

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 692
3257779

BETWEEN E CYCLES NZ LIMITED
Applicant

AND NICK SCOTT
Respondent

Member of Authority: Robin Arthur

Representatives: Melissa Johnston, counsel for the Applicant
Alex Kersjes, advocate for the Respondent

Investigation: On the papers

Determination: 22 November 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] E Cycles NZ Limited (ECNZL) sought reopening of an Authority investigation which had ended with a determination that its former employee Nick Scott was not employed under a valid trial period and had been unjustifiably dismissed.¹ The determination ordered ECNZL to pay Mr Scott lost wages of \$7,962.50 and distress compensation of \$15,000.

[2] ECNZL said difficulties with its participation in preparation for the Authority's investigation and providing evidence amounted to such special or unusual circumstances that there was a miscarriage of justice. It said this should be remedied by reopening the investigation and allowing the company to provide further evidence from an additional witness, a former manager.

¹ *Scott v E Cycles NZ Limited* [2023] NZERA 527.

[3] Mr Scott opposed ECNZL's application. He submitted the company was seeking to reopen the investigation "simply because of the result, not due to any miscarriage of justice".

The legal framework for considering a reopening application

[4] The Authority has a statutory discretion to order the reopening of an investigation on "such terms as it thinks reasonable".²

[5] Principles developed in the Employment Court's exercise of 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.³

[6] Applicable principles include the following:⁴

- (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
 - 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

² Employment Relations Act 2000, Schedule 2 clause 4.

³ *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].

⁴ *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [12]-[14] and *Idea Services Limited* [2013] NZEmpC 24 at [36]-[37] and [42].

litigants get their normal right to enjoy the fruits of judgments in their favour.⁵

- (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.⁶
- (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.

[7] 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”.⁷

[8] As usual where a party seeks a reopening, ECNZL’s request has been considered by the original decision maker, familiar with what happened during the earlier investigation meeting, after considering written submissions lodged by the parties’ representatives.⁸

What happened

[9] Counsel now representing ECNZL, and seeking a reopening, were not involved with the earlier investigation. Their submissions rely on records of correspondence with the Authority during the earlier process and, presumably, the account of ECNZL director Christopher Hoff-Nielsen about what happened. There are a number of assertions of fact made in those submissions which, as addressed in this determination, are incorrect.

[10] The following chronology of the case assists with assessing submissions:

- 16 August 2021 Mr Scott lodges application to Authority.
- 13 September 2021 ECNZL lodges statement in reply after being given leave to respond out of time.

⁵ *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607.

⁶ *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, n 4 above, at [37].

⁷ *Young*, above n 3, at [9].

⁸ *Idea Services Ltd v Barker*, n 4 above, at [4].

- 15 September 2021 Parties referred to mediation.
- 13 October 2021 Mr Scott advises matter not resolved in mediation, seeks Authority investigation.
- 14 February 2022 Authority begins liaising with Mr Scott's representative and Mr Hoff-Nielsen about case management conference.
- 4 April 2022 Case management conference abandoned after telephone connection with Mr Hoff-Nielsen lost.
- 19 April 2022 Case management conference proceeds without Mr Hoff-Nielsen's participation.
- 20 April 2022 Directions of Authority emailed to parties with Notice of Investigation Meeting for 18 August 2022.
- 23 June 2022 Mr Scott lodges and serves witness statement.
- 15 – 20 July 2022 Emails exchanged between Authority Officer and Mr Hoff-Nielsen about ECNZL providing its witness statements. Further copy of Mr Scott's witness statements emailed to Mr Hoff-Nielsen.
- 16 August 2022 Mr Hoff-Nielsen seeks postponement of investigation meeting notified for 18 August 2022 (for Covid-19 related reasons).
- 17 August 2022 18 August 2022 investigation meeting postponed, new notice of investigation meeting issued for 27 January 2023. **(First postponement)**
- 25 January 2022 Mr Hoff-Nielsen seeks postponement of investigation meeting notified for 27 January 2022 (due to investigation meeting on another Authority matter on 26 January 2023 in Blenheim).
- 25 January 2022 Authority postpones 27 January 2023 investigation meeting. **(Second postponement)**
- 31 January 2023 Authority proposes new investigation meeting dates of 22 or 23 June 2023. Mr Hoff-Nielsen thanks Authority "for the swift action last week" and confirms availability for investigation meeting on 22 June 2023.
- 3 February 2023 Authority issues new Notice of Investigation Meeting for 22 June 2023.
- 19 June 2023 Mr Scott lodges and serves updated information on earnings and job search.

- 21 June 2023

Mr Hoff-Nielsen emails Authority and Mr Scott’s representative advising that Amandeep Singh “an ex-employee ... will be joining for a brief period to submit his testimony for the hearing”.

Mr Scott’s representative asks by email if any written witness statements were lodged by ECNZL and asks if time will be given to amend draft closing submissions if Mr Singh gives evidence at the investigation meeting the next day.

Authority sends message to parties: “The Authority has received no written witness statements from [ECNZL]. The Authority member will deal with the question of additional witnesses and what may be required by way of closing submissions at the investigation meeting”.
- 22 June 2023

Investigation meeting attended by Mr Scott, Mr Scott’s aunt, Mr Scott’s representative and Mr Hoff-Nielsen. No attendance by Mr Singh.
- 15 September 2023

Authority determination issued.
- 29 September 2023

Mr Scott seeks costs award.
- 13 October 2023

ECNZL’s current counsel advises Authority that firm “have recently been instructed” by ECNZL and seek extension of time to lodge reply memorandum on costs.
- 17 October 2023

ECNZL applies for re-opening of investigation.

Three grounds submitted for reopening

[11] ECNZL submitted three circumstances or set of circumstances had a cumulative effect on the ability of the company to properly prepare and take part in the Authority’s investigation. This effect, it submitted, “led the Authority to misapprehend the facts, which ultimately lead to a miscarriage of justice”.

Not taking part in a case management conference

[12] ECNZL complained Mr Hoff-Nielsen was not telephoned on 18 April 2022 to take part in a case management conference which set a date for an Authority’s investigation meeting and a timetable for lodging witness statements. This, it submitted, left the company not knowing “what evidence was needed and which witnesses to prepare for the investigation meeting”.

[13] The Authority went ahead with a brief case management conference on 18 April 2022 against a background of delays in getting ECNZL's participation in the process. As Directions issued by email to the parties on the following day recorded, Mr Hoff-Nielsen had indicated in earlier communication with an Authority Officer that he would not participate in the call. As explained in those Directions and quoted from extensively in ECNZL's submissions:

During the call I spoke briefly with Mr Scott's representative, making the standard timetable directions for lodging witness statements and documents, a date for the investigation meeting and provision of relevant documents. No aspect of the merits of the case were discussed so, although less than ideal, no disadvantage or difference results from Mr Hoff-Nielsen not being able to participate as I would have hoped before making those directions. The arrangements set are as recorded in this Minute.

[14] Omitted from the submissions is reference to a later paragraph of the Directions of 19 April 2022 about witness statements. The paragraph notes a written statement is expected from Mr Hoff-Nielsen and then continues:

If there is any other necessary witness with relevant information that ECNZL wishes me to hear from, leave is reserved for a written witness statement to also be lodged from them by the timetabled date.

[15] The Authority's electronic record of correspondence shows these Directions were sent by email to Mr Scott's representative and to the email address Mr Hoff-Nielsen used for messages he successfully sent to and received from the Authority both before and after those Directions were sent to him on 19 April 2022.

[16] ECNZL's submissions make an unsubstantiated claim some notices from the Authority were diverted by the company's email firewall to its spam folder, "causing Mr Hoff-Nielsen further confusion". Significantly this submission does not go as far as saying he never saw the Directions containing the timetable directions or, once aware of that supposed issue, had not regularly checked the spam folder and located messages and attachments stored in it.

[17] However, even if he had not seen the Directions sent on 19 April 2022, the provision of witness statements was addressed in a later email exchange between an Authority Officer and Mr Hoff-Nielsen on 18 and 19 July 2022 when he was asked about "the written witness statement expected from you (and any other necessary witness you wanted the Authority to hear from) in response to Mr Scott's witness

statement”. The Authority Officer’s email referred to a timetable set for him “to send in the witness statement/s from you or anyone else” and asked him to confirm whether he would be “providing the expected written witness statement or statements”. When Mr Hoff-Nielsen responded saying he could not find Mr Scott’s witness statement after checking his “inbox”, without referring to whether or not he checked his spam folder, he was sent a further copy of statements from Mr Scott and Mr Scott’s aunt. There was no further correspondence from Mr Hoff-Nielsen suggesting he had not received those documents or that he was not aware of the expectation that ECNZL provide written witness statements in advance of the investigation meeting.

[18] There was nothing to establish ECNZL suffered any real prejudice from Mr Hoff-Nielsen not attending the 18 April 2022 case management conference. In the months that followed, his email correspondence back and forth with the Authority clearly showed that ECNZL knew of the opportunity to provide written witness statements from him and anyone else that the company considered necessary. In light of that knowledge, no substantial risk of a miscarriage of justice resulted from Mr Hoff-Nielsen not being on the 18 April 2022 conference call.

Proximity of investigation meetings in different matters

[19] Over the course of the investigation of Mr Scott’s application against ECNZL three dates were set for the Authority’s investigation meeting – 18 August 2022, 27 January 2023 and 22 June 2023.

[20] The first date was postponed at Mr Hoff-Nielsen’s request when he advised the Authority two days beforehand that a family member had contracted Covid-19 and he was “pretty certain” he was a close contact. Restrictions encouraging household isolation were in place at that time. His request was readily granted, without any verifying health documentation required. Mr Hoff-Nielsen was taken at his word.

[21] The second date, 27 January 2023, was postponed after Mr Hoff-Nielsen contacted the Auckland office of the Authority on 25 January advising that he would have difficulty attending the meeting. This was because he due to be at another Authority investigation meeting involving ECNZL in Blenheim on 26 January.

[22] The following ECNZL submission is wrong on two key points about those events:

The Authority had scheduled two investigation meetings for 27 January 2023 in two different locations of the country, for two separate matters. Mr Hoffman-Nielsen advised the Authority that the date was not suitable when it was initially proposed. However, the date was not changed until 25 January 2023, when Mr Hoff-Nielsen notified the Authority again that there had been a double booking.

[23] Firstly, there were not two Authority meetings scheduled on the same day. One was notified for Blenheim on 26 January, one in Auckland was notified for 27 January.

[24] Secondly, Mr Hoff-Nielsen did not advise the Authority that the 27 January date was not suitable when it was “initially proposed”. The Notice of Investigation Meeting for the 27 January 2023 meeting was issued on 17 August 2022. In Mr Hoff-Nielsen’s own copy of emails he said he received from the Authority at that time, the notice can be seen as an attachment to an email sent to him by the Authority in mid-August. The timing and date recorded on his copy of that email appears to be keyed to a European time zone, so it shows the message being received on 16 August, not 17 August.

[25] The Authority’s electronic record of correspondence shows no message from Mr Hoff-Nielsen about that investigation meeting date until 25 January, more than four months later. His January message said he “did inform the officer when this date was proposed”. He was then asked to provide a copy of the message he said he had sent an Authority Officer about that proposed investigation meeting date. He did not reply and sent no copy of any such message.

[26] The date of 26 January 2023 for an investigation meeting in the other matter, in Blenheim, was set after correspondence with the Authority’s Wellington office. The notice was issued on 26 August 2022 (nine days after the Auckland meeting date of 27 January 2023 was notified) and after Mr Hoff-Nielsen had confirmed by email to the Wellington office that the 26 January date in Blenheim “would be possible”.

[27] Despite Mr Hoff-Nielsen having information for more than four months about the consecutive dates of those two investigation meetings on two separate matters, he took no action about any concern that might cause until one day before the first of them was due to start.

[28] ECNZL submitted this scheduling situation caused Mr Hoff-Nielsen “significant stress and pressure”, but its submissions established nothing about that circumstance that had resulted in any real or substantial risk of miscarriage of justice in

the Authority determination as eventually delivered. Rather, on the day it was asked for, ECNZL was promptly granted a second and further postponement of the Authority's investigation of Mr Scott's case.

[29] Mr Hoff-Nielsen was asked then about alternative dates in June. His reply confirmed availability for the 22 June 2023 investigation meeting date offered and thanked the Authority for its "swift action last week".

Witness did not attend investigation meeting

[30] The submissions for this third ground for seeking a reopening also relied on an inaccurate account of events as they occurred prior to and during the 22 June investigation meeting.

[31] Firstly, ECNZL's submissions said Mr Hoff-Nielsen, before that investigation meeting, had told the Authority he was able to bring a further witness but "the Authority did not allow [ECNZL] to call witnesses stating [ECNZL] had missed its opportunity". This is not correct.

[32] On the morning before the investigation meeting Mr Hoff-Nielsen sent an email to the Authority Officer and Mr Scott's representative stating:

An ex-employee of EcyclesNZ and ex Colleague of Nick Scott will be joining for a brief period to submit his testimony for the hearing. His Name is Amandeep Singh.

[33] Mr Scott's representative promptly complained, by email, that he had received no written witness statements from any ECNZL witnesses and asked if he could get extra time to prepare closing submissions after the investigation meeting if Mr Singh was "giving evidence tomorrow". He made no objection to unexpected, late evidence from Mr Singh.

[34] An Authority Officer, at the member's direction, sent this response to those messages from Mr Hoff-Nielsen and Mr Scott's representative:

The Authority has received no written witness statements from E Cycles NZ Limited. The Authority member will deal with the question of additional witnesses and what may be required by way of closing submissions at the investigation meeting."

[35] There was no message saying Mr Singh could not give evidence. Rather, based on what Mr Hoff-Nielsen's email of 21 June indicated, Mr Singh was expected to be there "for a brief period to submit his testimony for the hearing".

[36] Secondly, ECNZL's submissions said that, on the day of the meeting, the Authority "reversed its decision on this and informed [ECNZL] that it may call its witness". According to those submissions, however, the reason Mr Singh was not at the investigation meeting was that Mr Hoff-Nielsen had told Mr Singh the day before that he was no longer needed and Mr Singh "had decided to go to work".

[37] In fact, Mr Hoff-Nielsen was asked at the opening of the investigation meeting what information Mr Singh could provide and why he was not present. Mr Hoff-Nielsen said Mr Singh had been at meetings where Mr Scott had signed an employment agreement but was not at the meeting which Mr Scott said had ended with Mr Hoff-Nielsen dismissing him. Mr Scott's representative had no objection to Mr Singh attending and giving evidence.

[38] However, when asked where Mr Singh was, Mr Hoff-Nielsen said he would need to contact him about coming to the meeting. He was unsuccessful in one attempt to contact Mr Singh. Shortly before 1pm, around three hours after investigation meeting began, Mr Hoff-Nielsen said he had been able to contact Mr Singh during a break in the meeting, but Mr Singh was at work elsewhere that day and could not attend. Mr Hoff-Nielsen suggested the investigation meeting could continue the next day. At that point Mr Hoff-Nielsen was told he had been given a reasonable opportunity to have Mr Singh attend, having said the previous day that he would be there. The meeting proceeded and concluded that day, after Mr Hoff-Nielsen, Mr Scott and Mr Scott's aunt had each given evidence and oral closing submissions were given.

[39] In short, it was not the Authority which prevented Mr Singh attending and giving evidence. ECNZL was responsible for that situation. It had not made satisfactory arrangements for him being there on the day, after having said the previous day that he would be at the investigation meeting.

No special or unusual circumstances established

[40] ECNZL submitted Mr Singh's evidence could have had "an important influence" on the Authority's determination with information about when Mr Scott

signed his employment agreement, the number of employees in ECNZL's business at the time Mr Scott started work, when Mr Scott was interviewed and what the interviews involved and what date Mr Scott started work.

[41] The first difficulty with that submission was that Mr Singh's evidence could "with reasonable diligence" by ECNZL have been given at the investigation meeting. ECNZL was responsible for neglecting to make the arrangements needed to have Mr Singh attend and give evidence, having known for many months that information from other witnesses could be given there and when the meeting was to be held.

[42] The second difficulty was that possible evidence from Mr Singh was not "of such a character as to appear to be conclusive". In part it was suggested that he would give the same evidence that Mr Hoff-Nielsen had already given about Mr Scott signing an employment agreement at the outset of his employment, which was relevant to the validity of a trial period supposedly in place. However, that evidence was, in the Authority's determination, conclusively outweighed by the evidence of both Mr Hoff-Nielsen and Mr Scott about their discussions on 4 June 2021, at which only they were present, and by the documentary evidence of messages exchanged before then and on that particular day.

[43] Mr Scott signed an employment agreement on 4 June 2021. Mr Hoff-Nielsen scanned it, with pictures of the pages scanned showing his fingertips on the edge of the pages, and sent it as a PDF format document titled Employment Agreement in a time-stamped message to Mr Scott. There was no reason for that activity if Mr Scott had already signed an employment agreement. Mr Singh repeating Mr Hoff-Nielsen's evidence about there being an earlier signed agreement would not change the probative weight of the electronic evidence or explain why ECNZL had not been able to produce such an earlier and different signed agreement.

[44] The third difficulty was that other evidence Mr Singh might contribute was not relevant to the determination made. Specifically, the determination did not rely on any conclusion about whether ECNZL might have had too many employees at the time of Mr Scott's employment to be entitled to use the trial period provisions.⁹ Similarly, the outcome in the determination did not rely on the suggestion that Mr Scott might have

⁹ Employment Relations Act 2000, s 67A(2).

worked some paid hours before his employment started so, again, a trial period would not have been valid.¹⁰

[45] ECNZL had not established a real or substantial risk of a miscarriage of justice that would have warranted granting its application for reopening. Rather, as submitted for Mr Scott, ECNZL's application appeared to be a 'back door' attempt by an unsuccessful party to seek to re-argue its case when it had already had a reasonable opportunity to do so in the Authority investigation. Weighed in this case, the balance favoured Mr Scott having certainty of outcome and receiving the fruit of his success from that process.

[46] A further factor weighed against reopening. ECNZL had a right to challenge the Authority's determination, issued on 15 September 2023, on the same grounds it has advanced in seeking a reopening. In those circumstances, applying the applicable principles, the Authority must be reluctant to reopen an investigation.

[47] The correspondence from ECNZL's counsel to the Authority indicated their firm was instructed before 13 October 2023, that is the day on which the 28-day period to file a challenge was reached, and the company's submissions acknowledged ECNZL was aware of the statutory process for doing so. It opted instead to seek re-opening. For the reasons given, the application is declined.

Outcome

[48] The application by ECNZL for reopening of the Authority's investigation in matter 3148181 is declined.

Costs

[49] Costs in relation to this application are reserved.

Robin Arthur
Member of the Employment Relations Authority

¹⁰ Section 67A(1).