

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 206  
3225679

BETWEEN	JESSICA HANLON First Applicant
AND	SCOTT POOL Second Applicant
AND	KAITLYN WATT Third Applicant
AND	SHONTEL ROBERTS Fourth Applicant
AND	MUSEUM OF NEW ZEALAND TE PAPA TONGAREWA BOARD Respondent

Member of Authority: Natasha Szeto

Representatives: Garry Pollak, counsel for the Applicants  
Jordan Boyle and Paddy Miller, counsel for the Respondent

Investigation: On the papers

Evidence and submissions received: 9 February and 16 February 2024 from the Applicants  
9 February and 19 February 2024 from the Respondent

Date: 10 April 2024

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**DETERMINATION OF THE AUTHORITY**

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**The employment relationship problem**

[1] On 18 December 2023, I issued a determination in which I found that Scott Pool, Kaitlyn Watt and Shontel Roberts had not raised personal grievances for unjustifiable disadvantage or unjustifiable dismissal in time. I declined leave for Mr Pool, Ms Watt

and Ms Roberts to raise personal grievances out of time because I was not satisfied the delay in raising personal grievances was occasioned by exceptional circumstances.<sup>1</sup>

[2] On 23 January 2023, Mr Pool wrote to the Authority saying that he was not satisfied with the outcome because although the Authority found there was no evidence that three of the Applicants made reasonable arrangements to have E tū raise grievances on their behalf, he had emails that “explicitly state E tū’s intentions to raise personal grievances on behalf of us three”. Mr Pool says exceptional circumstances therefore exist to explain the delay.

[3] Following receipt of the email, I invited the parties to provide submissions on reopening the investigation on the Authority’s own motion. I now need to consider whether my investigation should be reopened, and if so, on what terms.

### **Procedural history**

[4] The parties agreed for the reopening matter to be determined on the papers.<sup>2</sup> The Applicants provided information on 23 January and 16 February 2023, as well as submissions on 9 February 2024 which referenced material already before the Authority. Te Papa provided written submissions dated 9 February and confirmed on 19 February 2024 that it had nothing further to file.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. All material provided by the parties has been considered.

### **What is the new information?**

[6] After the Authority conducted its investigation on the papers and had issued the determination, Mr Pool provided an email chain to the Authority. On 16 February 2024, the Applicants provided a further email between E tū union organisers, and message exchanges between the Applicants (these communications are collectively referred to in this determination as “the new information”). The new information had not been provided to the Authority or the Respondent previously.

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<sup>1</sup> *Hanlon & Ors v Te Papa* [2023] NZERA 756.

<sup>2</sup> Minute of the Authority, 15 February 2024.

[7] The new information consists of:

- (a) An email chain from 2 November 2022 to 17 January 2023 between E tū Organiser Shane Pasene and the Applicants discussing a personal grievance the union wanted to take on the Applicants' behalf;
- (b) An email from 17 November 2022 from E tū Campaign Organiser Michael Gilchrist to Mr Pasene and Ms Hanlon (the first Applicant) stating Dr Gilchrist's intention to work on the notification of personal grievances for the Applicants other than Ms Hanlon.
- (c) Records of messages between the Applicants on 8 November 2022 and 11 January 2023 discussing the progress of their personal grievances.

[8] The Applicants' submissions focus on what they say the new information means. They say the new information shows the Applicants made reasonable arrangements to have their grievances raised. They also say the evidence corroborates the statements of Mr Pasene and Dr Gilchrist that they had been asked to raise personal grievances by all four Applicants, had erroneously thought or assumed they had and therefore it logically follows that E tū must have been asked to do something but did not do it. The new evidence, the Applicants submit, "unequivocally confirms" that the Applicants had in fact asked E tū to raise their personal grievances and E tū acted unreasonably by failing to ensure that three of the grievances were properly raised within the required time.

[9] Te Papa strongly opposes leave being granted by the Authority to reopen the investigation. It says that the information that has now been provided could have, with reasonable diligence, been provided during the Authority's preliminary investigation, and that the exceptional circumstances ground has already been pleaded and pursued. Te Papa says the Applicants could have brought a challenge in the Employment Court in relation to the Authority's determination, and that no miscarriage of justice will occur if the investigation is not reopened. To the contrary, Te Papa says there is a strong public interest in finality of litigation.

### **The issues**

[10] The issues to be investigated and determined are:

- (a) What is the legal framework for a reopening application?

- (b) Would there be an actual miscarriage of justice, or is there a real or substantial possibility or substantial risk of a miscarriage of justice, if the investigation is not reopened and the determination allowed to stand?

### **Legal framework**

[11] The Authority may order an investigation to be reopened on such terms as it thinks reasonable.<sup>3</sup> The Authority must exercise its discretion to reopen on a principled basis. There is a public interest in the finality of litigation which may be overcome in appropriate limited circumstances.<sup>4</sup> The main concern in the exercise of the discretion is to avoid a miscarriage of justice.<sup>5</sup>

[12] Applicable principles developed by the Employment Court that are relevant to this matter include:<sup>6</sup>

- (a) The jurisdiction is not to be exercised for the purposes of re-agitating arguments already considered or providing a “back door” method by which unsuccessful litigants can seek to reargue their case.
- (b) Some special or unusual circumstances must be found to exist to warrant the reopening, such as that fresh or new evidence has been discovered which is material to the outcome of the case, and that could not have been given at the hearing.
- (c) The mere possibility of a miscarriage of justice is not sufficient. What is required is an actual miscarriage of justice, or a substantial risk of miscarriage of justice, if the determination was allowed to stand.
- (d) Where a party is dissatisfied with an Authority determination on grounds that may be the subject of the specific statutory process of a challenge under s179 of the Act, the Authority should be reluctant to entertain an application for a reopening on the same grounds.
- (e) A factor in the balance is certainty in litigation so successful litigants get their normal rights to enjoy the fruits of judgments in their favour.

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<sup>3</sup> Schedule 2, clause 4 of the Employment Relations Act 2000.

<sup>4</sup> *AlKazaz v Enterprise IT Limited* [2020] NZEmpC 171 at [5].

<sup>5</sup> *Randle v The Warehouse Ltd* [2019] NZEmpC 68 at [13] – [18].

<sup>6</sup> *AlKazaz v Enterprise IT Limited* [2020] NZEmpC 171 at [8] – [9].

[13] In *AlKazaz*, the Employment Court held:<sup>7</sup>

A reopening of an Authority investigation may be appropriate where there are concerns about the quality of the evidence that was before the original decision-maker, but a concern which is speculative will not suffice.

[14] The considerations are the same, irrespective of whether the Authority considers reopening of its own volition or on application of a party, subject to natural justice requirements being met. The Employment Court has stated:<sup>8</sup>

...although the power conferred on the Authority by cl 4(1) is wide in its terms, that power may only be properly exercised in accordance with well-established principles. Those principles generally include ensuring that all parties potentially affected by the exercise of the Authority's powers are fully and fairly informed of what is to be considered and have a proper opportunity to be heard.

### **Analysis**

[15] The Applicants were declined leave to raise their grievances out of time because I was not satisfied that the delay in raising personal grievances was occasioned by exceptional circumstances. In particular, I was not satisfied the Applicants had made reasonable arrangements to have grievances raised on their behalf by their agent, and that the agent unreasonably failed to ensure grievances were raised within the required time.<sup>9</sup>

[16] Although the Applicants accept the finding that grievances were not raised in time, the Applicants say they believed at the time that they had been. E tū's position on the preliminary matter was that it had not unreasonably failed to raise grievances in time, because grievances had been raised in time, but if E tū had unreasonably failed to do so, that amounted to an exceptional circumstance.

[17] In assessing whether the matter should be reopened, I weigh into the balance the following:

- (a) The Applicants have run the exceptional circumstance argument in the preliminary matter, albeit their primary argument was that grievances were raised in time.

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<sup>7</sup> *AlKazaz v Enterprise IT Limited* [2020] NZEmpC 171 at [11].

<sup>8</sup> *Heritage Expeditions Ltd v Fraser* [2010] NZEmpC 35 at [26].

<sup>9</sup> Section 115(b) of the Act.

- (b) The investigation on the preliminary matter was on the papers by consent. While both parties had a full and fair opportunity to put information before the Authority for consideration of the preliminary issue and the new information was available or discoverable with reasonable diligence at that time, there is merit to the Applicants' submission that if the preliminary matter had been investigated in person, it is likely that the new information about the Applicants' arrangements with E tū would have come to light. While new arguments or new ways to consider the evidence are not grounds to reopen<sup>10</sup>, the fact remains that the new information was not before the Authority when I made my determination and it may have made a difference to the outcome. I have concerns about the quality of the evidence that was before me.
- (c) The Applicants did not challenge the preliminary determination to the Employment Court, and this was the primary process available for a party dissatisfied with a determination of the Authority. It will be unusual for the Authority to reopen in circumstances where a challenge under s 179 of the Act could have been pursued.
- (d) There is a strong public interest in the finality of litigation. However, the Authority's investigation is at an early stage. The Authority's determination related to a preliminary or threshold matter for three of the Applicants.

[18] Stepping back from the detail, the question I need to consider is whether there is a real or substantial possibility of risk of a miscarriage of justice if the determination relating to the finding that there were no exceptional circumstances was allowed to stand.

[19] I am satisfied having considered the factors above, and the full submissions of both parties that the new information is material, and could have made a difference to the outcome for these three Applicants on the issue of whether exceptional circumstances existed. That is because I found there was no evidence that the Applicants had made reasonable arrangements for their grievances to be raised, and therefore that E tū failed unreasonably to do so. However, the new information suggests

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<sup>10</sup> *Watkins v Watermark Homes* [2022] NZERA 638.

that not only did the Applicants understand that E tū was progressing their grievances, but they had a reasonable basis for believing this to be the case including that E tū intended to send personal grievance letters to Te Papa for each of the Applicants individually (emails of 17 November 2022 from Dr Gilchrist to Mr Pasene).

[20] While there is no information about why E tū's intention was not followed through, that is a matter for consideration in the next step of the process – namely whether the Applicants can establish that E tū unreasonably failed to ensure their grievances were raised within time.

[21] I consider that the real or substantial possibility or substantial risk of a miscarriage of justice outweighs any prejudice to Te Papa in terms of finality of litigation. While the Employment Court has cautioned that a reopening is not a step to be taken lightly because it involves setting aside a judgment which would otherwise be binding and compelling the parties to engage again in a litigation process which they were entitled to regard as over, in this case, the investigation is at an early stage and one of the Applicant's (Ms Hanlon's) substantive matter has not yet been set down for an investigation meeting and is still to be heard.

[22] I conclude the interests of justice favour a reopening on the narrow issue of whether the Authority should grant the Applicants Mr Pool, Ms Watt and Ms Roberts leave for their personal grievances to be raised out of time on the basis that the delay was occasioned by exceptional circumstances.

[23] As indicated to the parties, the Authority will schedule a Case Management Conference to timetable evidence and submissions on this issue.

[24] Costs are reserved pending the hearing of the substantive matter, or on earlier application of either party.

Natasha Szeto  
Member of the Employment Relations Authority