

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 61  
5158394

BETWEEN	TASNEEM BEGUM (LABOUR INSPECTOR) Applicant
AND	EFFECTIVE FENCING NZ LIMITED First Respondent
AND	EFFECTIVE FENCING LIMITED Second Respondent
AND BETWEEN	EFFECTIVE FENCING NZ LIMITED Applicant
AND	TASNEEM BEGUM (LABOUR INSPECTOR) Respondent

Member of Authority: Vicki Campbell

Representatives: Aaron Brown for Labour Inspector  
Sean Robertson-Welsh for Effective Fencing NZ  
Limited  
Mike O'Connor for Effective Fencing Limited

Investigation Meeting: 17 February 2011

Determination: 17 February 2011

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**DETERMINATION OF THE AUTHORITY**

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- A The application to join a party to the proceedings is granted.**
- B The application for reopening an investigation is granted.**
- C The Authority will provide Effective Fencing Limited a copy of the original application and all associated documents. Effective Fencing**

**Limited is to lodge a statement in reply within 14 days of receipt of the documents.**

**D A telephone conference call will be arranged within 7 days of receipt of the statement in reply to set a new investigation date.**

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[1] The Authority has two applications currently before it. The first is an application by the Labour Inspector to join Effective Fencing Ltd as second respondent to this matter. The application to join a party is opposed by Effective Fencing NZ Ltd.

[2] The second is an application by Effective Fencing NZ Ltd to reopen an investigation. The application is not opposed by the respondent (the Labour Inspector).

#### **Application to join Effective Fencing Limited as a party**

[3] In a determination dated 3 March 2010 (AA 94/10) the Authority dealt with the original issues between the Labour Inspector and the first respondent. The matter before the Authority in 2010 was a claim by the Labour Inspector to recover outstanding holiday pay owed to Mr Christopher Sucich, a former employee of Effective Fencing NZ Ltd.

[4] Mr Sucich was employed by Effective Fencing Limited from 2005 until 2008. In 2008 his employment was taken over by Effective Fencing NZ Ltd. Ms Begum says that originally she understood that when Effective Fencing NZ Ltd took over the business in 2008 it also took over responsibility for the payment of holiday pay.

[5] The Labour Inspector says that evidence has now come to light that indicates Effective Fencing Limited may owe the bulk of the holiday pay to Mr Sicich and not Effective Fencing NZ Ltd. In that case the Authority will need to establish what share of holiday pay is owed by each company. It is therefore important to have Effective Fencing Limited joined as a respondent in the matter.

[6] Mr Robertson-Welsh is opposed to joining Effective Fencing Limited as a party as he is concerned that a fair hearing will not result. In his statement in reply to the

application Mr Robertson-Welsh requested that the application be denied and a separate action be taken against any other parties to ensure fairness.

[7] The application for Joinder is made pursuant to section 221 of the Employment Relations Act which allows the Authority to direct parties to be joined to enable the Authority to more effectively dispose of a matter before it.

[8] In this matter I am satisfied Effective Fencing Limited should be joined as a party to enable a full and fair investigation into what (if any) liability exists by either company for any outstanding holiday pay payments owed to Mr Sucich.

### **Application for Reopening**

[9] The original matter was heard on 25 February 2010. At the investigation meeting Effective Fencing NZ Ltd did not make an appearance and the Authority member proceeded to investigate the matter pursuant to clause 12 of the 2<sup>nd</sup> Schedule of the Employment Relations Act 2000 (the Act). An oral determination was given at the conclusion of the Investigation Meeting. After that oral determination was given Mr Robertson-Welsh arrived at the Authority. It seems he was mistaken in his understanding of the time of commencement of the investigation meeting. He wrongly believed the investigation was to commence at 1.00pm, when it had actually commenced at 10.00am.

[10] Notwithstanding that it was Mr Robertson-Welsh's mistake, the Authority, of its own initiative explored the possibility of informally reopening the investigation to allow the employer a second opportunity to attend and be heard. The Labour Inspector was opposed to that course as a determination had already been given in the presence of the employee, who had taken time off work to attend.

[11] The Authority then confirmed in writing, its determination of the matter and made a comment to the effect that Effective Fencing NZ Ltd may lodge a formal application to have the investigation reopened, which it has.

[12] The Authority has a discretionary power to reopen an investigation pursuant to clause 4 of the 2<sup>nd</sup> Schedule of the Act. While the power is discretionary it must be exercised in accordance with principle.

[13] The principal test for determining whether a matter ought to be reopened or not is whether a failure to do so would constitute a miscarriage of justice. The Authority must balance the risk of miscarriage of justice against the countervailing principle that certainty in litigation is important.

[14] As advised orally at the investigation meeting this morning, the application for reopening is granted. I have accepted, as my colleague did in his determination, that Mr Robertson-Welsh had made an error in noting the time for the original investigation meeting.

[15] I am satisfied that a miscarriage of justice would occur if the reopening application is not granted. In addition the new evidence indicates that Effective Fencing NZ Ltd may not be liable for the entire amount of holiday pay outstanding and this requires further investigation.

### **Directions**

[16] The Authority Support Officer will today, forward to Effective Fencing Limited a full and complete copy of the original application and all associated documents. Effective Fencing Limited will have 14 days from the date of receipt of those documents to lodge a statement in reply.

[17] A telephone conference call is to be arranged within 7 days of the date of receipt of the statement in reply to set down a date and timetable for the hearing of the substantive issues.

### **Costs**

[18] Costs are reserved.

Vicki Campbell  
Member of Employment Relations Authority