

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 272
3282659

BETWEEN PURE NEW ZEALAND
INTERNATIONAL TRAVEL
SERVICES LIMITED
DIPIKA
MACKENZIE
Applicant

AND HU BIN also known as 'BEN
HU'
Respondent

Member of Authority: Eleanor Robinson

Representatives: Vincent Zhou, Representing the Applicant
David Fleming, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further
evidence 2024 from the Applicant
2024 from the Respondent

Determination: 8 May 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Pure New Zealand International Travel Service Limited (PNZ) 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 PNZ's application to reopen the investigation carried out by the Authority on 26 September 2023 is that Mr Zhou, its representative, was unable to attend the investigation due having to return to China to provide care to his parents.

[3] Mr Zhou also applies on the basis that the determination issued by the Authority was biased and did not consider the evidence PNZ lodged.

[4] Mr Fleming on behalf of Mr Bin opposes the application to reopen the investigation on the basis that PNZ did not participate in the Authority's investigation in good faith, nor did it provide proper wage and time records to the Authority. Further that (i) the application for a reopening has little merit; (ii) does not demonstrate a substantial risk of a miscarriage of justice having occurred; and (iii) has been made very late.

Issue

[5] The issue requiring investigation is whether or not a reopening should be granted.

Background

[6] Mr Bin claimed that he was owed monies by PNZ in respect of payment at the minimum rate for all the hours he worked, statutory public holiday pay, and expenses incurred on behalf of PNZ. He also claimed monies in respect of an employment premium he paid to PNZ, and a penalty in respect of PNZ's failure to provide him with wage and time records upon request.

[7] By determination [2023] NZERA 565 it was determined that PNZ had breached minimum employment standards, including the requirement to pay a premium in respect of employment. Various sums of monies were ordered to be paid to Mr Bin within 28 days of the date of determination [2023] NZERA 565, which was first issued on 2 October 2023 and reissued to correct typographical errors.

[8] PNZ did not make payment of the sums ordered to be paid to Mr Bin as set out in determination [2023] NZERA 565, nor did Mr Zhou make payment if PNZ failed to do so as ordered by the Authority.

[9] On 5 December 2023 Mr Bin applied to the Authority for a compliance order.

[10] No Statement in Reply to the application by Mr Bin for a compliance order was received from PNZ, but on 5 March 2024, almost five months after determination [2023] NZERA 565 was issued, PNZ applied for a reopening of the investigation.

Submissions for the Applicant

[11] Mr Zhou on behalf of PNZ submits that the determination of the Authority neglected evidence filed by PNZ. An email attaching the documents sent by Mr Zhou on 25 September 2023, the day before the Authority's Investigation Meeting, explaining his inability to attend the investigation was not considered.

[12] Mr Zhou further submits that he contacted the Authority in August 2023 before leaving New Zealand to advise he was not able to attend the investigation, attaching PNZ's evidence at that time.

Submissions for the Respondent

[13] Mr Fleming in opposing the application for a reopening submits on behalf of Mr Bin that proper time and wage records were not provided to the Authority and such evidence as was provided by PNZ was provided very late in the proceedings. This is a case about minimum code legislation, including the charging of a premium in employment, and it is submitted that it is in the public interest that it is dismissed.

[14] It is submitted that not only were PNZ and Mr Zhou warned of the consequences of non-attendance of the Authority's investigation in the Directions minute dated on 28 April 2023, but no prior notification of non-attendance was made before 25 September 2023, half a day before the investigation meeting.

[15] It is submitted that PNZ and Mr Zhao were emailed copies of submissions made on behalf of Mr Hu at the close of the investigation meeting and could have responded to these while the matter was still before the Authority and the outcome not yet determined, but they failed to do so.

[16] It is submitted for Mr Bin that the application for a reopening does not provide any evidence of a substantial risk of a miscarriage of justice. PNZ's application for a reopening does not disclose the existence of any new or additional evidence or other relevant information that could not have been put forward the Authority well in advance of 25 September 2023.

[17] It is submitted that while PNZ's application alleges bias on the part of the Authority Member, it does not disclose any reasonable basis for the making of this allegation.

[18] Finally, it is submitted that the application was not brought in a timely manner and Mr Bin is still being deprived of the benefits of his earlier success in the Authority more than seven months from the date of the determination on 2 October 2023.

Legal position and principles regarding a re-opening application

[19] 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:

... 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.

[10] A mere possibility that a miscarriage of justice has occurred does not apply. ¹

[20] 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.²

[21] 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) 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.

[22] 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.

[23] As stated by Judge Holden in *Randle v The Warehouse Limited* in respect of the reopening principles a basis of reopening it: "...is because material evidence has been discovered since the trial that could not have reasonably have been foreseen or known before the trial."³

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

² *Randle v The Warehouse Limited* [2019] NZEmpC 68 at [18](a)

³ *Randle v The Warehouse Limited* [2019] NZEmpC 68 at [15]

[24] 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.

[25] 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?

[26] An allegation of bias by a Member is not a basis for reopening an investigation. Nor do I accept that allegation as justified. PNZ was given full opportunity to participate in the Authority's investigation, these steps are set out in detail in paragraphs [5] to [14] of determination [2023] NZERA 565.

[27] Such evidence as PNZ provided was considered before I made a decision. Moreover, PNZ was given an opportunity to respond to the submissions made on behalf of Mr Bin prior to the determination being finalised. It did not do so.

Fresh or new evidence

[28] I consider that the evidence provided on 25 September 2023 should "have reasonably have been foreseen or known before the trial."⁴ I note as relevant the following dates and events:

- a) The Authority's Directions Minute issued on 14 February 2023 directed PNZ to lodge and serve its witness statements and relevant documents by 4 April 2023.
- b) On 29 May 2023 the Authority, not having received the documents as directed, requested an urgent update from PNZ.
- c) On 30 May 2023 Mr Zhou advised that he would send the documentation as soon as possible. An extension for filing PNZ's evidence was granted until 30 June 2023.
- d) On 25 June 2023 Mr Zhou emailed with a response to the claims raised by Mr Bin. The Authority responded with a reminder that all evidence should be provided under oath or affirmation at the investigation.

⁴ Above n3.

- e) A further extension for the Respondent to file its evidence was granted to 18 August 2023, noting that no further extension would be granted.
- f) On 13 September 2023 Mr Zhou advised the Authority that his father was critically ill but did not seek an adjournment of the investigation.
- g) On 25 September 2023 the Authority asked for a list of PNZ attendees at the investigation.
- h) In response Mr Zhou advised that he was in China and although he had expected to return to New Zealand by 24 August 2023, had been unable to do so and would not be attending the investigation the following day. Some evidence was attached to the email.

[29] I find that there was ample notification to, and opportunity for, PNZ to provide its evidence from the original date it was due on 4 April 2023. Any further evidence other to that provided by PNZ on 25 September 2023 would have been known to PNZ during the period of five months prior to the investigation and could have been provided at any stage during that time.

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

[31] An importance consideration is that of the importance of finality in litigation. Mr Bin presented his claims to the Authority, these were fully investigated and determination [2023] NZERA 565 issued. Mr Bin was the successful party in the matter. He has been deprived of the fruits of that determination and he is entitled to finality in this matter.

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

Costs

[33] Mr Bin is seeking costs in respect of his response to the reopening application.

[34] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing.

[35] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point.

[36] Accordingly, PNZ and/or Mr Zhou are ordered to pay Mr Bin the sum of \$2,250.00 towards his legal costs in responding to this reopening application, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority