Attention is drawn to the order prohibiting publication of certain information in this Determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 332
3229679

	BETWEEN	MURRAY ALEXANDER BOYD Applicant
	AND	OJI Respondent
Member of Authority:	Helen Doyle	
Representatives:	Murray Boyd, in person Ashleigh Fechney, advocate for the Respondent	
Investigation Meeting:	On the papers	
Date of Determination:	23 June 2023	

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] The non-publication order made in the substantive determination of the Authority dated 22 March 2023 continues for the purpose of this application.[1] The name, medical information and identifying details of OJI are subject to a permanent non-publication order.

Employment Relationship Problem

[2] Murray Boyd applies to reopen the substantive investigation of the Authority.

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[1] *OJI v Murray Boyd* [2003] NZERA 144.

[3] The same Member who undertook the investigation would usually determine the application for rehearing. Unavailability due to other commitments means another Member is determining this matter.

[4] I have considered in addition to the application and additional information, the substantive determination, the statements of problem, statement in reply, statements of evidence provided and notices of direction.

[5] In the substantive determination it was found that OJI was unjustifiably constructively dismissed due to Mr Boyd's "unfair and unreasonable sexual harassment."[2] OJI was awarded reimbursement of lost wages in the sum of $9,476 gross, together with compensation of $35,000.[3] Mr Boyd was represented at the investigation meeting on 15 and 16 December 2022 by counsel.

[6] The grounds in the application for reopening the investigation are set out in an attached submission. These grounds were supplemented by further information from Mr Boyd. Broadly the grounds advanced by Mr Boyd are that the things he has been accused of are "false" and that sexual harassment of any kind never happened. He says that OJI "lied" about matters during her employment including that sexual harassment took place. Further that OJI left because of conflict with other staff and not because of any actions or behaviour on his part. He has set out names of witnesses who will give evidence if the investigation is reopened.

[7] There is also a ground that OJI owes money to Mr Boyd for damage caused to two rooms she stayed in and loss of income from the rooms whilst they were cleaned. Damages are claimed of $35,000.

[8] OJI has applied to strike out the application for reopening on the basis that it is frivolous or vexatious.

The investigation process

[9] The Authority held a case management conference with Mr Boyd and Ms Fechney. The Authority advised Mr Boyd and Ms Fechney that it considered appropriate to deal with

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[2] Above n 1 at [58].
[3] Above n 1 at [80].

the applications on the papers already lodged, together with any supplementary information that Mr Boyd would like to supply.

[10] There was no objection to the matter being determined on the papers. Mr Boyd provided further information lodged on 15 June 2023. Ms Fechney did not consider there would be a need to lodge any further information on behalf of OJI and none was forthcoming.

The Issues

[11] The Authority needs to consider the following issues:

(a) What is the best way to proceed with the two different applications?

(b) What is the legal framework for a reopening application?

(c) Was the evidence relied on by Mr Boyd in support of his application to reopen new or fresh evidence not reasonably able to have been given at the investigation meeting?

(d) Was the claim for damages before the Authority when it undertook the substantive investigation?

(e) If the reopening of the investigation is not granted would there be an actual miscarriage of justice or at least a substantial risk of a miscarriage of justice?

What is the best way to proceed with the two different applications?

[12] The Authority has two applications before it. One is an application for the investigation to be reopened and the other is an application for strike out under clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[13] The Authority considers the most appropriate and efficient way to proceed is to consider whether the investigation should be reopened. The application for strike out is sufficiently detailed so its contents can be treated as an opposition to the application for reopening.

The legal framework when there is a reopening application

[14] Clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act) provides that the Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime, to stay the effect of any order previously made.

[15] The Authority must exercise the discretion to reopen on a principled basis. The main concern in the exercise of the discretion is to avoid a miscarriage of justice. With that, the desirability of certainty in litigation in the public interest and that there be an end to litigation, needs to considered.[4]

[16] The Employment Court described the principles for the exercise of a discretionary power to order a reopening in *Randle*.[5] Some of the principles that are material are set out below:

> (a) The jurisdiction is not to be exercised for the purposes of re-agitating arguments already considered or providing a backdoor method by which unsuccessful litigants can seek to reargue their case.
>
> (b) Some special or unusual circumstances must be found to exist to warrant the reopening, such as that fresh or new evidence is being discovered which is material to the outcome of the case, and that could not have been given at the hearing.
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> (c) The mere possibility of a miscarriage of justice is not a sufficient ground for granting reopening. What is required is an actual miscarriage of justice or a real or substantial possibility or substantial risk of miscarriage of justice if the determination is allowed to stand…

Is there fresh or new evidence material to the outcome of the case which could not have been reasonably given at the Authority hearing?

[17] An Employment Court judgment, *Randle v The Warehouse Limited,* states what is required to be shown to succeed with a ground that there has been material evidence discovered that could not have been reasonably foreseen or known before the investigation meeting.[6]

> (a) the evidence could not have been obtained with reasonable diligence for use at the Authority's investigation meeting;
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> (b) the evidence is such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
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> (c) the evidence is apparently credible although it need not be incontrovertible.

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[4] *Randle v The Warehouse Limited* [2019] NZEmpC 68 at [15] and [18].
[5] Above n 4 at [17].
[6] Above n 4 at [16] with reference to *Squire v Waitaki New Zealand Refrigerating Ltd* [1985] ACJ 839 at 842; *Cherrington v Auckland Farmers Freezing Co-op Ltd* [1988] NZILR 1032 - 1033.

[18] Before turning to these criteria, it is necessary in this matter to consider whether there is new or fresh evidence.

Does the application and further information indicate new evidence?

[19] Mr Boyd's statements that OJI lied and that what he has been accused of is false is consistent with the statement in reply lodged on his behalf and his defence. The substantive determination records Mr Boyd denied allegations of sexual harassment and that his actions and interactions with OJI were sexual in nature or inappropriate.[7] There is a detailed assessment of credibility in the substantive determination.[8] I do not conclude new evidence in this respect.

[20] Mr Boyd says in his application that it was another person who made a comment that he would "love to see you in a little pair of shorts" to OJI. His evidence about this is recorded in the substantive determination but not accepted.[9] It is not new evidence.

[21] Mr Boyd's statement in his application that OJI was under the influence of something was specifically referred to in the substantive determination.[10] The determination also referred to evidence from OJI's witnesses that she abstained from alcohol and drugs for as long as they had known her. The determination also states that Mr Boyd conceded after this evidence that he could be mistaken. This is not new evidence.

Seven named individuals – new evidence?

[22] Mr Boyd refers to seven names of people in his application who he says will give evidence.

[23] Two of the seven are Warren and Jen. I think it likely that Warren's last name was misspelt in the application for reopening because a statement was provided to the Authority for the substantive investigation from Warren with a different last name. Its contents are sufficiently similar to the statement attributed to him in the application for reopening to conclude it is the same person. Warren suggested in his statement that OJI left because of staff conflict.

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[7] Above n 1 at [29].
[8] Above n 1 at [32] (a) - (f).
[9] Above n 1 at [30](d).
[10] Above n 1 at 32 (c).

[24] The statement by Warren as to why OJI left therefore was before the Authority and made mention of his partner presumably Jen in an interaction with the chef. It was found in the substantive determination that although OJI accepted she had some conflict with some members of staff and it was a stressor that was not why she had left. It was concluded any such conflict was immaterial and that the reasons for resignation was sexual harassment by Mr Boyd.[11] I am not satisfied that Warren's evidence is new.

[25] The reopening application also refers to Murray and Margaret as new witnesses. Murray provided a statement to the Authority for the substantive investigation in which he refers to Margaret as his partner and made some comment about the state of the rooms OJI stayed in. I am not satisfied that his evidence is new.

[26] Two of the remaining three people named seem to be the chef and his partner. Issues in the relationship between the two of them and OJI is not new evidence because Mr Boyd had referred to these in his statement of evidence provided to the Authority. That evidence was therefore before the Authority.

[27] It is unclear what sort of evidence the final person named could give.

Could the evidence have been reasonably obtained for use at the Authority's investigation meeting

[28] As set out earlier I am not satisfied that there is new evidence.

[29] Even if there is I am not satisfied that it could not have been obtained with reasonable diligence for use at the Authority investigation meeting.

[30] A notice of direction dated 7 June 2022 was issued following a case management conference with the Authority and the representative for OJI and Mr Boyd. It states amongst other matters that Mr Boyd's counsel asked for an adjournment of the investigation meeting scheduled for 17 June 2022. The adjournment was requested because statements of evidence for OJI were lodged outside of the timetable set by the Authority and were larger in number than expected. The adjournment was granted by the Authority on the basis set out below in the notice of direction:

[11] Above n 1 at at [56] and [57].

> …to ensure that the respondent has sufficient and fair time to provide his witness statements.

[31] Mr Boyd was represented by experienced counsel who could have with reasonable diligence had evidence from the additional people who Mr Boyd refers to at the substantive investigation. Specific accommodation was made by the Authority to enable this to occur. There was ample opportunity until the investigation meeting rescheduled for 15 and 16 December 2022 to obtain the evidence.

[32] The grounds relied on that there is material new evidence that could not have been reasonably obtained earlier for use at the Authority investigation is unsuccessful.

[33] I have considered some other matters in an assessment of any miscarriage of justice.

Secretive relationship

[34] In his application Mr Boyd makes statements about a secretive relationship he believed OJI was involved in whilst staying in accommodation at Donegal House. Mr Boyd refers to that broadly in his statement of evidence at paragraph 21 provided at the time of the substantive investigation meeting so this is not new evidence.

[35] The application for reopening suggested that OJI was not truthful about any relationship and that impacted her credibility. I do not consider it would likely have had an important influence on the result of the case and findings of credibility. The evidence could have potentially infringed s 116 of the Act.[12]

[36] I don't conclude a risk of a miscarriage of justice of any significance about this matter.

Constrained in giving evidence

[37] Mr Boyd suggested that he felt constrained in what he could say by his counsel or the Authority at the investigation meeting. Mr Boyd was represented by experienced counsel for the two-day investigation. There was careful assessment of Mr Boyd's evidence in the substantive determination. I am not satisfied that he was constrained about evidence that was material and/or influential and likely to have an important influence on the outcome of the case.

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[12] Section 116 of the Employment Relations Act applies where there are allegations of sexual harassment and prevents account being taken of evidence about sexual experience or reputation.

[38] The risk of a miscarriage of justice on that basis is low.

Was the claim for damages before the Authority?

[39] There was no counterclaim for damages by Mr Boyd at the time of the substantive investigation. A reopening is not an opportunity to advance a new claim.

If the reopening of the investigation is not granted then would there be an actual miscarriage of justice or at least a substantial risk of a miscarriage of justice.

[40] Mr Boyd was dissatisfied with conclusions that were reached in the determination. He did not take the step of challenging these matters under s 179 of the Act to the Employment Court. Instead of a challenge Mr Boyd has tried to achieve the same result through a reopening.

[41] The Authority has not concluded there is new evidence relied on in the reopening application and/or has concluded that such evidence could have been reasonably obtained for use at the Authority investigation. The Authority has not concluded matters raised by Mr Boyd give rise to an actual or substantial risk of a miscarriage of justice.

[42] The Employment Court has made it clear in *Alkazaz v Enterprise IT Limited:*

> …The power to grant a reopening 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.[13]

[43] I am not satisfied that there has been an actual miscarriage of justice or that there is a substantial risk of a miscarriage of justice if the application is not granted.

[44] There is a public interest in ensuring the finality of litigation that needs to be weighed in the overall interest of justice. OJI is entitled to certainty and to the benefits of her successful claim.

[45] The reopening application is not granted.

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[13] *Alkazaz v Enterprise IT Limited* [2020] NZEmpC 171 at [9].

Costs

[46] Costs are reserved.

[47] The Authority has been advised that OJI is legally represented.

[48] Ms Fechney may lodge and serve a costs submission within 14 days from the date of this determination. Mr Boyd will have a further 14 days from receipt of the submission to lodge and serve reply submissions as to costs. Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[49] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.[14]

Helen Doyle
Member of the Employment Relations Authority

[14] https://www.era.govt.nz/assets/Uploads/practice-note-2.