

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Andrew Ayers (Applicant)
AND	Advertising Works Ogilvy Limited (Respondent)
REPRESENTATIVES	Justine O'Connell, Advocate for Applicant Chris Patterson, Counsel for Respondent
MEMBER OF AUTHORITY	Leon Robinson
INVESTIGATION MEETING	16 May 2006
SUBMISSIONS RECEIVED	23 May 2006
DATE OF DETERMINATION	20 October 2006

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

- A. Advertising Works Ogilvy Limited is ordered to pay Andrew Ayers the gross sum of \$93,333.33 as reimbursement.
 - B. Advertising Works Ogilvy Limited is ordered to pay to Andrew Ayers the sum of \$15,000.00 as compensation under section 123(1)(c)(i) of the Act.
 - C. Advertising Works Ogilvy Limited is ordered to pay to Andrew Ayers the gross sum of \$21,538.46 as compensation under section 123(1)(c)(ii) of the Act.
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The problem

[1] The applicant Mr Andrew (Drew) Ayers ("Mr Ayers") says he was unjustifiably dismissed by the respondent Advertising Works Ogilvy Limited ("AWO"), and that he was unjustifiably disadvantaged by its unlawful actions. Mr Ayers further says AWO has breached its obligations of good faith owed to him. AWO says that Mr Ayers resigned. It denies that it has any liability to him.

[2] Mr Ayers applies to the Authority for an investigation of these problems and asks that they be resolved in his favour in the form of orders for reimbursement and compensation.

[3] The parties were unable to resolve the problems between them by the use of mediation.

The facts

[4] Mr Ayers had been employed by AWO for six years. Since the beginning of 2005 he held a senior role as Creative Director of Brand and Direct Marketing. He was paid an annual salary of \$280,000.00 in that role.

[5] On Thursday 20 April 2006 at about 11.00 am, Mr Ayers was asked to meet with AWO's managing director Mr Greg Partington ("Mr Partington"). Mr Partington informed Mr Ayers that AWO had purchased another advertising agency *Meares Taine* although the transaction had not yet been finalised ("the purchase"). I accept Mr Ayers' evidence that Mr Partington told him that he (Mr Ayers) "*would be a casualty*". Appreciating the standing of the personalities heading that agency as "creative gurus" within the industry, Mr Ayers quite understandably in my view, immediately apprehended his existing role was in jeopardy. Mr Partington referred to a need for caution because of advice he had received about constructive dismissal.

[6] Quite significantly, I find that during the discussion Mr Partington told Mr Ayers that he (Mr Ayers) was not losing his job. However, I also find that Mr Partington presented Mr Ayers with three options as a consequence of the purchase of the *Meares Taine* business. These were: -

- (i) leave;
- (ii) renegotiate his employment package without the title of Creative Director;
- (iii) the possibility of becoming Creative Director of Direct Marketing, but that if he stayed on his same salary package this could make him "vulnerable".

[7] After the meeting, Mr Ayers walked out of the building and went next door to the Caltex station for some privacy. He called his wife and burst into tears on the phone with her.

[8] Mr Ayers was not involved in the discussions or negotiations surrounding the purchase of *Meares Taine*. I accept the news of the purchase came as a complete surprise to him.

[9] It is understandable and I accept Mr Ayer's evidence that after the discussion with Mr Partington he "*saw the writing on the wall*". He gives evidence that he felt the only option he had was to leave as the other two options were not acceptable to him. He says it was quite clear to him that he was being pushed out and would no longer have his job as Creative Director in the new merger.

[10] The meeting concluded with Mr Partington advising Mr Ayers that they should keep talking. Mr Ayers was asked to attend a management meeting later that afternoon. Mr Ayers gives evidence that he attended that meeting at which AWO's senior management were informed of the purchase. Mr Ayers says it became apparent to him that other staff had prior knowledge of the purchase.

[11] The following day Mr Ayers sought legal advice.

[12] On 26 April 2006 Mr Ayers' legal advisers wrote by email to Mr Partington raising a personal grievance on Mr Ayers' behalf. That advice materially concluded: -

In our view the facts set out a very clear case for a claim of disadvantage and constructive dismissal. Drew is a senior executive who has given six years of exemplary service. The manner in which he has been treated and the potential damage to his career and reputation is wholly unjustified.

*Drew has been put in an untenable position given the agency's unjustified actions and **has no option but to leave his employment**. Clearly a similar role as a creative director will take time to secure, particularly in such a niche market and the current economic climate. The agency's actions in respect of Drew's reputation will have further compounded the ability for Drew to find alternative employment.*

Therefore we advise on the basis that Drew will resign, he will accept the following remedies in full and final settlement of his personal grievance:

- *Agreed statements to staff, clients and the media advising of Drew's decision to leave the agency in (sic) manner that protects his professional reputation;*
- *Redundancy compensation in accordance with his employment agreement;*
- *One month's salary in lieu of notice;*
- *Twelve month's lost earnings;*
- *Compensation for distress and humiliation due to the grossly unfair manner in which Drew has been treated of \$35,000 payable under 123(c)(i) of the Employment Relations Act 2000;*
- *Legal Costs associated with making this claim;*
- *Compensation for the loss of any other benefits.*

*Drew does not wish to enter into protracted or litigious proceedings in respect of this claim. However, we wish to reiterate that given the serious breaches of your obligations to him, he has no alternative but to raise this grievance. As such we consider **this proposal of settlement** to be fair and reasonable in the circumstances.*

*In the event that **settlement** is not acceptable we have instructions to formally file this claim in the Employment Relations Authority.*

The emphasis is mine.

[13] At 10.30 am that same morning, Mr Partington approached Mr Ayers. Mr Partington was very unhappy with the advice he had received from Mr Ayer's legal representatives. Mr Partington berated Mr Ayers and challenged him. Mr Ayers was distressed that other staff witnessed Mr Partington's obvious displeasure.

[14] As a result of this exchange Mr Ayers had his representatives further wrote to Mr Partington that same day raising objection with Mr Partington's communication and informing AWO that Mr Ayers was taking leave for the remainder of the week.

[15] On 27 April 2006 the parties' legal representatives agreed to submit the employment relationship problem to mediation to take place the following Monday 1 May 2006.

[16] Mr Ayers did not subsequently return to work and he tells the Authority that in the weekend of 29-30 April he cleared his office of his personal items. He says he did so because he apprehended the end of his employment was imminent.

[17] About thirty minutes before the scheduled mediation on 1 May 2006, AWO responded to Mr Ayer's submission of personal grievance by email sent to Mr Ayer's legal representatives. That advice materially stated that Mr Partington considered Mr Ayers was "*part of the merger*" and his job "*was not at risk*". It further stated that Mr Ayers' "*decision to leave Advertising Works Ogilvy is completely contrary to my client's intentions and was not foreseeable*".

[18] I do not accept that the outcome of the mediation was that Mr Ayers was to return to work. I find that the employment relationship problem Mr Ayers had earlier raised was not resolved at mediation.

[19] Mr Partington issued an email to AWO's staff at 3.08 pm that same day immediately after the mediation had ended. That email stated: -

It is with deep regret I received Drew's letter of resignation Wednesday last week. Drew and I attempted to work through the reasons for his resignation but this was unsuccessful. Drew will not be returning to our

company. I have wished him well in his future endeavours and acknowledge his constructive contribution to our business.

[20] Mr Ayers maintained he had not resigned and says that Mr Partington's email advice was precipitous and constituted a dismissal. As I understand his position, he says that AWO's rejection of his proposed settlement in his advice of employment relationship problem left the employment relationship problem unresolved but his continued employment unaffected.

[21] Mr Ayers sought interim relief from the Authority. He sought interim reinstatement but the parties agreed that they would proceed to have the substantive matter investigated. Mr Ayers subsequently abandoned his claim for reinstatement.

The merits

[22] Mr Ayers' advice of employment relationship problem is on first reading problematic. When he advised by his representatives that he had *"no option but to leave his employment"* it was entirely reasonable for AWO and Mr Partington to interpret that advice as Mr Ayers' resignation. It is expressed as an unqualified declaration. It is advice which should not lightly be given and where it is, remaining in the employment will ordinarily be wholly inconsistent with it. However, fortunately for Mr Ayers, I conclude that this particular advice must properly be construed in the context of what is ultimately communicated.

[23] The context of what is actually communicated is essentially expressed in the later phrasing *"Therefore we advise on the basis that Drew will resign, he will accept the following remedies in full and final settlement of his personal grievance"*. I accept that advice submits a proposal. It contains a resignation that is conditional upon the acceptance by AWO of the remedies proposed by way of settlement. The initial declaration that Mr Ayers has *"no option but to leave his employment"* is to be read in this context.

[24] In my view, it would have been clear to Mr Partington and AWO that Mr Ayers was essentially communicating a proposal. I have emphasised the advice of a proposed settlement. Mr Ayers was proposing to go but he would do so on certain terms. It would and ought to have been clear to Mr Partington and AWO that Mr Ayers would not exit the relationship with nothing. Mr Ayers' advice was the starting point for negotiations.

[25] On this analysis, I conclude that Mr Ayers had not actually resigned. He had proposed that he would resign but that resignation was conditional upon a settlement satisfactory to him.

[26] The difficulty here about whether Mr Ayers resigned or not, arises because the correspondence sent by his representatives was essentially what lawyers call *"without prejudice"* advice, but it was not noted as such. It would have been proper for Mr Ayers'

representatives to endorse the advice reserving Mr Ayers' legal rights and declaring the communication was on a without prejudice basis, being as it was I find, the commencement or starting point of a proposed compromise or settlement.

[27] I find, in equity and good conscience, that the correspondence of 26 April 2006 was essentially without prejudice and accordingly, Mr Ayers should not be prejudiced by it. Mr Ayers continued to attend work. He remained in the employment and gave advice that he was taking leave. Obviously, he did not conduct himself as though he had resigned.

[28] Nor do I consider that AWO honestly considered that Mr Ayers had resigned. Mr Partington had taken steps to assure Mr Ayers there was no basis for his resignation.

[29] Mr Ayers does not maintain now, that he was dismissed after his meeting with Mr Partington where Mr Partington "suggested" three options to him, including that he could leave. Rather, he maintains that it was Mr Partington's email of 1 May 2006 that constitutes a dismissal. Following mediation, his proposed terms were not met and so his proposed resignation did not come about. Accordingly, there was no resignation.

[30] After the mediation, Mr Ayers' had a decision to make about whether he would continue in the employment. However, Mr Partington made the decision for him. Mr Partington affirmed a resignation the basis for which he had earlier taken steps to assure Mr Ayers was misconceived.

[31] Mr Partington's issue of his email of 1 May 2006 straight after the mediation had ended was premature and precipitous. He was aware of course that Mr Ayers had been attending work. He was aware too and presumably gave instructions to AWO's counsel to advise Mr Ayers that very same day his job "*was not at risk*" only minutes before the mediation. AWO had also advised in writing that it regarded Mr Ayers as "*part of the merger*" that his job "*was not at risk*" and that his departure was "*not intended*". Mr Partington continued to assure Mr Ayers his job was safe only to later declare it at an end.

[32] I seriously doubt whether it was an option for Mr Ayer's to retrieve the situation by denying or withdrawing any incorrect resignation. He and his advisors were aware of Mr Partington's prior inconsistent assurance that Mr Ayers' job "*was not at risk*" and the lawyer's advice that Mr Ayer's departure was not what AWO intended. As well, the public announcement would have made it very difficult for Mr Ayers because he would not have wanted to be seen to be asking for his job back. I have little doubt that if Mr Ayers had sought to retract any resignation, in all likelihood he would not have been permitted to do so. The

announcement made publicly had significant impact on Mr Ayers and rendered his continued employment untenable.

[33] As well, Mr Partington's statement that Mr Ayers "*will not be returning to our company*" is concerning. I find Mr Ayers had never communicated position that he would depart immediately and nor do I consider it an outcome of the mediation assistance. It is in my view a telling statement inasmuch as it is demonstrative of Mr Partington's attitude. I agree that Mr Ayers was right to consider he had been discarded.

[34] In these circumstances AWO's actions constituted repudiatory conduct. The declaration that Mr Ayers would not be returning was improper, there being no foundation for it, together with the advice of Mr Partington's email of 1 May 2006 and his preceding bad faith conduct, plainly evidenced an intention by AWO not to continue the performance of Mr Ayers' employment relationship. It was reasonable for Mr Ayers to regard AWO's actions as repudiatory conduct and he was entitled to elect to affirm it.

The determination

[35] For the above reasons, I determine that Mr Ayers was dismissed. That dismissal was unjustifiable.

[36] Separating out AWO's actions against the statutory objective standard of what a fair and reasonable employer would have done in these circumstances, **I find that Advertising Works Ogilvy Limited actions were not what a fair and reasonable employer would have done. I conclude therefore that Andrew Ayers was unjustifiably dismissed by Advertising Works Ogilvy. Andrew Ayers has a personal grievance as a result of Advertising Works Ogilvy Limited's actions and he is entitled to remedies in settlement of that grievance.**

The resolution

[37] In considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Ayer's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[38] While I accept the wording of the personal grievance letter of 26 April 2006 has needlessly created difficulties in this problem, I cannot describe that situation as blameworthy conduct on Mr Ayer's part. Accordingly, I find that Mr Ayers did not contribute to the situation that gave rise to the personal grievance I have found and there is no blameworthy conduct on

his part as would justify and require a reduction in the nature and extent of remedies to be awarded.

[39] The Court of Appeal has sent this very clear message to those fixing compensation: -

Those fixing compensation in this area must have regard to the actual loss suffered by the employee We also emphasise that . . . in no circumstances should an award be made which exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed the employee would have been dismissed. In this regard we draw attention to the English jurisprudence reviewed in 16 Halsbury's Laws of England (4th ed, reissue) at para [529]¹.

[40] The assessment of compensation is very much a matter of impression and discretion within recognised parameters. It also necessarily involves some degree of speculation. It calls for speculation both as to the occurrence of and effect of various contingencies. For example, whether a dismissal can be said to be "inevitable" is very much a speculative conclusion. It has always been true that only proved losses can be claimed.

[41] Enquiries into loss involve an analysis of probable attendant contingencies, the relevance and likelihood of their occurrence and the extent of their impact. A rigorous inquiry is called for and both parties and representatives must be aware of the need to alert the Authority to the relevant points of enquiry. While we do not speak of evidential burdens in this forum, the Authority can only carry out appropriate enquiries where relevant matters are first brought to its attention. The vicissitudes of life being infinitely various, only those put in issue before the Authority can be considered.

[42] The fixing of compensation is always an exercise of discretion that equally, must always be exercised on a principled basis. The exercise of such discretions and similar ones, have conventionally not been lightly interfered with unless plainly wrong or unprincipled.

[43] I proceed now to make an assessment of the true loss to Mr Ayers. I attempt as best I can to assess how Mr Ayers would have been placed in the absence of the legal wrong that I have found. I am required to make allowance for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of his employment. Mr Ayers was not actually dismissed for redundancy although that was the situation the parties would have eventually been confronted with.

¹ *Telecom NZ Ltd -v- Nutter* [2004] 1 ERNZ 315 at paragraph 81. That statement was repeated in *Ioane -v- Waitakere City Council* [2004] 2 ERNZ 552

[44] Mr Ayers claims one year's salary as reimbursement. I speculate that Mr Ayers would not have remained in his employment. Significantly in my view, he deposes that he perceived "*the writing was on the wall*". He cleared his office of his personal effects in the weekend of 29-30 April. He said he felt like the only option he had was to leave as the other two options were not viable options for him. They were not acceptable to him because they involved reduced remuneration. It seems to me that if Mr Ayers was not going to be Creative Director, nothing else was going to be acceptable to him. The purchase of *Meares Taine* left Mr Ayers well and truly sidelined and there was no doubt in his mind about that. Accordingly, I conclude that there is an inevitability that Mr Ayers would not have remained at AWO.

[45] I also speculate too that before the relationship was formally concluded, a redundancy process would very likely have been carried out in accordance with the relevant employment agreement. If he had not been dismissed by Mr Partington's peremptory 1 May email, then it is almost certain that a consultative process in relation to potential redundancy would then have ensued and it should have.

[46] Both Mr Ayers' resolution to depart and the potential redundancy are contingencies which I am required to have regard to in assessing his true loss.

[47] Mr Ayers' employment agreement specifies a consultative process in relation to potential redundancy. There may have been another role for him as Mr Partington suggested but we will never know, because the process did not advance to an ascertainment of that outcome. It seems to me very likely indeed, that notwithstanding that Mr Ayers had made up his mind to go, a consultative process would have run its course formally concluding the relationship. I do not know what this employer would have had in mind in terms of a timeframe for a proper consultation process, or even whether it would have carried out such a process, but I regard a period of two months as reasonable for a consultation period in these present circumstances during which time Mr Ayers would have continued to earn his salary. That is my assessment of his true loss of salary.

[48] If the contractual process had run its course there are also notice provisions at clauses 22 & 23 in the employment agreement that would have accrued to Mr Partington. Those entitlements too, I regard as measures of his true loss, in the sum of two months salary.

[49] On this analysis, I assess the true loss to Mr Ayers of his lost wages as a result of the personal grievance I have found to be in the amount of four months salary. **I order Advertising Works Ogilvy Limited to reimburse Andrew Ayers lost wages of four months salary in the gross sum of \$93,333.33 (\$280,000.00 per annum/3).**

[50] Mr Ayers claims \$35,000.00 as compensation for distress and humiliation. He also claims \$10,000.00 for loss of reputation as well as aggravated damages of \$10,000.00. I emphasise that Mr Ayers was not dismissed for redundancy. But he was dismissed unjustifiably.

[51] Mr Ayers tells the Authority that in his view, through no fault of his own and as a direct result of AWO's unjustified actions, he finds himself without a job and without income. He has given evidence of his substantial financial commitments and the impact of the situation for his family. He is particular aggrieved that the wording of Mr Partington's email of 1 May creates the impression that he has left "under a cloud" causing him further distress and humiliation.

[52] Mr Ayers held a senior position at a leading advertising agency in New Zealand. He held a position well recognised within that industry. His standing within the industry was of importance to him and the circumstances of his very public departure the cause of much anxiety for him.

[53] I accept that the email of 1 May 2006 aggravated the stress and suffering Mr Ayers endured. I also accept his encounter with Mr Partington on 27 April 2006 caused him further aggravation.

[54] I am satisfied that Mr Ayers has suffered hurt and humiliation, loss of dignity and injury to his feelings. He has suffered that injury as a result of the unjustifiable dismissal. Having regard to his evidence, his total length of service and the circumstances of the personal grievance, I award him compensation of \$15,000.00. **I order Advertising Works Ogilvy Limited to pay to Andrew Ayers the sum of \$15,000.00 as compensation under section 123(1)(c)(i) of the Act.**

[55] As well, having considered it likely he would have been made redundant for reimbursement purposes, that aspect of matters must equally apply for compensation purposes in the quest to ascertain his true loss. I consider Mr Ayers would have been paid redundancy compensation according to the agreement. His entitlement would be four weeks given his service in "the position" was just over one year. That is a loss of a future benefit he is entitled to be compensated for. **I order Advertising Works Ogilvy Limited to pay to Andrew Ayers the gross sum of \$21,538.46 as compensation under section 123(1)(c)(ii) of the Act (4/52 x \$280,000.00).**

Aggravated damages

[56] By section 113 of the Act the only way to challenge a dismissal is by way of personal grievance for unjustifiable dismissal. That is a statutory action the remedies for which are also statutory. The compensation awarded under section 123 is derived from statute not common law damages. The award I have made at paragraph 54 above is the full award of compensation under section 123.

Penalty

[57] I am not persuaded that the circumstances of this problem require a punitive response. I therefore decline to impose a penalty as sought.

Costs

[58] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms O'Connell is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Patterson is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson

Member of Employment Relations Authority