**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2018] NZERA Auckland 185
3017395

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| | BETWEEN | GEA PROCESS ENGINEERING LIMITED<br>Applicant |
| | AND | TONY SCHICKER<br>Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | Stephen Langton, Counsel for the Applicant<br>David Grindle, Counsel for the Respondent |
| Investigation: | On the papers |
| Determination: | 11 June 2018 |

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## THIRD DETERMINATION OF THE AUTHORITY

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[1] This determination concerns an application by GEA Process Engineering Limited for the reopening of an Authority investigation.

[2] A determination issued on 27 June 2017 (referred to in this determination as the First Determination) dismissed an application made by GEA seeking orders against its former employee Tony Schicker.[1]

[3] The First Determination, put simply, said the Authority would not investigate the claim GEA began against Mr Schicker two years earlier because GEA had not done enough to progress its case and the situation had become unfair. The determination said GEA, if it did not like that outcome, could ask the Employment Court to hear its claim instead.

[4] The First Determination also sent a costs issue to the Court to hear and decide.

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[1] *GEA Process Engineering Limited v Schicker* [2017] NZERA Auckland 183.

[5] Mr Schicker's employment as a component sales manager for GEA had ended on 30 January 2015. He then started work for a business that traded under the name Dynaflow. GEA thought Mr Schicker had taken or revealed some of its business plans to Dynaflow.

[6] As part of the Authority proceedings GEA arranged for Dynaflow's directors Kieron Clarke and Scott Clarke to be issued with witness summonses to provide relevant documents. Arrangements were then agreed for Dynaflow to provide its documents in a court-style discovery process. The two directors said this had resulted in them incurring substantial legal costs which they wanted GEA to pay. Their claim raised important questions of law over whether costs in Authority proceedings could be awarded to someone providing documents under a witness summons and who was not a party to the proceedings. The Authority, on its own volition, removed those questions to the Court.

**GEA's applications**

[7] GEA filed a challenge to the First Determination in the Court on 25 July 2017. Soon after GEA also made two applications to the Authority – one to reopen the investigation that was closed by the First Determination and, as a prior point, one to have its reopening application determined by a different Authority member. The Chief of the Authority considered the question of which member should deal with the reopening application. He heard from the parties and issued a determination on 7 December 2017 (referred to in this determination as the Second Determination).[2] He concluded GEA's re-opening application need not be considered by a different member. If GEA wished to continue with its application for a reopening of the Authority investigation, that was a matter for me to consider, after hearing from the parties about any reasons that may or may not be appropriate.

[8] In February 2018 GEA sought to re-agitate the recusal issue with a further application, this time to me, for a different member to consider its reopening application because it said its "position has not changed". During a case management conference with the parties' representatives held by telephone on 7 February 2018 I declined to further consider that application. This was because that question was *res judicata*, a matter on which the parties had already been heard and a decision made in the Second Determination. The Authority's typical approach of the original investigating member

[2] *GEA Process Engineering Limited v Schicker* [2017] NZERA Auckland 380 at [25]-[26].

considering any reopening application was consistent with the Employment Court's usual practice that the trial judge hears and decides any application for rehearing.[3] It was also consistent with an observation made, in an article quoted in the Second Determination, by District Court Chief Judge Jan-Marie Doogue made about practitioners asking for a change of decision-maker:[4]

> It seems that this is often occurring in situations where the Judge may have expressed an opinion in an earlier case and that is not necessarily a ground for recusal. The mere fact that a Judge earlier in the same case, or in a previous case, has commented adversely on a party or a witness or found the evidence of a party or a witness to be unreliable would not without more be found to be a sustainable objection to that Judge presiding …

[9] The principle is as apt for a tribunal such as the Authority whose proceedings are declared to be judicial proceedings.[5] In light of the Second Determination's conclusion, and absent some new development, the question of which member would consider GEA's reopening application was not open to revisit.

