New Zealand Employment Relations Authority Decisions

Zeng v Air New Zealand Limited AA245A/10 (Auckland) [2010] NZERA 912 (10 December 2010)

Last Updated: 17 December 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 245A/10 5121831

BETWEEN

AND

CHAO ZENG Applicant

AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: Representatives:

Memoranda received:

R A Monaghan

Tuariki John Delamere, advocate for applicant R Towner, counsel for respondent

6 April 2009 and 21 June 2010 from applicant 3 June 2010 from respondent

Determination:

10 December 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 2 April 2009 the Authority decided that, because of the failure of the applicant to attend or be represented at the investigation meeting scheduled for that day, the investigation into her employment relationship problem would cease.[1] The respondent subsequently filed an application for costs, with no response being received from the applicant at the time.

[2] A further determination dated 30 July 2009 addressed an application to reopen the investigation. It referred to the existence of two issues in particular, namely one of whether Air New Zealand or another company was the applicant's employer, and one concerning the raising of the applicant's personal grievance in time. The Authority granted the application to reopen on certain terms. They were that there would first be an investigation into whether a personal grievance was raised in time,

with associated timetabling directions being given. Costs would not be imposed in respect of the application.

[3] In a third determination dated 24 May 2010 the Authority found no personal grievance was raised within the time set out in s 114 of the Employment Relations Act 2000, and declined an application to grant leave to raise the grievance out of time.[2] Although the Authority had anticipated determining the identity of the employer in the course of what became the abandoned investigation meeting, it identified a different approach in the course of the application to reopen. It did not

determine the identity of the employer in the reopened investigation.

[4] Costs of the reopened investigation were reserved and both parties have since filed memoranda. I address that matter as well as costs associated with the abandoned investigation meeting.

The respondent's position on costs

[5] The respondent says it has incurred total costs of $59,780 in relation to the problem, from April 2008 to May 2010. It seeks a contribution to 40% of its costs, being the sum of $23,910, on the grounds that:

a.

it was wholly successful;

b.

underlying the application for leave to raise a grievance was a long and complex procedural history;

c.

the application was progressed in a misleading and inefficient manner, included serious allegations against the respondent to which the respondent was forced to reply, and raised complicated jurisdictional issues;

d.

no attempt was made to raise a personal grievance until some 18 months after the termination of employment; and

e.

the application was an abuse of process in that its true purpose was to secure for the applicant a return from China to New Zealand so the applicant could work in New Zealand.

2 Chao Zeng v Air New Zealand Limited Member Robinson, 2 April 2009, AA 103A/09

The applicant's position on costs

[6] The applicant submitted that an award of costs would be unreasonable and amount to a grave injustice. There was also a submission that the amount sought was unreasonable.

[7] The submissions addressed whether the respondent or another company was the applicant's true employer, which I infer was intended to address the points made in submissions of the respondent following the first abandoned investigation meeting. The applicant's submissions emphasised material allegedly placed before the New Zealand Immigration Service (NZIS) in the course of an application by the applicant for a work visa, in which Air New Zealand was said to have identified itself as the employer.

[8] In a costs setting I understand that the respondent's purpose in referring to the material it did was to provide information in support of its view that the applicant had misled the Authority, in particular by her failure to provide the Authority with all relevant information and her omission of information that appeared to contradict some of her assertions about the identity of the employer. It was said the extensive efforts to ensure the Authority was provided with full information added unnecessarily to its costs. I accept that was so.

[9] I do not accept there is any accuracy in the further submission on behalf of the applicant that:

9. The Authority has confirmed in its finding that it has accepted the declarations by the respondent that at no time did the respondent ever employ the applicant and that at all times she was employed by the Chinese company FASCO. Then ipso facto the Authority has confirmed that the respondent must have committed a criminal offence.

[10] The reference to a 'criminal office' is to allegations of breach of the Immigration Act 1987, a breach allegedly arising because the respondent identified itself to the New Zealand Immigration Service as the applicant's employer. The Employment Relations Authority has no jurisdiction in respect of the Immigration Act, and has not suggested any view and has not purported to make any finding on the matter. Moreover, as I have indicated, its own determinations did not extend to a determination of the identity of the employer so that matter remains unresolved.

[11] I do not accept the submission that as a result the respondent has come to the employment relationship problem without clean hands, so is disentitled to an award of costs. Nor, in the absence of full evidence and argument on the point, am I prepared to accept that the applicant's approach to the Authority was an abuse of process.

Determination

[12] According to the application for costs following the first abandoned investigation meeting, costs of $43,248 were incurred. That means a further $16,532 was incurred in costs in respect of the subsequent matters.

[13] The framing of the submissions indicates these additional costs included costs in respect of the application to reopen. The application was heard on the papers and the file indicates detailed preparation was undertaken. However since there was to be no order for costs in respect of that matter I apply a notional reduction of $5,000 to the amount cited, leaving $11,532 in respect of the subsequent matters.

[14] While mindful of the principles in **PBO Ltd (formerly Rush Security**

Limited) v da Cruz[3], I note that overall there was almost no hearing time so that a strict application of a notional daily rate with reference to hearing time would not be helpful.

[15] Otherwise I accept that extensive preparation was required in respect of the abandoned investigation meeting, and that this was added to unnecessarily by the need to respond to the allegations the applicant was making. I acknowledge that considerable amounts of time can be required to prepare a response to wide-ranging and serious allegations. However my difficulty in relation to costs in the matter is that, as recorded in the application to reopen, the explanation of the applicant's failure to attend or be represented at the abandoned meeting was accepted. A second difficulty is that there has been no finding on the merits of the parties' positions on the identity of the employer.

[16] In that the respondent has identified activity relevant to the effort it went to in order to address misleading and inaccurate statements and material produced by the applicant, I am persuaded that even in the absence of a determination of the substantive issue, an order for costs is appropriate. I assess this activity at two days' work and apply the Authority's notional daily rate to that period.

[17] I therefore set costs in relation to the abandoned investigation meeting at $5,000. Payment is ordered accordingly.

[18] The application for leave to raise a grievance was heard on the papers. The respondent succeeded and is entitled to an order for costs. As indicated by the determination, there was no foundation for consideration of a grant of leave to raise the grievance. In short, the claim should not have been made.

[19] Accordingly, on the basis of the preparation evident from the file, I set costs with reference to a notional one day's meeting enhanced to reflect the unnecessary cost to which the respondent was put with reference to the weakness of the claim. The resulting amount is $4,000. Payment is ordered accordingly.

Order for costs

[20] The applicant is ordered to contribute to the respondent's costs in the sum of

$9,000.

Change in member constituting the Authority

[21] I record that I have continued to act as the Authority in this matter pursuant to Schedule 2, Clause 16 of the Employment Relations Act 2000 and pursuant to an instruction by the Chief of the Authority. There has been no need to retake evidence.

R A Monaghan

Member of the Employment Relations Authority

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[1] Chao Zeng v Air New Zealand Limited Member Robinson, 2 April 2009, AA 103/09
[2] Chao Zeng v Air New Zealand Limited Member Robinson, 24 May 2010, AA 245/10
[3] [2005] NZEmpC 144; [2005] 1 ERNZ 808
