

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 84A/08  
5085452

BETWEEN IAIN ALLAN  
Applicant

AND OGILVY WELLINGTON  
LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Barbara Buckett, Counsel for Applicant  
Chris Patterson, Counsel for Respondent

Investigation Meeting: 4 September 2007 and 16 April 2008 at Wellington

Submissions Received: 21 July and 15 August 2008 from  
Applicant  
8 August 2008 from Respondent

Determination: 8 October 2008

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] The applicant, Iain Allan (Mr Allan) initially alleged that he was the victim of a series of unjustifiable actions causing disadvantage. The respondent employer, Frank Advertising Limited denied those allegations, claimed to have behaved justifiably and to have not caused Mr Allan disadvantage in his employment.

[2] Mr Allan's statement of problem in relation to the disadvantage claim was filed on 2 July 2007.

[3] Then, Mr Allan was dismissed from his employment on the grounds of redundancy on 3 September 2007 and in consequence of the termination of his employment, Mr Allan brought a fresh statement of problem before the Authority alleging an unjustified dismissal.

[4] Both of those matters are disposed of in the present determination, but for the sake of completeness, I note that I have already issued an interim determination in relation to this matter. That interim determination is dated 18 June 2008 and determines the identity of Mr Allan's employer. That matter became an issue during the investigation meeting and I decided that it required to be dealt with first and separate from the substantive determination.

[5] Mr Allan was the Creative Director of an advertising agency called Frank Advertising Limited which subsequently became part of Ogilvy Wellington Limited. Because the issue of the identity of Mr Allan's employer has already disposed of, I will refer to the employer throughout as Ogilvy.

[6] Mr Allan had occupied the Creative Director role since 1 April 2005 and I accept the evidence that suggested Mr Allan was an experienced senior employee in the advertising industry. Indeed, prior to the role in question Mr Allan had been employed by one of the smaller agencies which had merged to create Frank Advertising Limited.

[7] Mr Allan's employment was governed by an individual employment agreement including a job description.

[8] As part of the 2005 merger between the two advertising agencies that created Frank Advertising Limited, the Managing Director of the new entity (Mr Shennan) and the General Manager (Mr Irwin) determined to commission a survey of staff attitudes and use that material to assist in the bedding down of the merger arrangements. The evidence suggested to them that the merger had caused some anxiety to the staff.

[9] Because that survey exercise in 2005 had been perceived as a positive experience, it was determined to repeat the survey at the beginning of 2007 and this new exercise was promoted through an outside surveying entity.

[10] Critical to Mr Allan's employment relationship problem alleging disadvantage to him by unjustifiable actions of his employer, is the information provided by the outside surveying company which included a clear statement that individual responses to the survey were *confidential* and that the employer would *not have access to your individual responses*.

[11] On 9 February 2007 there was a management meeting at which the results of the survey in question were discussed. I am satisfied that at that meeting, the Managing Director, Mr Shennan, disclosed his intention to provide reasonably detailed information

from the survey to a whole staff meeting the following working day (Monday 12 February 2007).

[12] Mr Allan appeared at the management meeting on 9 February 2007 but contends that he was late (a view not supported by the other evidence) and that in consequence of his lateness, he may not have got the message that Mr Shennan was proposing to release the information to the whole staff meeting. In any event, there was no protest from Mr Allan at the management meeting on the Friday. Nor did anybody else object to the proposed release of the information.

[13] Mr Allan gave evidence that his understanding from the management meeting (which he acknowledges may have been imperfect because of his allegedly late arrival) was that there was to be discussion about the survey at the whole staff meeting but not that there was to be the level of detail and specificity that actually happened.

[14] At the whole staff meeting on Monday 12 February 2007, Mr Shennan released information which, amongst other things, enabled recipients to identify clearly comments made about Mr Allan. Mr Allan gave evidence about three comments in particular which were negative and which were clearly directed at him.

[15] Mr Allan's evidence, which is not contested on this point, is that at the whole staff meeting on the Monday, he protested about the release of this information, noting that it was imbued with a confidence, and having effectively protested about the breach of that confidence, left the meeting.

[16] Mr Shennan claims to have remonstrated with Mr Allan and tried to get him to remain, although Mr Allan denies that this conversation happened. I prefer Mr Allan's recollection of this matter, but nothing turns on whether Mr Shennan did or did not try to speak to Mr Allan immediately before his departure.

[17] It is clear that Mr Shennan subsequently left an apology on Mr Allan's cellphone, not apologising for the breach of confidentiality but apologising for the fact that Mr Allan was anxious about it.

[18] Over succeeding weeks, Mr Allan remained absent from the workplace on sick leave, supported by continuing medical certificates, and Mr Shennan, on behalf of the employer, sought to both address Mr Allan's issues (without success) and to obtain further and better particulars on Mr Allan's health prognosis.

[19] Mr Allan declined to engage with Mr Shennan, engaged legal counsel, and raised a personal grievance. In doing so, Mr Allan's counsel set out the nature of his first grievance (the unjustified disadvantage grievance) in two letters in early March 2007 and Mr Shennan responded to those letters by a letter of his own dated 13 March 2007 in which he tried to deal in detail with the allegations made by Mr Allan against Ogilvy.

[20] Mr Allan proposed mediation and Ogilvy refused initially, but was eventually persuaded to attend mediation on the basis that Mr Allan provided further and better particulars about his health prognosis. Ogilvy received the first detailed report on Mr Allan's health on 20 April 2007, some two months after Mr Allan had first gone on sick leave, and Ogilvy's evidence is that it was surprised, when it received that report, that it was dated 30 March 2007, fully three weeks before it was made available to Ogilvy.

[21] The parties proceeded to mediation in early May 2007 but were unsuccessful in resolving Mr Allan's first employment relationship problem. Accordingly, an application was then made for an urgent investigation meeting with the Authority.

[22] Mr Shennan left Ogilvy on 31 July 2007 and Mr Allan returned to the workplace on and from 7 August 2007.

[23] By email dated 3 September 2007, solicitors acting for Ogilvy advised Mr Allan that as a consequence of the corporate restructuring that Ogilvy was undertaking and in particular the demise (in a practical sense) of the entity that Mr Allan had previously worked for, he (Mr Allan) was no longer employed by that entity and thus might be redundant. It is useful to set out the relevant words from that email in full. It reads:

*... Frank Advertising Limited no longer has a business in which to be able to continue employing your client (a reference to Mr Allan). In the event that Ogilvy Wellington Limited is unable to offer your client an alternative position, Frank Advertising Limited will be left with no choice but to give your client notice of termination of employment on the grounds of redundancy.*

[24] By letter dated 21 September 2007, Mr Allan raised his personal grievance in respect to the alleged unjustified dismissal. At the investigation meeting, Ogilvy conceded through counsel that the email that I have just quoted dated 3 September 2007, constituted the dismissal of Mr Allan and that the process used by Ogilvy in effecting that dismissal was non-conforming in terms of the employer's obligations under s.103A of the Employment Relations Act 2000. While accepting that it was liable to Mr Allan in compensation for the procedural unfairness of the dismissal, Ogilvy maintained that the genuineness of the

redundancy could not be questioned because the entity previously employing Mr Allan (Frank Advertising Limited) had ceased to trade.

## Issues

[25] There are only two issues that require investigation by the Authority. They are:

- (a) Was Mr Allan disadvantaged by unjustifiable actions of Ogilvy; and
- (b) What remedies should apply to Mr Allan's unjustified dismissal?

### Unjustified disadvantage?

[26] I have already described the events Mr Allan particularly relies upon to ground his disadvantage claim. In short, Mr Allan says that he was promised confidentiality in relation to the workplace survey undertaken on Ogilvy's behalf but that that promise of confidentiality was broken by Ogilvy. The consequence was, Mr Allan alleges, that his work colleagues became aware of criticisms made of him as part of the survey process and he was publicly humiliated and embarrassed.

[27] It is, however, important to put that central allegation in context. In the memorable words of Lord Steyn in *R v. Secretary of State for the Home Department ex parte Daly* [2001] 3 All ER 443 at 447: *In law context is everything.*

[28] Mr Allan alleges that his relationship with the Managing Director, Mr Shennan, was poor. He says that employment relationship problems *were never dealt with properly*. He referred to Mr Shennan's *confrontational and often bullying style*.

[29] Mr Allan describes a succession of alarms and excursions during the work relationship, not especially directed at him but simply illustrative of an unwholesome culture and work environment.

[30] Mr Allan made particular reference to an episode of what he describes as sexual harassment where his evidence suggests that a client he had been working closely with had made sexually explicit observations about Mr Allan to one of Mr Allan's work colleagues. Mr Allan's evidence is that he sought to be relieved from that particular account, but that the employer refused.

[31] The difficulty with this evidence is that it is strongly contested by Mr Shennan and Mr Shennan's view of matters is supported by other former senior managers of Ogilvy.

Mr Shennan denied in his written brief that he knew anything of the employment relationship problems Mr Allan refers to.

[32] Furthermore, Mr Shennan gave evidence that he was *astounded* by Mr Allan's allegation of his having a *confrontational style of management*. Mr Shennan both denied that such was true, and indicated that Mr Allan had never raised the matter with him.

[33] Similarly, in relation to Mr Allan's contention that he was personally at risk as a consequence of potential sexual harassment by a client, Mr Shennan is adamant that Mr Allan never asked Ogilvy to deal with the matter, and in particular did not ask to be removed from the account.

[34] When I asked Mr Allan about the difference between his perception and those of Mr Shennan, he maintained that he had raised his concerns about Mr Shennan's style with Mr Shennan and that he did that in March 2005 when he recalled asking Mr Shennan: *Give me one reason why I should continue working for you?*

[35] Paul Irwin, the General Manager of Ogilvy at the time, gave evidence (which I accept) that he had a good working relationship with Mr Shennan, although he acknowledged that Mr Shennan could be *inconsistent*. Furthermore, when Mr Shennan gave his evidence, he accepted when pressed that Mr Allan was raising issues with him *in a very obscure kind of way*. Indeed, in his oral testimony, Mr Shennan made a number of small concessions of the sort I have just referred to, which tend to suggest to me that the emphatic denial of knowledge of Mr Allan's issues set out in his written brief of evidence may well have rather overstated the position.

[36] On balance then, I am satisfied that the context in which Mr Allan had to deal with the fundamental issue about confidentiality was already unhealthy and that because of his uncertain relationship with Mr Shennan, there was already a context to the confidentiality problem which informed the parties' behaviour.

[37] I find as a fact that there was a crucial difference between the process adopted by Ogilvy in calendar 2005 when the first survey of staff attitudes was conducted, and the process adopted in 2007. On the earlier occasion, Mr Shennan conceded in giving his oral evidence before the Authority that verbatim comments from the individual responses of staff members were **not** included in the feedback material provided to the staff as a whole. All that happened was that one or two verbatim comments were picked up.

[38] In 2007, however, the position was different and Mr Shennan agreed that he distributed the verbatim comments more or less in their entirety. Mr Shennan agreed that it was *unprecedented* to distribute the full verbatim comments.

[39] Mr Shennan stoutly maintained that by distributing the verbatim comments of participants in full, he did not breach confidentiality and he felt that the only way he could *test the culture* was by using the information in the verbatim comments. He said that he had distributed the verbatim comments *in the interests of a good open discussion*.

[40] When the material referred to was distributed to staff, the names of the people who had made these verbatim comments were blanked out. However, Mr Allan's objection is that some of those verbatim comments referred to the position that he occupied in the organisation. Although those comments were not directed at him by name, they were directed at him by position and some anyway of those comments were negative ones.

[41] Although I do not think it particularly significant, I mention now for the sake of completeness the process used by Ogilvy in distributing this information. First, there was a management meeting which was held on 9 February 2007 (a Friday). I am satisfied, on the evidence I heard, that Mr Shennan's intention to disclose the material in dispute by Mr Allan was notified to attendees at the management meeting. The only issue was whether Mr Allan was present when that notification took place. Mr Allan's evidence is that he was late for the subject meeting and may have missed the notification and certainly Mr Allan is clear that he had no warning about Mr Shennan's intention until the meeting of the full staff the following Monday, 12 February 2007.

[42] Witnesses for Ogilvy do not accept Mr Allan's evidence that he missed the notification of Mr Shennan's intention at the management meeting on 9 February, but again, the evidence is unequivocal that whether Mr Allan was present when Mr Shennan made his announcement to management or not, there was no objection by Mr Allan to the process at the earlier meeting.

[43] I do not think anything turns on whether Mr Allan had advance warning or not. If, as seems most likely, Mr Allan missed the relevant announcement at the management meeting, then there would have been no opportunity for him to protest. If he did hear the announcement and perhaps did not appreciate its significance, then he may still not have protested at that point.

[44] Either way, I am satisfied there was no protest from Mr Allan at the earlier management meeting, but at the full staff meeting on 12 February 2007, he made his position abundantly clear.

[45] Mr Allan describes the process of the 12 February meeting in his brief of evidence. He indicates that Mr Shennan handed out the survey results and gave the staff an opportunity to read them. During the reading process, Mr Shennan left the room. Mr Allan describes himself as being *very distressed and mortified* that comments made by individual staff were being distributed to all staff, in Mr Allan's view, *without ... permission (of the author)*.

[46] Mr Allan was particularly upset by *negative comments about me* which were distributed to the whole staff *most of whom I managed*.

[47] Mr Allan refers specifically to three negative comments which he says *were clearly about me*. Of the three comments specifically referred to by Mr Allan, one refers explicitly to his position of Creative Director, one refers generally to *creative staff, particularly senior staff*, which would include Mr Allan, and one complains that *young creatives need more direction*, presumably also a reference to Mr Allan and his management ability.

[48] Mr Allan says that he protested about the distribution made by Mr Shennan and Mr Shennan's oral evidence confirms that Mr Allan told Mr Shennan that the latter was *out of order* in distributing material which everyone had completed *in confidence*.

[49] Mr Shennan says that Mr Allan asked him to immediately withdraw the material but that he (Mr Shennan) confirmed that the meeting and its subject matter would continue, at which point Mr Allan left the meeting. There is some dispute about exactly how that departure happened, but nothing turns on the differences between the parties on that point. It seems clear that, at some point during Mr Allan's departure, Mr Shennan offered to discuss the matter with Mr Allan but the proposal clearly was that the discussion take place with all the staff present, and Mr Allan thought that completely inappropriate and said so.

[50] The Authority must decide whether Ogilvy has breached its obligations in the way in which it conducted this meeting and in the material that it provided for the meeting. I have no hesitation in reaching the conclusion that Ogilvy has indeed breached its obligations as employer. The material which was freely provided by staff to the survey company was imbued with a confidence. That is clear from the process advised to the staff before the survey was undertaken. In my opinion, at the very least, Ogilvy would have had to obtain the consent of each and every staff member who provided comments which they (Ogilvy)

wanted to share with other staff members and Ogilvy could only provide those comments to other staff when the author of the comments approved of that course of action.

[51] Further, in my view, any comments which could be construed as critical of a particular staff member or a particular position (such as the observations Mr Allan is concerned about), would of necessity have to be removed from the public disclosure to all staff.

[52] Mr Allan is quite correct to object to dissemination of his alleged weaknesses to all of the staff in the organisation and, in particular, to staff which he was responsible for managing. There could be no more toxic process than this in building wholesome workplace relationships.

[53] Whether Mr Allan is a trifle thin-skinned in his objection to some of these comments is, in my judgement, neither here nor there. He is entitled to have his inadequacies (if such they be), dealt with privately as a good and fair employer would, and not to have them bandied around in a public forum where the very people who are complaining about his management style are able to feed off comments from others.

[54] It follows from the foregoing that I am absolutely satisfied that Mr Allan has been the victim of unjustified actions by his employer and, based on Mr Allan's graphic evidence of the medical consequences of those actions of Ogilvy, I am satisfied that Mr Allan has suffered disadvantage.

[55] I am reinforced in that conclusion by my earlier finding that the context in which this confidentiality issue arose was already unwholesome.

### **The unjustified dismissal**

[56] As I have already made clear, Ogilvy quite properly indicated during the investigation meeting that it accepted that Mr Allan had been unjustifiably dismissed, not because the redundancy lacked genuineness, but because the process used was unsatisfactory. For his part, Mr Allan contends that the process was indeed unsatisfactory, but that the redundancy was not genuine either. It follows that the Authority needs to deal with both aspects.

[57] It is common ground that the process of making Mr Allan redundant did not comply with the law and I certainly agree with that conclusion. This was a redundancy declared by

email dated 3 September 2007 addressed to Mr Allan's counsel. The terms of that email are set out in para.[23] of the determination but briefly state that Mr Allan's original employer, Frank Advertising Limited, had ceased to trade and that in the event Ogilvy could not offer Mr Allan a position, then Frank Advertising Limited would make him redundant.

[58] Ogilvy says that the genuineness of Mr Allan's redundancy cannot be questioned because it is plain that Frank Advertising Limited had ceased to trade and that it was *unfortunate* that Frank's successor in title was unable to find Mr Allan a position.

[59] The difficulty with that thesis seems to me to be that Mr Allan appears to have been the only employee of Frank who was not found employment in the new structure. Mr Allan was not actively employed during the changeover period because of the ill health which he had sustained as a consequence of the disadvantage grievance which I have now found proved. Mr Allan ceased work on 12 February 2007 and did not go back to work until 7 August 2007, a period of some seven months. Even in the period from 7 August down to 3 September 2007, it is common ground that little or no gainful work was provided to Mr Allan, and in those circumstances, I am left with the conviction that Mr Allan's redundancy was no more than a convenient device for disposing of an employee who had become troublesome.

