

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 346/07
5078047

BETWEEN CAMERON MACKENZIE
Applicant

AND OGILVYNEW 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

Submissions received: 11 and 19 September 2007 from Applicant
18 September 2007 from Respondent

Determination: 1 November 2007

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 29 August 2007 (AA 267/07) I upheld Mr Mackenzie's claim that his dismissal was unjustified and made an award of remedies in his favour. Those remedies were reduced to take into account his contribution to the circumstances which gave rise to his personal grievance. The parties were invited to try to resolve the issue of costs themselves. In the event they were unable to leave was granted to refer the matter to the Authority for determination; that is now the situation.

[2] Mr Smyth advises that Mr Mackenzie's actual costs total \$3070 (incl GST), not including costs associated costs. He submits that a contribution to those costs of \$2026.20 (incl GST) would be fair and reasonable given the following:

- Mr Mackenzie's claim was successful;

- The matter could have been settled but for the respondent's refusal to make a settlement offer either before or during the investigation meeting;
- Mr Mackenzie is entitled to a reasonable award of costs which does not deny him an effective remedy;
- With the assistance of counsel the matter was effectively disposed of within 2/3rds of one day with written closings filed later.

[3] Mr Patterson submits:

- An award of costs by the Authority is discretionary and overrides the principle that costs follow the event;
- A contribution finding would justify the Authority departing from its usual tariff based approach and that \$500 maybe an appropriate costs award;
- That neither party made a *Calderbank* offer and the absence of such does not justify an award of costs or increased award; and
- The success of Mr Mackenzie's claim was limited.

[4] Mr Mackenzie achieved a modest level of success. However, he was successful and his contribution to the circumstances which gave rise to his personal grievance is reflected in the level of remedies awarded. That contribution is not further punishable via any costs award.

[5] There is no evidence that Mr Mackenzie has not paid Mr Smyth's invoices. The suggestion is mischievous.

[6] I agree with Mr Smyth's submission that this matter was amenable to settlement. There was very little factual disagreement between the parties, the investigation meeting provided the respondent with an opportunity to rectify the factual inaccuracies in its statement in reply, inaccuracies which were germane to the central issues between the parties and during the course of the investigation meeting the respondent conceded that it had failed to meet the standard of procedural fairness required in a dismissal setting.

[7] Taking into account the principles articulated in *PBO Ltd v Da Cruz*¹ I find that an award of costs is warranted. Given the particular circumstances of this matter that award should be set at the sum of \$2000 (incl GST) plus \$70, by way of reimbursement of the filing fee incurred by Mr Mackenzie in lodging this application and I so order.

Marija Urlich

Member of the Employment Relations Authority

¹ [2005] 1 ERNZ 808