

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 281/10  
5277521

BETWEEN	CLAIRE SULLIVAN Applicant
AND	AGM PUBLISHING LIMITED First Respondent
AND	NATHAN INKPEN Second Respondent

Member of Authority:	R A Monaghan
Representatives:	G Service, counsel for applicant A Drake, counsel for respondents
Memoranda received:	7 May 2010 from applicant 28 May 2010 from respondents
Determination:	14 June 2010

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] AGM Publishing Limited (AGM) and Nathan Inkpen seek an order for costs against Claire Sullivan, following the withdrawal of her employment relationship problem.

**Background**

[2] Ms Sullivan filed an employment relationship problem in the Authority in August 2009. She said AGM, through its employee Mr Inkpen, had breached the terms of a mediated settlement recorded under s 149 of the Employment Relations Act 2000 (the settlement agreement). In particular the settlement agreement included a prohibition on either party making disparaging statements about the other. Ms Sullivan alleged that Mr Inkpen had made certain disparaging statements about her to Shastiq Abdul. She sought compliance orders and penalties.

[3] In response, AGM sought further and better particulars of the allegedly disparaging statements. For his part Mr Inkpen denied being a party to the employment relationship, denied any breach of the settlement agreement, said the Authority had no jurisdiction to deal with Ms Sullivan's claim against him and asked that the claim be struck out.

[4] The Authority directed the parties to mediation by direction dated 9 September 2009.

[5] Despite s 159(2) of the Employment Relations Act 2000<sup>1</sup>, counsel for AGM filed a memorandum dated 30 September 2009 (but not received in the Authority until 12 October 2009) complaining about a failure to provide a 'transcript' of the comments allegedly made and a copy of a statement from Ms Abdul which the applicant had apparently obtained. It was said this material was necessary so that AGM was fully and fairly informed of the allegations to be met, and that mediation would not be constructive without the material. Counsel had also filed a memorandum dated 6 October 2009 objecting to the Authority's jurisdiction to deal with the claim against Mr Inkpen.

[6] In the interests of ensuring mediation scheduled for that day went ahead, the Authority conducted an informal telephone conference with the parties on the morning of 12 October 2009. This was not the Authority's usual case management conference call. Counsel for the respondents maintained the requirement that full details of all allegations be provided before mediation was attempted. Counsel for the applicant indicated that the information would be made available at mediation.

[7] The parties attended mediation later on 12 October 2009, but the problem was not resolved.

[8] In late October and early November 2009 counsel for the respondents filed further memoranda raising essentially similar issues to those in the earlier memoranda. Also in November 2009 Ms Service received instructions, with Ms Sullivan having been represented by a barrister until then.

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<sup>1</sup> Where the Authority gives a direction to mediation the parties must comply with the direction and attempt in good faith to reach an agreed settlement, and meanwhile proceedings in the Authority are suspended.

[9] In December 2009 counsel began discussions about a resolution of Ms Sullivan's claim, including discussion about costs. No resolution was obtained. In submissions counsel for the applicant raised a concern that these discussions were without prejudice, but since the respondents had referred to them she provided more detailed information about them.

[10] By letter dated 12 April 2010 counsel for the applicant advised the Authority that Ms Sullivan was withdrawing her claim. Ms Sullivan's serious illness was given as a reason for the inaction between December 2009 and March 2010, and counsel's absence on leave in March was the reason for a further delay.

### **The parties' positions on the claim for indemnity costs**

[11] The respondents sought full indemnity costs in the sum of \$26,315. Counsel cited in support cases decided under legislation which preceded the Employment Relations Act, and cases on costs in the Employment Court. Regarding the categories of case in which indemnity costs have been awarded counsel referred to a judgment of the Court of Appeal in **Bradbury v Westpac Banking Corporation**<sup>2</sup>, which contained an assessment of the test for indemnity costs with reference to the High Court Rules. Counsel also referred to a decision of the Employment Court in **Postles v Airways Corporation of New Zealand Limited (No 2)**.<sup>3</sup>

[12] In general the counsel said the applicant's case was without merit. In addition the particular circumstances said to warrant the order sought were:

- a. the applicant's failure to provide particulars and refusal to produce a statement;
- b. the applicant's wilful disregard for the clear jurisdiction of the Authority in naming Mr Inkpen as a party to the employment relationship problem, when he was not a party to the employment relationship or the settlement agreement; and
- c. the applicant's delay in withdrawing her case.

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<sup>2</sup> [2009] 3 NZLR 400

<sup>3</sup> [2002] 2 ERNZ 817

[13] The conduct of the applicant's case was also raised, in terms which effectively repeated the above matters.

[14] Counsel for the applicant raised a concern about the lack of detail of how the level of costs sought was incurred, and pointed to the brevity of the statements in reply and the memoranda filed in the Authority. No other documents had been timetabled or filed in the Authority, and no investigation meeting had been scheduled.

[15] Counsel for the applicant also disagreed that the application was without merit. In further support she filed a brief signed but unsworn statement from Ms Abdul, which I understood to be the document the respondents were requiring prior to the mediation.

### **Merits of the applicant's case**

[16] I do not accept that the applicant's case was without merit. The statement of problem identified the person who allegedly made the statements of concern, the person to whom they were made, and identified particular statements which, if made, were disparaging.

[17] If the allegations had been proved in evidence, the applicant would have had a good chance of success in establishing a breach of the settlement agreement. The applicant's obtaining of a statement from Ms Abdul setting out the statements allegedly made to her indicate both that the applicant was doing more than making unfounded accusations and that evidence in support of her allegations existed. The respondents did not allege any reason why Ms Abdul might wish to fabricate an account of what was said to her, instead simply maintained an insistence on the production of Ms Abdul's statement.

[18] Accordingly I do not accept that the case was an unmeritorious 'try-on', and I do not accept that the applicant knew it was an unmeritorious 'try-on'.

### **Particular circumstances**

1. Refusal to produce statement and information

[19] Inevitably Ms Abdul's statement would have been produced voluntarily or by direction of the Authority if the employment relationship problem came before it following any inability to resolve the problem in mediation. Depending on her health - which I was advised in October was poor - Ms Abdul would have been required to attend and give evidence at an investigation meeting or a suitable alternative arrangement would have been made.

[20] The nature and extent of the material to be provided for mediation was a matter for the parties and the mediator. Further, while the parties to mediation could expect to be informed enough about what they are to address to facilitate an effective mediation, here as mentioned the respondents were aware before the mediation of what was allegedly said, who allegedly said it and to whom, and possibly where, although it is not clear whether they were aware of the timing of the relevant conversation. Even so I took it from the conference call in October that the respondents understood at least that the alleged statements were made during a single conversation. Beyond the matter of the timing of the conversation I am unaware of what information was considered to be missing, but it seems to me that there was sufficient information available to attempt a resolution by commencing mediation.

[21] I consider the approach to the Authority and insistence on the provision of Ms Abdul's statement prior to mediation was premature and unduly formal. It is not a good reason for considering full indemnity for costs. If it created additional cost for the respondents, the cost is not recoverable.

## 2. Disregard for Authority's lack of jurisdiction

[22] The concern about jurisdiction arose out of the citing of Mr Inkpen as a respondent to the employment relationship problem. It was submitted that there was a wilful disregard of the Authority's jurisdiction in citing him, despite his not being a party to the settlement agreement.

[23] In support a letter to counsel for the respondents from Ms Sullivan's former representative, and dated 23 July 2009, was referred to. The letter said that Mr Inkpen would be held liable severally with the company for several matters described earlier in the letter - many of which were not within the jurisdiction of the Authority

as they were set out in the letter and were not raised in the statement of problem – with the express exception of the “breach of the employment relations settlement where no relief is sought against Mr Inkpen, he not being a party to the settlement.”

[24] Nevertheless when the statement of problem was filed a penalty was sought in the Authority against Mr Inkpen in his personal capacity, and apparently under s 149(4) of the Act. Neither party referred to a decision of the Employment Court in **Musa v Whanganui District Health Board & Anor**,<sup>4</sup> which indicates at least that there was a tenable cause of action against Mr Inkpen in that respect. It is not necessary to comment on the likely outcome of such a claim, but I can say it is going too far to allege that there was a wilful disregard of the Authority’s jurisdiction.

### 3. Unnecessary delay

[25] The delay was explained, and in any event there was nothing to show how or why it added to any costs incurred by the respondents. I do not accept that it had that effect.

### **Conclusion**

[26] The amount sought by way of costs is an extraordinarily high sum for a problem that concerned at heart allegations that Mr Inkpen had made disparaging statements about Ms Sullivan in breach of the settlement agreement, when no investigation meeting was ever scheduled and no costs of preparing evidence or submissions in respect of the substantive applications were incurred.

[27] Not only was there no information beyond their total about the costs incurred, even if such information were available an order for the payment of such a large sum would be unlikely because the sum is so out of proportion to the factual simplicity of the core issue and a realistic assessment of the litigation risk faced by the respondents. There was nothing in the material before me to satisfactorily explain that lack of proportion, or to persuade me it is appropriate to reflect the matter in costs.

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<sup>4</sup> Unreported, Judge Shaw, 18 November 2008, WC 20/08.

[28] I do not overlook the possibility that Ms Sullivan's barrister took an aggressive approach, which appears to have been responded to in kind, and which in turn became time-consuming and costly. The risk of such an approach for all concerned is that matters escalate to the point where costs of the level cited are incurred, and cannot be recovered.

[29] For the reasons set out in the previous section I would not in any event have ordered the payment of full indemnity costs. There remain questions of whether, and in what amount, any order for costs should be made.

[30] In principle an order for costs can be sought in respect of a matter filed in and withdrawn from the Authority, where the withdrawal is not accompanied by an agreement between the parties as to costs.

[31] In the absence of any information about what the respondents' costs comprised, there is no basis on which I can assess an appropriate sum based on the parties' conduct of the matter in the context of something less than the level of full indemnity costs. I am left with the relatively few and relatively brief documents on the Authority's file against which costs can be assessed, and the fact that the problem had not progressed very far in the Authority at all. Accordingly it is difficult to support a claim for more than a very modest award.

[32] Ms Sullivan is therefore ordered to pay to the respondents the single global sum of \$500 in respect of her withdrawn claim. It is for the respondents to determine how such payment is to be allocated between them.

R A Monaghan

Member of the Employment Relations Authority