[60] If there were a genuine redundancy, I would have expected a better process with a more measured response from the employer. The very method of dismissal, in this case, suggests an ill considered and reactive approach rather than the reflective and thoughtful actions of an employer acting prudently.

[61] Applying the s.103A test, a good and fair employer would have conducted a proper inquiry into the circumstances which might give rise to the need to restructure, and then acted in a way that a good and fair employer would act, judged objectively at the time the decision had to be taken. Further, considering the amendments to s.4 effected by the 2004 Amendment to the Act, the Parliament has added specific duties to an employer's obligations in redundancy dismissals. The Court considered the changes to the statute in *Simpson Farms Ltd v. Aberhart* ARC 13/01 and concluded:

*So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s.103A.*

[62] In the present case, the process was imperfect. That much is acknowledged by Ogilvy. A dismissal for redundancy by email cannot involve any inquiry of the surrounding circumstances, nor can there be the customary exchange of information required in such cases. Of necessity, there can be no consideration of alternatives to the redundancy. There is no evidence, in the present case, that Ogilvy made any attempt to consult nor to meet any of its obligations under s.4. In particular, there is a clear breach of the employer's obligations under s.4(1A)(1)(c). This succession of breaches suggests to the Authority a failure to act *genuinely* and a semblance of *an ulterior motive*.

[63] What strengthens that conclusion for me is the absence of any evidence of a restructure, in the true sense of the word. This was not a situation where the business had failed or suffered an economic downturn which necessitated cost-cutting. There was simply a purchase of assets and the entity which happened to employ Mr Allan ceased trading. Other staff, it seems, who were not in dispute with Ogilvy, had their employment transferred to the new entity.

### **Determination**

[64] I am satisfied that Mr Allan has proved his claim that he has suffered a disadvantage as a consequence of an unjustifiable action of his employer, Ogilvy, and in consequence he is entitled to remedies.

[65] I am also satisfied that Mr Allan has been unjustifiably dismissed on the grounds of redundancy, and again he is entitled to remedies.

[66] In relation to the redundancy, it is common ground that the process used to effect the redundancy was unjustified, but I also make a finding that the redundancy was not a genuine one either for the reasons that I advanced above.

[67] Having reached the conclusion that Mr Allan has been successful in both his personal grievances, I must consider whether any behaviour of his has contributed to the circumstances giving rise to either grievance. I am satisfied that Mr Allan is blameless in relation to the circumstances surrounding each of his grievances and accordingly I am satisfied no reduction in remedies is required.

[68] Mr Allan has not worked in his industry since the termination of his employment, and even then had only worked for a very short period after a long period of ill health which I consider was caused by the employer's unjustified action. Furthermore, the failure of the

employer, Ogilvy, to provide Mr Allan with his portfolio for some nine months, materially contributed to Mr Allan's inability to obtain fresh employment.

[69] Further and finally under this general head, the fact that the employer, Ogilvy, failed to pay redundancy compensation to Mr Allan, which was plainly due to him, until I directed that that payment be made, further exacerbates Mr Allan's precarious financial position.

[70] In respect of wages, I think this is a case where it is proper to award a higher than usual amount as a contribution to lost wages and I intend to award four months' lost wages to Mr Allan in that regard. In doing so, I seek to take account of the failure of Ogilvy to pay redundancy compensation promptly when it was plainly due and owing, irrespective of the dispute between the parties about other matters, and the unwarranted failure of Ogilvy to release to Mr Allan his portfolio in order that he could progress further employment.

[71] I direct that Ogilvy is to remedy Mr Allan's two personal grievances by making the following payments to him:

- (a) A payment of \$8,500 under s.123(1)(c)(i) of the Employment Relations Act 2000 in respect of the unjustified disadvantage grievance;
- (b) A payment of \$10,000 under s.123(1)(c)(i) of the unjustified dismissal grievance;
- (c) A payment of \$48,000 gross being a contribution to the wages lost by Mr Allan as a consequence of his unjustified dismissal.

[72] I decline to award interest on the overdue payment of the redundancy compensation as I have included that factor in my calculation of the other amounts to be paid to Mr Allan by Ogilvy.

### **Costs**

[73] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority