

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 47A/09  
5134016**

BETWEEN      MARGARET WHITTEN  
Applicant

AND            OGILVY NEW ZEALAND LIMITED  
Respondent

Member of Authority:    Leon Robinson

Submissions Received:    20 February 2009  
6 March 2009

Determination:            31 March 2009

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**DETERMINATION OF THE AUTHORITY AS TO COSTS**

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[1]    The applicant seeks costs against the respondent in respect of the respondent's unsuccessful applications for removal and referral of question of law to the Court.

[2]    The applicant initially sought to have the Authority receive a letter dated 27 January 2009 as evidence it being marked, controversially, "without prejudice". The Authority agreed the advice ought to be received and made a direction accordingly. In revisiting the matter with the benefit of the respondent's input, the respondent made application to have the matter removed to the Court and further, that the Authority refer a question of law to the Court. In a Determination of 13 February 2009 both applications were refused and a timetable set for the receipt of memoranda in the event costs were sought.

[3]    The applicant now makes application seeking full indemnity costs of \$8,772.00 plus GST being the advised actual costs incurred. It is submitted that the Authority regarded the respondent's applications as entirely without merit and did not accept any of the submissions made by the respondent finding for the applicant on every limb of each issue. It is further submitted that the letter of 27 January 2009 was an attempt to

threaten and bully the applicant which is said to be "reprehensible". Finally it is said that the respondent's actions clearly demonstrate that it has put the applicant to significant and unnecessary cost and expense. In such circumstances, full indemnity costs are sought.

[4] In reply, the respondent by its counsel denies the respondent's actions were "reprehensible" or that the applications were totally lacking in merit. It does not deny the respondent is entitled to costs and confirms an offer of costs was made. It is submitted that offer is to be considered in context - that the applications were dealt with on the papers, no evidence was prepared and presented and the notional daily rate following an investigation meeting. It is submitted that an award in the range of \$300 and \$600 would be appropriate.

[5] The applicant's response to the eleventh hour applications made by the respondent were full and comprehensive. It is obvious considerable effort was applied by way of response at the applicant's cost.

[6] The applicant shall have an award of costs, but not on an indemnity basis. That is because I do not consider counsel's hourly rate is entirely recoverable in this forum. That statement is in no way a comment on senior counsel's involvement. But the Authority has not permitted recovery of costs based on such a level. There has been previous reference to roughly half of counsel's charge out rate as recoverable in this forum as an upper bound.

[7] I agree that the advice of 27 January 2009 is "unfortunate". I agree that the applications for removal and referral of question of law were "unmeritorious". That being so, I agree that the applications were made at a very inconvenient time and it is reasonable to draw an inference they were designed to delay the Authority's substantive investigation.

[8] I am certain the applicant ought not have had to incur the costs she satisfies me she has. On that basis and in this equity and good conscience jurisdiction, I permit her half the fee of \$8,772.00 broadly reflecting an award of half of counsel's charge out

rate, in the sum of \$4,386.00. **I order Ogilvy New Zealand Limited to pay to Margaret Whitten the sum of \$4,386.00 as costs.**

Leon Robinson  
**Member of Employment Relations Authority**