

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 643
3063158

BETWEEN VICKI HIGGS
Applicant

AND CANTERBURY RELOCATIONS
LIMITED
First Respondent

AND TRU GROUP LIMITED now known as
MNO LIMITED (IN LIQUIDATION)
Second Respondent

AND WILLIAM ROBERTSON
Proposed Third Respondent

AND TRAFFIC R US LIMITED
Proposed Fourth Respondent

AND TRU HIRE LIMITED
Proposed Fifth Respondent

AND AC AUTO ELECTRICAL 2002 LIMITED
Proposed Sixth Respondent

Member of Authority: Geoff O'Sullivan

Representatives: Linda Ryder and Jeff Goldstein, counsel for the Applicant
Hugh Matthews and Andrew Mitchell, counsel for the Respondents

Investigation Meeting: On the papers

Submissions [and further 22 July 2019 and 30 August 2019 from the Applicant
Information] Received: 23 August 2019 from the Respondent

Date of Determination: 8 November 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Vicki Higgs seeks the reopening of the Authority's investigation, to which the Authority's determination of 2 April 2019 relates, on the basis that the determination did not correctly identify her employer. The reopening is sought for the purpose of adding a third, fourth, fifth and sixth respondent to the proceedings so that the finding relating to who the correct employer is can be reconsidered.

[2] Although the Statement of Problem cited two respondents, namely Canterbury Relocations Limited as first respondent and Tru Group Limited as second respondent, during the Investigation Meeting it was submitted on Ms Higgs' behalf she was employed by four legal entities comprising Tru Group Limited and three other entities sitting under the Tru Group banner.

[3] Tru Group Limited submitted however that Ms Higgs was its employee being a company in its own right. The Authority found that this was correct on the balance of probabilities. It also found Ms Higgs had made out her claims and awarded her remedies. Ms Higgs however seeks only to reopen that part of the determination which identified her employer as Tru Group Limited.

[4] Nine grounds were put forward in support of her application. These are:

- (a) There never was an employment relationship between Tru Group Limited and the applicant.
- (b) The applicant was employed by William Kevin Robertson to work as directed by him for his group of companies which he described as the Tru Group.
- (c) The applicant was employed jointly and severally by the Tru Group of companies, namely Traffic R Us Limited, Tru Hire Limited, Canterbury Relocations Limited and A C Auto Electrical 2002 Limited.
- (d) The issue as to the identity of the employer was not tested in evidence at the Authority hearing.

- (e) The applicant is able to commence proceedings against William Kevin Robertson and Traffic R Us Limited, Tru Hire Limited, Canterbury Relocations Limited and A C Auto Electrical 2002 Limited for breach of contract however, as the Authority has issued its determination in regard to the applicant's substantive claims it would not be in the interests of justice that these matters be relitigated.
- (f) That the proposed employer companies and Tru Group Limited have a common director and the same or similar shareholdings.
- (g) That the proposed respondent employers will not be prejudiced by the reopening.
- (h) Evidence will be produced to establish the correct identity of the employer.
- (i) That it is in the interests of justice that the Authority determination is reopened.

[5] The respondents object to the application for reopening, submitting the following:

- (a) The application does not identify any principled ground or basis for the reopening of the Authority's investigation.
- (b) The issue of who was the employer of the applicant was:
 - (i) raised in the statement of problem;
 - (ii) was the subject of evidence, questions from the Authority, and cross-examination of witnesses;
 - (iii) was the subject of written and oral submissions at the investigation meeting held for submissions on 22 August 2018
 - (iv) was the subject of a finding by the Authority which is set out in paragraph 8 of the Authority's determination.
- (c) No evidence has been advanced by the applicant in support of the application to reopen.

[6] The parties have provided written submissions and it was agreed the Authority would determine the matter on the papers.

The law regarding a reopening application

[7] The Authority has a statutory discretion to order the reopening of an investigation on “such terms as it thinks reasonable”.¹ This discretion must be exercised according to principle. Principles developed by the Employment Court in the exercise of its similar discretionary power to order a “re-hearing” provide a useful framework for the Authority when considering whether or not to reopen an investigation.² Applicable principles include the following:³

- (a) The rehearing jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered or to provide a back door method by which unsuccessful litigants can seek to re-argue their case.
- (b) Some special or unusual circumstance must be found to exist to warrant the reopening, such as:
 - (i) fresh or new evidence which could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive;
 - (ii) a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended; or
 - (iii) some other special or unusual circumstance particular to the case.
- (c) A mere possibility of a miscarriage of justice is not a sufficient ground for granting a reopening. The threshold test is whether the party seeking the reopening can establish there would be a natural miscarriage of justice or at least a real or substantial risk of a miscarriage of justice if the determination were allowed to stand.

¹ Employment Relations Act 2000, Schedule 2, clause 4.

² *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].

³ *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [12] – [14] and *Idea Services Limited v Barker* [2013] NZEmpC 24 at [36] – [37] and [42].

- (d) An apparent misapprehension of the facts or relevant law will not warrant a reopening where the misapprehension is attributable solely to the neglect or the fault of the party seeking the re-hearing.⁴
- (e) Where a party is dissatisfied by an Authority determination on grounds that may be the subject of a specific statutory process of a challenge under s 179 of the Employment Relations Act 2000 (the Act), the Authority should be reluctant to entertain an application for reopening on those grounds.

[8] The overriding consideration must be the interests of justice, having regard to the likelihood of a miscarriage of justice balanced against other relevant factors such as the importance of finality in litigation.⁵

Discussion

[9] Central to the applicant's application is her view that in its determination of 2 April 2019, the Authority has incorrectly identified her employer as Tru Group Limited. She says this finding constituted a miscarriage of justice because the Authority made this decision without following the rules of natural justice (s 157(2) (a) of the Act). The basis for this is her view that the identity of the employer was not tested in evidence before the Authority.

[10] The original proceedings were brought by Ms Higgs against Canterbury Relocations Limited and Tru Group Limited. It is clear from the determination that the identity of the employer was in issue during the proceedings. In paragraph [8] of the determination, the Authority records: "After consideration of the evidence which included Ms Higgs' witness statement where she said she was employed by Tru and her employment agreement, which identified Tru as her employer, I find, on the balance of probabilities, Tru employed Ms Higgs". Tru was the abbreviation used in the determination for Tru Group Limited. It is clear, therefore, that in reaching its decision regarding the identity of the employer, the Authority had turned its mind to the identity of the employer and considered the evidence before it.

⁴ *Autodesk Inc v Dyason* (No. 2) (1993) HCA 6 (1993) 173 CLR 300 at 303 cited with approval and *Idea Services Limited v Barker* [2013] NZEmpC 24 at [37]

⁵ *Young above* at [9].

[11] Ms Higgs however contends there was no evidence led in regard to any dispute about the identity of the employer and no opportunity for the parties to produce any evidence in regard to the identity issue. However that submission fails in light of the observation that although Ms Higgs pleaded Tru Group Limited was her employer and confirmed this in her brief of evidence, she also submitted that she was employed by four legal entities.

[12] The submissions filed on behalf of the Respondents confirm that at all times during the investigation meeting the view of Tru Group Limited, was that it was the employer. On that basis Ms Higgs had the opportunity to contest that evidence.

[13] It is difficult to accept there could have been a miscarriage of justice in that regard. The Authority reached its conclusions on principled grounds and in accordance with Ms Higgs' filed claim.

[14] In reality there is no fresh or new evidence which could be placed before the Authority now. The liquidator's first report issued on 7 June 2019 is not determinative of the issue as to the identity of the employer. Further, if the applicant had been of a mind, she could have brought initial proceedings against all the parties she now names but chose not to. Also, having received the Authority's determination of 2 April 2019, Ms Higgs, if dissatisfied by the determination, could have challenged the same under s 179 of the Act. She chose not to do this.

Conclusion

[15] Returning to the principles outlined in paragraph [7] above, I have reached the following conclusions.

[16] Ms Higgs' application attempts to re-argue points made or which were able to be made during the investigation meeting and prior to the determination issued on 2 April 2019. The employer identity was a matter canvassed at the investigation meeting and was dealt with at the time by the Authority.

[17] There are no special or unusual circumstances warranting a reopening.

[18] Even if I were to accept the possibility of a miscarriage of justice, this on its own would not be a sufficient ground for granting a reopening. In any event, it has not been established that there would be an actual miscarriage of justice or at least a real or substantial risk of a miscarriage of justice if the Authority's determination of 2 April 2019 stands. For the reasons given above, Ms Higgs' application for the reopening of the investigation is declined.

Costs

[19] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority