

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 406  
3236939

BETWEEN ANNE ABERNETHY AND  
OTHERS  
Applicant  
AND KONO NZ LP  
Respondent

Member of Authority: Peter van Keulen  
Representatives: Peter Cranney and Simon Mitchell KC, counsel for the  
Applicant  
Maria Dew KC, Daniel Josephs and Carl Blake, counsel for  
the Respondent  
Investigation Meeting: On the papers  
Submissions Received: 1 July 2025 from the Applicant  
10 June 2025 from the Respondent  
Date of Determination: 9 July 2025

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1] In a determination dated 14 May 2025, I found that Kono NZ LP's actions in coming to its decision to dismiss the applicants were actions that a fair and reasonable employer could have taken in the circumstances and the applicants' dismissals were justified.<sup>1</sup>

[2] In my determination I reserved costs so that the parties could try to agree costs. The parties have been unable to agree and now Kono has applied for costs.

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<sup>1</sup> *Anne Abernathy and Others v Kono NZ LP* [2025] NZERA 268.

## **Application for costs**

[3] Kono seeks an award of costs of \$63,528.02 based on:

- (a) The application of the daily tariff for a three-day Investigation Meeting with an uplift to \$9,000 per day for a total of \$27,000.<sup>2</sup> Kono says an uplift is appropriate because the applicants did not accept a Calderbank offer it made just prior to the investigation meeting – the offer providing a better outcome for the applicants than my determination.<sup>3</sup>
- (b) An award of \$27,000 for hearing preparation, which it says is justified given the complexity of this matter.
- (c) Full disbursements of \$9,528.02 that covers travel and accommodation for counsel and the cost of two expert witnesses.

[4] The applicants say there is no basis for any award of costs other than in line with the Authority’s normal daily tariff regime. In particular the investigation of this employment relationship problem did not have any complex legal or factual matters, was not protracted in any way - least of which by any conduct of the applicants who cooperated appropriately with Kono over the investigation and as a result kept the time required to a minimum – and the Calderbank offer was non-compliant and should not be a factor in assessing costs.

## **Analysis**

### *Costs in the Authority*

[5] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The principles and approach adopted by the Authority in respect of this power are outlined in the Authority’s practice note on costs.<sup>4</sup>

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<sup>2</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.

<sup>3</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 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>4</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).

### *Costs for Kono*

[6] The starting point is that costs should follow the event. As the employment relationship problem was resolved in favour of Kono it is entitled to an award of costs.

### *Applying the daily tariff*

[7] The applicants submit that part of this employment relationship problem considered the interpretation and application of clauses in the collective agreement that was in force between the parties at the applicable time (the Collective Agreement). And, on the basis of the Authority's approach to costs for disputes, any amount awarded to Kono should reflect this.

[8] The applicants' employment relationship problem with Kono was primarily based on personal grievances for unjustified dismissal. At issue in terms of justification was the consultation undertaken by Kono over the applicants' possible dismissals. This consultation was informed by the Collective Agreement and the duty of good faith, specifically the obligation set out at s 4(1A) of the Act and the exception to that obligation as set out at s 4(1B) of the Act.

[9] For this reason, I do not consider the applicants' employment relationship problem to be a dispute, and it does not attract the usual presumption in relation to costs that applies in the Authority for disputes.

[10] There is no other reason advanced by the parties to depart from the normal daily tariff approach to assessing costs in the Authority. I consider it appropriate to award costs based on the daily tariff.

[11] The Investigation Meeting took one and a half days in Nelson dealing with the evidence and a half day by AVL for submissions. So, the starting point for applying the daily tariff is two days. The current rate for the daily tariff is \$4,500 for the first day of the Investigation Meeting and \$3,500 for the second day – so, applying the daily tariff the total is \$8,000.

### *Adjusting the daily tariff*

[12] The question that follows is whether I should adjust the daily tariff because of the Calderbank offer made by Kono that the applicants did not accept.

[13] The unreasonable rejection of a Calderbank offer from one party may be a basis for adjusting the daily tariff where the party that rejected the offer did not receive a better outcome in the determination than was presented in the offer.<sup>5</sup>

[14] The key requirements relating to Calderbank offers that apply here are:<sup>6</sup>

- (a) There must have been a valid Calderbank offer by Kono to the applicants.
- (b) The Calderbank offer was unreasonably rejected by the applicants.
- (c) The Calderbank offer presented a better outcome for the applicants than my determination.

[15] In this case Kono made a Calderbank offer to the applicants on Tuesday, 23 July 2024 that was open for acceptance until 4 pm on Friday, 26 July 2024 – in the context that the Investigation Meeting was scheduled to start on Monday, 29 July 2024.

[16] The applicants did not accept the offer and because the employment relationship problem was not resolved in favour of the applicants, they did not obtain more than the Calderbank offer in my determination.

[17] The applicants say the timing of the Calderbank offer, immediately before the Investigation Meeting, and the limited time it was open for acceptance meant it expired before it could be properly considered and responded to.

