

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 84/08
5085452

BETWEEN IAIN ALLAN
 Applicant

AND OGILVY WELLINGTON
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Barbara Buckett, counsel for the Applicant
 Chris Patterson, counsel for the Respondent

Investigation Meeting: 16 April 2008 at Wellington

Interim Determination: 18 June 2008

INTERIM DETERMINATION OF THE AUTHORITY

Introduction

[1] The employment relationship problem between these two parties was investigated by the Authority initially on 4 September 2007 and then on 16 April 2008 at Wellington. The identity of the employer became a major issue for the parties and for the Authority and, in consequence, I decided that I would issue an interim determination first dealing only with the identity of Mr Allan's employer to assist the parties and hopefully to clarify a number of issues relating to the employment relationship between them as a consequence.

[2] Having made the intimation that I intended to issue an interim determination on that matter, counsel then helpfully provided submissions on that point alone but the receipt and timetabling of those submissions has rather delayed the production of this interim decision.

[3] The reason that the identity of the employer is such a central focus of this matter is simply that there have been a number of changes in the employer's name during the period that the

applicant (Mr Allan) has had his employment relationship and on the basis that there are issues of potential liability as between Mr Allan and his employer, the question who precisely his employer is, becomes relevant.

[4] Certainly it was clear that there was no agreement between the parties as to who the employer of Mr Allan actually was at the various relevant times and accordingly it falls to the Authority to determine those issues so that the substantive matter can then be addressed.

Chronology

[5] Mr Allan filed his initial statement of problem on 2 July 2007 citing Frank Advertising Limited as respondent.

[6] The matter proceeded to an investigation meeting in Wellington on 4 September 2007. Before any evidence could be heard, counsel for Mr Allan produced an email from counsel for the then stipulated respondent, Frank Advertising Limited, dated the previous day to indicate that Frank Advertising Limited had ceased to trade and that Mr Allan might become redundant as a consequence.

[7] It seemed from the information supplied by counsel for Frank Advertising Limited that Frank Advertising Limited had been acquired (either in whole or in part) by Ogilvy Wellington Limited which was separately represented.

[8] A telephone conference was convened by the Authority on 5 September 2007 at which counsel for Ogilvy Wellington Limited was also present. The Authority's provisional conclusion from that telephone conference was that Mr Allan's employment was with Frank Advertising Limited although it seemed that Mr Allan might, when it came to his evidence being given, advance the proposition that his employer had changed during the course of the employment relationship.

[9] Because of the intimation that Mr Allan might allege in his evidence that his employer changed from Frank Advertising Limited to Ogilvy Wellington Limited during the course of the employment, I directed that the investigation meeting be suspended to enable the parties to consider their positions and in particular to enable Mr Allan to join Ogilvy Wellington Limited to the proceedings if he chose to.

[10] That is in fact what happened and an amended statement of problem was subsequently filed naming Ogilvy Wellington Limited as respondent and, critically, adding to the nature of the

employment relationship problem to be resolved, an allegation of unjustified dismissal on the grounds of redundancy.

[11] At the second part of the investigation meeting on 16 April 2008, the Authority heard the balance of the evidence and the issue of the identity of the employer continued to be an issue for the parties and the Authority.

Issues

[12] The only issue for determination here is the question which legal entity has liability for Mr Allan's claim and whether there has been any relevant change in the identity of that entity during the period of Mr Allan's employment.

The identity of the employer

[13] I am satisfied on the evidence I heard that:

- Mr Allan commenced employment on 1 April 2005 with Frank Advertising Limited;
- Mr Allan filed a statement of problem on 2 July 2007 against Frank Advertising Limited alleging unjustified actions by Frank Advertising Limited causing him disadvantage;
- On 1 August 2007, Ogilvy New Zealand Limited took ownership of Frank Advertising Limited and caused Frank Advertising Limited to cease trading, transferring Frank Advertising Limited's assets to Ogilvy Wellington Limited;
- On the same day (1 August 2007), Frank Advertising Limited's employees (including Mr Allan) were transferred from Frank Advertising Limited to Ogilvy Wellington Limited;
- On 3 September 2007, Ogilvy Wellington Limited terminated Mr Allan's employment on the grounds of redundancy.

[14] It seems to me to follow then that Mr Allan was employed for a number of years by Frank Advertising Limited and notwithstanding the various changes in corporate structure and nomenclature was ultimately dismissed from his employment by Frank Advertising Limited's successor in title. Mr Allan has finally been paid his redundancy compensation, to which he is contractually entitled.

[15] The only remaining issue is whether Mr Allan was also employed by another related entity in the period from early August 2007 down to 3 September 2007.

[16] In this respect, I accept the submission of counsel for the respondent to the effect that the evidence discloses that, at the relevant time (loosely August 2007), Persuasion Limited was contemplating whether or not it was able to offer Mr Allan a position in its restructured organisation. In the result, I am satisfied there was no meeting of minds as to any proposal for Mr Allan to be employed by Persuasion Limited so there was no subsequent employment agreement.

[17] It follows that Mr Allan is not entitled, on the basis of that finding, to any additional redundancy compensation as a consequence of, in effect, having been made redundant twice.

[18] It is my decision then that Mr Allan had one employer only during the period in question and was dismissed from that single employment once by reason of redundancy for which he has finally received redundancy compensation to which he is entitled by force of his employment agreement.

Determination

[19] Mr Allan was employed by Frank Advertising Limited on and from 1 April 2005 and brought a claim against Frank Advertising Limited alleging unjustified disadvantage on 2 July 2007.

[20] Mr Allan was subsequently dismissed from his employment on the grounds of redundancy by Frank Advertising Limited's successor in title and has brought fresh proceedings alleging unjustified dismissal against his employer.

[21] As Ogilvy Wellington Limited is Frank Advertising Limited's successor in title, the proceedings are properly re-intituled to record the respondent as Ogilvy Wellington Limited with both Mr Allan's claims of unjustified disadvantage and unjustified dismissal to be responded to by Ogilvy Wellington Limited.

[22] I reject the suggestion that Mr Allan was ever employed by Persuasion Limited; that is, I reject the contention that there were two separate periods of employment involving two separate, albeit related, respondents.

[23] It follows that there was one period of employment involving Mr Allan and one respondent, albeit that that respondent changed its name on more than one occasion during the period of the employment.

[24] The Authority would welcome submissions from counsel on the substantive employment relationship problem such that the applicant has three weeks from the date of this determination to file and serve his submissions, the respondent has a further two weeks thereafter to file and serve its submissions.

Costs

[25] Costs are reserved.

James Crichton
Member of the Employment Relations Authority