IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 41
3263519

	BETWEEN	KATIE MORTENSEN and ALASTAIR MORTENSEN Applicants
	AND	ANGELINE GUYOMARD Respondent

Member of Authority:	Andrew Gane
Representatives:	Applicants in person Respondent in person
Investigation Meeting:	On the papers
Determination:	26 January 2024

DETERMINATION OF THE AUTHORITY

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[1] By determination issued on 11 October 2023 I found Angeline Guyomard had been unjustifiably dismissed by Katie and Alastair Mortensen (the Mortensens) and was entitled to remedies (the Determination). In the Determination I ordered the Mortensens to pay Ms Guyomard $1,500 for reimbursement of lost wages, holiday pay of $100 and interest on these amounts, and $4,000 compensation for humiliation, loss of dignity and injury to feelings.[1]

[1] *Guyomard v Mortensen and Anor* [2023] NZERA 591.

[2] The Mortensens have applied for a reopening of the investigation of Ms Guyomard's claim, which was the basis for the Determination.

[3] The Mortensens' application for reopening is made on the grounds that the Determination was "not correct" because it was based on submissions that were made two years prior and not made with the benefit of any oral submissions or records from the investigation meeting. Furthermore, they say the award made to Ms Guyomard in the Determination failed to take into account of Ms Guyomard's next job which commenced shortly after she left their home.

[4] Ms Guyomard lodged a statement of reply opposing reopening the investigation.

The Authority's investigation

[5] This application is determined on the papers. The parties have lodged submissions and information in accordance with the timetable set by the Authority on 7 December 2023.

[6] In determining this matter I have carefully considered all the material, including all evidence of the parties and their submissions.

The legal framework for considering a reopening application

[7] The Authority has a statutory discretion to order the reopening of an investigation on "such terms as it thinks reasonable".[2]

[6] The applicable principles to be Applied when considering a reopening application include the following:[3]

(i) The jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered or to provide a 'backdoor' method by which unsuccessful litigants can seek to re-argue their case.

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[2] Employment Relations Act 2000, Schedule 2 clause 4.

[3] *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9]; *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [12]-[14]; and *Idea Services Limited v Barker* [2013] NZEmpC at [36]-[37] and [42].

(ii) Some special or unusual circumstance must be found to exist to warrant the reopening, such as:

- fresh or new evidence that could not with reasonable diligence have been discovered prior to the investigation meeting, which is of such a character as to appear to be conclusive; or
- a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended; or
- some other special or unusual circumstance particular to the case.

(iii) The 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 an actual miscarriage of justice or at least a real or substantial risk of a miscarriage of justice if the determination were allowed to stand.

(iv) The assessment of the possibility of a miscarriage of justice does not require a high standard of proof of that possibility. However, of equal weight as a factor in the balance is certainty in litigation so successful litigants get their normal right to enjoy the fruits of judgments in their favour.[4]

(v) An apparent misapprehension of the facts or relevant law will not warrant a reopening where the misapprehension is attributable solely to the neglect or default of the party seeking the reopening.[5]

(vi) Where a party is dissatisfied by 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 those same grounds.

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[4] *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607.
[5] *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, above n 4, at [37].

[8] For the Member deciding a reopening application, "the overriding consideration must be the interests of justice balanced against other relevant factors such as the importance of finality in litigation".[6]

Discussion

[9] In making the Determination I had received written statements of evidence and supporting documents from Ms Guyomard and the Mortensens.[7] It was agreed with the parties that the matter would be considered "on the papers" and I would give a brief overview of my assessment of Ms Guyomard's claims. On 27 September 2023 I provided the parties with a brief overview of my assessment of Ms Guyomard's claims. As the parties were subsequently unable to resolve the matter between themselves, I determined Ms Guyomard's application "on the papers" and issued the Determination on 11 October 2023.

[10] The Mortensens' reopening application does not identify any special or unusual circumstance such as new or fresh evidence not available at the time of the September/October 2023 investigation or identify some overlooked statutory provision or authoritative decision of superior courts that the Authority could and should consider if its investigation were to be re-opened. Rather the application simply seeks to re-argue the case that the Mortensens say was not properly understood in the Determination issued.

[11] The Mortensens allege the Determination failed to take into account Ms Guyomard's "next job which commenced shortly after the she left their home", however, the Determination acknowledged Ms Guyomard had worked at a pizza restaurant from 29 September 2020 and included this when assessing the reimbursement of wages.

Outcome

[12] I have carefully considered the principles applicable to reopening. The Mortensens have not established any actual miscarriage of justice or a real or substantial risk of a miscarriage of justice. They had the opportunity to be heard. Their evidence,

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[6] *Young*, above n 3, at [9].
[7] *Guyomard v Mortensen and Anor* [2023] NZERA 591.

including everything submitted in writing was considered. Their argument was not successful. They had the right to challenge the Determination and did not do so. No grounds for reopening were established. Overall, I am not persuaded reopening would be in the interests of justice, especially when balanced against the importance of finality in litigation.

[13] The Mortensen's application for reopening of the Authority's investigation of Ms Guyomard's claim is declined.

Andrew Gane
Member of the Employment Relations Authority