

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 40/10  
5139680**

BETWEEN                      SERGIO GUIDA  
   Applicant  
  
AND                                OGILVY NEW ZEALAND  
   LTD Respondent

Member of Authority:        James Wilson  
  
Representatives:              Paul Wicks for the applicant  
   Chris Patterson for the respondent  
  
Investigation Meeting:        17 September 2009 at Auckland  
  
Submissions received:        5 & 27 October 2009 from the applicant  
   16 October 2009 from the respondent  
  
Determination:                3 February 2010

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**DETERMINATION OF THE AUTHORITY**

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## **Sergio Guida's employment relationship problem**

[1] Until mid-2007 Sergio Guida owned (with his wife) and operated a small advertising agency, Virtus: Officine di Immagine (Virtus). In mid 2007 the Managing Director of Ogilvy New Zealand Ltd (Ogilvy) Mr Greg Partington, formally proposed that Ogilvy purchase Virtus. The sale and purchase agreement subsequently signed by the parties included the following:

### ***2. Conditions:***

*2.1 Conditions precedent: This agreement is subject to the following conditions:*

*2.1.1 Employment Arrangements: The purchaser entering into suitable employment arrangements with Sergio Guida, with the employment agreement to be attached to this agreement as scheduled 5.*

#### **4. Purchase Price**

*4.1 Purchase Price: The purchase price for the business will be calculated and paid as follows:*

*(a) The sum of \$100,000 to be paid upon settlement date, this sum being payable in respect of the goodwill of the business.*

*(b) Three further payments of \$50,000 to be paid within 10 working days of the purchaser's annual accounts being available in each of the 2008, 2009 and 2010 financial years (with any such payment to be made no later than 15 February in the year following each financial year) provided that each payment is payable only if within the particular financial year;*

*(i) Sergio Guida has been employed by the purchaser for the entire year; and*

*(ii) the existing client base of Virtus and any new clients which Sergio Guida's team make a contribution towards winning have, within that financial year, generated a minimum of \$389,000 in revenue.*

*(c) ...*

*(d)...*

[2] The employment agreement signed by Mr Guida subsequent to this sale and purchase agreement included the following terms:

#### **3 Term**

*3.1 The Employee shall commence employment on 1 November 2007 (on which date this agreement shall be deemed to have come into force), for a period of three years to 31 December 2010, at which time the agreement shall cease, (unless it is terminated earlier in accordance with the terms of this agreement), unless the parties agree to extend the term in writing.*

*3.2 The nature of this Agreement is one of a fixed term contract. The use of a fixed term is for legitimate commercial reason, the reason being due to the purchase by Ogilvy New Zealand Ltd (an associated company of the employer) of (Virtus) and the terms and conditions of that purchase, and the employee understands that the employer has genuine reasons for employing employee pursuant to a fixed term contract.*

3.3...

*3.4 At any time before 31 December 2010, at the employer's discretion, but after reasonable notice in consultation with the employee, the employer may require the employee to not attend its premises, but continue to be paid, for the remaining duration of this agreement.. The employee acknowledges this right of the employer, is in keeping with the fixed term nature of the agreement until the 31 December 2010.*

And, as I will explain later in this determination, both contentiously and of particular relevance, the Employment Agreement included:

**18. Termination.**

*18.1 Other than as provided for in clause 3, the employer will only terminate this agreement for redundancy, matters of discipline, non-performance or poor performance, medical incapacity or abandonment of employment.*

**19. Redundancy**

*19.1 Redundancy arises if for any reason the position filled by you is superfluous to the needs of the employer. This includes an excess of labour due to a decrease in business activity, changes in methods or reorganisation of workloads, and changes in technology and customer demand resulting in a permanent reduction in the number of permanent employees required.*

*19.2 Where, in the circumstances, you are advised that your position is identified as one that may potentially be declared redundant, a consultation process shall take place with the employer, including giving you the opportunity for your views and comments. If the employer cannot find you some alternative employment, and decides to make you redundant, you will be given at least four weeks notice of your termination date or four weeks salary in lieu of notice. Such notice shall be given in writing and shall be worked or paid at the employer's discretion.*

19.3...

19.4...

*19.5 Except as otherwise provided in this clause, if an employee's position is declared redundant, they shall not be entitled to any additional payment, whether by redundancy compensation or otherwise.*

[3] Mr Guida says that he queried this clause at the time but was assured that it was simply a standard clause and that it would never be invoked i.e. he would never be made redundant. More of that later...

[4] After a series of meetings between Mr Guida and senior managers of Ogilvy Mr Guida was advised on 6 August 2008 that his position was to be made redundant. On the same day he was advised that, as the relevant conditions of the sale and purchase agreement had not been met he would not receive the \$50,000 per annum payments provided for in the sale and purchase agreement

[5] Mr Guida claims that he has a personal grievance against Ogilvy in that his dismissal was unjustified. By way of compensation he is seeking the reimbursement of his salary for the period of the fixed term contract, lost bonuses, and the three \$50,000 annual payments due in terms of the sale and purchase agreement. He is also seeking compensation, for the hurt and humiliation caused to him by his unjustified dismissal, of \$25,000 and costs.

[6] In the alternative Mr Guida claims that Ogilvy breached his contract of employment by failing to pay him, on the termination of that contract, in accordance with the provisions of that fixed term employment agreement. Under this alternative Mr Guida is claiming \$450,000 in damages plus costs.

## **The issues**

[7] Does Mr Guida have a personal grievance for unjustified dismissal and/or is he entitled, in the alternative, to compensation for breach of his employment agreement? The law in respect to redundancy is reasonably settled. Dismissal for redundancy will be justified if the employer is able to demonstrate that the redundancy was for genuine reasons and was carried out in accordance with any contractual arrangements and in a

procedurally fair manner. However there are a number of aspects to this case which make it unusual.

[8] The first unusual aspect is that, although Mr Guida's employment agreement contains a provision that his employment could be terminated for reason of redundancy, Mr Guida says he received an assurance from the company that this clause would not be invoked. There are other specific clauses in Mr Guida's employment agreement which reinforce the term of his employment as being for three years. In particular clause 3.1 sets a fixed term of three years concluding on 31 December 2010 and clause 3.4 gives Ogilvy the discretion to place Mr Guida on "garden leave" until the end of his employment term

[9] The second unusual factor is that the terms of the sale and purchase agreement provide that Mr Guida will receive, as part of the purchase price for Virtus, albeit on certain conditions, three payments of \$50,000 for each of the following three years. Although one of the conditions of payment of these additional amounts was that Mr Guida was employed by Ogilvy *for the entire financial year*, these payments were clearly a way for Ogilvy to spread the purchase price over a period of time. Mr Guida's dismissal saved Ogilvy \$150,000. Put another way, Mr Guida's dismissal allowed Ogilvy to purchase Virtus for \$150,000 less than envisaged by Mr Guida when he agreed to sell his business. This windfall raises the implication, strongly rejected by Ogilvy, that Ogilvy deliberately and cynically enticed Mr Guida to sell Virtus by signing both the sale and purchase agreement and the employment agreement while intending to subsequently engineer Mr Guida's dismissal thereby avoiding paying him what they had promised while reaping the benefits of obtaining the Virtus client base.

[10] The questions for determination are therefore:

- (i) Was an assurance given to Mr Guida that he would not be made redundant, (Ogilvy say it was not) and if it was given, whether this assurance, in conjunction with the other clauses in the employment agreement, constituted a contractual obligation which overrode the specific wording of the redundancy provisions of employment agreement?

- (ii) If there was no contractual guarantee that Mr Guida would not be made redundant, was the termination of his employment for reasons of redundancy for genuine business reasons, and
- (iii) Was Mr Guida's termination carried out in a procedurally fair manner

[11] Having answered these questions it is necessary to consider as a whole the way in which Ogilvy terminated Mr Guida's employment and determine, in the words of section 103A of the Employment Relations Act, (the Act) whether Ogilvy's *actions, and how (Ogilvy) acted, were what a fair and reasonable employer would have done in all the circumstances at the time*. If the answer to this question is "no" then Mr Guida has a personal grievance against Ogilvy and it will be necessary to consider what remedies he is entitled to receive.

## Discussion

### ***Did Mr Guida receive a "guarantee" that he would not be made redundant?***

[12] There is a direct conflict of evidence on this matter. However I find that, on the balance of probabilities (i.e. it is more likely than not) Mr Guida did not receive a *guarantee* that he would not be made redundant. The company denies having given any assurance whatsoever. Ogilvy's Managing Director, Mr Greg Partington, told me that he would never give an employee an assurance that they would not be made redundant and had not given Mr Guida any such assurance. However Mr Guida had agreed to sell his business on terms which required him to be employed for the three years to receive full payment for that business. It would be astonishing if he were to sign an employment agreement, including a redundancy provision, without seeking, and receiving some reassurance that his ongoing employment was safe, at least for the first three years. Given the direct conflict in the evidence between Mr Partington and Mr Guida it is impossible to know exactly the form of the discussion between the two. I believe what is likely to have occurred is that Mr Guida raised his concerns with Mr Partington who responded that Mr Guida should not be concerned as Ogilvy had no intention of making him redundant. Mr Guida, perhaps naïvely but in the light of the other conditions set out in the sale and purchase agreement and the proposed employment agreement accepted that Mr Partington's assurance.

[13] To sum up this point: I find that Mr Guida did not receive a guarantee that he would not be made redundant but rather was advised, by way of reassurance, that Ogilvy had no intention of making him redundant.

***Did the assurance Mr Guida received amount to a contractual obligation that his employment would not be terminated for reasons of redundancy?***

[14] I have reviewed the Employment Courts judgement in *Kluskens v James Hardie Building Services & Technologies NZ Ltd* (AEC 36/97 Judge Travis, 9 May 1997, unreported) and several other cases cited and distinguished in that judgement. While none of those cases closely mirror Mr Guida's circumstances, there are a number of factors which can be identified as being relevant. These include: the events surrounding the giving of any assurance; the timing of any assurance relative to the signing of the employment agreement; the time lapse between the giving of the insurance and the redundancy and any change in the financial circumstances of the employer in the intervening time period..

[15] In Mr Guida's case the timing of the assurance he received, relative to his signing of his employment agreement, is relevant. There is no doubt that any verbal assurances given to Mr Guida were given before he signed his employment agreement on 8 November 2007. Before the final version of the employment agreement was signed there was an exchange of e-mails and several discussions between the party's legal representatives to agree the final wording. In this exchange Mr Guida's representative accepted *that there will be no redundancy compensation but ... if he does not accept the new offer of employment he will not be entitled to notice...* Redundancy was mentioned several times in these discussions including a comment conveyed by Ogilvy's legal representative to Sarah McGregor (Ogilvy's Operations Manager) querying:

*What happens if (Mr Guida) is made redundant by Ogilvy? Currently, you make him redundant, give him four weeks notice..... he wants either (1) Ogilvy agrees that if Ogilvy makes him redundant, the restraint of trade does not apply, so he can walk out with his staff, clients etc; or (2) Ogilvy agrees that the payments of \$50K made under the sale and purchase agreement*

*continue to be made to him if his clients are generating the appropriate revenue – so the provision in clause 4 that he has to be working for Ogilvy for the payments to be made would not apply if he wasn't working there because Ogilvy made him redundant.*

And in a subsequent e-mail, on 6 November 2007 Mr Guida's representative said:

*Our client requires that either the restraint of trade and non solicitation clauses will not apply in this situation or the further payments of the purchase price will still be payable (terms to be agreed).*

This requirement seems to have been explicitly rejected by the company and the next day Mr Guida signed the employment agreement

[16] It is clear from this exchange that Mr Guida was aware Ogilvy wished to retain, as part of his employment agreement, its ability to make him redundant should this prove necessary. Despite his reservations he signed the agreement. The sequence of events seems to have been: Mr Guida saw the draft employment agreement and queried the inclusion of a redundancy provisions. He then received the "assurance" that Ogilvy had no intention of making him redundant; the exchange of views between the party's representatives as outlined above took place; Mr Guida signed the agreement.

[17] The assurance given to Mr Guida, and the signing of his employment agreement, took place in November 2007. There was no indication at that time of the international financial crisis which was to dramatically affect all businesses in 2008. I accept Mr Partington's evidence that the advertising industry was particularly hard hit by this downturn. I also accept that whatever the specific reassuring words used by Ogilvy to Mr Guida in October/November 2007 they genuinely believed that the purchase of Mr Guida's business was in the best interests of both Mr Guida and Ogilvy and they had no intention, at that point, of making him redundant.

[18] Taking into account all of the circumstances surrounding the signing of Mr Guida's employment agreement I find that the assurance given to Mr Guida did not constitute a contractual guarantee that he would not be made redundant.

***Was Mr Guida's redundancy for genuine business reasons?***

[19] Mr Guida has not contested the proposition that Ogilvy's business was seriously affected by the global economic downturn. In simple terms he was made redundant because of that downturn and the need for Ogilvy to drastically reduce its overheads to reflect the dramatic downturn in revenue. Although Ogilvy were not particularly open with Mr Guida during the process which led to the termination of his employment his redundancy was *for genuine business reasons*. In *Simpsons Farms Ltd v Aberhart* [2006] 1 ERNZ 825, the Employment Court confirmed that the approach adopted by the Courts to cases of redundancy for genuine commercial reasons had not been changed by the enactment of s. 103A. of the Act. i.e. generally a redundancy will be genuine if it was made for valid commercial reasons and it is not for the Courts (or the Authority) to substitute their business judgement for that of the employer.

***Was Mr Guida's termination carried out in a procedurally fair manner?***

[20] During August 2008 Ms McGregor (Ogilvy's operations manager) held a series of meetings with Mr Guida during which he was advised that the company were considering making him redundant, and giving him an opportunity to discuss how this could be avoided. The minutes of those meetings suggest that a good deal of the discussion centred on the appropriate method of accounting to be applied to Mr Guida and his team, whether or not that team was making a profit and whether or not he was meeting the level of income set out in Mr Guida's employment agreement.

[21] On 22 August 2008, at Mr Guida's request, Mr Guida met with Mr Partington and Ms McGregor. No notes were kept of this meeting but Mr Guida, in his evidence, recalls

*The manner and tone of (Mr Partington's) comments to me in the meeting on 22 August along with his body language that was aggressive towards me in that he would lean towards me, was red in the face and raised his voice made it clear that (he) was not interested in meeting with me. I was sure that there*

*was apparently a predetermined outcome to the discussions having taken place with (Ms McGregor and Ogilvy's HR Consultant Mr Eddie Mann). I got the clear impression that no matter what I raised I was going to have my employment terminated.*

Mr Partington denies that his attitude in this meeting was aggressive or that Mr Guida's termination had already been predetermined. In his oral evidence he made it quite clear that he considered that the decision was to be made by Ms McGregor and that he accepted and supported her decision.

[22] At a final meeting, on 26 August 2008, Ms McGregor advised Mr Guida that he was to be made redundant. This decision was confirmed in writing in a letter delivered to Mr Guida on the same day. Also on the same day Ms McGregor advised Mr Guida that, as he was not to be employed at Ogilvy for the entire financial year, and in terms of the sale and purchase agreement, he would not receive the three \$50,000 annual payments set out in that agreement.

[23] What does not seem to have been discussed during the meetings with Mr Guida was the company's real reason for making him redundant. When questioned by the Authority Mr Partington made it clear that Mr Guida's departure was a question of simple economics. Ogilvy, as a consequence of the global economic crises, had suffered a serious downturn in business. As a result of this downturn the company had no option but to take drastic measures to reduce its overheads, including its staff costs. Mr Guida was one of the most highly paid employees. Dismissing Mr Guida may have resulted in the loss of some of the clients who had been acquired by Ogilvy as a result of the purchase of Mr Guida's business but these losses were unlikely to be greater than the amount saved by not having to pay Mr Guida's salary. In Mr Partington's view the economic equation added up to only one conclusion: Mr Guida should be made redundant.

[24] In other circumstances the consultation process which led to Mr Guida's redundancy may have met the minimum test of being fair and reasonable. Mr Guida was advised that the company were considering making him redundant. He was given an opportunity to comment and discuss alternatives. The process met the provisions of his employment agreement. However under all the circumstances in this case I find that the process fell short of the standard required. Mr Guida was not simply another

employee. He had relatively recently sold his business to Ogilvy in good faith and in the expectation that he would be employed for at least three years. He had also agreed that the purchase price would be paid out over those three years. The termination of his employment was far more than the simple reliance on the relevant clause in his employment agreement following a consultation process. For Mr Guida his termination amounted not only to the loss of a job and the associated salary but the loss, at substantially lower price than he had anticipated, of the business he had established and nurtured for 10 years. He deserved to be treated far more sympathetically than he was. At very least a full and frank discussion directly with Mr Partington would have may have helped him to understand the financial position in which Ogilvie found itself. While perhaps not contractual obligated to do so, Ogilvy (and in particular Mr Partington) could perhaps had considered a far more generous severance payment including the payment of the three annual \$50,000 payments Mr Guida would have received had his employment not been terminated. Instead Ogilvie chose to simply insist on its legal right to make Mr Guida redundant. It followed a sterile procedure, concentrating solely on the economic circumstances, while ignoring the human implications.

***Were Ogilvy's actions in terminating Mr Guida's employment "what a fair and reasonable employer would have done in all circumstances?"***

[25] Because of the particular circumstances pertaining to Mr Guida I find that while his redundancy was for *genuine commercial reasons*, the way in which he was made redundant by Ogilvy was not *what a fair and reasonable employer would have done in all circumstances*. **Mr Guida has a personal grievance against Ogilvy for its unjustified action.**

## **Remedies**

### ***Contribution***

[26] I have found that Mr Guida has a personal grievance against his former employer for the unjustified way in which the termination of his employment was carried out. Before turning to the remedies to be awarded to him I record that, in

terms of section 124 of the Act,-Mr Guida did not contribute to the situation that gave rise to his personal grievance.

### ***Loss of wages and other benefits***

[27] As set out above I have found that the termination of Mr Guida's employment was for genuine commercial reasons. Despite having found that the way in which Ogilvy terminated Mr Guida's employment was unjustified, Ogilvy was entitled to conclude that Mr Guida's position with the company could no longer be sustained and that he should be made redundant. The unjustifiable process does not remove the commercial imperative. To put it another way; if Ogilvy had acted fairly and reasonably towards Mr Guida he would be entitled only to the one month's notice he received and would have no sustainable personal grievance. Mr Guida is not entitled to receive compensation for salary or other payments he would not have received if Ogilvy had carried out the termination in a procedurally fair and reasonable manner.

### ***Compensation for hurt and humiliation***

[28] Both Mr Guida and his wife gave me very clear evidence regarding the effects of his termination on him. He says he was depressed and unmotivated, his sleep was affected and his pride hurt. His wife describes him as being *angry, irritated frustrated and always on edge*. The economic downturn which had precipitated his redundancy made it extremely difficult for him to find work. I accept that Mr Guida felt, in the words of his wife, that *this was not simply a redundancy but an unprofessional betrayal of trust* and had a major emotional effect on him.

[29] Mr Guida is entitled to be compensation for the traumatic effect Ogilvy's unjustified actions have had on him. **In terms of s 123(1)(c)(i) of the Act, Ogilvy New Zealand Ltd is to pay Mr Guida \$15000.00 without deduction.**

### **Costs**

[30] Cost are reserved to give the parties an opportunity to settle this issue between themselves in the first instance. If they are unable to do so Mr Guida may file and serve submissions in respect to costs within 28 days of the date of this determination. Ogilvy will then have 14 days in which to respond

James Wilson

Member of the Employment Relations Authority