Employment Court of New Zealand

Rodionov v Ozone Technologies Limited [2018] NZEmpC 56 (29 May 2018)

Last Updated: 31 May 2018

IN THE EMPLOYMENT COURT
WELLINGTON

[2018] NZEmpC 56
EMPC 44/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALEXANDER RODIONOV Plaintiff
AND	OZONE TECHNOLOGIES LIMITED Defendant

EMPC 48/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND BETWEEN	OZONE TECHNOLOGIES LIMITED Plaintiff
AND	ALEXANDER RODIONOV Defendant

Hearing:	3 May 2018 (heard in Wellington)
Appearances:	D Organ, advocate for Mr Rodionov N Gray, counsel for Ozone Technologies Limited
Judgment:	29 May 2018

JUDGMENT OF JUDGE B A CORKILL

ALEXANDER RODIONOV v OZONE TECHNOLOGIES LIMITED NZEmpC WELLINGTON [2018] NZEmpC 56 [29 May 2018]

Introduction

[1] What costs if any should be paid where both parties successfully resisted each other's claims in the Employment Relations Authority (the Authority)?

[2] This issue arises because the Authority determined that, overall, the employer had been more successful in resisting the employee's claim than the employee had been in successfully resisting the employer's claim.

[3] Both parties have challenged the Authority's costs determination,1 though neither party challenged the substantive determination.2

The Authority's substantive determination

[4] The Authority dismissed a claim that Mr Alexander Rodionov had been unjustifiably dismissed, albeit constructively; and that he was unjustifiably disadvantaged.

[5] It also dismissed the counter-claim brought by Ozone Technologies Limited (Ozone) that Mr Rodionov had breached various duties and covenants by disclosing confidential information while entering into a new employment agreement prior to leaving its employment.

[6] The background is that Ozone is a company specialising in water and wastewater treatment solutions. Its sole director is Mr Dirk Haselhoff. He and his wife are shareholders. Mrs Haselhoff is an employee of the company.

[7] Mr Rodionov is a scientist expert in the field of water and wastewater treatment whose work focuses on mineral processing technologies.

[8] The Authority's detailed consideration of the chronology began with reference to an email intended for Mr Rodionov, which was mistakenly sent to Mr Haselhoff by a prospective employer on Friday, 4 December 2015.

1 *Rodionov v Ozone Technologies Lt*d [2018] NZERA Wellington 2.

2 *Rodionov v Ozone Technologies Ltd* [2017] NZERA Wellington 105.

[9] The email indicated negotiations to employ Mr Rodionov were at an advanced stage. The Authority also found that the prospective employer was an existing customer of Ozone.

[10] Mr Haselhoff said Mr Rodionov told him that he did not know what the email was about, having not spoken to the client for months. He was leaving for the day and said that he would look at it on the following Monday.

[11] Mr Haselhoff checked phone records which established that there had been contact on many occasions between Mr Rodionov and the client over the preceding weeks.

[12] On Monday, 7 December 2015, a dispute arose between Mr Rodionov and Mr Haselhoff early in the morning, because the former was attempting to remove a computer belonging to the company, apparently to separate and presumably remove personal information stored on it. There was an issue as to whether this situation descended into violence.

[13] The next day, Mr Haselhoff attended Mr Rodionov's home, leaving two copies of what was said to be his individual employment agreement (the IEA), and an account of monies Ozone claimed he owed.3 Mr Rodionov contended he had never signed an IEA. He was also given a letter proposing a disciplinary process, and suspending him on pay in the meantime.4

[14] Mr Rodionov's case was that he was extremely stressed by what had occurred. He wrote a letter to his employer on 23 December 2015 stating that due to several events he had no option but to tender his immediate resignation. The facts he complained about were:

a. there had been an act of violence on 7 December 2015;
b. he had been suspended for no good reason; and

3 At [20].

4 At [25].

c. a document had been fabricated which it had been claimed was his employment agreement.

[15] Subsequently, Mr Rodionov raised a constructive dismissal claim. This was dismissed by the Authority, which held that by the time Mr Haselhoff discovered Mr Rodionov had been negotiating with a third party an arrangement to employ him was all but completed. The Authority determined that Mr Rodionov's departure from Ozone was going to occur in the near future.5

[16] The Authority went on to consider other matters. First, it found that Mr Rodionov had been unjustifiably suspended, because no process had occurred before the decision to suspend was made.6

[17] Second, there was no doubt that the IEA delivered by Mr Haselhoff was fraudulent. This was conceded by the company itself in evidence which had been filed prior to the investigation meeting. Its employee, Mrs Haselhoff, explained that she had panicked when she could not locate the document, and so she prepared a replacement using Mr Rodionov's electronic signature.7

[18] Third, the Authority found that Mr Rodionov had not been attacked or otherwise assaulted on 7 December 2015.8

[19] Fourth, the Authority rejected the claim that Ozone had forcibly removed Mr Rodionov's property, namely the computer; in fact, the computer was Ozone's own property.9

[20] Fifth, it concluded that even if Mr Rodionov was disadvantaged, there was no entitlement to remedies since his employment was all but over and there was no proof of harm.10

5 At [41].

6 At [43].

7 At [24].

8 At [45].

9 At [46].

10 At [47]-[48].

[21] Turning to Ozone's counter-claim, the Authority found that it too faced insurmountable obstacles. The company was incapable of providing a properly signed agreement proving the covenants it asserted had been breached. The Authority could not be certain as to what might have been included in the original agreement, given variations which were present in other IEAs that were produced.11 Nor was Ozone capable of estimating its loss.12

[22] The Authority went on to reject Mr Rodionov's claim that Ozone wrongfully retained his property, or that Ozone owed monies for unpaid wages.13

[23] In the result, the claims which each party brought were dismissed. Costs were reserved.14

Costs determination

[24] Subsequently, the Authority was required to consider an application brought by Ozone for a contribution towards the costs which it said were incurred in successfully defending Mr Rodionov's claims. Mr Rodionov took the position that costs should lie where they fall.

[25] The first issue was whether Ozone could be considered the successful party, given the mixed outcome.

[26] Standing back and looking at things in the round, an approach which was approved in respect of such a situation in *Coomer v JA McCallum and Son Ltd*,15 the Authority concluded that Ozone was the successful party.16

[27] The Authority reasoned that Mr Rodionov's claims occupied the bulk of evidential time and were wholly unsuccessful. It stated that the claim bordered on one that should never have taken place. This was because it was very clear, particularly

11 At [52]-[53].

12 At [55]-[56].

13 At [57]-[63].

14 At [65]-[67].

15 *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156 at [43].

16 *Rodionov v Ozone Technologies Ltd,* above n 1 at [5].

from the documentary evidence, that Mr Rodionov had already decided to leave when the events occurred. Similarly, his claim of unjustifiable suspension was a forlorn claim. And the improper preparation of the IEA did not require consideration since this had been acknowledged prior to the hearing.

[28] By contrast, the time spent on Ozone's counter-claim was significantly less, and involved unnecessary attendances. Again, the Authority considered that Mr Rodionov's defence relating to the fraudulently prepared IEA did not in the circumstances need to be traversed.

[29] Turning to quantum, the Authority observed that although the investigation spanned five days, two were incomplete, and time was spent on discussing a possible settlement. The resulting reduction in hearing time, however, needed to be balanced against the fact that comprehensive submissions were prepared and filed after the hearing. A starting point of five days was therefore appropriate, which under the tariff produced a figure of $17,500.

[30] Ozone sought an uplift. Although this might have been warranted by the way in which Mr Rodionov ran his case such as the sub-optimal answering of questions and an inappropriate amount of time being spent on the authenticity of the IEA, the Authority said it needed also to balance the fact that Ozone's counter-claim was untenable. Accordingly, no uplift was appropriate.17

[31] Mr Rodionov argued that the tariff should be reduced on the basis that the falsification of the IEA amounted to criminal

behaviour that should not be condoned by any award of costs. The Authority concluded, however, that an award of costs needed to reflect how the litigation was pursued; it was not appropriate to use such an award to punish a party.

[32] It was also argued that elements of Mr Rodionov's claim had merit. However, the Authority concluded that the substantive outcome spoke for itself: Mr Rodionov had failed to obtain any remedies.

17 At [25]-[26].

[33] Then the Authority considered a Calderbank offer which Mr Rodionov sent. He had proposed that both parties withdraw their claims with costs to lie where they fell. The Authority recorded that the Calderbank offer had been made between day three and four of the investigation by which time the bulk of costs had been incurred. Accordingly, it was of little value.

[34] Finally, the Authority turned to the only issue which in its view might have warranted reduction, that Ozone had failed to establish its claims. On this issue, the Member stated:18

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

[35] The Authority accordingly ordered Mr Rodionov to pay Ozone $15,000 as a contribution to Ozone's costs in addressing Mr Rodionov's claims.19

The challenges

[36] As mentioned earlier, both parties brought a challenge to the Authority's costs determination. Ozone's challenge was not brought on a de novo basis, but Mr Rodionov's challenge was. I directed that both challenges be heard on a de novo basis, as it would have been impracticable to hear one challenge on a de novo basis, and the other on a non de novo basis. Although that meant the Court was required to consider the costs issues afresh, the representatives both gave detailed submissions to the effect that the Authority had in fact erred in multiple respects.

[37] For its part, Ozone contended that the Authority had misunderstood the counter-claim; it had determined that the company's claim was untenable because the employment agreement before it was not authentic. It was asserted that such a finding overlooked the fact that the claim was not wholly based on the IEA. It included claims which related to Mr Rodionov's alleged breaches of his obligations of good faith,

18 At [31].

19 At [32].

fidelity and confidentiality, whether under the Employment Relations Act 2000 (the Act) or at common law.

[38] Second, Ozone sought an uplift of the daily tariff to $5,500 for each of the five days' hearing time, with no deduction or allowance to be made in connection with its unsuccessful counter-claim.

[39] Mr Rodionov's challenge was initially pleaded as a comprehensive critique of each of the Authority's findings in its costs determination. However, in the submissions which were advanced for Mr Rodionov at the hearing the focus was on three particular matters. The first was a submission that Ozone should in essence be disqualified from recovering costs having regard to the fact it attempted to rely on a fraudulent document until shortly before the investigation meeting; second, that the issuing of the proceeding served a purpose because it caused several key issues to be resolved prior to the hearing; and finally, insufficient regard was paid to the fact that it was essential for Mr Rodionov to mount a strong defence to Ozone's counter-claim because of potential consequences for him if he had not done so.

Legal principles

[40] The general principles which apply to costs issues in the Authority are well established; they were summarised by a full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.20 The tenets which it is appropriate for the Authority to apply must also guide the Court on a costs challenge. These include:

- There is a discretion as to whether costs would be awarded and in what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

20 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 (EmpC) at [44].

- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event.
- Without prejudice offers can be taken into account.
- Awards will be modest.
- Frequently, costs are judged against notional daily rates.
- The nature of the case can also influence costs, and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[41] Subsequently, a full Court confirmed that these principles remain appropriate:

*Fagotti v Acme & Co Ltd.*21

[42] Next, a question which arises in this case is whether Ozone should be regarded as the successful party. Usually, costs follow the event.22

[43] However, the Court of Appeal in *Health Waikato Ltd v Elmsly* noted that cases where parties have mixed success may be different.

[44] The Court noted that it is not necessarily easy to determine who 'won' the case, and who would thus be entitled to costs.23 It went on to say that whilst New Zealand

21 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, [2015] ERNZ 919 at [114].

22. *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [35]; *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109; [2013] 1 NZLR 305 (SC) at [8].

23 *Health Waikato Ltd v Elmsly*, above n 22, at [35].

courts do not usually award costs on an issue-based basis, the failure of a successful party on a large scale could not properly be ignored;24 an award could be made where the interests of justice so require.25

[45] The final preliminary matter relates to the correct approach to evidence for the purposes of a costs challenge. Judge Couch discussed this topic in *Metallic Sweeping (1998) Ltd v Ford,* stating:26

> [13] When conducting a de novo hearing of substantive issues, the Court effectively puts the Authority's determination to one side and decides the matter on the basis of the evidence adduced before it. Given the nature of the process by which costs determinations are made, however, that is simply impractical when the Court is asked to decide what costs ought to have been awarded by the Authority. The Court receives nothing from the Authority. There is no record of the investigation meeting. While it would be possible for oral evidence to be given by the parties about every aspect of the Authority's investigation and each other's conduct on which they seek to rely, that could easily lead to a hearing out of all proportion to what is at stake.
> [14] It seems to me that the only practical way of deciding a challenge to a costs determination is for the Court to be primarily informed through the submissions of the parties, with the possibility that this may be supported by affidavit evidence about contentious issues. In most cases, there will not be a hearing at which the parties or their agents appear in person. Thus, resolving differences between the parties or their representatives will be problematic. Inevitably, a Judge of the Court deciding a challenge can never be as well informed about events as the member of the Authority who conducted the investigation but I can see no realistic means to bridge that gap. In areas of uncertainty, the Court will need to have regard to the Authority's assessment of matters in a manner it would not do when deciding a substantive challenge by way of a hearing de novo. It may also be helpful and appropriate for the Court to have regard to the Authority's substantive determination.

[46] In this case, a hearing was held. The Court received a common bundle, which included a range of documents placed before the Authority for its investigation, further information placed before the Court by consent at the hearing, and the detailed submissions advanced by the parties' representatives. The Court is accordingly in a position where it has obtained an accurate appreciation of the background information giving rise to the costs determination.

24 At [44(3)].

25 At [39]-[40].

26 *Metallic Sweeping (1998) Ltd v Ford* [2010] NZEmpC 129, [2010] ERNZ 433.

Findings of fact

[47] Before considering any costs issues, it is necessary to resolve several factual issues placed before the Court by the parties.

Alleged incorrect determination of Ozone's counter-claim

[48] Mr Gray, counsel for Ozone, argued that Ozone's failure to establish its counter-claim was not relevant to costs because the Authority had misunderstood the basis of the counter-claim: it was not founded solely on the IEA.

[49] There are two difficulties with this submission. The first is that the Authority made clear findings that the counter-claim could not succeed. No challenge was brought by Ozone in respect of that conclusion. Although Mr Gray strenuously argued that the nature of the discretion to be exercised under cl 15 of sch 2 of the Act is sufficiently broad that the Authority, and now the Court, could take into account the fact that an erroneous conclusion had been reached, Mr Gray was unable to provide any case law in support of this proposition. In my view, the discretion in cl 15 does not permit the Authority to override its previous conclusions; it had no option but to determine costs according to the actual outcome. Nor is it appropriate for the Court now to effectively rehear and re-determine the merits of a claim, when the only issue in the challenge before it relates to costs.

[50] However, there is an even more fundamental problem. It is clear from the Authority's reasoning in the substantive determination that there were a number of problems with the company's claim, only one of which was the fact that Ozone had not proved what the terms of any employment agreement with Mr Rodionov were.

[51] Reference was made to whether there might have been non-solicitation or restraint of trade provisions. Although no relief was sought in respect of such provisions, information as to the extent of these would at least have been relevant to an assessment of what the parties had agreed should be protected. This was recognised by the Authority when it stated:27

27 *Rodionov v Ozone Technologies Ltd*, above n 2, at [53].

There are also issues about propriety 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.

[52] Whether the cause of action was founded on an IEA or on statutory or common law duties, the terms of the employment agreement entered into with Mr Rodionov would have been relevant to a determination of all these issues. It was accordingly open to the Authority to conclude that uncertainty as to the terms and conditions of employment impacted on the other issues which the Authority identified.

[53] Mr Gray also submitted that the Authority erred because it went on to discuss remedies, including the fact that Ozone was incapable of estimating its loss. He submitted that the Authority had not realised it was dealing only with liability, and that any issues as to quantum would follow.

[54] The Authority's discussion concluded with the observation that Ozone was incapable of estimating its loss, because it could not establish that it would have concluded an agreement with the organisation which had been its client and which became Mr Rodionov's employer. The Authority said that Mr Haselhoff's evidence suggested this was far from a certainty.

[55] I do not consider the Authority erred in touching on this aspect when considering liability issues. The Authority was merely making the point that the weakness of the quantum claim reinforced the futility of the claim overall.

[56] In short, I consider the findings which the Authority made about the counter-claim are entirely relevant to the costs issues which I must resolve, and should not be put to one side.

Was the fraudulent IEA a disqualifying factor?

[57] Mr Organ, advocate for Mr Rodionov, submitted that Ozone was effectively disqualified from seeking costs because of its conduct. He argued that the provision of a document which the Authority had found was fraudulently prepared, and then relied on to support its case until shortly before the investigation meeting, was conduct that was so egregious that Ozone should not be the beneficiary of an order for costs.

[58] Relevant to this issue is the principle articulated by the full Court in *PBO Ltd* that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct. However, conduct which increases costs unnecessarily can be taken into account in increasing or reducing an award; the Authority's equity and good conscience provision may also be relevant.

[59] Ozone is open to criticism for the fact that one of its employees was party to the preparation of a fraudulent document and that in its counter-claim it relied on that document.

[60] However, the company is entitled to point to the fact that Mrs Haselhoff eventually came clean about the attaching of Mr Rodionov's electronic signature to the document prior to the commencement of the investigation meeting itself.

[61] Somewhat surprisingly, Ozone repeated its reliance on the document which had been improperly prepared in an amended statement of problem filed during the investigation meeting. Mr Gray informed the Court that Ozone continued to rely on the document because it set out the terms and conditions which had actually been agreed to between the parties. He said the company was not attempting to perpetrate the fraud during the hearing. I accept that explanation.

[62] I agree that whilst the initial reliance on the fraudulent document does Ozone no credit, and arguably the issue should have been cleaned up long before it was, this failure does not amount to an outright disqualification. In summary, I am not persuaded that Ozone's conduct was so egregious that it is precluded from applying for costs.

What time/attendances were devoted to particular issues?

[63] In assessing the extent of the time and attendances devoted to particular issues, I begin by referring to several references on that topic contained in the costs determination, since these provide an evidential starting point.

[64] The Authority referred to a submission made for Mr Rodionov that the payment of his holiday pay and the late return of personal property would not have occurred but for the lodging of his claims.28 Then the Authority said that these issues were rectified due to the passage of time.29

[65] Later, the Authority said the length of the investigation meeting was extended through Mr Rodionov's insistence on continuing to assert that the agreement had been fraudulently prepared when this was no longer an issue.30 Further, the way in which he answered questions was sub-optimal which extended the hearing time.31

[66] The Authority went on to conclude that the time spent at the investigation meeting on the counter-claim was significantly less than that spent on Mr Rodionov's claims, and a lot of that was unnecessary.32 Ultimately, the Authority concluded, as can be seen in the passage set out above, that less than 10 per cent of the investigation time was devoted to the counter-claim, although this then needed to be increased.

[67] Mr Organ made several points relating to these statements. First, he emphasised that the issuing of the proceedings which occurred in early 2015 led to many significant issues being resolved prior to the investigation meeting itself. These included the return of a significant amount of Mr Rodionov's property by Ozone, the payment of some of his claim for holiday pay, and the volunteering of the concession that the IEA had been fraudulently prepared. He said that these achievements, particularly the last, were very important to Mr Rodionov.

[68] In essence, he submitted that when considering the extent of attendances, regard should be given not only to what occurred during the investigation meeting itself, but also in the lead up to that meeting.

[69] I agree. The principle is illustrated by what happens when an applicant or plaintiff discontinues proceedings. Even though no hearing has taken place, prima

28 *Rodionov v Ozone Technologies Ltd*, above n 1, at [9].

29 At [16].

30 At [19].

31 At [25].

32 At [19].

facie the other party has an entitlement to costs to that point.33 Such an award recognises that pre-hearing attendances may well be relevant when assessing costs.

[70] Mr Organ also commented on an observation made by the Authority that Mr Rodionov's claim bordered on one that should never have taken place. Mr Organ said that although much was achieved prior to the investigation meeting, it was not realistic to expect Mr Rodionov to discontinue the balance of his claims when it was clear Ozone would not discontinue its counter-claim. He submitted that the assertions raised in the counter-claim were very significant for Mr Rodionov since strong allegations of breach of confidentiality were made; a penalty and unspecified damages were sought. He argued that the fraudulent agreement was at the core of the counter-claim, so that it was necessary for Mr Rodionov to run those claims which also required consideration of the same issue.

[71] The third and related matter raised by Mr Organ concerned the assessment of less than 10 per cent of hearing time being devoted to the counter-claim. As already mentioned, it was submitted that this assessment did not take account of the pre-hearing attendances. But it was also submitted that the Authority's starting point did not take adequate account of the time devoted to the authenticity of the employment agreement which underpinned Ozone's counter-claim. Mr Organ said that given the potential significance of the counter-claim, Mr Rodionov needed to establish that the employment agreement was not properly proved, and that he should not have been criticised for emphasising the unreliability of the document.

[72] Mr Gray accepted that the return of property and holiday pay issues were unresolved at the time the statement of problem was raised; but said that the proceeding was issued at an early point, and before the company had an opportunity of dealing with the issues. In essence, he said that the company needed time to sort these issues out, which is what occurred.

33. High Court Rules 2016, r 15.23; *Kelleher v Wiri Pacific Ltd* [2012] NZEmpC 98, [2012] ERNZ 406 at [11].

[73] He also submitted that issues pertaining to the question of whether the agreement was fraudulent prolonged the investigation meeting unnecessarily, given the concession made by the company before the investigation meeting commenced.

[74] I have reviewed correspondence which has been placed before the Court touching on these issues; and the explanation contained in the briefs of evidence as to the holiday pay and property issues.

[75] It is reasonable to conclude that the proceedings were in part a driver for resolution of the property and holiday pay issues, and that some allowance should be made for that factor. These matters were important to Mr Rodionov, as is evidenced by his formal claims. I also find that the proceeding was more likely than not to have led to the concession made by the company. It was a significant acknowledgment; it led to the successful defence of Ozone's counter-claim.

[76] It is apparent that hearing time was devoted not only to whether Mr Rodionov's signature had been electronically affixed to the document, but whether other alterations had been made to the IEA, an issue which would necessarily affect conclusions as to the extent of Mr Rodionov's obligations as an employee.

[77] The assessment of less than 10 per cent of hearing time being devoted to the counter-claim appears to have been a starting point, because in the next sentence, the Authority apparently doubled this assessment. I also note the submission of the representatives that it is unclear what arithmetical process was then adopted.

[78] Having regard to the totality of information before the Court, I conclude that the extent of attendances devoted to the counter-claim was in fact significantly more than 10 per cent of hearing time.

Analysis of costs issues

[79] It is now necessary to consider the costs issues in light of those findings. The first matter relates to the question of how the success which each party achieved should be treated.

[80] When considering the attendances devoted to the respective claims brought by the parties, the following factors are relevant:

a. It is apparent from the determinations that a substantially larger amount of time and effort went into resolving Mr Rodionov's claims. Those claims involved rather greater factual complexity than did the counter-claim; thus, the Authority was required to review more evidence than was required in respect of the counter-claim.
b. Pre-hearing attendances must be acknowledged, as discussed above. In particular, the concession made by the company was significant; it is more likely than not that this was triggered because the issue was to be the subject of a hearing.
c. Regrettably, the issues relating to the authenticity of the IEA were not cleared up for some nine months. It is reasonable to conclude this resulted in costs being incurred by Mr Rodionov in preparation for what was to that point, as Mr Gray accepted, a live issue.
d. It must also be acknowledged that although the counter-claim apparently involved fewer attendances at the investigation meeting, it was nonetheless potentially a very significant claim. Mr Rodionov could not have assumed that Ozone's claims for damages and/or a penalty would be futile. It was not unreasonable for careful preparation to be devoted to the counter-claim, and for the relevant issues to be explored.
e. To some extent, Mr Rodionov was locked into his claim, because it raised issues that were also potentially relevant to the counter-claim.

[81] The circumstances of the present case are very unusual. I have accordingly concluded that the interests of justice require costs in respect of each unsuccessful claim to be assessed separately.

[82] Of the factors which I have just summarised, the one which has the greatest impact on costs relates to time and effort. I am persuaded that Mr Rodionov's unsuccessful claims required more time and effort than did those brought by Ozone.

[83] Standing back, I assess costs on the basis that Ozone is entitled to 60 per cent of costs to which it would otherwise be entitled in successfully resisting Mr Rodionov's claims; and Mr Rodionov is entitled to 40 per cent of costs to which he would otherwise be entitled in successfully resisting Ozone's counter-claim.

[84] This calculation should be based on the Authority's daily tariff of $3,500.

[85] There was debate between the representatives at the hearing as to the extent of downtime during the investigation meeting, when negotiations took place. Mr Organ submitted that a day was lost; Mr Gray submitted that .75 of a day was lost. However, against that must be balanced the attendances which were required before and after the hearing. I adopt a multiplier of five.

[86] I fix Mr Rodionov's costs in respect of his success at $7,000; I fix Ozone's costs in respect of its success at $10,500.

Conclusion

[87] Netting off these two amounts, Mr Rodionov is to pay Ozone the sum of $3,500 as a contribution to its costs.

[88] This judgment replaces the Authority's costs determination.

[89] Given the mixed outcome, costs in respect of each challenge are to lie where they fall.

B A Corkill Judge

Judgment signed at 10.30 am on 29 May 2018