IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 243/08
5081019 & 5081026

	BETWEEN	NEVILLE SHAKES & MALCOLM HELYAR Applicants
	AND	NORSKE SKOG TASMAN LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Lou Yukich for Applicants Richard McIlraith for Respondent
Submissions Received:	26 June 2008 from Applicant 2 July 2008 from Respondent
Consideration of the Papers:	10 July 2008
Determination:	10 July 2008

DETERMINATION OF THE AUTHORITY

Application for Re-opening

[1] The applicants have applied to the Authority to reopen an investigation which is opposed by Norske Skog Tasman Ltd (NSTL). The employment relationship problem has been the subject of a determination of the Authority in *Nevillel Shakes & Maclolm Helyar v Norske Skog Tasman Ltd*, 12 September 2007, AA283/07.

[2] The Authority's determination was the subject of a non de novo challenge which was determined in *Neville Shakes & Malcolm Helyar v Norske Skog Tasman Ltd*, unreported, 1 May 2008, Colgan CJ, AC11/08.

[3] In an application for reopening lodged on 15 May 2008 the Applicants state that the ground for reopening relates to a miscarriage of justice. On page 5 of the application for reopening, the Applicants state:

> The grounds upon which this rehearing are sought; are not those of fresh evidence becoming available or the like, but rather included a challenge to the adequacy or correctness of the judgment at first instance, i.e. a miscarriage of justice.
>
> There is a second basis for concluding that a substantial miscarriage of justice may have occurred, i.e. the Authority was in error in declining to hear the matters brought before it on the basis that it lacked the jurisdiction to do so.
>
> There will be a further sustained miscarriage of justice if the Authority declines to reopen the matter.

[4] In contrast to the stated grounds for re-opening and in support of their application for reopening the Applicants submit that one of the grounds includes that there is new evidence to be considered following the Employment Court decision with regard to the provisions of the collective agreement relating to the fixing of time that leave is to be taken.

[5] Submissions are not the appropriate place for extending the grounds upon which an application for reopening is made. I have therefore dealt with this matter on the basis of the grounds set out in the amended application, being a miscarriage of justice.

[6] By the consent of the parties I have dealt with this application on the papers.

[7] Clause 4 of Schedule 2 to the Employment Relations Act 2000 provides the Authority with a discretionary power to reopen an investigation.

[8] As with any discretionary power the Authority must not use its discretion arbitrarily. It is well established that the main criterion in determining whether a rehearing should be granted is whether there has been a miscarriage of justice. (*Ports of Auckland Limited v NZ Waterfront Workers Union* [1995] 2 ERNZ 85)

[9] The Authority must balance the importance of certainty in investigating and determining an employment relationship problem with the rights of the successful party to enjoy the fruits of a determination in its favour.

Background

[10] In assessing whether a miscarriage of justice has occurred, I have considered the background to this proceeding, and have set out the main points as follows.

[11] In its determination dated 12 September 2007 the Authority held that:

- NSTL had not unjustifiably disadvantaged Mr Shakes or Mr Helyar and they therefore had no personal grievance;

- Norske Skog had not breached its obligations of good faith under the Act; and

- it had no authority to determine breaches of the Holidays Act in the way framed by Mr Shakes and Mr Helyar.

[12] The non de novo challenge in the Employment Court related to three narrow aspects of the Authority's determination, namely:

- whether the Authority had jurisdiction to address the claim brought by Mr Shakes and Mr Helyar for breach of the Holidays Act;

- whether the Authority had jurisdiction to reinstate the leave days Mr Shakes and Mr Helyar claim to have lost; and

- if the Authority did not have jurisdiction, whether it was correct to reject the application before it.

[13] In the decision from the Employment Court dated 1 May 2008 the Chief Judge comments on the strategy employed by the Applicants in its challenge:

> The plaintiffs want the Court to declare that the Authority erred in law so that its determination should simply be set aside. Mr Yukich told me that he proposes then to apply to the Employment Relations Authority to reopen its investigation and to re-determine the plaintiffs' claims with such guidance as this judgment may give. Mr Yukich, on behalf of the plaintiffs, has elected deliberately not to challenge the Authority's determination by hearing de novo. Not only that, he has not just asked the Court to substitute its decision for that of the Authority, but has asked that it not do so.
>
> As Mr McIlraith submitted, there is no power for this Court to remit a proceeding back to the Authority for re-determination. Rather, the appropriate course is usually for the Court itself to decide what the Authority ought to have determined. But in this case the plaintiffs do not seek such an outcome, as they are entitled not to do. Rather, they propose to use this judgment to ask the Authority to reopen its investigation into their personal grievances and to re-determine them in their favour.

Application for Reopening

[14] As advised to the Employment Court during its hearing, the Applicants have applied to have the investigation reopened, on the basis that a miscarriage of justice has occurred due to the Authority declining to hear matters brought before it on the basis of jurisdiction.

[15] Two of the objects of the Employment Relations Act at ss.3(vi) and 143(fa) include the need to reduce judicial intervention and ensure that Employment Relations Authority investigations are concluded before a higher court exercises its jurisdiction.

[16] If this application is successful, and the Authority produces a further determination following a second investigation the Applicant achieves another right of challenge. This seems contrary to the objects of Part 10 of the Act. To allow this matter to be reopened has the potential to also impinge on the principles of *res judicata* and *estoppel*.

[17] In *Reid v New Zealand Fire Service Commission (No 2)* Goddard CJ referred to Spencer Bower and Turner, *The Doctrine of Res Judicata* (2nd ed), London, Butterworths 1969, para 10 where the following statement of the House of Lords was cited:

> The doctrine … is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issues to be litigated afresh between the same parties.

[18] The Chief Judge (as he then was) set out the elementary proposition that:

- where a final decision has been pronounced
- by a court or tribunal of competent jurisdiction
- over the parties to
- and the subject-matter of
- litigation

each party is estopped or precluded from disputing or questioning such decision on the merits as against the other party in subsequent litigation.

[19] The Applicants submit that the Authority did not issue a final determination on all matters relating to the application brought before it and was in error in not doing so. Also, that the Authority did not complete its investigation and did not make final determinations on all matters relating to the original statement of problem.

[20] That submission is wrong. A final determination was published by the Authority in September 2007. At that point in time, the job of the Authority was finished and the Applicants were then entitled to challenge the whole or parts of the determination as they saw fit.

[21] The Applicants have been represented throughout, by an experienced advocate. The Act provides the Applicants with the opportunity to have their case

heard from the beginning if they were dissatisfied with it. Mr Shakes and Mr Helyar specifically chose to challenge only the issues in relation to the Authority's finding with regard to jurisdiction.

[22] As pointed out by the Chief Judge the appropriate course is usually for the Court itself to decide what the Authority ought to have determined. Mr Yukich, on behalf of the Applicants specifically requested the Court not to take that course of action. That was open for the Applicants to do. What is not available is to now seek a rehearing on the basis that the Authority has been found to be wrong at law.

Disadvantage grievance

[23] In the event that I am wrong in not ordering a reopening in this matter, I have given consideration to whether there is a live issue between the parties with regard to the one day's annual leave.

[24] The Employment Court found that the Authority was mistaken to find that it did not have jurisdiction to investigate and determine whether the employer disadvantaged the Applicants unjustifiably by breaching the Holidays Act. The Court noted that where an employer acts in breach of its statutory duties or contractual obligations affecting terms and conditions of employment including holidays, thereby disadvantaging an employee, a personal grievance will generally be established. Only in rare cases can it be conceived that a breach of statute or a collective agreement will be justifiable.

[25] The Court then noted that payment of wages for a day is no substitute for being deprived of a days holiday which is essentially for rest and recreation, and that proper compensation would be the provision of an alternative holiday.

[26] The Court went on to state that it was strongly arguable that the agreement of Messers Shake and Helyar to take annual leave for the day on 29 November was not the agreement contemplated by the Holidays Act or the Collective Agreement as both men had indicated they were applying for the leave under protest.

[27] Mr McIlraith on behalf of NSTL submits that neither applicant has been deprived of a days holiday as both Applicants have, since the Employment Court decision, had their days leave reinstated, albeit Mr Helyar is no longer employed

by NSTL. In accordance with the decision of the Employment Court, the provision of an alternative holiday is proper compensation.

[28] In their application for re-opening Mr Shake and Mr Helyar also seek payment of compensation for hurt and humiliation as a result of the unjustified actions of NTSL with regard to the requirement to take leave for the day on 29 November 2007. The Authority noted in its determination at paragraph 30 that neither Applicant provided evidence at the investigation meeting of hurt and humiliation in support of their claim for compensation. This finding was not subject to challenge and therefore, it is difficult to see how the Authority could now make an award for compensation where none was proven or made out.

Determination

[29] I find that there has been no miscarriage of justice, no unfairness and no material evidence discovered after the determination of the Authority. The applicants exercised their right of challenge in the manner they chose. It is now not open to Mr Shakes and Mr Helyar to re-litigate the same claim or point. The application for reopening is declined.

Costs

[30] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority