

[2] In that determination I reserved the question of costs and suggested that the parties should attempt to settle the issue between themselves in the first instance. Unfortunately they have been unable to do so and Mr Wicks, for Mr Guida, has filed a submission seeking an award of costs of \$7000.00 against Ogilvy New Zealand Ltd. Mr Patterson, for Ogilvy, on the other hand, has filed a submission seeking an award against Mr Guida of \$7500.

The submissions

[3] Mr Wicks argues that Mr Guida was, for all intents and purposes the successful party and that the Authority should follow the well-established approach to costs set out in the judgment of the Employment Court in *PBO Ltd. v Da Cruz* [2005] 1 ERNZ 808. He suggests that as the resistance of Ogilvy's Managing Director, Mr Partington, to attending the Authority's investigation meeting necessitated a second day of attendance, costs should be calculated on the usual "tariff" approach, i.e. \$3000 for each of the two days, plus an uplift for the conduct of the respondent as it affected the time of the investigation meeting. He says that his client's costs were well in excess of the \$7000.00 he is claiming but has not produced a detailed breakdown of those costs.

[4] Mr Patterson argues that Mr Guida was in fact only partially successful in his claim. He points out that a major part of Mr Guida's claim was that he should be paid some \$450,000 in salary that he said he was entitled to as a result of the early termination of his fixed term contract of employment. He suggests that in fact Mr Guida was successful in less than 2% (in financial terms) of his claims. Mr Patterson says that Ogilvy has incurred some \$16,000 in legal costs in defending the whole range of Mr Guida's claims and that, as the more successful party by a substantial margin, is entitled to an award in respect to costs.

Discussion

[5] As the Employment Court said in *Da Cruz* (supra):

There is a discretion as to whether costs would be awarded and what amount.

The discretion is to be exercised in accordance with principle and not arbitrarily.

The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

Equity and good conscience is to be considered on a case by case basis.

[6] The Court went on to say:

We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. (My emphasis)

[7] This is a case where it is appropriate that the Authority use its discretion, and exercise its equity and good conscience jurisdiction, to make an award which is fair and consistent in the particular circumstances. Mr Guida filed a two pronged application in the Authority; claiming that he had been unjustifiably dismissed and that he was entitled to continue his employment, or continue to be paid his full salary while on "garden leave", until the expiry of his fixed term employment agreement. In the event I found that Ogilvy were entitled to make Mr Guida redundant and that that redundancy was genuine. However I also found that the way in which Ogilvy had treated Mr Guida fell *short of the standard required* and that as a consequence Mr Guida suffered significant hurt and humiliation.

[8] Had Mr Guida simply claimed that his redundancy was not genuine and/or that his dismissal was unjustified in terms of the way in which it was carried out the outcome would have been the same but the Authority's investigation would almost certainly have occupied only one day. In my judgment it is this somewhat hypothetical scenario that should form the basis of an award of costs.

[9] Apart from the difficulty in arranging for Mr Partington to be available for the Authority's investigation meeting, alluded to by Mr Wicks, the parties conducted themselves efficiently. Neither raised irrelevant issues or impeded the Authority's investigation.

Determination

[10] **Ogilvy New Zealand Ltd is ordered to pay Mr Guida \$3000.00 as a contribution to his costs.**

James Wilson

Member of the Employment Relations Authority