

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 536
3235079

BETWEEN	AZ SCAFFOLDING (2017) LIMITED Applicant
AND	SAM WILSON Respondent

Member of Authority:	Rowan Anderson
Representatives:	Aaron Smith, in person for the Applicant Richard Anderson, advocate for the Respondent
Investigation Meeting:	1 September 2023
Submissions received:	At the investigation meeting
Determination:	18 September 2023

DETERMINATION OF THE AUTHORITY

[1] On 17 May 2023 the Authority issued a determination¹ in which I found that Sam Wilson was unjustifiably dismissed by AZ Scaffolding (2017) Limited (AZ Scaffolding) and ordered AZ Scaffolding to make payment to Mr Wilson of compensation for humiliation, loss of dignity, and injury to feelings. A costs determination, awarding a contribution towards Mr Wilson's costs, was subsequently issued on 26 June 2023.²

[2] AZ Scaffolding has made application, pursuant to clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act) for the Authority's investigation of Mr Wilson's substantive claims to be reopened. That application was made on 29 June 2023.

¹ Wilson v AZ Scaffolding (2017) Limited [2023] NZERA 249.

² Wilson v AZ Scaffolding (2017) Limited [2023] NZERA 336.

[3] The basis for the reopening application, as stated in the application signed by Aaron Smith, sole director and shareholder of AZ Scaffolding, is as follows:

I was unable to attend court in person as previously stated. I did not authorize anyone to act on my behalf. I would like a fair trial where I can put forward my facts & view on it please.

[4] Mr Wilson opposes the application for reopening and says that AZ Scaffolding simply failed to engage with the Authority's investigation.

The Authority's investigation

[5] A case management conference was held on 12 July 2023. At the case management conference, Mr Smith advised that he had issues with reading and writing. Having regard to that, I advised that AZ Scaffolding would be provided an opportunity to provide further information and evidence in relation to the application by convening an investigation meeting by audio visual link (AVL).

[6] AZ Scaffolding was advised that they were entitled to engage a representative and that, in addition to the investigation meeting, it could lodge any relevant witness statements. Written witness statements were provided from Mr Smith, Jessica Arrow, former employee and partner of Mr Smith, and Kirsty Tuhiwai, administration employee. The witnesses gave evidence and answered questions at the investigation under oath or affirmation.

[7] Having regard to the opportunity for AZ Scaffolding to provide oral evidence, Mr Wilson was advised that, if sought, leave would be granted for Mr Wilson to provide the Authority any relevant evidence after hearing from AZ Scaffolding's witnesses. No application eventuated and final submissions were heard at the investigation meeting.

[8] As permitted by s 174E of the Employment Relations Act 2000 (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.

Relevant principles

[9] The Authority may order an investigation be reopened on such terms as it thinks reasonable.³ Clause 4 of Schedule 2 of the Act does not set out factors that the Authority is to consider in exercising its discretion, which it must do in a principled way. A reopening may be granted where there has been, or there is a real or substantial risk of, a miscarriage of justice.⁴

[10] A common example of where a miscarriage of justice may arise includes where there is “...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. Other “special and unusual circumstances” may provide a proper basis on which an investigation should be reopened and should be considered on a case-by-case basis.⁶

[11] Certainty of litigation, or the principle of finality, is to be given equal weight.⁷ Whilst there are circumstances in which justice may require that principle be supplanted, a cautious approach should be taken where any asserted misapprehension by the Authority relates to negligence or default from the relevant party.⁸

What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases.

[12] Ultimately, the discretion to be exercised by the Authority is one that involves balancing the interests of justice with other relevant factors.

³ Employment Relations Act 2000, Schedule 2 Clause 4.

⁴ *Idea Services Limited v Barker* [2013] NZEmpC 24, at [36]; *NZ Waterfront Workers Union v Ports of Auckland* [1994] 1 ERNZ 604; *Cavalier Carpets NZ Ltd v NZ (except Taranaki etc) Woollen Mills etc IUOW* [1989] NZILR 378.

⁵ *Hardie v Round* [2002] 2 ERNZ 1 at [13] as cited in *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [13].

⁶ *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [13]; *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 (CA)

⁷ *NZ Waterfront Workers Union v Ports of Auckland* [1994] 1 ERNZ 604;

⁸ *Autodesk Inc v Dyason* (No 2) (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, at [37].

Evidence and submissions

[13] Mr Smith gave evidence that he has difficulty with reading and writing and that he believes he has undiagnosed dyslexia. Mr Smith says that AZ Scaffolding “struggled to understand the Authority’s processes and timeframes” and that “I have tried to engage with it as far as I can understand it”. Mr Smith says that he now understands he missed an Authority meeting and that “...unfortunately I was detained for some time during this process”.

[14] Mr Smith stated, consistent with a statement in reply lodged in relation to the substantive claims, that Mr Wilson was not dismissed from his employment. He says that if the investigation were reopened there were witnesses that could give evidence in support of AZ Scaffolding’s position.

[15] In questioning at the investigation meeting, Mr Smith confirmed that he had been incarcerated for a period between approximately July 2022 to September 2022, and additionally that he had spent some time in hospital. When asked about the statement in reply lodged by AZ Scaffolding in the substantive matter, he confirmed that Ms Arrow and/or Ms Tuhiwai had prepared the document and that he had signed it.

[16] Mr Smith also confirmed that the addresses for service provided in AZ Scaffolding’s statement in reply, including both physical and email addresses, were correct. Mr Smith confirmed he was aware of the Authority’s investigation, but that he personally did not receive the documents sent to AZ Scaffolding and that he was not aware of the investigation meeting held on 2 March 2023.

[17] Mr Smith says he was unaware of attempts by his father to engage a representative on AZ Scaffolding’s behalf, that he did not authorise anyone else to act on AZ Scaffolding’s behalf, and that he was not aware that Ms Tuhiwai had attended a case management conference on 10 August 2022.

[18] Ms Arrow confirmed that Mr Smith had trouble reading and writing. In answer to questioning she said that Mr Smith can’t spell and couldn’t really read. Her experience was that letters would be written for him and explained to him if he needed to know about the content. When asked about two letters⁹ said to have been sent by AZ

⁹ Dated 16 and 21 March 2022 and signed by Mr Smith.

Scaffolding to Mr Wilson suggesting Mr Wilson had abandoned his employment, she confirmed she was aware of the letters and that she would have talked to Ms Tuhiwai about them at the time. Ms Arrow confirmed that at an early stage that she knew that Mr Wilson had made an application to the Authority and that the Authority had commenced an investigation. Ms Arrow says she had no contact with Mr Smith while he was incarcerated and in hospital.

[19] Ms Tuhiwai confirmed that she drafted the statement in reply that was lodged in relation to the substantive matter and that she spoke with Mr Smith about it at the time. She says she also briefly spoke with Ms Arrow about the response. Mr Smith provided her the necessary details to include in the statement in reply, including as to factual matters relating to Mr Wilson's employment.

[20] Ms Tuhiwai confirmed that she would use, and was authorised to use, Mr Smith's electronic signature of various documents. Whilst initially saying that the two abandonment letters were not discussed with Mr Smith and that they were signed electronically, when I pointed out the signatures did not appear to be the same, she stated that Mr Smith may have signed them. She also confirmed that both her and Mr Arrow had access to the email address given in the statement in reply as an address for service.

[21] Ms Tuhiwai's evidence is that communications were received from the Authority. She said that Mr Smith's father dealt with various business matters whilst Mr Smith was incarcerated and that he had arranged for a representative. She confirmed that she remained in contact with Mr Smith but that she didn't mention the Authority's investigation to him.

[22] The statements provided from Ms Arrow and Ms Tuhiwai, in summary, briefly addressed what would be their evidence as to the substantive issues.

Analysis and discussion

[23] AZ Scaffolding was served appropriately with all the relevant notices, orders, and other documents relating to the authority's investigation. I am satisfied that AZ Scaffolding were appropriately served notice of the investigation meeting that took place in Auckland on 2 March 2023.

[24] It is apparent that AZ Scaffolding were aware of the Authority's investigation and Mr Wilson's claims given it lodged a statement in reply on 22 June 2022. In that statement in reply, AZ Scaffolding referred to several matters in response to Mr Wilson's claims, including by:

- (a) taking issue with and responded to Mr Wilson's claims;
- (b) asserting Mr Wilson had abandoned his employment;
- (c) asserting that Mr Wilson had been told to leave residential premises and there was no discussion about Mr Wilson being dismissed from his employment; and
- (d) including some detail as to the specific events, including alleged theft, in response to claims made by Mr Wilson.

[25] So far as AZ Scaffolding seeks a reopening on the basis that it was unable to put evidence before the Authority, that was clearly not the case. AZ Scaffolding had the opportunity to engage with the Authority, to provide evidence and information, and to attend the Authority's investigation meeting. Despite that, it did not. The evidence it proposes now be considered is not new and it was available to AZ Scaffolding at the time of the Authority's investigation. I do not consider a miscarriage of justice has been established nor that there is a real or substantial risk of that having regard to the issue of new evidence.

[26] AZ Scaffolding was not prevented from participating in the Authority's investigation. Whilst there were clearly issues in terms of the way in which AZ Scaffolding went about dealing with the matter, including there being some internal confusion as to representation, those matters in my view arose from AZ Scaffolding's own neglect and default.

[27] To the extent it may be relied upon by AZ Scaffolding, I do not consider Mr Smith's incarceration, nor any medical situation, establish a proper basis on which the investigation should be reopened. As recorded elsewhere, I am satisfied that AZ Scaffolding was appropriately served with all relevant documents and notice of the investigation meeting. I am not satisfied that Mr Smith nor AZ Scaffolding were unable to attend or participate in the Authority's investigation having regard to what evidence there is in relation to the timing of those matters.

[28] Whilst Mr Smith raised his literacy issues as a basis on which the Authority should reopen its investigation, I do not consider there are ‘special or unusual circumstances’ such as would provide a reasonable basis, when weighed with other factors including the need for finality in litigation, reopening of the Authority’s investigation. The evidence provided by Mr Smith in relation to this was limited. Whilst I am prepared to accept Mr Smith has some difficulty with literacy, I find that was not the cause of AZ Scaffolding’s failure to attend or engage.

[29] As I have noted above, AZ Scaffolding lodged a statement on reply in relation to the substantive matter. I consider it could have engaged appropriately in the Authority’s investigation notwithstanding any literacy issues Mr Smith may have. In reaching this conclusion I have had regard to the following matters:

- (a) AZ Scaffolding lodged statements in relation to the reopening application and were able to otherwise participate in that process;
- (b) AZ Scaffolding carried on business regardless of any literacy issues relating to Mr Smith personally, including by engaging with various individuals and organisations in the course of its business. AZ Scaffolding were able to draft and put in place employment and commercial arrangements, including an individual employment agreement relating to Mr Wilson;
- (c) AZ Scaffolding did not raise any issue as to literacy or an inability to understand matters when lodging its statement in reply to Mr Wilson’s substantive claims, nor did otherwise do so until seeking to have the Authority’s investigation reopened. The statement in reply responded to the merits of Mr Wilson’s claims, as did an earlier response to the raising of his personal grievance¹⁰; and
- (d) It is alleged by AZ Scaffolding that Mr Wilson abandoned his employment. In support of that position and attached to AZ Scaffolding’s statement in reply to the substantive matter, AZ Scaffolding allegedly wrote to Mr Wilson twice regarding that purported abandonment.¹¹

[30] I do not accept that AZ Scaffolding were unable to participate in the Authority’s investigation. The matters identified above, which are far from exhaustive, evidence that AZ Scaffolding were able to engage in written correspondence, and to attend to

¹⁰ By email on 7 April 2022.

¹¹ Letters dated 16 and 21 March 2022.

matters arising in the course of its business. The literacy issues did not prevent AZ Scaffoldings engagement in those matters, and I do not accept it prevented in any way its engaging with the Authority.

[31] So far as AZ Scaffolding did not engage in the Authority's investigation, I find that was attributable to its own default or negligence. Even if I were wrong in relation to any of the grounds put forward by AZ Scaffolding, I would have declined to reopen the investigation having regard to the necessary balancing of those matters with the need for finality of litigation.

Conclusion

[32] AZ Scaffolding's application is unsuccessful, and I decline to reopen the Authority's investigation.

Costs

[33] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[34] If they are not able to do so and an Authority determination on costs is needed Mr Wilson may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum AZ Scaffolding would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Rowan Anderson
Member of the Employment Relations Authority