IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 96
3070812

	BETWEEN	DIPIKA MACKENZIE Applicant
	AND	HUNTINGTON'S DISEASE ASSOCIATION (AUCKLAND) INC Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Adam Mapu, Advocate for the Applicant Michael Headifen, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and/or further evidence	29 November 2019 from the Applicant 6 December 2019 from the Respondent
Determination:	28 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Dipika Mackenzie, has applied to the Authority for a reopening of an investigation pursuant to clause 4 of Schedule 2 to the Employment Relations Act 2000 (the Act).

[2] The basis for Ms Mackenzie's application to reopen is that the determination issued by the Authority was demonstrably incorrect and the Authority Member should have adjourned the Investigation Meeting in order to allow evidence from witnesses who had not attended the Investigation Meeting.

[3] Mr Michael Headifen, on behalf of the Respondent, Huntingdon's Disease Association (Auckland) Limited (HDA) opposes the application to reopen the investigation on the basis that Ms Mackenzie has not shown that the evidence now sought to be adduced could not have been obtained with reasonable diligence for use at the Investigation Meeting.

[4] Further it is submitted for HDA that the evidence sought to be adduced is irrelevant to the issue of a constructive dismissal occurring as at 9 May 2019.

Issue

[5] The issue requiring investigation is whether or not a reopening of Ms Mackenzie's claims against HDA should be granted.

Background

[6] Ms MacKenzie claimed that she had been constructively dismissed from her employment with HDA on 9 May 2019 and unjustifiably disadvantaged by HDA failing to investigate her complaint.

[7] By determination [2019] NZERA 421 it was determined that Ms Mackenzie had not been constructively dismissed by HDA but that she had been unjustifiably disadvantaged by HDA.

[8] On 13 August 2019 Ms Mackenzie filed a challenge to the determination of the Authority on the basis that the Authority did not appropriately address the issue of the constructive dismissal claim, specifically that had the Authority permitted evidence from other witnesses than those called, the outcome of Ms Mackenzie's claim of constructive dismissal would have been different.

[9] The challenge had been put 'on hold' by the Employment Court pending the outcome of this application for a reopening.

Submissions for the Applicant

[10] Mr Mapu on behalf of Ms Mackenzie submits that the determination of the Authority in respect of the constructive dismissal claim was wrong, and did not appropriately address the issues raised by Ms Mackenzie.

[11] It is submitted that had the Authority heard from other witnesses, a different outcome may have been reached. In particular it is submitted that:

a) the Respondent obstructed the investigation by failing to submit witness statements and/or calling witnesses it had indicated it would call to give evidence at the Authority's investigation;

b) The Authority Member should have adjourned the investigation in order to hear evidence from a Respondent witness who had not been called by the Respondent after it had been indicated he would be called; and

c) The Authority Member should have adjourned the investigation to allow the Applicant to provide evidence from two witnesses which had not been provided in time for the Investigation Meeting.

Submissions for the Respondent

[12] Mr Headifen for the HDA in opposing the application for a reopening submits that the Applicant has not shown that the evidence now sought to be adduced could not have been obtained with reasonable diligence for use at the Investigation Meeting. Further that the evidence now sought to be adduced is irrelevant to the issue of constructive dismissal occurring on 9 May 2019.

[13] Moreover it is submitted that the witness evidence sought to be adduced is by witnesses who are not witnesses of fact in that it is evidence of conduct between employees who had left HDA's employment prior to the commencement of Ms Mackenzie's employment, or who had left prior to the alleged disagreement occurring.

[14] It is submitted that there is no risk of an actual or a potential miscarriage of justice.

[15] It is further submitted that the Respondent is entitled to regard the litigation as final, and it is in the interests of justice for the Authority to not exercise its discretion and order that the Authority's investigation be reopened.

Legal position and principles regarding a re-opening application

[16] Pursuant to Schedule 2, clause 4 of the Act, the Authority has a statutory discretion to order the reopening of an investigation on : "such terms as it thinks reasonable." Such discretion must be exercised on a principled basis. The principles as set out in *Young v Board of Trustees of Aorere College* are*:*

> [9] … at the end of the day 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. In *Ports of Auckland Limited v NZ Waterforce workers Union* a full Court of the Employment Court put it in this way:
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> > … in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by a successful litigant, … to enjoy the fruits of a judgment in its favour.
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> [10] A mere possibility that a miscarriage of justice has occurred does not apply. [1]

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

[17] The rehearing jurisdiction should not be exercised for the purpose of re-arguing points already considered, nor is it a 'back door' mechanism for unsuccessful litigants to seek to re-argue his or her case following determination.

[18] The application to reopen must be based upon special or unusual circumstances in the area of:

a) Fresh or new evidence which could not with reasonable diligence have been discovered prior to the hearing, and which is of such a nature as to appear conclusive; or

b) Is a relevant and significant statutory provision or authoritative decision that has been inadvertently overlooked or disregarded; or

c) Some other special or unusual circumstance particular to the case.

[19] As noted in *Young v Board of Trustees of Aorere College*, a mere possibility of a miscarriage of justice is not a sufficient ground for the Authority to grant a reopening of the case. The threshold test is whether the party seeking the reopening can establish either that there would be a natural miscarriage of justice or a real or substantial risk of a miscarriage of justice if the determination were allowed to stand.

[20] As stated by Judge Holden in *Randle v The Warehouse Limited* in respect of the reopening principles a basis of reopening*: "...* is because material evidence has been discovered since the trial that could not have reasonably have been foreseen of known before the trial."[2]

[21] An apparent misapprehension of the facts or relevant law will not provide a basis for a reopening in circumstances in which the misapprehension is attributable solely to the neglect or the fault of the party seeking the re-opening. As stated in the Australian case of *Autodesk Inc v Dyason:*

> … What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking a rehearing.[3]

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[2] *Randle v The Warehouse Limited* [2019] NZEmpC 68 at [15]
[3] *Autodesk Inc v Dyason* (No 2)(1993) HCA 6 at 302 – 303 as cited with approval in *Idea Services Limited v Barker* (2013] NZEmpC 24 at [37]

[22] Finally, if a party is dissatisfied by a determination made by the Authority on grounds that may be the subject of a specific process of a challenge under s 179 of the Act, the Authority should be reluctant to entertain an application for reopening on those grounds.

[23] In summary, the principles informing a reopening application note that the interests of justice must be the overriding consideration, in which the likelihood of a miscarriage of justice is balanced against other relevant factors which include the importance of finality in litigation.

Should the application for a reopening be granted?

[24] In this case I am not persuaded the evidence now sought to be admitted by Ms Mackenzie, specifically the evidence of witnesses who are not witnesses of fact, is "material evidence" which is relevant to the determination which has already been issued.

[25] I consider this rather to be an application which has the nature of a further attempt to re-litigate the evidence and the claims brought by Ms Mackenzie which have been already heard and considered by the Authority.

[26] Overall I am not persuaded that a miscarriage of justice has occurred which is a major consideration for granting a reopening application.

[27] An importance consideration in addition to that of the possibility of a miscarriage of justice when considering an application for a reopening, is that of the importance of finality in litigation.

[28] In this case, whilst finality in litigation is an important consideration, the determination has been appealed to the Employment Court by Ms Mackenzie and therefore I do not find it as weighty a consideration as the possibility of a miscarriage of justice. As stated, I do not find that there is substance in an argument that my determination constituted a miscarriage of justice for the reasons set out above.

[29] In all the circumstances, the application to reopen is dismissed.

Costs

[30] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[31] If they are not able to do so and an Authority determination on costs is needed [party name] may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum

[other party name] would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[32] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority