IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 364
3377243

	BETWEEN	ERNESTINA BONSU-MARO T/A EBM MODELS Applicant
	AND	CAITLYN SMYTHE Respondent

Member of Authority:	Rachel Larmer
Representatives:	Applicant in person Jonothan Whyte, counsel for the Respondent
Investigation:	On the papers
Other Information:	11, 14, 17 and 23 June 2025 from the Applicant
Date of Determination:	24 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Substantive determination

[1] The Authority issued a substantive determination in the matter of *Smythe v Bonsu-Maro t/a EBM Models* dated 7 April 2025, in which Ms Smythe was the successful party. [1]

[2] The Authority was informed that no challenge has been lodged against the substantive determination.

[1] *Smythe v Bonsu-Maro t/a EBM Models* [2025] NZERA 197.

Re-opening application

[3] On 8 May 2025 Ms Bonsu-Maro lodged an application to re-open the substantive investigation. She stated that the grounds were:

(a) The relevant statute or legal principle was misapplied in the determination;

(b) Significant new evidence has become available that could not reasonably have been provided to the early investigation meeting.

(c) There is some other special interest of justice that requires this matter to be looked at again.

[4] Ms Bonsu-Maro asked for a different Member to be allocated the re-opening application. That did not occur, because parties cannot select which Authority Member will or will not investigate their matter. This Member also had full knowledge of all matters pertaining to the substantive investigation.

Ms Smythe's position

[5] Ms Smythe lodged a statement in reply on 23 May 2025 that claimed Ms Bonsu-Maro's re-opening application was frivolous and/or vexatious, and she asked that it be dismissed.

[6] Ms Smythe sought indemnity costs for the legal costs she has incurred in defending this re-opening application, on the grounds the matters raised should have been addressed by way of a challenge.

[7] Ms Smythe said Ms Bonsu-Maro was "on clear notice of the need to file any challenge with the employment Court." She also pointed out that on:

(a) 6 May 2025 the Authority informed Ms Bonsu-Maro that she could challenge its substantive determination if she was unhappy with it; and

(b) 8 May 2025 Ms Bonsu-Maro was informed by the Authority that her re-opening application "appears to rely on matters that would more properly be raised via a challenge to the Employment Court." Ms Bonsu-Maro was encouraged by the Authority to take legal advice about her options.

(c) 8 May 2025 Ms Bonsu-Maro was also informed that any matters involving a challenge had to be raised with the Court directly, not the Authority, and that it

was up to a party who wanted to pursue a challenge to meet the applicable timeframes for doing so.

The Authority's investigation

[8] On 6 May 2025 Ms Bonsu-Maro attempted to lodge a re-opening application. However, it could not be validated as it was not in the correct Form 6. The Authority sent Ms Bonsu-Maro Form 6 and provided her with information as to how Form 6 needed to be completed by her.

[9] Ms Bonsu-Maro then lodged a Form 6 on 6 May 2025, which could not be validated as it had named Ms Smythe, and not Ms Bonsu-Maro, as the applicant. The Authority again informed Ms Bonsu-Maro about what she needed to do to lodge a valid re-opening application.

[10] On 7 May 2025 the Authority informed Ms Bonsu-Maro that "the stated grounds in the re-opening application [which could not be validated] are matters that should properly be addressed by lodging a challenge." The parties were also advised that the fact a re-opening application would be, or had been, lodged did not change the 28 day time limit that applied to the lodging of a challenge with the Employment Court.

[11] Ms Bonsu-Maro lodged Form 6 (re-opening application) in the required format on 9 May 2025 and it was served on Ms Smythe's counsel that same date.

[12] To save the parties time and costs, and to ensure the re-opening application could be determined as efficiently as possible, the Authority has determined it 'on the papers', so the parties did not have to wait for, or attend, an investigation meeting. That approach also avoided the potential problems of Ms Bonsu-Maro arriving late and departing early and attending without any documents, which had occurred with the investigations meetings held last year.

[13] The Authority issued a Minute dated 29 May 2025 that advised the re-opening application would be determined 'on the papers'. The parties were given until 12pm on 23 June 2025 to lodge any information/evidence/submissions they wanted to rely on. The parties were also advised they could seek a timetable variation if they needed more time, but such a request would have to be made before the timetable direction was breached.

[14] The parties were also put on notice that the Authority would determine the re-opening application based on the information available to it as at 12pm on 23 June 2025, unless an extension of time had been granted.

[15] The Minute also set out the issues to be determined, so the parties knew exactly what issues they would need to address, had they wanted to provide anything further on the re-opening application.

[16] The Minute stated the Authority's usual costs regime would apply to the re-opening application. It pointed out that as a self-represented party Ms Bonsu-Maro, if successful, would be entitled to recover her filing fee. Ms Smythe if successful could seek to recover a contribution towards her actual legal costs. The Authority also stated that solicitor/client (indemnity) costs would not be recoverable, as the Authority would be adopting its usual notional daily tariff approach to assessing costs in this matter.

[17] Ms Bonsu-Maro did not provide the Authority with anything other than what she had included in her original application and what Ms Maeli had put in the emails she sent the Authority on 11, 14, 17 and 23 June 2025.

Issues

[18] The following issues are to be determined:

(a) Did the new evidence meet the qualifying criteria for re-opening? In particular:

(i) With reasonable diligence, could the new evidence have been obtained by Ms Bonsu-Maro and produced to the Authority during the initial investigation?

(ii) Would the new evidence have had an important influence on the outcome of Ms Smythe's claims?

(iii) Was the new evidence credible?

(b) Does the substantive matter need to be re-opened to avoid a miscarriage of justice or a serious risk of a miscarriage of justice?

(c) Was there a substantial risk of a miscarriage of justice that outweighed the public interest in finality of litigation?

(d) Is re-opening the substantive investigation in the overall interest of justice?

(e) Should the substantive matter 3248339, in which Ms Smythe was the applicant, be re-opened?

(f) What costs and disbursements should be awarded?

Relevant law

[19] Clause 4(1) of Schedule 2 of the Employment Relations Act 2000 (the Act) gives the Authority the discretion to order that an investigation be re-opened, upon such terms as it thinks reasonable. It may also stay the effect of any previous orders made. This discretion must be exercised on a principled basis.

[20] The overarching concern of the Authority must be to avoid a miscarriage of justice or a substantial risk that a miscarriage of justice would occur if the determination was allowed to stand.

[21] The Authority's power in clause 4 of Schedule 2 of the Act recognised that there may be some limited circumstances in which the public interest in avoiding a miscarriage of justice, or serious risk of miscarriage of justice, outweighed the public interest in there being finality of litigation.

[22] The Employment Court in *Randle v The Warehouse Limited* summarised the applicable principles for the Authority to consider when deciding whether to exercise its discretion to re-open an investigation.[2] These principles in *Randle* were also approved by the Chief Judge of the Employment Court in *Alkazaz v Enterprise IT Limited*.[3]

[23] The Court in *Alkazaz* expressly noted that there was considerable public interest in ensuring there was finality of litigation. It said:

> The [re-opening] jurisdiction is not to be exercised for the purposes of relitigating arguments already considered or so as to provide a backdoor method by which unsuccessful litigants can seek to re-argue their case. Some special or unusual circumstance must be found to exist to justify re-opening. This may

[2] *Randle v the Warehouse Ltd* [2009] NZEmpC 68.
[3] *Alkazaz v Enterprise IT Ltd* [2020] NZEmpC 171.

> include where fresh or new evidence has been discovered that is material to the outcome of the case and that could not have been given at hearing.

[24] The Employment Court held that a mere possibility of a miscarriage of justice occurring is not sufficient grounds to re-open an investigation. What is required is an "actual miscarriage of justice" or a "real or substantial possibility or substantial risk of a miscarriage of justice" occurring if the determination that is the subject of the re-opening application was allowed to stand.[4]

[25] The Employment Court in *Alkazaz* made it clear that:

> The power to grant re-opening of the Authority's investigation is not directed at allowing parties free reign to reformulate their claim, improve their arguments or otherwise have a second bite at the litigation cherry.

[26] There are three qualifying criteria that apply to an application by a party to adduce fresh evidence:[5]

(i) The evidence could not have been obtained with reasonable diligence to be produced to the Authority during its initial investigation;

(ii) The evidence must have an important influence on the result of the case, although it need not be decisive; and

(iii) The evidence must be credible, although it did not need to be incontrovertible.

What is the proposed new evidence?

[27] Ms Bonsu-Maro's re-opening application attached 16 "supporting and character reference letters." However, character references were not relevant to any of the issues that were determined. Whether or not Ms Bonsu-Maro had support from other members of her community was not relevant to a determination of what had occurred or had not occurred with Ms Smythe.

[28] Emails of support for Ms Bonsu-Maro, and criticising the Authority's investigation process and determination, were sent by Ms Maeli directly to the Authority on 1, 14, 17 and

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[4] *Alkazaz*, above n3 at [9].
[5] *Randle* above n2 and *Alkazaz* above n3.

23 June 2025. These emails did not address any of the substantive issues that were determined in the substantive determination or the legal tests that had to be applied to a re-opening application.

[29] Screenshots dated 17 April 2023 from Mr Nansen explaining why he had removed himself from EBM, which were not relevant to any of the issues that were determined, were attached to the re-opening application.

[30] An unsigned "To Whom it May Concern" note dated 14 November 2023 was provided from Calvin Handika, which recorded he was part of the modelling team for EMB and that "there is no payment for all the events we partake in, it's all about growing and learning."

[31] Based on the date of November 2023 this was available prior to the investigation meetings that were held on 3 October and 12 December 2024. Ms Smythe's claims were determined in light of what had and had not occurred with her personally, however the 14 November 2023 note from Calvin Handika did not address that.

[32] An email dated 28 April, with no year recorded, was submitted from Tia Flemming which said she had attended workshops through EBM artistry "without any personal cost to myself. I was always supported and there was never an expectation for me to pay. In light of that, all modelling events I participated in were not paid or commissioned, nor did I expect any putea."

[33] In her email Ms Flemming also acknowledged "I cannot speak to the current allegations as I am not involved, but I feel it's important that my own interactions with Tina have always been positive and community-centred …".

[34] Ms Megan Easthorpe was a witness during the substantive investigation. She provided a "To Whom It May Concern" email dated 1 May 2025 that was said to be "a statement to confirm what I said during Tina's mediation [referring to the Authority's investigation meeting not mediation] last year."

[35] A "To whom it may concern" undated, unsigned letter from an unnamed mentor for "EBM Artistry" was provided, that said none of the shows the models walked in were paid gigs and that the models did not sign contracts.

[36] Ms Bonsu-Maro also provided a document which set out her comments on each paragraph in the substantive determination. An Authority matter cannot be re-opened just to give an unsuccessful party an opportunity to challenge the content of the substantive determination. A de novo challenge is the correct way for a dissatisfied party to address matters they dispute in a substantive determination.

[37] An undated letter from Ms Flora Pihigia-Neemia, who attended the investigation meeting and gave evidence, was provided. She therefore had the opportunity to give the Authority all relevant information she had when she gave evidence.

Is the proposed new evidence relevant and material to the substantive determination?

[38] None of the proposed new evidence appeared to be relevant or material to the specific issues that were determined in the substantive determination.

Did the new evidence meet the qualifying criteria for re-opening?

[39] The three qualifying criteria that the Employment Court in *Alkazaz* stated applied to new or fresh evidence were not met in this case.

Could the new evidence have been obtained during the initial investigation?

[40] Ms Bonsu-Maro could have obtained the new evidence she wanted to rely on any time from 7 March 2024 (when timetable directions regarding the lodging of evidence were made) to 6 April 2025, which was the day before the substantive determination was issued.

[41] A reasonably diligent inquiry by Ms Bonsu-Maro would have obtained the proposed new evidence she attached to her re-opening application, for the Authority to have considered prior to the issuing of its substantive determination.

Would the new evidence have had an important influence on the outcome?

[42] The new evidence would not have had any, much less an important, influence on the outcome of the substantive investigation, as none of it was fact specific to Ms Smythe's personal situation. It would not have been decisive of whether or not the parties were in an employment relationship, whether Ms Bonsu-Maro had breached minimum code legislation or whether Ms Smythe was owed wages arrears, or had been unjustifiably dismissed. None of the new evidence from Ms Bonsu-Maro's supporters addressed those matters.

[43] It would not have been relevant to an overall assessment of the witnesses' credibility, as that was a matter for the Authority, not Ms Bonsu-Maro's supporters, to determine. Nor would it have been relevant to the remedies awarded or the penalties that were imposed on Ms Bonsu-Maro. Such matters were reliant on evidence, not on the subjective views of one party's supporters.

Was the new evidence credible?

[44] The Authority accepted the information provided by Ms Bonsu-Maro and others reflected their subjective personal views of Ms Bonsu-Maro.

[45] However, the Authority's substantive findings were based on an objective assessment of the evidence provided by those who had direct knowledge of, and were personally involved in, what had occurred. Accordingly, the subjective views other people, who were not involved, had about Ms Bonsu-Maro were not relevant to that.

[46] None of the character references or other proposed new evidence, which if accepted, would have changed any of the findings in the substantive determination.

Finding on the new evidence

[47] The qualifying criteria for re-opening a matter based on new evidence were not met in this case. That fundamentally undermined the need for this matter to be re-opened in order to consider the new evidence Ms Bonsu-Maro wanted to produce.

Does the substantive matter need to be re-opened to avoid a miscarriage of justice or a serious risk of a miscarriage of justice?

[48] The substantive determination was detailed and it recorded why the findings had been made. Ms Bonsu-Maro could and should have pursued a challenge if she was unhappy with any of the findings in the substantive determination.

[49] Ms Bonsu-Maro failed to establish there had been a substantial miscarriage of justice or that there was likely to be a serious risk of a miscarriage of justice if the new evidence she wanted to introduce at a re-opened substantive investigation meeting did not result in a re-opening of the Authority's investigation.

Is re-opening the substantive investigation in the overall interests of justice?

[50] After standing back and considering the overall interests of justice, the Authority was not satisfied that re-opening the investigation to consider the new evidence that Ms Bonsu-Maro wanted to rely on would be likely to have a determinative effect on the outcome and findings in the substantive determination.

[51] A re-opening should not be used as a vehicle for an unsuccessful party to change or improve their evidence on the substantive claims, as a de novo challenge already provides parties with an opportunity to do that.

[52] There is considerable public interest in ensuring that there is finality of litigation. Ms Smythe's claims involved events that occurred prior to 16 April 2023. The substantive investigation meeting was delayed to accommodate the birth of Ms Bonsu-Maro's baby in March 2024.

[53] The substantive investigation meeting was conducted over two days that occurred ten weeks apart, due to Ms Bonsu-Maru abruptly departing in the middle of giving her evidence on the first day of the investigation meeting, and then not rejoining remotely by Teams link on the afternoon of the first day.

[54] While it was open to the Authority to have completed its investigation in Ms Bonsu-Maro's absence, as per clause 12 of the Schedule 2 of the Act, it instead elected to find another day of investigation meeting time in order to give her an additional opportunity to participate in the substantive investigation. Although that caused additional delay and inconvenience for Ms Smythe and her witnesses who had been ready for the matter to proceed on 4 October 2024, it occurred in order to accommodate Ms Bonsu-Maro.

[55] Ms Bonsu-Maro was also given an opportunity to lodge additional evidence and submission after the second day of the investigation meeting had been completed. She availed herself of that opportunity, so the new evidence could have been lodged then.

[56] Ms Bonsu-Maro was given every opportunity to participate in the substantive investigation and she had from 7 March 2024 (being the date the timetable directions were

issued) to 13 January 2025 (being the date the last evidence and submissions were lodged by the parties) to produce relevant evidence.

[57] Ms Smythe is entitled to finality. She has suffered considerable stress and distress as a result of the events that occurred both during her employment and due to the way Ms Bonsu-Maro has acted towards her after her employment ended and in connection with the Authority proceedings. Ms Smythe has had to wait a long time to get her claims and costs determined by the Authority, and she has expended significant resources in doing so. The overall interests of justice required Ms Smythe to finally have closure on the matters arising from her employment by Ms Bonsu-Maro.

[58] That outweighs any of the other factors Ms Bonsu-Maro has identified in her re-opening application. A re-opening in this case would effectively be allowing Ms Bonsu-Maro to obtain an improper "*second bite at the litigation cherry*", and that should not be permitted to occur.

[59] Ms Bonsu-Maro's dissatisfaction with the outcome of the substantive matter and her other concerns could and should have been raised by way of a challenge to the Employment Court.[6]

Outcome

[60] While it was clear that Ms Bonsu-Maro disputed the Authority's findings, it was not uncommon for an unsuccessful party to hold that subjective view. However, whether there has been an actual miscarriage of justice or whether there was a real or substantial possibility or risk that a miscarriage of justice would occur if the substantive investigation was not re-opened must be objectively determined.

[61] The new evidence Ms Bonsu-Maro sought to rely on fell far short of the threshold needed to establish a miscarriage of justice would occur if the substantive investigation was not re-opened. Granting the re-opening application would be inconsistent with the overall interests of justice, so Ms Bonsu-Maro's re-opening application did not succeed.

Costs

[62] Ms Smythe as the successful party is entitled to a contribution towards her actual legal costs for this re-opening application. Although she did not lodge evidence or submissions her

[6] *Alkazaz*, above n3, at [9].

counsel had to read the material that Ms Bonsu-Maro lodged with the re-opening application, the emails Ms Maeli has sent to the Authority, take instructions, review the Authority's Minute, lodge a statement in reply, communicate with the Authority about such matters and provide Ms Smythe with legal advice and attendances. Ms Smythe has therefore incurred legal costs, some of which are recoverable.

[63] The investigation of the re-opening application will be treated as if it had involved a half-day of investigation meeting time. Therefore the notional starting point for assessing costs was $2,250.00, being half of the notional daily tariff for the first day of an investigation meeting.

[64] The notional starting tariff should be reduced by $1000.00 to reflect that no submissions were lodged. There were no factors that should result in the notional starting tariff being increased.

[65] Within 28 days of the date of this determination, Ms Bonsu-Maro is ordered to contribute $1,250.00 plus GST to Ms Smythe as a contribution towards her legal costs on this re-opening application.

Should interest be awarded?

[66] Schedule 2 of the Act gives the Authority a broad discretion to award interest.

[67] Ms Smythe has not been paid any of the money she was awarded in the substantive determination that was issued in April 2025. It can therefore reasonably be anticipated that Ms Smythe may not be promptly paid the costs contribution she has been awarded in this re-opening determination.

[68] Ms Smythe's legal costs incurred for defending the re-opening application are an out of pocket expense, so it is appropriate to award her interest on the $1,250.00 costs she has been awarded in this re-opening determination.

Outcome

[69] Ms Bonsu-Maro's re-opening application did not succeed. The findings and orders in the substantive determination dated 7 April 2025 therefore continue to apply unchanged.

[70] The Authority makes the following orders:

(a) Within 28 days of the date of this determination, Ms Bonsu-Maru is ordered to contribute $1,250.00 towards Ms Smythe's actual legal costs for this re-opening application;

(b) Ms Bonsu-Maro is ordered to pay interest on any part of the $1,250.00 costs Ms Smythe has been awarded in this determination that had not been fully paid to her by 22 July 2025.

(c) Interest is to be calculated using the Civil Debt Calculator on the Ministry of Justice website, and is to run from 23 July 2025 until all money Ms Smythe is owed, including interest, has been paid in full.

Rachel Larmer
Member of the Employment Relations Authority