IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2026] NZERA 403
3376963

	BETWEEN	NATHAN CRISP Applicant
	AND	MALCOVE DISTRIBUTORS LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Laura Trethewey, advocate for the Applicant Danny Gelb, advocate for the Respondent
Investigation Meeting:	On the papers
Submissions received:	16 January and 23 March 2026 from the Applicant 9 March 2026 from the Respondent
Determination:	23 June 2026

DETERMINATION OF THE AUTHORITY

What is this determination about?

[1] This is an application by Mr Crisp under Sch 2 cl 4 of the Employment Relations Act 2000 (the Act) to reopen an investigation and its determination dated 3 April 2025 (the determination).[1] This is opposed by Malcove Distributors Limited (MDL or the company), Mr Crisp's then employer.

[2] The determination records that Mr Crisp had requested that the Authority investigate his claims of unjustified disadvantage and a claim of constructive and unjustified dismissal from his then role of operations coordinator for MDL. While the Authority upheld the former claim of unjustified disadvantage,[2] and ordered the company to pay compensation of $7,000 to Mr Crisp for hurt and humiliation,[3] as well

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[1] *Crisp v Malcove Distributors Limited* [2025] NZERA 191.
[2] At [32].
[3] At [43].

as reimbursement of the filing fee,[4] the latter claim of constructive and unjustified dismissal was unsuccessful.[5] It may be noted that the Authority's orders against MDL have to this day, remain unpaid which is an unsatisfactory state of affairs that I return to later in this determination.

What do the parties say about reopening the investigation?

[3] Briefly stated, Ms Trethewey who acted for Mr Crisp at the initial investigation, submits that there are material errors of fact and law with the determination, that the presiding Member failed to fully consider key evidence and arguments central to her client's case, and that collectively considered, there are serious concerns about whether the matter was properly and fairly determined.

[4] For its part, MDL through its representative, Mr Gelb, submits that Mr Crisp has not identified any procedural defect, fresh evidence, or circumstance to warrant a reopening of the investigation which was properly conducted. It was further submitted that Mr Crisp has challenged the Authority's reasons, findings, and its outcome which are matters that properly fall within the jurisdiction of the Employment Court on challenge, rather than an Authority reopening.

How has the Authority investigated the present application?

[5] On 26 November 2025, a case management conference was held with the representatives in which it was agreed that the reopening application could be determined on the papers. Ms Tretheway and Mr Gelb have since filed with the Authority their respective written submissions and a reply submission from Mr Crisp dated 23 March 2026, all of which have been considered.

[6] 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.

[4] The determination, at [50].
[5] At [40].

What is the legal framework for considering a reopening application?

[7] While the Authority has a broad discretion to reopen an investigation on "such terms as it thinks reasonable",[6] that discretion must be exercised according to principle.[7] The Employment Court has provided a useful framework with which to consider such applications which include:

(i) That 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.[8]

(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.[9]

(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, which could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive.[10]

(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.[11]

A limited reopening of the investigation

[8] Mr Crisp's first relied upon ground to reopen the application concerned the Authority's determination of notice pay and wage arrears which it found he was not

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

entitled to.[12] Although it was incorrect of the Member to have recorded at [48] of his determination that "there was no evidence" showing that Mr Crisp had asked MDL to pay his one month's notice period when there was evidence that Mr Crisp had queried this with his employer,[13] the error was not fatal to the analysis and did not lead to a miscarriage of justice.

[9] The question of payment was one of contractual entitlement and this was front of mind for the Member for his determination quotes cl 21.3 of the parties' employment agreement. Clause 21 deals with termination of contract and although in my view, quoting the clause in its entirety would have underscored the Member's point more fully, it remains that his interpretation of the clause was objectively and reasonably made. This was because cl 21 of the employment agreement did not entitle Mr Crisp to payment of one month's notice from his employer and as the Member correctly observed, MDL's decision not to pay was "in line" with the employment agreement.

[10] The second ground for reopening was an alleged failure by the Authority to address breaches of the Holidays Act 2003. Although the determination may not have dealt with this issue as fulsomely as Mr Crisp would have preferred, there was sufficient engagement with the issue, first, by identifying Holiday Pay arrears as one of the issues for investigation and determination,[14] and second, by acknowledging that there had been an issue with the payment of Mr Crisp's annual leave which the Member attributed to a "payroll anomaly" which the company had rectified.

[11] The words "payroll anomaly" signifies that the Member considered what had occurred to have been not intentional and that any statutory breach was towards the lower end of the spectrum of seriousness. Having had the benefit of hearing from the parties and as the first trier of fact, the mere possibility of a miscarriage of justice does not suffice to reopen the Member's investigation of this ground.

[12] The third ground for reopening the investigation was an alleged failure of the Authority to consider redeployment and advertised roles. This ground is essentially a second bite at Mr Crisp's unsuccessful constructive dismissal claim which the Member

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[12] The determination, at [46] to [48].
[13] See in particular, an email from Mr Crisp to MDL at page 58 of the Common Bundle.
[14] At [5](e).

determined had not been established. Closely related to this is Mr Crisp's fourth ground for reopening which is that the Authority failed (allegedly) to apply the correct legal test to approach a claim of unjustified constructive dismissal.

[13] However, this ignores the Member's footnote of the leading case in constructive unjustified dismissal namely the Court of Appeal's decision in *Auckland Shop Employees Union IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372. Particular reference was made by the Member to pages 374 to 375 of the decision in which the Court discussed the three potential situations in which a constructive dismissal could occur. The Member would therefore have been alive to all of these in the circumstances of Mr Crisp's case which is evident from the determination itself in which the Member committed some 16 percent of his decision to this issue alone before finding that a case of constructive unjustified dismissal had not been established.

[14] The fifth ground for reopening relates to the Authority's compensation award of $7,000. The "similar cases" to which the Member refers but does not name is to his knowledge of awards by the Authority in similar circumstances. In reaching that figure, the Member will have taken into account that the award related to how MDL's restructured process had disadvantaged Mr Crisp which ultimately led him to taking sick leave.[15] Seen through that lens, the award of $7,000 was well within range of similar circumstances of disadvantage that the Member would have been aware of.

[15] It was submitted by Mr Gelb that the application for reopening should be declined because the threshold for reopening under Sch 2 cl 4 of the Act has not been met, that the investigation was properly conducted and determined, and the application represents an impermissible attempt to relitigate matters already decided. However, there is one ground for which reopening has been established and this relates to costs.

[16] Ordinarily costs are reserved at the end of an investigation which did not occur here. It is clear that Mr Crisp was represented at the investigation meeting by Ms Tretheway and as the successful party, the general rule is that costs follow the event. For reasons that remain unclear, this did not happen here.

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[15] The determination, at [32].

Conclusion

[17] At the core of this application is Mr Crisp's dissatisfaction with the final outcome and while this is not uncommon, a party's dissatisfaction with the outcome of an investigation is not a ground for reopening. Although the Member could have expressed various matters in his determination more fulsomely, I am not satisfied that this has led to a miscarriage of justice and, with the exception of costs, the determination ought to stand for better or for worse.

[18] For the reasons given, the application to reopen is granted but only with respect to costs. Having reopened the investigation, the Authority will consider any application for a compliance order by Mr Crisp as the sums of money previously awarded to him by the Authority remain outstanding.

Costs

[19] Costs are reserved but as this matter has been determined on the papers, a starting point based on one 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 to this starting point.

Peter Fuiava
Member of the Employment Relations Authority