

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 254
3346240

BETWEEN

DURGESH DURGESH
Applicant

AND

PRO-AUTO CARS
REFINISHING LIMITED
Respondent

PRANESH KARAN
Second Respondent

Member of Authority: Andrew Gane

Representatives: John Wood, advocate for the Applicant
Pranesh Karan for the First and Second Respondent

Investigation Meeting: On the papers

Submissions received: 18 March 2025 From the Applicant

Determination: 7 May 2025

DETERMINATION OF THE AUTHORITY

[1] On 15 July 2024 I issued a costs determination ([2024] NZERA 429) in favour of Durgesh Durgesh. In the determination I ordered Pro-Auto Cars Refinishing Limited (Pro-Auto) to pay Mr Durgesh \$4,500 costs and \$71.56 for the lodgement fee.¹

¹ *Durgesh v Pro-Auto Cars Refinishing Limited & Anor* [2024] NZERA 429.

[2] Mr Duresh has now applied for a reopening of the investigation of his costs determination.² Mr Duresh seeks to have the second respondent, Mr Karan, added to the orders for costs.

[3] Mr Duresh's application for reopening is made on the grounds that there are compelling and justified reasons to revisit the costs award in light of new information that was not available at the time of issuing the costs determination.

The Authority's investigation

[4] Following a case management conference held on 4 February 2025 it was agreed to avoid unnecessary costs and time, the matter would be investigated on the papers.

[5] Mr Duresh provided supporting documents and submissions in support of his application to reopen proceedings in accordance with the timetable set by the Authority.

[6] Mr Karan represented himself and Pro-Auto at the case management conference, where he stated he had already provided all relevant information in the previous proceedings. Pro-Auto and Mr Karan did not participate further in these proceedings.

[7] 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

[8] While the discretion to order the reopening of an investigation on "such terms as it thinks reasonable" is broad, the discretion must be exercised according to principle. 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.³
- (ii) 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

² Employment Relations Act 2000, schedule 4 clause 2.

³ *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].

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.⁴

- (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.⁵
- (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.⁶
- (v) 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.

Issue

[9] 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 Mr Durgesh's application to reopen the Authority's costs investigation.

Discussion

[10] In my substantive determination of 22 May 2024, I found Mr Karan as a director was a person involved in the breaches of employment standards by Pro-Auto. ⁷ Mr Karan had given evidence that he was considering closing Pro-Auto Cars and that Pro-Auto Cars would have difficulty in making any payments that might be awarded to Mr Durgesh. Pursuant to s 142Y of the Act I found Mr Karan was therefore liable for the

⁴ *Idea Services Ltd v Barker* [2013] NZEmpC 24 at [36].

⁵ *Davis v Commissioner of Police* [2015] ERNZ 27 at [13].

⁶ At [9].

⁷ *Durgesh v Pro-Auto Cars Refinishing Limited & Anor* [2024] NZERA 302.

amounts set out in the determination to be paid to Mr Durgesh from the breaches of employment standards by Pro-Auto, if Pro-Auto was unable to pay the amounts owed.

[11] Mr Durgesh submits he has been unable to recover any money from either the Mr Karan or Pro-Auto concerning the determinations made by the Authority on 22 May 2024 and 15 July 2024. As a result, Mr Durgesh will be applying for a compliance order from the Authority to enforce both determinations.

[12] When Mr Durgesh lodged his costs application with the Authority, he only sought costs against the first respondent, Pro-Auto and omitted to include the second respondent, Mr Karan. Subsequently costs were only awarded against Pro-Auto.

[13] Mr Durgesh submits that there are now compelling and justified reasons to revisit the costs award in light of new developments, in that there is new evidence that was not considered or available at the time of earlier investigations and determinations.

Is there fresh or new evidence material to the outcome of the case which could not have been reasonably given at the Authority hearing?

[14] The Employment Court has stated what is required to be shown to succeed with a ground that there has been material evidence discovered that could not have been reasonably foreseen or known before the investigation meeting.⁸

- (a) the evidence could not have been obtained with reasonable diligence for use at the Authority's investigation meeting;
- (b) the evidence is such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
- (c) the evidence is apparently credible although it need not be incontrovertible.

Does the application and further information indicate new evidence?

[15] Before turning to these criteria, it is necessary in this matter to consider whether there is new or fresh evidence.

[16] Mr Durgesh submits that the new evidence is that the Registrar of Companies has initiated action to remove the Pro-Auto from the Companies Register, effectively preventing the Mr Durgesh from recovering any money owed by Pro-Auto.

⁸ *Randle v The Warehouse Limited* [2019] NZEmpC 68 at [15] and [18].

[17] After assessing Mr Durgesh's reopening application, he does not identify any credible new evidence that was available at the time of July 2024. Mr Durgesh was aware of Pro-Auto's dire financial circumstances at the time of making his claim for costs, and although the Registrar of Companies had not initiated any action to remove Pro-Auto from the Companies Register, such an action was foreseeable.

If the reopening of the investigation is not granted, then would there be an actual miscarriage of justice or at least a substantial risk of a miscarriage of justice?

[18] I have carefully considered the principles applicable to reopening. Mr Durgesh has not established any actual miscarriage of justice or real or substantial risk of a miscarriage of justice if the application is not granted, especially when balanced against the importance of finality in litigation.

Outcome

[19] Mr Durgesh's application for reopening of the Authority's investigation of his costs claim is unsuccessful.

Costs

There is no issue as to costs.

Andrew Gane
Member of the Employment Relations Authority