

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA200A/10  
5134016

BETWEEN MARGARET WHITTEN  
Applicant  
AND OGILVY NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Marija Urlich  
Representatives: Susan Hornsby-Geluk, Counsel for Applicant  
Chris Patterson, Counsel for Respondent  
Submissions received: 14 May 2010, from Applicant  
27 May 2010 from Respondent  
Determination: 21 June 2010

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 30 April 2010 (AA200/10) I found Mrs Whitten had made out all grounds advanced including that she had established a personal grievance for unjustified constructive dismissal. Extensive orders were made in her favour. Costs were reserved. The parties have been unable to resolve this issue and memoranda have been filed setting out the parties' respective positions in respect of costs.

[2] In her memorandum to the Authority Ms Hornsby-Geluk advises Mrs Whitten's costs in relation to this matter total \$40,271.31 plus GST of \$500.92 with disbursements of \$400.60 (noting an 18% discount of legal fees). She submits that applying the daily tariff approach \$9000 plus GST with a multiplier of three hearing days would be a reasonable starting point but that this case justifies an award of indemnity costs on the following grounds:

- Ogilvy's case was entirely without merit;

- Ogilvy made no attempt at resolution;
- Ogilvy's approach to and conduct during proceedings was threatening and contemptuous, including interference with witnesses; and
- The totality of Ogilvy's actions in relation to this matter is a relevant consideration for the Authority in setting costs including unmeritorious preliminary issues brought before the Authority and subsequently challenged to the Court.

[3] Mr Patterson submits no grounds exist to extend the usual notional daily rate given:

- Ogilvy's defence was not entirely without merit and it was entitled to respond to Mrs Whitten's claims;
- The 27 January 2008 letter (the threat of High Court proceedings) is not relevant to the costs issues currently before the Authority given the letter was written after the personal grievance arose, the letter had no practical effect on the Authority's investigation, the Authority and Court have made costs awards in relation to the letter on the usual basis and Mrs Whitten has not identified whether or how her costs were increased as a consequence of the letter;
- This is not a matter justifying an award of indemnity costs, a position supported by the prior related costs awards;
- The principles articulated in *PBO v Da Cruz*<sup>1</sup> should apply to the matter at hand;
- The usual \$3000 notional daily rate in the Authority should apply with a minor increase given extra submissions were filed after the hearing and given Mrs Whitten's level of success; and
- Costs are not to be punitive and good reason must exist to depart from the usual notional daily rate.

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<sup>1</sup> [2005] 1 ERNZ 808

## **Determination**

[4] *PBO Ltd v Da Cruz* sets out the appropriate principles to be applied by the Authority in exercising its costs discretion.

[5] It is usual that costs follow the event and an award of costs is warranted in this matter. The purpose of costs is not to punish or express disapproval for conduct which does not relate to the proceedings or unnecessarily increases costs. The claim for indemnity costs is declined. While I accept indemnity costs may be awarded in the Authority any such consideration must include an assessment of actual costs reasonably incurred.

[6] Notwithstanding, in this case grounds for a high award of costs do exist:

- (i) Mrs Whitten incurred a high level of costs in asserting her employment rights;
- (ii) Mrs Whitten was wholly successful in her claims;
- (iii) Ogilvy aggressively and without merit opposed every aspect of Mrs Whitten's claim and made no genuine settlement offers;
- (iv) Ogilvy's challenge to Al Dickman giving evidence was reprehensible and consistent with the grandstanding and overbearing attitude adopted by Ogilvy towards this matter;
- (v) Mr Partington's conduct during the course of the investigation was discourteous, disruptive and uncooperative; and
- (vi) Ogilvy's threat to Mrs Whitten to pursue High Court action against her was repeated during the investigation meeting.

[7] For these reasons I set a reasonable notional daily rate for this matter at \$9,000 plus GST to be multiplied by hearing time of 3 days. The multiplier is set to take account of further evidence and extensive closing submissions filed after the investigation hearing days.

**[8] Ogilvy New Zealand Limited is ordered to pay Margaret Whitten \$27,000 plus GST in costs plus disbursements of \$400.60, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.**

Marija Urlich

Member of the Employment Relations Authority