IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 194
3219700

	BETWEEN	DRAPAC LIMITED Applicant
	AND	ZHANGYING ZHUANG Respondent

Member of Authority:	Robin Arthur
Representatives:	Quan Shu for the Respondent Applicant in person
Investigation:	On the papers
Determination:	19 April 2023

DETERMINATION OF THE AUTHORITY

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[1] Drapac Limited (Drapac) applied for a reopening of the Authority investigation of a claim by its former employee Zhangying Zhuang that she was owed arrears of wages.

[2] By determination issued on 7 February 2023 the Authority found Drapac had unlawfully applied a deduction of 7.5 minutes from each hour Ms Zhuang worked and had paid her only for that reduced time. Drapac said this deduction was made because Ms Zhuang, who worked driving a shuttle bus, needed and had agreed to take a break of that length each hour as a safety measure for herself and her passengers.[1] The Authority's determination ordered Drapac to pay $1,700 (with interest and less tax) as arrears of wages for the deductions made.

[3] Drapac applied for a reopening on the grounds that the determination was "not correct" because it was "agreed and documented clearly" that Ms Zhuang was to take that time as unpaid breaks. Drapac's director Quan Shu said he suspected "the

[1] *Zhuang v Drapac Limited* [2023] NZERA 57.

determination maker did not read through all the details of the application and wrote up the determination based on dead legal terminology".

[4] Ms Zhang opposed reopening the investigation. She said she wanted the amount ordered to be paid to her as soon as possible or she would, otherwise, apply to the District Court for enforcement.

[5] I note Mr Shu asked that the Authority member who made the original determination not be the member who considered the reopening application. He said this was because "a better qualified person" should made that decision. This was not sufficient opinion or reason to displace the usual approach of the Authority and the Employment Court that the original decision maker, familiar with the evidence and what happened during the earlier investigation or hearing, is best placed to consider a request for reopening or rehearing.[2]

The legal framework for considering a reopening application

[6] The Authority has a statutory discretion to order the reopening of an investigation on "such terms as it thinks reasonable".[3]

[7] Principles developed by the Employment Court in exercising its similar discretionary power to order a 'rehearing' provide a useful framework, applicable by analogy, for the Authority when considering whether to reopen an investigation.[4]

[8] Applicable principles include the following:[5]

(i) The jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered or to provide a 'backdoor' method by which unsuccessful litigants can seek to re-argue their case.

(ii) Some special or unusual circumstance must be found to exist to warrant the reopening, such as:

- Fresh or new evidence that could not with reasonable diligence have been discovered prior to the investigation meeting, which is of such a character as to appear to be conclusive; or

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[2] *Idea Services Ltd v Barker* [2013] NZEmpC 24 at [4]
[3] Employment Relations Act 2000, Schedule 2 clause 4.
[4] *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].
[5] *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [12]-[14] and *Idea Services Limited*, above n 2, at [36]-[37] and [42].

- a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended; or
- some other special or unusual circumstance particular to the case.

(iii) The mere possibility of a miscarriage of justice is not a sufficient ground for granting a reopening. The threshold test is whether the party seeking the reopening can 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 were allowed to stand.

(iv) The assessment of the possibility of a miscarriage of justice does not require a high standard of proof of that possibility. However, of equal weight as a factor in the balance is certainty in litigation so successful litigants get their normal right to enjoy the fruits of judgments in their favour.[6]

(v) An apparent misapprehension of the facts or relevant law will not warrant a reopening where the misapprehension is attributable solely to the neglect or default of the party seeking the reopening.[7]

(vi) Where a party is dissatisfied by an Authority determination on grounds that may be the subject of the specific statutory process of a challenge under s179 of the Employment Relations Act 2000 (the Act), the Authority should be reluctant to entertain an application for a reopening on those same grounds.

[9] For the decision-maker of a reopening application, "[t]he overriding consideration must be the interests of justice balanced against other relevant factors such as the importance of finality in litigation".[8]

No valid grounds for re-opening investigation

[10] Drapac's reopening application does not identify any new or fresh evidence not available at the time of the February investigation meeting or identify some overlooked statutory provision or authoritative decision of superior courts that the Authority could and should consider if its investigation were to be re-opened. Rather the application

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[6] *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607.
[7] *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, above n 2, at [37].
[8] *Young*, above n 3, at [9].

simply seeks to re-argue the case that Drapac considers was not properly understood in the determination issued.

[11] Drapac's case rested on the notion that it was entitled to deduct the equivalent of 7.5 minutes pay from each working hour as a safety break and that Ms Zhuang must be held to have agreed to that deduction because she filled in timesheets on that basis. For reasons given in the February determination, Drapac's argument was not accepted as correct or acceptable under New Zealand employment law.

[12] Mr Shu had not attended the investigation meeting which had been set for a time that he had told the Authority member he could be there on the appointed day. Instead, he sent an office administrator, Carol Ling, who said Mr Shu was "too busy" to attend. Ms Ling handed over some documents which set out some of the information already in evidence about Ms Zhuang's work hours but could not expand on the analysis of them.

[13] Ms Zhuang was then given an opportunity to provide some more information in writing and Mr Shu was given the opportunity to respond to that information by email. He did so, reiterating his view that the 7.5 minute deduction was for a permitted safety reason and Ms Zhuang, by her conduct, had agreed to the arrangement. In this way it was clear that Drapac had the opportunity to participate in the Authority's earlier investigation, which it had not fully utilised, but still got the chance to provide additional information that was then considered before the determination was issued. It had not, in the reopening application, established there was any miscarriage in the opportunity to be heard or to have information provided reasonably considered.

[14] Even if there were some misapprehension of the facts, this was not a ground to reopen the investigation now. Rather, such an error would be grounds for using the specific statutory process of filing a challenge in the Employment Court.

[15] Drapac was advised, on issue of the determination, of its right to challenge it and provided with a link to information about how to go about doing so if the company wished to do so in the following 28 days. Mr Shu promptly responded, on 8 February, that he would file a challenge in the court. It was not until 3 March that he contacted the Authority about seeking to reopen its investigation.

[16] Measured against the applicable principles about reopening, Drapac had not established any actual miscarriage of justice or a real or substantial risk of a miscarriage of justice. It had the opportunity to be heard. Its evidence, including everything submitted in writing by Mr Shu, was considered. Its argument was not successful. It had the right to challenge the outcome if it was not happy with it.

Application for reopening declined

[17] No grounds for reopening were established. Rather, this was a situation where the principle of finality in litigation, at least at the Authority stage of the process, should properly be applied. Drapac's application for reopening of the Authority's investigation of Ms Zhuang's application is declined.

Certificate of determination to be issued

[18] Ms Zhuang has advised the Authority that she wishes to enforce the award made in the February determination through the District Court procedure.[9] A certificate of determination is to be issued for her use in that process.

Robin Arthur
Member of the Employment Relations Authority

[9] Employment Relations Act 2000, s 141.