IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2021] NZERA 102
3123496

	BETWEEN	GRACE McKENZIE Applicant
	AND	PENTLAND HOLDINGS LIMITED First Respondent
	AND	WET PETS 2014 LIMITED Second Respondent
	AND	WET PETS AND COUNTRY PETS LIMITED Third Respondent
	AND	DEBRA-ANN KOLO LISTER Fourth Respondent
	AND	ERIC LISTER Fifth Respondent

Member of Authority:	Michael Loftus
Representatives:	Phillip Drummond, counsel for the Applicant Eric Lister, for the Respondents
Submissions Received:	22 December 2020 and 29 January 2021 from the Applicant 15 January 2021 from the Respondent
Determination:	12 March 2021

COSTS DETERMINATION OF THE AUTHORITY

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[1] This matter has its origins in an application by Ms McKenzie asking that the respondents be required to comply with the provisions of a mediated settlement the parties had previously concluded pursuant to s 149 of the Employment Relations Act 2000 (the Act). Penalties and costs were also sought.

[2] In particular, she asked that the respondents comply with the instalment payment regime required by the settlement and from which they had departed.

[3] In their original statement in reply the respondents took issue with the claim asserting Ms McKenzie had forfeited the right to any outstanding amount by virtue of a concerted social media attack she mounted against the respondents' reputation. They say this had a significant effect on turnover and came soon after the damage incurred as result of the covid lockdown.

[4] During a teleconference which was held on 15 December 2020 it was explained how and why the respondents had some problems. As a result the call was adjourned so as to allow the parties to discuss their differences before a continuation which was scheduled for 18 December 2020.

[5] As it transpired, the parties did not converse but the respondents paid the money outstanding under the mediated settlement.

[6] During the telephone conference of 18 December the remaining issues, costs and penalties, were discussed. The call ended with Ms McKenzie deciding to take what she says was a pragmatic approach so as to reduce costs and withdraw the penalty claim. She was, however, adamant she still sought costs though her decision meant that residual issue could be determined on the papers to which the parties agreed.

Discussion

[7] Normally the Authority will use a daily tariff when addressing a costs claim, with the current starting point being $4,500 for the first day and $3,500 for each day thereafter.[1] From there adjustment may be made depending on the circumstances.

[8] Ms McKenzie seeks a costs contribution of $1500 plus the Authority filing fee. This is, on the basis of the figures proffered, a claim for indemnity costs but to counter this, and given costs are normally a contribution with indemnity costs only being awarded in very limited circumstances,[2] Ms McKenzie notes the amount sought equates to less than a half days tariff. She says this is not unreasonable given counsel's attendances which included preparation of the original filing, two telephone

[1] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

conferences, and preparation of the costs submission. She also notes the claim is not for indemnity costs as she will carry the GST and a couple of disbursements.

[9] Mr Lister's position, which has remained consistent throughout, is the respondents should not pay any more. The reason is that notwithstanding the settlement, which in any event was eventually honoured, Ms McKenzie was guilty of multiple infractions which justified the employment's end and her subsequent conduct means she warrants no more.

[10] Having seen some of the texts Ms McKenzie sent I understand Mr Lister's anger, but as was explained during one of the telephone conferences this did not discharge his obligation under the settlement.

[11] To this Ms McKenzie says the response is further confirmation the breach was deliberate and that necessitated the issuing of proceedings which in turn warrants what are effectively indemnity costs.

[12] The problem with Mr Lister's argument is threefold. The first is a costs award is to recognise costs incurred and not to revisit and punish the original conduct. The second is that, in any event, there was no non–disparagement clause and therefore no apparent breach on Ms McKenzie's part. The third is the decision to cease payment was deliberate which did necessitate the filing and imposed costs.

[13] Conversely, I have to say that while costs should not be used to punish neither should they be used to reward. As already said I can understand Mr Lister's anger and to award what is essentially indemnity costs would, in my view, be tantamount to rewarding inappropriate behaviour.

[14] Two wrongs do not make a right, which leads me to conclude the normal approach of a contribution is appropriate.

[15] Having read and considered the parties' input I consider half the costs incurred and sought to be appropriate. To that I add the Authority's filing fee which I consider a given. The respondents are jointly and severally liable.

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[2] *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA)

Conclusion

[16] As a result I order that the respondents, on a joint and several basis, pay Ms McKenzie the sum of $821.56 (eight hundred and twenty one dollars and fifty-six cents) toward the costs she incurred in pursuing her claim.

[17] Payment is to be made within 28 days of this determination.

Michael Loftus
Member of the Employment Relations Authority