New Zealand Employment Relations Authority Decisions

Ruru v Mr Apple New Zealand Limited (Wellington) [2017] NZERA 2054; [2017] NZERA Wellington 54 (30 June 2017)

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Last Updated: 13 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 54
5620879

BETWEEN GRAHAM RURU Applicant

AND MR APPLE NEW ZEALAND LIMITED

Respondent

Member of Authority: M B Loftus

Representatives: Nil for Applicant

Bill Calver, Counsel for Respondent

Submissions Received: 30 May 2017 from Respondent

Nil from Applicant

Determination: 30 June 2017

COSTS DETERMINATION OF

[1] On 19 May 2017 I issued a determination in which I dismissed Mr Ruru's claims he had been both unjustifiably dismissed and unjustifiably disadvantages by the respondent, Mr Apple New Zealand Limited (Mr Apple).1

[2] Costs were reserved and Mr Apple, as the successful party, now seeks a contribution toward those it incurred defending the claims.

[3] Normally the Authority will use a daily tariff approach when addressing a costs claim.2 The tariff might then be adjusted depending on the circumstances.

[4] The investigation took a day and while Mr Apple's costs were significantly

greater it seeks what it says is now the *usual contribution*, read tariff, of $4,500. Here

1 [2017] NZERA Wellington 39

2 refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

it should be pointed out that the tariff of $4,500 to which Mr Calver refers applies to matters lodged on or after 1 August 2016 and then it only relates to the first day. This matter was filed before that date and the applicable tariff is therefore $3,500 per day.3

[5] While Mr Ruru has not replied to the claim I am aware he was in receipt of legal aid. As Mr Calver notes s 45(2) of the Legal Services Act 2011 provides, amidst other things, that:

(2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

(3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:

(a) any conduct that causes the other party to incur unnecessary cost:

(b) any failure to comply with the procedural rules and orders of the court:

(c) any misleading or deceitful conduct:

(d) any unreasonable pursuit of 1 or more issues on which the aided person fails:

(e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:

(f) any other conduct that abuses the processes of the

court.

[6] Section 46 of the Legal Services Act contains provisions under which a party prejudiced by a decision to award less than would otherwise have been awarded by virtue of s 45 may ask that the Legal Services Commissioner address the difference.

[7] It is Mr Calver's submission this is a situation in which exceptional circumstances exist (s 45(2)) given the unreasonable pursuit of one or more issues on which Mr Ruru failed (s 45(3)(d)). He says:

The applicant has pursued, in the face of evidence to the contrary, a claim which had no prospect of success. The respondent provided the applicant with relevant evidence to establish that the applicant's recollection of events simply could not have been correct. The applicant was given the opportunity of withdrawing on a no costs basis but insisted on proceeding.

[8] In particular reference is made to:

a. A Calderbank dated 14 September 2016 under which Mr Apple offered to forgo costs if Mr Ruru withdrew his claim. The letter asserted the claim was without merit and put Mr Ruru on notice that if he chose to proceed a s 45(2) application would result. The offer was rejected.

b. On 9 March 2017 and following release of the Authority's determination in *Pogai v Mount Erin Limited*4 Mr Apple repeated its Calderbank offer on the grounds *Pogai* further confirmed Mr Ruru could not succeed. Again the offer was rejected.

c. Mr Apple consistently expressed the view Mr Ruru's claim was untenable and supported its assertion by forwarding to his representative evidence he could not have signed an employment agreement on 28 January 2016 as alleged.

[9] Mr Ruru's application was based on three assertions:

a. He signed an employment agreement on 28 January 2016. This made him a person intending to work which invalidated the 90 day trial provision contained in another employment agreement subsequently signed on 15 February 2016;

b. The 15 February agreement was, in any event, invalid as Mr Ruru was not given an appropriate opportunity to consider it before signing; and

c. Mr Ruru was unjustifiably disadvantaged by Mr Apple's failure to tell him of alleged deficiencies thus depriving him of an opportunity to address them.

[10] Putting aside the fact I concluded Mr Ruru did not sign an agreement on 28

January the argument that even if it existed it invalidated the later agreement was not pursued with any vigour in any event. That was because of *Pogai* so while I have to agree this claim had no chance of success I consider that was recognised by the approach of Mr Ruru's Counsel during the investigation.

[11] The argument the 15 February agreement was invalidated by reason of Mr Ruru not being allowed a reasonable

opportunity to consider it was dismissed on the facts, as was the disadvantage claim. That said both had a chance of succeeding depending on how the facts had come out.

[12] Having seen and heard from Mr Ruru I have to conclude his lack of success in respect to the factual findings was not the result of relying on facts he knew to be wrong but a case of a poor recollection exacerbated by a misunderstanding of the processes he was engaged in and the relationship between his employer and Work and

Income New Zealand.5 It was also tainted by his desire to work and it is difficult to

criticise him for that.6 Finally I note evidence led in the substantive investigation would lead me to conclude Mr Ruru is most likely incapable of paying any award should one be made.

[13] A consideration of the submissions, the substantive determination, the way the investigation proceeded and the above factors leads me to conclude this is not a case that constitutes exceptional circumstances warranting an award of costs against a legally aided individual. The order is therefore nil with Mr Ruru being protected by s

45(2) of the Legal Services Act 2011.

[14] That said and had Mr Ruru not been protected by s 45(2) he would have been ordered to pay $3,500 as a contribution toward Mr Apple's costs. This is because the Authority's normal approach would have applied. Costs follow the event and the investigation took a day. Given Mr Apple's claim, the submissions and the way the investigation proceeded the normal tariff would have been applied.

M B Loftus

Member of the Employment Relations Authority

5 n 1 at [32]

6 n 1 at [38]