

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 552
3181519

BETWEEN	KARIN O'CONNOR Applicant
AND	NEW ZEALAND WOOL DUMPING GROUP (2019) LIMITED PARTNERSHIP Respondent

Member of Authority:	Rowan Anderson
Representatives:	Seungmin Kang, counsel for the Applicant David McLeod, advocate for the Respondent
Investigation Meeting:	On the papers
Submissions received:	1 September 2023 and 7 September 2023 from the Applicant 7 September 2023 and 18 September 2023 from the Respondent
Determination:	25 September 2023

COSTS DETERMINATION OF THE AUTHORITY

Background and submissions

[1] On 18 August 2023 the Authority issued a determination in which I found that Karin O'Connor was not unjustifiably disadvantaged in her employment, but that she was unjustifiably dismissed.¹ In awarding remedies to Ms O'Connor in relation to her dismissal, I ordered that the relevant remedies be reduced by 20% on account of contributory blameworthy conduct.

¹ *Karin O'Connor v New Zealand Wool Dumping (2017) Limited Partnership* [2023] NZERA 457.

[2] Costs were reserved. The parties have not been able to agree on costs, and Ms O'Connor now asks the Authority for orders as to the costs she incurred in pursuing her claims against New Zealand Wool Dumping Group (2019) Limited Partnership (NZ Wool Dumping).

[3] Ms O'Connor seeks a total contribution towards its costs of \$13,571.56 based on the daily tariff approach adopted by the Authority for a two-day investigation meeting, including an uplift of \$5,500 on the basis of a refusal by NZ Wool Dumping of a *Calderbank* offer said to have been made on 16 May 2022. Ms O'Connor also seeks reimbursement of the filing fee of \$71.56.

[4] NZ Wool Dumping submits that it is accepted that the daily tariff should apply and that it accepts the disbursements claimed by Ms O'Connor. As such, it accepts that an order for \$8,000 in costs and \$71.56 in disbursements should be made. As to the *Calderbank* offer and uplift claimed by Ms O'Connor, NZ Wool Dumping submits that Ms O'Connor has benefited from the rejection of the offer and that as such it is irrelevant, and that an uplift is not otherwise warranted.

Costs principles

[5] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.²

[6] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that *Calderbank* offers may be taken into account, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.³

[7] The daily tariff is usually taken as a starting point,⁴ although not used in a rigid manner, with principled adjustments made having regard to the particular characteristics of a case.

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

⁴ Employment Relations Authority Practice Direction, August 2023, <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>

Consideration

Costs to follow the event

[8] Ms O'Connor was successful in pursuing her claims against NZ Wool Dumping and it is appropriate that costs follow the event.

Application of the daily tariff

[9] The substantive proceeding involved the setting down of a two-day investigation meeting. I consider the appropriate starting point for daily tariff approach would see a contribution of \$8,000 (\$4,500 for the first day, \$3,500 for the second day).

Calderbank offer

[10] Ms O'Connor made an offer of settlement on 16 May 2022, well prior to the investigation meeting or any other substantive steps being required in the Authority. NZ Wool Dumping was provided a full week to consider and respond to the offer, that being until 23 May 2022. The settlement offer was made on the basis of a full and final settlement involving NZ Wool Dumping being required to make payment of \$10,000 to Ms O'Connor.

[11] I consider that the Calderbank offer made was in clear terms and was otherwise reasonable. The offer was made well before any substantive steps were required in terms of the Authority's investigation. The offer was clearly marked "without prejudice save as to costs" and Ms O'Connor has been successful in her application being awarded more than the sum sought by way of the Calderbank offer.

[12] I consider that the offer of 16 May 2022, and its rejection, should be taken into account. I do not accept NZ Wool Dumping's submission that the offer is irrelevant, and I consider it relevant that ultimately costs for both parties increased because of the offer being rejected. However, any uplift should be modest, and I consider an uplift of \$1,500 appropriate in the circumstances.

[13] I consider it appropriate that an order be made requiring NZ Wool Dumping to reimburse Ms O'Connor the filing fee of \$71.56.

Orders

[14] I order New Zealand Wool Dumping (2017) Limited Partnership to pay Ms O'Connor, within 28 days:

- (a) the sum of \$9,500 as a contribution towards the costs she incurred in pursuing her claims; and
- (b) the sum of \$71.56 as reimbursement of the filing fee.

Rowan Anderson
Member of the Employment Relations Authority