New Zealand Employment Relations Authority Decisions

Rodionov v Ozone Technologies Limited (Wellington) [2018] NZERA 2002; [2018] NZERA Wellington 2 (17 January 2018)

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Last Updated: 2 February 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 2
5604897

BETWEEN ALEXANDER RODIONOV Applicant

AND OZONE TECHNOLOGIES LIMITED

Respondent

Member of Authority: M B Loftus

Representatives: Dean Organ, Advocate for Applicant

Nathan Gray, Counsel for Respondent

Submissions Received: 8 December 2017 from Respondent

9 January 2018 from Applicant

Determination: 17 January 2018

COSTS DETERMINATION OF

[1] On 11 October 2017 I issued a determination in which I dismissed various personal grievance claims brought by Mr Rodionov. 1 The most significant of these was that he had been constructively dismissed.

[2] I also dismissed Ozone's claims Mr Rodionov had breached various duties and covenants by disclosing confidential information while entering into a new employment agreement prior to leaving Ozone's employ.

[3] Costs were reserved and Ozone subsequently sought a contribution toward

those it incurred in successfully defending Mr Rodionov's claims. Mr Rodionov is of the view costs should lie where they fall.

1 [2017] NZERA Wellington 105

[4] Normally the Authority will use a daily tariff approach when addressing a costs claim.2 The tariff applying when these claims were lodged was $3,500 per day. From there adjustment might be made depending on the circumstances.

[5] It is Ozone's view an upward adjustment should be made. It asks it be reimbursed at the rate of $5,500 for each of the five days over which the investigation took place and in doing so notes actual costs were considerably greater.

[6] In support of its claim Ozone, having noted the principle costs are not to be used as a punishment, says Mr Rodionov's conduct is relevant to the extent it unnecessarily increased costs which, it is submitted, is what occurred here. In arguing this reference is made to the following:

a. A submission that as Mr Rodionov's own evidence was instrumental in ensuring he could not establish his claims it should have been obvious he would fail. The pursuit of untenable claims generated unreasonable costs. Particular reference is made to the fact Mr Rodionov based his constructive dismissal claim (and the majority of his disadvantage claims) on arguing the importance of Ozone's alleged actions when the evidence made it patently clear he had already decided to go of his own volition;

b. The way in which Mr Rodionov offered evidence and answered questions with particular reference to negative observations about this in the substantive determination at paragraphs [38], [39], [40] and [45];

c. The fact the investigation became a credibility contest which necessitated reliance on numerous documents which, in turn, generated additional cost;

d. A submission Mr Rodionov's conduct, especially under cross examination, required on-going and increased preparations particularly in the evening which again increased costs;

e. A misguided reliance on Mrs Haselhoff's admission she had fabricated

Mr Rodionov's signature on an employment agreement which led to a

2 refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 and *Fagotti v Acme & Co*

prolonged examination of various documents which, it is submitted, was unnecessary.

[7] With respect to the counterclaim it is argued that I may have misunderstood its nature. Notwithstanding that it is noted Ozone only wanted to establish liability with liability left for another day. By adopting this approach costs were reduced and it is submitted it would not be equitable to require Ozone pay costs in respect to the claim given the approach and result.

[8] Mr Rodionov's reply is based on the premise neither party was successful in pursuing their claims.

[9] It is also asserted Mr Rodionov's claims were not without merit with particular emphasis being placed on an allegation the counterclaim was based on fraudulent documentation as was the wider defence to Mr Rodionov's claims. Mention is also made of my finding his suspension was unjustified3 and it is said a six month delay in producing Mr Rodionov's holiday pay and the late return of personal property would not have occurred but for the lodging of claims.

[10] It is noted the fact the employment agreement filed with the Authority had been falsified was only admitted days before the investigation meeting and suggested that was only because Mr Rodionov had the document forensically examined. It is submitted:

*The actions of the respondent were an attempt to unlawfully restrain the applicant, pursue the counterclaim, mislead the Authority and pervert the course of justice*4 [and] *Such conduct is relevant to costs.*5

[11] It is also alleged aspects of Ozone's cross examination of Mr Rodionov was repetitive and misguided given it is said to have been based on information Ozone knew, or should have known, to be incorrect. It is submitted this was again unacceptable and designed to mislead the Authority with such conduct being relevant to costs.

[12] Reference is also made to a Calderbank letter Mr Rodionov sent on 14

December 2016. It proposes both parties withdraw their claims with costs lying

3 n 1 at [43]

4 Applicant's submissions at [15]

5 Applicant's submissions at [23]

where they fall. It also advises Mr Rodionov would seek all of his costs post its date. That said, such a course has not been pursued via the costs submission. Mr Rodionov, in closing, submits that given Ozone's ... *unlawful actions toward the applicant (both before and after filing of proceedings) the respondent does not deserve to be compensated for*

*costs*6 and costs should lie where they fall.

[13] The first issue is who, if anyone, can be considered the successful party in a situation such as this where there has been mixed success. The situation has recently been examined by the Employment Court in *Coomer v JA McCallum and Son Limited.*7 There the Court observed:

*Determining which party has been successful can be problematic. Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations.*8

[14] The Court then considered various precedents and outlined the issues to be considered.

[15] Ultimately I stand back and look at things "in the round" as the Court suggested was appropriate in *Coomer*.9 Having done so I conclude Ozone must be considered the successful party.

[16] The key claim and that which triggered these proceedings was Mr Rodionov's allegation he had been constructively dismissed. It was upon that and the three alleged disadvantages which underpinned the claim that the bulk of evidential time was spent. With these Mr Rodionov was unsuccessful and the same applied to his claims regarding retained property and holiday pay though this was partly due to the issues being rectified after the passage of some time. I say partly as residual elements remained upon which Mr Rodionov was again unsuccessful.

[17] I cannot help concluding this was a claim that bordered on being one that should never have been taken. The evidence, particularly documentary evidence, made it patently obvious Mr Rodionov had already decided to leave. He was doing so for reasons beneficial to himself and which had nothing to do with those he was

arguing forced him to go.

6 Applicant's submissions at [69]

7 [2017] NZEmpC 156

[18] Even those claims to which there was a degree of merit such as the unjustifiable suspension and the improper preparation of what Ozone claimed to be his employment agreement were forlorn claims. They were proffered in support of his untenable claim of constructive dismissal and no remedies could have accrued in

any event.10

[19] On the other hand time spent on the counterclaim was significantly less and a lot of that was unnecessary. In this regard I am referring to the evidence supporting Mr Rodionov's claim the agreement was fraudulent. By the time this was done that was unnecessary as the agreement's lack of authenticity had been conceded.

[20] As already said, and when viewed in the round, I consider Ozone to have been successful (and note this is perhaps reflected by the fact Mr Rodionov did not even seek to recoup the costs he said he would in the Calderbank when its proposed outcome in respect the substantive conclusions is effectively what occurred).

[21] Turning to what should be ordered as payable to Ozone.

[22] While the investigation did, as Ozone says, take place over five days I note two were, in terms of hearing time, incomplete and time was spent on another discussing a possible settlement. That said the resulting reduction in hearing time should be balanced against the fact comprehensive submission were subsequently prepared and forwarded. I consider five days appropriate.

[23] Applying the tariff that would see a contribution in the order of $17,500. Ozone asks that be increased while Mr Rodionov effectively seeks a reduction via his submission costs lie where they fall.

[24] I have some sympathy with Ozone's argument Mr Rodionov's claims were largely untenable. To that I add the fact no remedies were likely to result from those that had validity given the way they were pursued.

[25] I also accept the way Mr Rodionov answered questions was sub-optimal and that extended the hearing time. An inappropriate amount of time was also spent on

the issue of the employment agreement's authenticity (paragraph [19] above).

8 n 7 at [37]

9 n 7 at [43]

10 n 1 at [47] and [48]

[26] Balancing these issues, and the reason why I am not convinced they warrant an increase in the tariff, is the fact that once the issues with the employment agreements authenticity were clarified Ozone's counterclaim became equally untenable. That was a major factor in my conclusion in that regard though there were

others.11 Here I note the comment I may have misconstrued the claim but if I got that

wrong it should have been addressed via a challenge. None has been taken.

[27] My negative comments about the proffering of Mr Rodionov's evidence are balanced by the fact these issues are reflected in what could be considered an extended hearing time.

[28] Turning to the arguments the tariff should be reduced. Again they largely fail to convince. The prime argument is the respondents conduct, and particularly its falsification of the employment agreement, amounted to criminal behaviour that should not be condoned by an award of costs. That argument faces a problem in that an award of costs is aimed at recognising how the litigation was pursued and not to punish a party's conduct in respect to the substantive matter.

[29] The other main thrust of Mr Rodionov's submission is that elements of his claim had merit. All I can say is the substantive outcome speaks for itself in this regard – he failed to attain any remedies.

[30] There is then the Calderbank. Again I find it of little value. The key purpose of a Calderbank is to avoid cost. To do this it should be proffered in advance of an investigation and not between days three and four, especially when only three were initially scheduled. At that point only Mr Rodionov's evidence has been completed. By then the bulk of the costs had been incurred and I suspect the letter and its offer was a reaction to the fact that by then it should have been becoming apparent Mr Rodionov's claims were facing some difficulty.

[31] Perhaps the only issue which might warrant a reduction, and while I have concluded it was Ozone which was primarily successful, is the fact it too failed to establish its claims. In my view dedicated evidence occupied less than 10% of the investigation time. I conclude a reflective amount which is effectively doubled in

recognition of the fact this was an issue on which Mr Rodionov was successful and

11 n 1 at [51] to [54]

could himself has recouped costs should be deducted from the tariff. I consider it appropriate I award Ozone $3,000 a day.

Conclusion and orders

[32] For the above reasons Alexander Rodionov is ordered to pay Ozone Technologies Limited the sum of $15,000.00 (fifteen thousand dollars) as a contribution toward the costs Ozone incurred in addressing these claims.

M B Loftus

Member of the Employment Relations Authority
