attendances required as a result of the adjournment resulting from Mr Meehan's unavailability. An additional \$600 is awarded in respect of those attendances.

[33] Both parties' key witnesses, Ms McCann and Mr Meehan, gave some unanticipated evidence at the investigation meeting. I am not satisfied on the available

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<sup>3</sup> *Treleavan v MRZW Ltd* [2024] NZERA 526.

information that this unnecessarily increased each parties' costs, and if it did to any discernible extent, each neutralises the other. No costs adjustment is made in respect of this.

[34] No reduction is made for costs incurred by Winton in preparing its costs memorandum. Ms McCann's offer to settle costs came on 7 April 2025, and it was not until 6 May 2025 that Winton finally countered that offer with the daily tariff amount. Winton's approach rendered a costs application necessary.

[35] Parties can expect costs in the Authority to be modest. That is why parties are encouraged to undertake a realistic 'risk versus reward' assessment prior to an investigation meeting. After assessment, I consider an award for costs in the amount of \$6,000 appropriate.

### **Orders**

[36] I order Winton Capital Limited to pay an award of costs to Leah McCann in the amount of \$6,100 within 14 days of the date of this determination.

Sarah Blick  
Member of the Employment Relations Authority