[18] In *Ogilvie & Mather (NZ) Ltd v. Darroch* the Employment Court said that a party (in that case the defendant) could not have the benefit of the cost protection afforded to it if a Calderbank offer was left open for too short a period of time for the other party to properly consider it. The Court referred to parties having “... a modicum of time for calm reflection and the taking of advice before a decision has to be made whether to accept the offer or reject it ...”.<sup>7</sup>

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<sup>5</sup> The basic premise that applies here is that if an unsuccessful applicant has rejected a Calderbank offer to settle from the respondent, then the respondent should get increased costs. 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.

<sup>6</sup> *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943.

<sup>7</sup> *Ogilvie & Mather (NZ) Ltd v. Darroch* [1993] 2 ERNZ 943.

[19] The situation in *Ogilvy & Mather* applies here. I find that, in the circumstances, the Calderbank offer made by Kono was not one that allowed the applicants sufficient time to properly consider it, take advice and decide how to respond.

[20] On this basis Kono's Calderbank offer is not a valid Calderbank offer and it does not provide a basis for increasing the daily tariff.

#### *Costs for preparation*

[21] Counsel for Kono says that in addition to awarding costs based on the daily tariff I should also award costs for preparation time given that this was a substantial case requiring extensive preparation, including briefing five witnesses one of whom was an expert financial consultant.

[22] I will not award additional or a separate amount for preparation work undertaken by a successful party. The daily tariff is an all-encompassing approach to costs where a daily amount represents a proportion of costs for all aspects of the investigation and determination of an employment relationship problem by the Authority; this includes preparation.

[23] It is possible however for the daily tariff to be increased if the complexity of the matter justifies it and I will consider Kono's request for additional costs for preparation in this context.

[24] On this point the applicants say this matter was not complex either factually nor legally and involved standard evidence and standard submissions.

[25] I agree with the applicants. This employment relationship problem was based on unjustified dismissals, with the issue limited to consultation. The evidence was broad with some complexity in terms of understanding the commercial context which gave rise to the applicants' dismissals and the events that occurred. The evidence was also limited by agreement to a sample of employees. I was required to interpret and apply provisions of the Collective Agreement and the duty of good faith for which there was an Employment Court judgment to follow and apply.

[26] The complexity in the commercial evidence was insufficient to warrant an increase in the daily tariff and overall, there was not the level of complexity in the evidence or legal

issues to warrant an increase. I will not increase the daily tariff based on the complexity or difficulty of this employment relationship problem.

### *Disbursements*

[27] Kono's disbursements that it seeks to have paid by the applicants are comprised of travel and accommodation costs for counsel from outside Nelson and costs associated with two witnesses it engaged that it says were experts.

[28] It is not normal practice for the Authority to award disbursement for out-of-town counsel.<sup>8</sup> Essentially it was Kono's choice to instruct counsel from Auckland rather than Nelson and there was no reason advanced as to why that was necessary. In these circumstances the costs of Kono's out-of-town counsel should not be borne by the applicants.

[29] Kono incurred costs for the time spent by two of its witnesses in preparing their evidence and attending the Investigation Meeting – although I note here that in the end one witness's evidence was admitted by consent and an attendance was not required. Kono describes these two witnesses as experts.

[30] These two witnesses were:

- (a) An HR Consultant originally engaged by Kono to assist with, amongst other things, the consultation with the applicants over their dismissal.
- (b) A Corporate Finance Consultant originally engaged by Kono to undertake a review of its various business operations, which lead in turn to the sale of the business that the applicants were employed to work in.

[31] Whilst I do not question each of these witnesses' knowledge, ability and experience I do not consider them to have provided expert evidence for the investigation and determination of the employment relationship problem. Their expertise arose during their advice to and actions for Kono in the sequence of events that gave rise to this employment relationship problem. Their evidence in the investigation was about them discharging their expertise for Kono's benefit and explaining to me their actions at the time and the reasons for those actions. I did not require expert evidence on the HR processes involved in consultation with employees over the sale of the business those employees were employed in, nor did I require

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<sup>8</sup> See also *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].

expert evidence over the commercial considerations impacting on the sale of the business, including possible deal structures and the various implications of consultation.

[32] From my perspective the evidence from these two witnesses was helpful in explaining some of the events that occurred and why they occurred, but their evidence was no different from most witnesses in the Authority describing their involvement in the events that give rise to an employment relationship problem.

[33] That Kono may have incurred some cost in briefing these witnesses and for their attendance is a matter for Kono. In the circumstances I do not consider it appropriate to pass the costs of these two witnesses on to the applicants.

[34] I will not award Kono its disbursements as part of the costs the applicants must pay in this matter.

### **Order**

[35] Kono is entitled to an award of costs for a two-day investigation meeting, applying the daily tariff without any adjustment.

[36] The applicants are to pay Kono \$8,000 as a contribution to its costs in this matter.

Peter van Keulen  
Member of the Employment Relations Authority