

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 267/07  
5078047

BETWEEN CAMERON MACKENZIE  
Applicant

AND OGILVY NEW ZEALAND  
LIMITED T/A ADVERTISING  
WORKS OGILVY LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: Michael Smyth, Counsel for Applicant  
Chris Patterson, Counsel for Respondent

Investigation Meeting: 7 August 2007

Submissions received: 14 August, from Applicant  
23 from Respondent

Determination: 29 August 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Cameron Mackenzie commenced his employment with Ogilvy New Zealand Limited (“Ogilvy”) in May 2005 in a graduate role as a photography coordinator. A year later he was promoted to an account executive role for Progressive Foods, one of Ogilvy’s “cornerstone” accounts. His key responsibility in this role was to coordinate the production of Progressive’s Foodtown weekly catalogues and ensure those catalogues were produced on time. Mr Mackenzie fulfilled this role by liaising between the client and Ogilvy’s design team.

[2] The Progressive account is lead by Siobhan Partington, Ogilvy’s Retail Client Services Director. She was involved with all management and disciplinary actions concerning Mr Mackenzie.

[3] In early October 2006 Mr Mackenzie received a written warning regarding his work performance. Mr Mackenzie said in evidence that he did not challenge the warning because he accepted he was at fault. He also accepted that through this warning Ogilvy drew to his attention the importance of attention to detail in his role.

[4] As a consequence of these performance issues the client asked that Mr Mackenzie be removed from the Foodtown account. Ogilvy fulfilled this request and Mr Mackenzie was moved to the Countdown account, another Progressive account.

[5] On 7 December 2006 Mr Mackenzie inadvertently copied an email chain between himself and a member of the design team to the Countdown representative with whom he dealt. That email chain included the following:

*with some crafty emails we will be able to sell eggs to these chooks!*

[6] Mr Mackenzie said the email was not intended to be derogatory of the client but accepted that it could be taken that way.

[7] Mr Mackenzie was understandably mortified when he received a reply email from the Countdown representative saying internal communications of this sort were not very professional. He immediately telephoned the Countdown representative and apologised. Mr Mackenzie did not advise his immediate supervisor or Ms Partington of his error because his apology had been accepted.

[8] At about this time Ms Partington sent an email to all staff reminding them to be careful with email correspondence. The issue was clearly important to Ms Partington because she asked Mr Mackenzie if he had seen the email. There is no dispute that the sending of Ms Partington's email was coincidental to and not in response to Mr Mackenzie's email.

[9] On 20 December 2006, in similar circumstances to the 7 December 2006 incident, Mr Mackenzie forwarded the following email to the Countdown representative:

*Hi Cherie, when you get a chance ...rediculous (sic) I know...*

[10] Mr Mackenzie said he could see nothing wrong with the email because the Countdown representative had called the requested changes ridiculous and he was simply repeating what she had said. There is no clue in the email that the client has called the changes ridiculous and Cherie, the design team member to whom Mr Mackenzie had sent the email, was not to know because Mr Mackenzie confirmed she was not party to the conversation with the Countdown representative. Cherie could reasonably take from the email that Mr Mackenzie thought the changes were ridiculous.

[11] On 21 December 2006 Ms Partington received a telephone call from the Countdown representative complaining about Mr Mackenzie's emails of 7 and 20 December 2006. She told Ms Partington that she had not raised the first email with her because she had hoped it was a "one-off". She also told Ms Partington that she had lost all confidence in Mr Mackenzie and that she wondered if these types of communications were an Ogilvy way of operating. She said, because of the second incident, that she did not want Mr Mackenzie working on the account.

[12] Ten minutes after the conclusion of that telephone call Ms Partington received a call from the Countdown representative's manager raising concerns about Mr Mackenzie's emails and asking that Mr Mackenzie be removed from the account.

[13] Ms Partington then convened a meeting with Sarah McGregor, Ogilvy's General Manager and John Payne, Ogilvy's General Manager Administration and Finance. They decided to dismiss Mr Mackenzie. Ms Partington and Mr Payne confirmed that they did not consider the terms of Mr Mackenzie's written employment agreement in their deliberation. The employment agreement sets out a process for conducting disciplinary inquiries.

[14] On 22 December 2006, the last working day before Christmas, Mr Mackenzie was asked to attend a meeting with Ms Partington, Ms McGregor and Mr Payne. Mr Mackenzie was handed a detailed letter advising that he was dismissed with immediate effect. The letter set out the reasons for dismissal and that Mr Mackenzie would receive two weeks pay in lieu of notice. The letter expressed regret that the dismissal had to be affected with such proximity to Christmas and wished Mr Mackenzie the best for his future endeavours.

[15] I accept that there was some discussion about the reason for the meeting and Mr Mackenzie provided an explanation for his conduct. However, Ogilvy has not been able to demonstrate that this dismissal comes close to meeting the accepted standards of a procedurally fair process. Ogilvy made a concession to this effect at the investigation meeting. This concession recognises that the decision to dispense with a fair process breached the legal obligation Ogilvy had to Mr Mackenzie to treat him fairly and reasonably.

[16] I find Mr Mackenzie's dismissal was unjustified.

### **Remedies**

[17] Mr Mackenzie is entitled to a consideration of the remedies he seeks. There can be no doubt that Mr Mackenzie has suffered as a consequence of his dismissal however, that dismissal is directly related to his own intemperate actions. I do not accept his explanations as to the reasonableness of the emails. The emails were dismissive of the client. Ogilvy was entitled, on any objective assessment, to form the view that the emails were unprofessional and their reference to the client was a consequence of Mr Mackenzie's own carelessness. Ogilvy was also entitled, on an objective basis, to consider the sending of the emails amounted to serious misconduct warranting dismissal. Mr Mackenzie had been formally warned about careless work practises, a global email had been sent cautioning care with regard to email correspondence and he had not been forthcoming with his employer about the chook email. It would be entirely unjust if any award did not reflect the reality that Mr Mackenzie was the author of his own misfortune<sup>1</sup>.

[18] I have considered the submissions filed by counsel regarding remedies and contributory conduct. I have great difficulty accepting that someone with Mr Mackenzie's skills was unable to mitigate his lost wages and secure satisfactory employment. As I have said above I accept Mr Mackenzie's dismissal has had a negative impact on him.

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<sup>1</sup> *Waitakere City Council v Ioane* [2005] ERNZ 1043

[19] In all the circumstances I consider that a global approach to the awarding of remedies is appropriate in this case and that that award should be \$1500 pursuant to section 123(1)(c)(i) of the Employment Contracts Act 2000.

### **Costs**

[20] Costs are reserved. The parties are encouraged to resolve this issue themselves. If this is not possible Mr Smyth should file and serve costs memorandum within 28 days of the date of this determination. Mr Patterson should file and serve any response within a further 14 days. Mr Smyth any reply within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority