New Zealand Employment Relations Authority Decisions

Rodionov v Ozone Technologies Limited (Wellington) [2017] NZERA 2105; [2017] NZERA Wellington 105 (12 October 2017)

Last Updated: 14 November 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 105
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

Investigation Meeting: 28, 29 and 30 November, 19 and 20 December 2016 at

Napier

Submissions Received: 14 February and 28 March 2017 from Applicant

9 March 2017 from Respondent

Determination: 12 October 2017

DETERMINATION OF

THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant, Mr Rodionov claims he was unjustifiably dismissed, albeit constructively, on 23 December 2015. He also claims he was unjustifiably disadvantaged by the Respondent, Ozone Technologies Limited (Ozone), by virtue of five events though at least three are the same as those which led him to conclude the employment had come to an end. Mr Rodionov also claims Ozone has retained some of his property and there is a claim relating to unpaid wages.

[2] Ozone denies the claims have validity and is of the view Mr Rodionov tendered a resignation which was accepted.

[3] Ozone has also lodged a significant counterclaim. It alleges Mr Rodionov breached various duties and covenants by disclosing confidential information while entering into a new employment agreement prior to leaving Ozone's employ.

[4] Mr Rodionov's reply is the counterclaim is vexatious and frivolous.

Background

[5] Ozone is a company specialising in water and wastewater treatment solutions. Its sole Director is Dirk Haselhoff and he jointly owns it with his wife.

[6] Mr Rodionov is a scientist expert in the field of water and wastewater treatment with a particular emphasis on mineral processing technologies. He joined Ozone in 2011 having already had a relationship with Mr Haselhoff through AD Solutions Ltd, a company in which both had an interest.

[7] According to Mr Rodionov all went well until 4 December 20151 though that may be debatable given his evidence he started looking for alternate employment at the beginning of 2015.2 He says Mr Haselhoff was aware of his job search though the later denies it. Mr Haselhoff says while Mr Rodionov had indicated he would like to be closer to his Auckland based son, he had not said he was actively seeking alternate work.

[8] Mr Haselhoff says he first became aware Mr Rodionov was in negotiation with a prospective employer on Friday 4 December 2015. This knowledge was imparted when an e-mail from the prospective employer was mistakenly sent to Mr Rodionov's work e-mail and it indicated the process was at an advanced stage.

[9] The e-mail was from a client of Ozone's which concerned Mr Haselhoff who then asked Mr Rodionov to explain. Mr Haselhoff's concern was exacerbated by the fact Ozone had been engaged in delicate negotiations with this client for some time and, according to Mr Haselhoff, he had instructed Mr Rodionov not to contact them.

[10] Mr Haselhoff said Mr Rodionov simply said he did not know what the e-mail was about, having not spoken to the client for months. He was leaving for the day and

would look at it on Monday.

1 Statement of Problem at [3.1]

2 Brief of evidence at [8]

[11] This enhanced Mr Haselhoff's concerns and he checked phone records. They confirmed contact between Mr Rodionov and the client. Indeed there had been a contact that day and on many other occasions over the preceding weeks. The records also suggested inexplicable contact with other clients. Further investigation followed over the weekend.

[12] The key events occurred on the morning of 7 December 2015. Mr Rodionov says he arrived at work set on preparing for the coming week. He says at approximately 7.12am Mr Haselhoff arrived, barefoot and angry. An altercation then ensued, though the parties differ on exactly what happened.

[13] Mr Haselhoff says an electronic monitoring device he had at his home alerted him to the fact someone had entered Ozone's premises at 7.17am. He says this was unusual as the first person who normally arrived did not do so till a bit later. He says he went down to see what was happening and saw Mr Rodionov's car. This he found very unusual as Mr Rodionov did not normally appear till around 8.30 or later.

[14] Mr Rodionov says Mr Haselhoff challenged him about a box it was alleged he had put in his car and yelled to Mrs Haselhoff instructing her to call the police. Mr Rodionov says he was then accused of stealing company property and Mr Haselhoff demanded he relinquish his company computer. Mr Rodionov says he advised he had *critically important personal information on my computer (not the property of the company), mobile and diary...* He says he acknowledged there were company documents on the computer and he would like to separate the two then return the laptop, mobile and diary.

[15] Mr Rodionov says Mr Haselhoff then attacked him and tried to wrest the computer from him. He says a two to three minute fight followed during which Mr Haselhoff screamed continuously and loudly. He says this was brought to an end when he chose to let go of the computer.

[16] Mr Rodionov says Mr Haselhoff then asked he (Rodionov) go home and prepare for a meeting to be held on 9 December.

[17] Mr Haselhoff has a different view. He says he did not initially know about the box which it appears became an issue after Mrs Haselhoff, who had accompanied her husband to Ozone's premises, looked at surveillance footage and saw Mr Rodionov taking it out to the car. It had the name of a client on it and as it turned out contained

various items. There is a dispute about the use they might have been put to with Mr

Rodionov saying the removal was legitimate and Ozone having a different view.

[18] Mr Haselhoff says he challenged Mr Rodionov about what was going on to which the later admitted negotiating with the client. It is alleged Mr Rodionov admitted approaching the client offering to provide a solution to the problem Ozone was negotiating over. It is alleged Mr Rodionov said he had no choice due to financial difficulties and that he intended using and disclosing information confidential to Ozone. Mr Haselhoff says this prompted him to advise suspension and ask for the computer. He says he reached out for it and Mr Rodionov grabbed it pulling him (Haselhoff) over the desk behind which Mr

Rodionov was seated. He says he let go and it was then Mrs Haselhoff came in and advised what she had seen on the surveillance camera.

[19] Mr Haselhoff describes the situation as one where they had a tug of war over the computer but no fight. He accepts he did tell Mrs Haselhoff to call the police and it was this that he believes prompted Mr Rodionov to relinquish the computer.

[20] Mr Rodionov says the following morning Mr Haselhoff arrived at his home unannounced and left two copies of what Mr Rodionov says purports to be his individual employment agreement and an account of moneys Ozone claimed he owed.

[21] Mr Rodionov takes particular offence at this saying he never signed an employment agreement. He claims the document was fraudulently prepared in order to impose various restrictions upon him and prevent the possibility of his working for another company.

[22] Ozone accepts the employment agreements were delivered but says this was because Mr Rodionov requested copies. Mr Rodionov denies making the request on the grounds he never signed an employment agreement and this highlights one thing he is correct about. The copies he received were fraudulent.

[23] It is said Ozone keep copies of all employment agreements on file. Mrs Haselhoff says that when she went to get the agreement Mr Rodionov had requested she found it missing. Ozone is adamant Mr Rodionov signed an employment agreement in 2011 and is now alleging he stole it so it could not be sued to enforce the restraints and covenants contained therein. Mr Rodionov denies that accusation.

[24] Having found the agreement missing Ms Haselhoff says she panicked. She say due to the fact Mr Haselhoff was clearly wound up and stressed she chose not to tell him the agreement was missing and prepared a replacement using Mr Rodionov's electronic signature. Mr Haselhoff did not know about this till some time later.

[25] Mr Rodionov says that later that day he found another envelope. It contained a letter mentioning the meeting already scheduled for the next day; advised a list of disciplinary allegations and confirming a suspension on pay.

[26] Mr Rodionov says he was extremely stressed by these events and went to his GP on the morning of 9 December. In Mr Rodionov's words the GP gave him stress leave till 25 December.

[27] Correspondence then flowed between the party's representatives. About this Mr Rodionov takes particular exception to the fact Ozone's lawyers would not be available till mid-January 2016. He says this was unacceptable and he was not going to wait around till then for the issues to be discussed. He goes on to say *After the way I had been treated I couldn't remain employed with the company and considered myself constructively dismissed.*3

[28] Ozone was advised of that by letter dated 23 December 2015. It cites three issues as leading Mr Rodionov to conclude he had no option but to tender an immediate resignation. They are:

a. The act of violence toward me received from both company directors on 7 December 2015;

b. Suspending me for no good reason;

c. *Fabricating a document you now claim is my employment agreement*.4

Determination

[29] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow

a written determination of findings at a later date.

3 Brief of evidence at [36]

4 Letter Rodionov to Haselhoff dated 23 December 2015

[30] In opening I note the investigation took five days and hundreds of pages of documents were presented. While the background description above does not reflect that it contains what I consider a precise containing the pertinent facts which will determine the issues I must decide. The parties can be assured I have considered all the evidence and documentation. The same applies to the comprehensive submissions they presented though once again these are not recorded or summarised.5

[31] Mr Rodionov's prime claim is he was constructively dismissed.

[32] In *Wellington etc Clerical Workers etc IUOW v Greenwich6* the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be

dismissive or repudiatory conduct.

[33] While a simplistic summary of more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation. It is for the applicant to convince me that is the case. There must also be a causal link between the employer's conduct and the tendering of the resignation7 and the possibility of resignation should be foreseeable.8

[34] The correspondence of 4 December indicates, as Ozone says, Mr Rodionov's negotiations were at an advanced stage. Indeed it suggests his new arrangement was all but a done deal. The e-mail confirmed acceptance of Mr Rodionov's suggestion the job title change; a proposal the start date be pre-Christmas and that the parties would talk about vehicle options the following Monday.

[35] Another document dated 6 December is even more detailed. It talks about a proposed start date of 14 December and confirms a mobile phone would be provided once the agreement was signed. It again talks about the job title and a vehicle. Tellingly it asks Mr Rodionov provide a list of equipment he needed so it could be

ordered that week. It closes by expressing delight at having Mr Rodionov on board.

5 Section 174E(b)(ii) of the Employment Relations Act 2000

6 (1983) ERNZ Sel Cas 95; [1983] ACJ 965

7 *Z v A* [1993] 2 ERNZ 469

8 *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140

[36] I also note an e-mail Mr Rodionov sent on 30 November prophesising a bright future now he had a better understanding of *the need for dependency on our Chilean vendors.*

[37] Notwithstanding this Mr Rodionov is trying to convince me the impression created by the correspondence is misleading. He says even at that stage there was no guarantee he would go and his departure is wholly attributable to the actions of Ozone's owners on 7 December 2015 and the following days.

[38] Yet when questioned about this assertion and the impression if was at odds with the correspondences' content Mr Rodionov's answers were far from convincing. He often avoided questions and was almost totally incapable of explaining the incompatibility or why the correspondence said what it did.

[39] To that I add three more factors. Mr Rodionov accepts the change allowed him to fulfil what to him was the important goal of being nearer to his son. He also failed to satisfactorily explain why he was removing property on the morning of 7

December in what can only be considered a covert way.

[40] More importantly he acknowledged more than once he felt financially constrained and would do almost anything to improve his situation. Notwithstanding that he is also trying to convince me, even at this late stage in his negotiations over the new arrangements, that it was still distinctly possible he was likely to reject an income some three times greater than that he earned with Ozone. I find that totally implausible.

[41] The evidence and in particular Mr Rodionov's answers and the way they were

presented lead me to conclude his departure from Ozone had been decided before 7

December and it was going to occur in the near future. The reasons therefore had nothing to do with December's events and Ozone's alleged actions during that period as he now claims. The claim of constructive dismissal fails.

[42] Turning to the disadvantage claims. There are five. In addition to the three points raised in his letter of 23 December he adds accusations he was disadvantaged by Ozone having misappropriated his personal property with force and failing to conduct a fair and proper disciplinary process.

[43] There can be no doubt the claim regarding an unjustified suspension has merit. It is well known suspension requires a prior process whereby the employer advises it is being considered and allows input from the employee before deciding whether or not to go ahead with the suspension. There is no evidence that occurred. Indeed Mr Haselhoff's evidence says it did not - he decided to suspend and simply imparted advice of that decision.

[44] Similarly there is no doubt the agreement's Mr Haselhoff delivered were fraudulent. That is admitted though I am not sure how Mr Rodionov knew that was the case. He says it is because he never signed an agreement in the first place but I also heard significant evidence about the electronic signature differing in small detail from his normal written one and it is possible he noticed.

[45] I do not, however, consider the other three claims have validity. For three reasons I do not accept Mr Rodionov's claim he was attacked or otherwise assaulted on 7 December. They are:

a. I prefer the evidence of both Mr and Mrs Haselhoff. Both gave full responses to a simple question of what happened which were consistent with their briefs and which went undisturbed by cross examination. Their presentation was preferable to Mr Rodionov's incomplete answers and avoidance of some questions;

b. There is also evidence Mr Rodionov is an experienced martial arts practitioner. Against that is evidence both Mr and Mrs Haselhoff have medical issues which suggest they would be ill equipped to consider a fight with such a person and unlikely to do so;

c. Third, and perhaps most importantly, there was another employee on the premises throughout much of the time the events of 7 December allegedly occurred. He was at a work station where he could have heard the type of altercation reported by Mr Rodionov yet says he hardly even heard any raised voices.

[46] My preference for the above evidence also leads me to reject the claim Ozone forcibly removed Mr Rodionov's property – namely one computer on 7 December. In any event the evidence leads to a conclusion the computer was Ozone's. There is then

the claim Ozone conducted an unacceptable disciplinary process which is dismissed if only because the process was never completed.

[47] Even if the above is wrong, and a reason why I do not need to consider how Mr Rodionov knew the employment agreements were fraudulent, is no remedies would accrue even if he was disadvantaged. For that to occur the disadvantage must negatively affect the employment yet by the time the events complained of occurred the employment was effectively over at Mr Rodionov's volition.

[48] There is then the fact there was little evidence of harm emanating from the above incidents. There were a couple of statements Mr Rodionov felt extreme hurt but I note that did not stop him concluding his new arrangements and commencing on

6 January 2016. There was also the medical certificate but that is little more than the GP's reiteration of Mr Rodionov's self-diagnosis. The bulk of Mr Rodionov's assertions about harm emanating from the alleged disadvantages relate to the effect it had in respect to his decision to resign. I have already rejected that in rejecting the constructive dismissal claim.

[49] For these reason the disadvantage claims also fail.

[50] There is then Ozone's counterclaim. This too will face insurmountable

obstacles and will be dismissed.

[51] First Ozone is incapable of providing a properly signed agreement containing the covenants it believes have been breached. This deficiency will not be capable of being overcome even if I accept its claim Mr Rodionov stole the original though here I must say the evidence supporting that claim falls short. It has long been accepted a higher standard of proof is required when undertaking an investigation where serious and criminal misconduct is alleged. Support for this can be found in various judgments of the Court, including for example *Alatipi v Chief Executive of the*

Department of Corrections;9 *Edwards v Board of Trustees*10 and *Lawless v Comvita*

New Zealand.11 That level of evidence is not apparent here – it is little more than a belief.

9 [2015] NZEmpC 7 at [81], [121]

10 [2015] NZEmpC 6 at [8]- [11]

11 [2005] NZEmpC 155; [2005] ERNZ 861 at [14]

[52] The problem is that while Ozone asserted it had similar agreements with all its staff and produced a number of examples I had to note variations in their content. I cannot therefore have any certainty as to what might have been in Mr Rodionov's original agreement had he actually had one and what actual provisions he might have breached.

[53] There are also problems with some of the restraints themselves. For example one of the agreements tabled by Ozone contains a 6 year prohibition on non- solicitation and a two year restraint of trade. A perusal of relevant case-law would lead to a conclusion these terms are far too long to be enforceable. There are also issues about proprietary interest and a lack of clarity over what was Ozone's confidential information and what was knowledge Mr Rodionov might have brought with him. He has a relevant Doctorate.

[54] There is also a problem regarding the remedies sought should the claim have succeeded. Ozone seeks damages for the loss incurred.

[55] It is well established an award of damages is to restore a wronged party to the position they would have been in had the breach not occurred. When an award is monetary the quantum required for restitution must be measurable.

[56] Ozone is incapable of estimating its loss. Indeed it cannot even establish it would have concluded an agreement with the organisation to which Mr Rodionov went. Mr Haselhoff's evidence suggests that was far from a certainty.

[57] Mr Rodionov claims Ozone still retains some of his property. This largely involves electronic files and books. Ozone is adamant it has done all in its power to identify and return any such property.

[58] Putting aside the fact Mr Rodionov can have little recourse over electronic files he chose to store on his employer's computer I have two other reasons for rejecting these claims. First he is incapable of specifying exactly what is involved and while he has proffered a detailed list it has been subject to amendment. Second, and more importantly, a general preference for the Haselhoff's evidence, which I have alluded too, leads me to accept their assertions they have done their best and can find nothing further to return. This was often repeated during the investigation and was evidently heartfelt.

[59] Here I must comment on the obvious *elephant in the room* in respect to credibility and that is Mrs Haselhoff's preparation of the false employment agreement. This slur on her credibility is at least addressed to a significant extent by her admission.

[60] The last issue is the wage claim. It involves holiday pay and $4,423.91 Mr

Rodionov claims Ozone deducted from his final pay when it was made on 2 June

2016. He wants it back along with interest and penalties which he says should be imposed due tote underpayment and the fact the payment he did receive was delayed and that delay was deliberate.

[61] Originally a greater sum was involved but after correspondence part of what was originally claimed was paid. Mr Rodionov's evidence in respect to his claim is based on a brief assertion bereft of supporting documentation.

[62] Against that is Ozone's evidence the residue is not owing. It was supported by considerable evidence from Mrs Haselhoff. In essence she is saying Mr Rodionov was paid in advance and Mr Rodionov is failing, in his calculations, to take account of a payment made on 5 September 2011 when he first transferred from AD Solutions to Ozone. Her claims are backed with documentary evidence which show Mr Rodionov worked 52 Months for Ozone and received 52 monthly payments. Indeed there may be an argument he was still slightly overpaid as his resignation took effect on 23

December yet he was paid for the full month.

[63] Having weighed the evidence and Mr Gray's submission I accept Ozone's claim nothing remains owing and the deductions is justified as an overpayment due to a system adopted at Mr Rodionov's request.

[64] That leaves the fact there was some tardiness in making the final payment and a question over whether or not that deserves a penalty. I conclude the answer is no. There was a dispute over what was owing and the issue was ultimately resolved with an appropriate payment.

Conclusion and costs

[65] For the above reasons I conclude Mr Rodionov has failed to establish he was constructively dismissed. Similarly, and for reasons already explained, his unjustified

action claims fail as do his allegations Ozone remain in possession of some of his personal property. The wage claim also fails.

[66] Ozone's counterclaim also fails which effectively means all claims bought to the Authority in this matter are rejected.

[67] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority
