IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 125A/10
5163603

	BETWEEN	AUCKLAND WOOD WASTE REMOVALS LTD Applicant
	AND	POIAKI MANAVESE Respondent

Member of Authority:	Dzintra King
Representatives:	Harry Waalkens, Counsel for Applicant Nyra Marshall, Counsel for Respondent
Investigation Meeting:	15 November 2010 at Auckland
Determination:	15 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant has applied for a rehearing. The respondent opposes the application.

[2] On 17 March 2010 I issued a determination AA 125/10. I found that Mr Manavese had been unjustifiably dismissed, that unauthorised deductions had been made from his final pay and that annual leave payments had not been properly made. Mr Manavese was awarded compensation for the unjustified dismissal, reimbursement of the unauthorised deductions, reimbursement of wages, payment of the unpaid annual leave and interest. He was also awarded costs and disbursements.

[3] Auckland Wood Waste Removals Limited did not file a Statement in Reply. Documents were sent to the registered office of the company and these were returned marked "unknown." Mr Manavese was instructed to effect personal service. Documents were also sent to a PO Box address that was given as the address of the

company on its letterhead. This address was on the letter of dismissal dated 1 May 2006. The year is incorrect. Mr Manavese was dismissed in 2008.

[4] Mr Charles Riechelmann, the director of the company, did not appear at the hearing.

[5] A copy of the Authority's determination was sent to the respondent at its registered office which was also the address for service.

[6] On 29 April 2010 Ms Marshall wrote to the company regarding the determination saying that a certificate of determination would be sought in light of the company's failure to pay and that an application would be filed in the District Court.

[7] On 2 July Mr Waalkens informed Ms Marshall that he had been instructed by Mr Riechelmann who had brought him a summons requiring him to attend the Auckland District Court to be examined as to his means. He said Mr Riechelmann would be applying to set the judgment aside and would seek a rehearing. He asked that Mr Manavese consent to having the determination set aside. Mr Manavese did not consent.

[8] On 21 July Mr Waalkens lodged an application to have the matter reopened. It was made on the grounds that Mr Riechelmann was unaware of the hearing date and the basis upon which he was being sued. Mr Reichelmann had not used the PO Box address for some months and there had been a breakdown in communication between him and his accountants as he had not seen the documentation.

[9] Mr Riechelmann said the first time he had seen the determination was on 2 July 2010 when he obtained a copy of it from the Authority's office. The file also contained a letter dated 5 February 2009 written by the Community Law Centre on behalf of Mr Manavese. Mr Riechelmann said he had not previously seen that letter either.

[10] Mr Riechelmann did recall having a conversation about Mr Manavese. He said he could not recall what it was about. He thought Mr Manavese wanted to get some money out of him. I find this was a conversation with Ms Marshall when she contacted him raising the personal grievance. Mr Riechelmann accepted that Mr Manavese had sent him text messages regarding concerns about his final pay.

[11] Ms Marshall sent Mr Riechelmann a letter on 29 April 2010 enclosing a copy of the determination. This was sent to the registered office and also to Mr Riechelmann's home address. The respondent says Mr Riechelmann was aware of the determination before he obtained a copy from the Authority.

[12] The respondent says that Mr Riechelmann also had a copy of the letter of 5 February 2009 prior to seeing it on 2 July 2010. Mr Riechelmann contacted Ms Marshall on 12 February 2009 to advise he would not pay Mr Manavese's legal costs and would seek legal advice.

[13] The power to order the reopening of an investigation is contained in the second schedule to the Employment Relations Act 2000 at clause 4(1): *The Authority may order an investigation to be reopened upon such terms as it thinks reasonable*.

[14] This is a discretionary power. The main criterion in determining whether a rehearing should be granted is whether there has been a miscarriage of justice: *Ports of Auckland v New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 (CA).There needs to be a substantial possibility or a real or substantial risk of a miscarriage of justice occurring.

[15] In *Bankfield Farm Ltd v Murray*, 4 July 2003, ERA Christchurch, CA55A/03 an application to reopen an investigation was declined on the ground that the substantial merits of the case would not be affected by the new evidence that the applicant proposed to introduce.

[16] The delay has not been reasonably explained. The non appearance has not been satisfactorily explained. It appears that Mr Riechelmann hoped the matter would just go away and ignored it until he was summonsed to the District Court for an examination.

[17] No useful purpose would be served by setting the judgment aside. Mr Riechelmann did not suggest that Mr Manavese was justifiably dismissed. There is not a substantial ground of defence. Neither is there a substantial ground of defence regarding the deductions from wages as Mr Manavese did not give written consent.

The argument is with the remedies and that is a matter that should have been dealt with by a challenge.

[18] As to the matter of irreparable injury Mr Waalkens argued that any harm could be met by costs. If this was a determining factor then I accept it could be met by an appropriate award of costs. However, it is not because the determining factor is that the decision that there was an unjustified dismissal and illegal deductions could not change.

[19] In all the circumstances it would not be just to set the decision aside and grant the application for a rehearing.

Costs

[20] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority