IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 56
5525427

	BETWEEN	CHASE DEXTER DEREK BEALS Applicant
	AND	OVATION NZ LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	David Balfour, Advocate for Applicant Elizabeth Brown, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	6 June 2018 from Applicant 20 June 2018 from Respondent
Determination:	28 June 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant (Mr Beals) seeks to reopen an Authority investigation which resulted in a determination issued by the Authority on 31 January 2018. That application is opposed by the respondent (Ovation).

The Law

[2] The Authority has a discretion by statute to reopen an investigation on such terms as it sees fit.

[3] The principles to be applied in determining whether or not the Authority ought to exercise that discretion in favour of a reopening, are well settled.

[4] The test for reopening requires the party seeking that reopening to 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 is allowed to stand.

[5] Moreover, there must be some special or unusual circumstance applying which would justify the reopening such as fresh compelling evidence that would not have been available prior to hearing, if the matter had been prepared with reasonable diligence or a failure to correctly apply the law, or some other particular circumstance relevant to the instant case.

[6] What is not a basis for reopening an Authority investigation is an enthusiasm to re-litigate matters that have already been argued and disposed of or what the cases refer to as a back door method by which an unsuccessful party will seek to have a further attempt at persuading the tribunal of the soundness of her or his argument.

[7] Moreover, a mere possibility of a miscarriage of justice is not enough; there must be an actual miscarriage of justice or at the very least a real or substantial risk of a miscarriage of justice; *Davis v Commissioner of Police* [2015] NZEmpC 38 and *Idea Services Limited v Barker* [2013] NZEmpC 24 applied.

The law applied

[8] Mr Beals maintains that the Authority failed to properly consider and apply s.317(2) of the Accident Compensation Act 2001. All that section of the 2001 statute does is allow for a party to progress personal grievance claims concurrently with personal injury claims pursuant to the 2001 statute.

[9] The whole point of s.317 of the 2001 Act is to circumscribe the ability of parties to issue proceedings in respect to personal injury save by way of the 2001 Act. Personal grievances are a specific exemption referred to in the section, for the avoidance of doubt.

[10] Having reviewed the determination issued by the Authority in the instant matter I am satisfied that the Authority correctly applied s.317 of the 2001 Act and that the complaint made by Mr Beals in that regard is misplaced. Not only did the

Member correctly apply the Accident Compensation Act 2001 but he then went on to consider and deliberate upon the personal grievances that were within this Authority's jurisdiction and dispose of them in accordance with the evidence before him.

[11] It is important that I reiterate a point already made by the Member in the substantive determination that the effect of s.317 is to preclude any party from progressing any personal injury matter in any jurisdiction save the 2001 Act. It follows that no individual can, for example, progress personal injury claims via a proceeding in this Authority.

[12] To put that same point another way, the Authority is a creature of statute and has only the powers given to it by the Parliament in its operative statute. Those powers in that statute do not confer any jurisdiction to consider or deliberate upon personal injury claims and our sole raison d'être as a tribunal is to deal with employment relationship problems and such other particular matters as the Employment Relations Act 2000 ("the 2000 Act") provides for.

[13] Nor am I much attracted by Mr Beals' contention that the Member did not refer to a particular decided case: *Austin v Silver Fern Farms Limited* [2014] NZEmpC 30. The Authority is under no obligation to refer to particular decided cases in its determination; Section 174E of the 2000 Act gives the Authority wide discretion about how it expresses its conclusions. Provided that the logic of the decision is apparent on its face, there can be no proper criticism of the Authority's failure to refer to a particular decided case. The Authority's only obligation is to ensure that it states relevant findings of fact and relevant findings of law so as to explain its conclusions and the orders that it eventually makes. The whole point of the exercise is to assist the Authority to deliver speedy informal and practical justice to the parties. I acknowledge that in the present case the delivery of the determination was unreasonably delayed and I have already addressed that in responding to Mr Beals' complaint on the matter.

[14] Despite the unreasonable delay in the issue of the substantive determination, I am satisfied that the nature and extent of the determination issued by the presiding Member properly complied with the statutory requirements in that regard.

[15] I must consider now whether any fresh evidence has become available which might create the special unusual circumstance that would be required to institute a reopening. I am not persuaded that there is any evidence of this kind.

[16] What Mr Beals asserts as fresh evidence seems to comprise admissions that it is said were extracted from witnesses for Ovation during the investigation meeting. Those concessions or acknowledgements, assuming they were achieved as a consequence of cross-examination, do not constitute fresh evidence of the sort required to reopen matters.

[17] All that evidence was heard by the Member presiding. There is nothing fresh or new in that material because it was all part of the evidential matrix which the presiding Member used to craft his determination.

[18] What would be required for evidence to fall within the category of fresh or new evidence is material which was not available at the original hearing. The reliance that Mr Beals places on concessions which he claims were achieved from Ovation's witnesses during the hearing therefore falls outside the ambit of the rule because the Member heard all that evidence when he presided over the investigation meeting which resulted in the substantive determination.

[19] Moreover, it is appropriate that I record that Counsel for Ovation is not persuaded that any of the Ovation witnesses made concessions or admissions which in any way constituted evidence that was not otherwise available so on that ground as well, there would seem to be no force in Mr Beals' submission.

[20] I turn finally to consider whether there are any particular circumstances of this case which would justify a reopening on the basis that there were special or unusual circumstances in this particular matter. I have not found any evidence of any such unique or peculiar circumstances in this case which would underpin a decision to reopen the matter.

[21] It is apparent that Mr Beals disagrees with the decision of the Authority, as he is entitled to do and the appropriate course of action for Mr Beals to take is to do precisely what he has already done which is to challenge the matter to the Employment Court. I am not persuaded there is any basis on which this matter can properly be reopened in this Authority.

Determination

[22] I have not been persuaded that this is a matter where I ought to exercise my discretion to reopen the instant matter. It follows that Mr Beals application to reopen the Authority's investigation fails in its entirety.

Costs

[23] Ovation seeks costs of $4,200 plus GST. There is no comment at all from Mr Beals in respect of costs.

[24] While Ovation have been completely successful in resisting the application to reopen the Authority's investigation, and therefore in principle are entitled to pursue an award of costs in their favour, I leave it to the parties' representatives to engage to see if the matter can be resolved by agreement, recognising that the substantive proceeding is now on challenge in the Employment Court and it may be that the parties agree that the issue of costs in this matter be disposed of as part of the wider disposition of the challenge in the Court.

[25] In the alternative, if those observations are not accepted by the parties, then I will fix costs.

[26] Either party may initiate that process by providing me with a brief memorandum seeking costs to be fixed and a statement of what is sought by way of costs and why. That memorandum will need to be filed and served and then the responding party will have fourteen days from the date of their receipt of the initiating memorandum to file and serve their own memorandum on costs.

[27] I will then deal with the matter on the papers.

James Crichton
Chief of the Employment Relations Authority