NOTE: This preliminary determination continues an earlier interim non-publication order of the applicant's name and identifying details

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 226
3329580

	BETWEEN	CPD Applicant
	AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Member of Authority:	Peter Fuiava
Representatives:	Applicant in person Sarah Lim, counsel for the Respondent
Investigation Meeting:	24 January 2025 at Auckland
Submissions received:	10 October 2024 and 4 January 2025 from the Applicant 13 December 2024 and 24 January 2025 from the Respondent
Determination:	22 April 2025

SECOND PRELIMINARY DETERMINATION OF THE AUTHORITY

What is this determination about?

[1] This is an application by CPD to reopen a preliminary determination by another Authority Member dated 17 September 2024 (the preliminary determination).[1] In brief, the preliminary determination concerned whether CPD had raised various claims of unjustified disadvantage with the Chief Executive of the Ministry of Social Development (MSD) within the 90-day period as required by s 114 of the Employment Relations Act 2000 (the Act). The section requires an employee wishing to raise a

[1] *CPD v The Chief Executive of the Ministry of Social Development* [2024] NZERA 559.

personal grievance to do so within 90 days of the date the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

What are the parties' positions?

[2] CPD's reopening application of 10 October 2024 alleges that the Authority Member who determined the preliminary determination had "rewritten my personal grievances (PGs) without my permission, and these do not reflect my claims" and that the Member "falsely stated in paragraph 18 (of the determination) that I advised at the meeting I was no longer pursing a number of claims." It was further alleged that the Member "made many factual errors in representing my argument" and that the Member "did not allow my response to the amended statement in reply to be included in the preliminary hearing" which would have addressed the issues at hand regarding the PGs being submitted within 90 days.

[3] It was also claimed that both CPD and MSD were permitted to provide evidence that went beyond the issue for determination namely whether certain personal grievances were raised in time. CPD claimed that there was not enough time to go through every detail and that CPD was cut off on a few occasions by the Member who "advised he wasn't concerned about certain facts etc." CPD states that there was still "a lot left to go" regarding their personal grievances and believed that the investigation meeting would continue the following day as two days had been scheduled.

[4] By way of statement in reply dated 1 November 2024, MSD expressed its opposition to reopening the investigation disagreeing with the contention that the Authority Member had re-written CPD's claims or falsely stated that CPD had agreed to discontinue a number of personal grievances. MSD denied that the preliminary investigation meeting was conducted in a manner that was disadvantageous to CPD in any way.

[5] As to the conduct of the hearing, MSD submitted that the Member paused to confirm the scope of CPD's personal grievance claims that were the subject or scope of the preliminary investigation and that CPD had clarified their PG claims of unjustified disadvantages as follows:[2]

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[2] *CPD v The Chief Executive of MSD*, n 1, at [18].

(a) Not providing CPD with additional support in early 2022;

(b) Declining CPD's numerous requests to work from home;

(c) The implementation of a rehabilitation plan;

(d) Declining requests to work overtime; and

(e) The reallocation of work from CPD to other employees.

[6] MSD submit that the five unjustified disadvantage grievances listed above, comprised the scope of the Authority's preliminary investigation and that only the reallocation of work from CPD to another employee ([5](e)) was found by the Member to have been raised within the 90-day time period. The other four grievance claims ([5](a) to (d)) were not raised in time and, consequently, could not be proceeded with any further.

[7] MSD further submit that CPD is applying to reopen the preliminary investigation because, in short, CPD disagrees with the Member's conclusions. However, this is not a valid ground with which to reopen an investigation.

How has the Authority investigated CPD's reopening application?

[8] In support of CPD's application for reopening, I was provided with CPD's "Objection to facts presented in the preliminary determination" (undated but received on 10 October 2024) and a second written submission from CPD (4 January 2025) which comprised CPD's response to MSD's submissions in opposition of 13 December 2024.

[9] As I was not present at the initial preliminary investigation held on 2 July 2024, I held an in person investigation meeting on 24 January 2025 to ask questions of CPD and Ms Lim who were present at the meeting. At the end of the investigation meeting, Ms Lim provided me with MSD's closing written submissions which together with the above written material provided by CPD, has been taken into account as well.

[10] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What is the legal framework for considering a reopening application?

[11] While the discretion to order the reopening of an investigation on "such terms as it thinks reasonable" is broad,[3] the discretion must be exercised according to principle.[4] The Employment Court has provided a useful framework of applicable principles (set out below) with which to consider such applications:

(i) 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]

(ii) The mere possibility of a miscarriage of justice is not a sufficient ground for granting a rehearing. What is required is an actual miscarriage of justice or at least a real or substantial risk of a miscarriage of justice.[6]

(iii) Rehearings have been ordered when the integrity of a judgment has been placed in issue by some special and unusual circumstances such as the discovery of fresh or new evidence, that could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive.[7]

(iv) The rehearing jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case.[8]

What is the issue?

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[3] The Act, Schedule 2, cl 4.
[4] *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [8].
[5] At [9].
[6] *Idea Services Ltd v Barker* [2013] NZEmpC 24 at [36].
[7] *Davis v Commissioner of Police* [2015] ERNZ 27 at [13].
[8] At [14].

[12] With the above legal framework in mind, the issue to be determined is whether there is a valid or proper ground or basis to grant CPD's application to reopen the Authority's preliminary investigation.

Whether to reopen the investigation

[13] At [17] of the preliminary determination,[9] the following is recorded:

> At the completion of hearing evidence at the investigation meeting CPD advised that they were no longer pursuing a number of claims and reduced the number of active claims to five.

[14] CPD submits that they did not say they were no longer pursuing a number of claims or that these be reduced to five claims. CPD acknowledges that there was confusion on their part about whether a PG or personal grievance was 'live" or what qualified as a live PG. Because I was not present at the investigation meeting which is not ordinarily recorded, I put to MSD's counsel, Ms Lim, whether there had been a reduction in the number of disadvantage claims during the course of the investigation meeting. Ms Lim was adamant that this was not the case and that in fact, the scope of the meeting started (and ended) with five claims of unjustified disadvantage that MSD denied CPD had raised with their employer within the 90-day period required by s 114 of the Act.

[15] Counsel's account of the number of claims before the Authority is consistent with MSD's written submissions filed in advance of the preliminary investigation. While paragraph [17] of the preliminary determination suggests on a plain reading that there was a reduction in the number of claims, I find that this was in error but even so, it has not been shown that this has resulted in a miscarriage of justice for CPD given that the scope of the investigation from the outset was focussed on no more and no less than five claims of unjustified disadvantage of which only one was found to have been raised in time as noted above.

[16] CPD claims to have been confused about whether a PG was live or what qualified as a live PG. It is noted that the investigation meeting was scheduled for two days but finished in one. While it has been suggested that the Member was "rushed" and on occasion chose not to speak to CPD but through Ms Lim (which counsel denied),

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[9] Above n 1.

subsequent questioning by me of CPD and Ms Lim as to what took place at the investigation establishes that the investigation meeting started at 10 am and finished at 5.30 pm later that same day. This was a full day's worth of an investigation meeting which is inconsistent with the Member rushing things as CPD contends. The discussion around the number of disadvantage claims said to be out of time occurred towards the end of the first day and in my view, was undertaken by the Member to ensure that he, CPD, and MSD were all on the same page with each other regarding what PGs needed to be looked at in terms of s 114.

[17] If there was confusion on the part of CPD, it was not raised with the Member at the investigation meeting. During my meeting with CPD and Ms Lim, CPD stated that in an email they sent to the Member on 4 September 2024, which was some 13 days before the preliminary determination was issued, CPD claimed to reclarify the various PGs of unjustified disadvantage for review. I note that CPD sent two emails to the Authority on 4 September 2024 the first of which relates to the raising of a PG of unjustified dismissal. The second was CPD's response to Ms Lim's reply. In neither of CPD's emails of 4 September 2024 do I find any express reference to the five PGs that the Authority was looking at in terms of its preliminary investigation. CPD is mistaken and their emails of 4 September 2024 do not show that a miscarriage of justice has occurred or that there is a real or substantial risk of a miscarriage of justice.

[18] Therein lies the difficulty for CPD as there is a clear disconnect between what CPD has expressed in an email and the message that CPD believes or considers the same email or communication to convey. Even if CPD remained confused about the number of live PGs that were being considered, CPD's emails of 4 September 2024 fail to alert the Member to the alleged confusion or misapprehension. In the circumstances, the Member cannot be faulted for making his decision based on all the information and evidence he considers relevant and has before him at the time his preliminary determination was made.

[19] CPD takes issue with the way the Member has set out the factual background in his decision and that his summary of CPD's claims change the material facts so substantively that this will affect the substantive investigation to come. However, the Member's summary of the background facts to the employment problem does not attempt to quote CPD verbatim and when I raised this with CPD, it was acknowledged

that CPD may have been a "little pedantic" with the Member's writing. Even so, CPD maintained that the way the decision was written had changed the meaning of CPD's claims.

[20] With respect, I disagree. While I have pointed out that there was in fact no reduction in the number of claims, and note other minor errors in the determination such as "unexplained absences" by CPD when "unauthorised absences" may have been more apt, the minor nature of these errors do not compromise the overall integrity of the determination which must be considered as a whole rather than piecemeal.

[21] Another example where CPD says that the determination has allegedly not put things correctly is reference at paragraph 18 of the decision to CPD asking MSD for "additional paid sick leave". CPD submits that at no point in an email to her manager (24 February 2022) did CPD request further paid sick leave. I have considered CPD's two emails from that day and while CPD is correct that additional paid sick leave was not expressly sought, this is nevertheless what can be readily inferred from the two emails which state:

> I do not think it is unfair that any sick leave I have had above my sick leave entitlements should be considered unpaid leave given the circumstances …
>
> I have never burned through sick leave quite so quickly …
>
> Now that my sick leave entitlement has been used up I now have to deal with the stress (potentially even with covid) I will have to manage with a reduced pay if I take time off. This seems entirely unfair especially when I have provided medical certificates.

[22] When the above passages are individually and cumulatively considered, the Member's description of CPD asking MSD for additional sick leave was fair and reasonable. No unfairness or miscarriage of justice arises from this.

How do I find?

[23] At the core of this application is CPD's dissatisfaction with the final outcome. While this is not uncommon, a party's dissatisfaction with the outcome of an investigation is not a ground for reopening. Although the preliminary determination contains minor errors as noted above, these do not compromise its overall integrity as a decision which must be allowed to stand for better or for worse. The application to reopen is unsuccessful and is declined.

[24] Perhaps underpinning the present application is CPD's concern that because the Authority has determined that four of their personal grievances for unjustified disadvantage are out of time, the various emails that support those grievances cannot be considered further. It is correct that CPD is prohibited from using these emails to support PGs of unjustified disadvantage determined to be out of time (see [5](a) to (d) above). However, the emails may yet serve a secondary function in providing background context to the substantive issues that were raised with MSD within the 90-day period and remain to be investigated.

[25] That said, the emails would still need to be relevant to the substantive issues and not hinder the investigation meeting from being completed in a robust but efficient and cost-effective manner. This is where CPD could benefit from the assistance of an experienced representative who is capable of harnessing all the information CPD wishes to put before the Authority in a way that is relevant, precise and to the point.

What about costs for this matter?

[26] As this case will proceed to a substantive investigation, my preliminary view regarding costs for the second preliminary determination on reopening is that it can be dealt with by the Member in the final wash up following the substantive determination should the parties not be able to agree on costs and should a determination on costs from the Authority be required.

[27] As a preliminary indication for costs for the reopening application, taking into account that a two-hour in person investigation meeting was required, a starting point based on half of the notional tariff for a one-day investigation meeting or $2,250 may apply. From there, an upwards or downwards adjustment may be made subject to costs submissions from the parties which the presiding Member may make timetabling directions if necessary.

Peter Fuiava
Member of the Employment Relations Authority