

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 354  
3309540

BETWEEN XINYI CHENG  
Applicant  
AND THE VICE CHANCELLOR OF  
LINCOLN UNIVERSITY  
Respondent

Member of Authority: Peter van Keulen  
Representatives: Robbie Bryant, counsel for the applicant  
Scott Wilson and Sydney Caughey, counsel for the  
Respondent  
Investigation Meeting: On the papers  
Submissions Received: 17 April 2025, 13 May 2025 and 9 June 2025 from the  
Applicant  
1 May 2025 from the Respondent  
Date of Determination: 18 June 2025

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The determinations**

[1] In a determination dated 12 September 2024 I reinstated Xinyi Cheng to her role of Research Field Technician based at Mount Grand Station (the MGS Role), on an interim basis.<sup>1</sup> In a further determination dated 20 March 2025 I found that Lincoln University had acted

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<sup>1</sup> *Cheng v The Vice Chancellor of Lincoln University* [2024] NZERA 552.

unjustifiably toward Ms Cheng causing disadvantage to her employment and that it had unjustifiably dismissed Ms Cheng - I ordered Lincoln University to reinstate Ms Cheng to a Field Technician role (the FT Role), and to pay Ms Cheng \$26,000 as compensation and \$8,001.57 as reimbursement for lost remuneration.<sup>2</sup>

[2] In both determinations I reserved costs so that the parties could try to agree costs. The parties were unable to agree and now Ms Cheng seeks an order for costs.

### **Application for costs**

[3] Ms Cheng seeks an award of costs of \$15,750 plus GST, applying the daily tariff as follows:<sup>3</sup>

- (a) \$4,500 plus GST for the interim application, based on \$2,250 for a half day investigation meeting with an uplift for additional work,
- (b) \$11,500 plus GST for a three-day investigation meeting.

[4] Lincoln University says that for costs on the interim reinstatement:

- (a) Ms Cheng was ultimately unsuccessful with her reinstatement claim as she was permanently reinstated to a FT Role rather than the MGS Role, which she sought.
- (b) The outcome of the substantive investigation vindicated Lincoln University's position on the interim application.
- (c) For these reasons costs should lie where they fall.

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<sup>2</sup> *Cheng v The Vice Chancellor of Lincoln University* [2025] NZERA 167.

<sup>3</sup> The normal practice of the Authority when setting costs is to apply a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff. The current daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for every subsequent day of an investigation meeting.

(d) Alternatively, there is no basis for increasing the costs awarded for the interim application as the additional work by Ms Cheng was her choice and not necessary for the application.

[5] Lincoln University says that for costs on the substantive investigation:

(a) Ms Cheng had mixed success in terms of her claims.

(b) That it made two Calderbank offers to Ms Cheng that were not accepted and Ms Cheng received less than one of the offers in my second determination.<sup>4</sup>

(c) Because of the mixed success and the failure to beat the last Calderbank Offer costs should lie where they fall.

## **Analysis**

### *Costs in the Authority*

[6] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000. The principles and approach adopted by the Authority in respect of this power are outlined in the Authority's practice note on costs.<sup>5</sup>

### *Costs for Ms Cheng*

[7] The starting point is that costs should follow the event.

[8] Ms Cheng was successful with her interim application being reinstated to the MGS Role, but then she was not permanently reinstated to the MGS Role. I do not accept that this changes Ms Cheng's entitlement to costs on the interim reinstatement – Ms Cheng was reinstated on an interim basis and reinstated on a permanent basis.

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<sup>4</sup> A Calderbank offer is an offer made by one party to settle the claim on terms. The offer is marked "without prejudice save as to costs". The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court's (or in this case the Authority's) attention if the claim is not settled. This is so that the offer can be used for assessing costs once the claim has been determined.

<sup>5</sup> For further information about the factors considered in assessing costs, see:

[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).

[9] Also, Ms Cheng was also unsuccessful in one personal grievance, but successful with two grievances.

[10] Overall Ms Cheng has had mixed success. The question of mixed success and an applicant's entitlement to costs has been resolved by the Employment Court in *William Coomer v JA McCallum and Son Limited*.<sup>6</sup> The position is that any success for an applicant is sufficient success for the purposes of costs; it does not matter that an applicant may have lost a significantly larger or more complex claim if it was successful with any claim.

[11] Applying the principle here, Ms Cheng was successful with two grievances and was reinstated to a FT Role so Ms Cheng is entitled to an award of costs.

#### *Applying the daily tariff*

[12] There is no reason to depart from the normal daily tariff approach to assessing costs in the Authority. I will calculate the award of costs based on the daily tariff.

[13] The investigation meetings took one half day and three full days so the starting point for costs is \$2,250 (for the interim application) plus \$11,500 (for the substantive matter).

#### *Adjusting the daily tariff*

[14] The question that follows then is whether I should adjust the daily tariff by way of:

- (a) An increase for the interim application based on additional work required by Ms Cheng.
- (b) A decrease for the substantive matter based on the Calderbank offers made by Lincoln University.

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<sup>6</sup> *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

*Increase the daily tariff for additional work*

[15] Counsel for Ms Cheng says there was additional evidence and submissions required for the interim application and that this means the daily tariff applied to the interim matter should be increased.

[16] I accept there was some additional work undertaken by Ms Cheng but I am not satisfied this warrants an increase. Overall, the work for the interim application was reflective of the normal work required in an investigation of an interim matter. Additional evidence and further submissions are often required in interim applications and must be considered as part of the work covered by the daily tariff.

[17] What is required is additional work that is significant, was unnecessary, and/or was caused by unreasonable conduct of the case by the other side. I am not satisfied that any of these factors applied here.

[18] I will not increase the daily tariff amount for the interim application based on additional work.

*The effect of the Calderbank offers*

[19] One accepted basis for adjusting the daily tariff is where there has been a Calderbank offer from one party that has been unreasonably rejected by the other.<sup>7</sup>

[20] The key requirements relating to Calderbank offers that apply here are:

- (a) There must be a valid Calderbank offer by Lincoln University to Ms Cheng.
- (b) The Calderbank offer was unreasonably rejected by Ms Cheng.

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<sup>7</sup> The basic premise is that if a successful applicant has rejected a Calderbank offer to settle from the respondent and has then not been awarded an amount in the subsequent determination that betters the offer then the successful applicant should not be awarded costs or costs should be reduced. The rationale is that continuing with its claims after rejecting the Calderbank offer was futile and unnecessary because the applicant would have gained more from accepting the offer and would have avoided the ongoing costs for both parties by ending its claims at that time. In essence the applicant was not successful in relative terms (considering the rejected offer) and therefore it should bear its own costs.

(c) Ms Cheng did not get an award from the Authority that was greater than the amount of the Calderbank offer.<sup>8</sup>

[21] In this case Lincoln University made a Calderbank offer to Ms Cheng on 6 December 2024. This was a valid Calderbank Offer. Ms Cheng rejected the offer and the remedies she received in my second determination were, overall, less than the Calderbank offer.

[22] Ms Cheng accepts this is what occurred with the Calderbank offer but says her rejection of the offer was reasonable as the offer did not address vindication. In rejecting the offer Ms Cheng's counsel stated:

Ms Cheng is not solely after money. She wants vindication via an impartial third party determining that the University's actions in respect of her dismissal and the steps it took after she raised serious issues with Human Resources were unlawful.

The offers below do not address this and are therefore not accepted.

[23] The rejection of a Calderbank offer on the basis that it does not address issues of vindication is reasonable.<sup>9</sup>

[24] Therefore, in this case the Calderbank offers do not provide a basis for reducing the daily tariff.

### *GST*

[25] Ms Cheng has sought to have GST added to the daily tariff. The Authority's approach to the addition of GST on costs awards is that the daily tariff is an all-inclusive, GST neutral figure. Therefore, GST is not awarded on any award of costs.

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<sup>8</sup> *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943.

<sup>9</sup> *Wiles v The Vice Chancellor of the University of Auckland* [2025] NZEmpC 109; and *Pyne v Invacare New Zealand Ltd* [2024] NZEmpC 26.

*Conclusion*

[26] Ms Cheng was the successful party and is entitled to receive an award of costs. The daily tariff should be applied to calculate the quantum of the award without any adjustment; Ms Cheng is entitled to an award of costs of \$13,750.

**Order**

[27] Lincoln University is to pay Xinyi Cheng \$13,750 as a contribution to her costs in this matter.

Peter van Keulen  
Member of the Employment Relations Authority