[10] A timetable was set for the parties to provide written submissions, and any supporting affidavits, on the reopening application. A tentative date for an investigation meeting was set in case either party's counsel wished to have oral argument on written submissions heard in person. GEA lodged submissions along with affidavits from Taree Smith, Human Resources Manager for GEA's Australasian group of companies, and from Simon Schofield, a solicitor for the law firm Langton Hudson Butcher which acted for GEA in this matter. Mr Schicker, through his representative, opted not to lodge any reply submissions. The Authority checked whether the representatives wished to be heard in person. Neither did and the meeting set for that purpose was vacated. By agreement the reopening application was to be determined on the papers.

[11] 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.

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[3] *Marx v Southern Cross Campus Board of Trustees* [2017] NZEmpC 4 at [13].
[4] "Reminder from Chief Judge on judicial recusal" Law Talk 911 (October 2017) 46.
[5] Employment Relations Act 2000, s 176(2).

**The legal framework for considering a reopening application**

[12] The Authority has a statutory discretion to order the reopening of an investigation on "such terms as it thinks reasonable".[6] This discretion to reopen an investigation must be exercised according to principle. Principles developed by the Employment Court in 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.[7]

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

(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 hearing, which is of such a character as to appear to be conclusive;
- 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) 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 rehearing.[9]

(v) 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

[6] Employment Relations Act 2000, Schedule 2 clause 4.
[7] *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].
[8] *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [12]-[14] and *Idea Services Limited v Barker* [2013] NZEmpC 24 at [36]-[37] and [42].
[9] *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services Limited v Barker* [2013] NZEmpC 24 at [37].

Authority should be reluctant to entertain an application for a reopening on those grounds.

[14] For the decision-maker in 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".[10]

**GEA's reasons**

[15] If the investigation ended by the First Determination was not reopened GEA said a miscarriage of justice (or a substantial risk of one) would occur for the following three reasons:

(i) Adverse findings against GEA, said to be reached in breach of natural justice and wrong, would stand unchallenged; and

(ii) GEA would be denied its statutory right to have its claim properly brought, investigated and determined by the Authority at first instance;

(iii) GEA would be denied its right of challenge to a substantive determination of its claims.

[16] This determination has considered each of those reasons before returning to cross-check conclusions reached against the principles outlined in paragraph [13] above.

**Adverse findings reached in breach of natural justice and wrong?**

[17] GEA submitted adverse findings about its conduct of its case so far, made in the First Determination, were reached in breach of natural justice and were wrong.

[18] Its concern needed to be considered against the entire course of the proceedings that began with GEA's statement of problem lodged on 16 June 2015. The Authority's investigation could be taken as having begun from 2 September 2015 when GEA advised that a mediation held in July 2015 had not resolved the matter and GEA sought continuation of the proceedings in the Authority. The early stages of the investigation included dealing with GEA's application for directions about discovery of documents by Mr Schicker and Dynaflow. GEA proposed either "a discovery regime that mirrors the one that operates in the High Court" or the issue of witness

[10] *Young*, above n 7, at [9].

summons requiring the Dynaflow directors to produce documents. This eventually resulted in directions for GEA's preferred court-style discovery regime.

[19] Also at this early stage of its investigation the Authority declined, on 7 December 2015, a separate application by Mr Schicker for leave to raise a personal grievance out of time.[11]

[20] Four case management conferences were convened between 5 October 2015 and 30 March 2016. On 6 May 2016 the Dynaflow directors lodged an affidavit effectively completing what they considered they needed to do at that stage of the investigation. Ten months later, on 6 March 2017, Dynaflow's lawyers lodged a memorandum complaining about the delay in the proceedings. During the intervening 300 or so days between those events the Authority twice sought information from GEA about progress.

[21] On 26 August 2016 an Authority Officer sent this message to GEA's counsel:

> I note from the Authority's file that the last message from a party in this matter is 9 May 2016 (an email from Mr Hogg to Mr Grindle and the Authority Officer). Would counsel for the Applicant and the Respondent please advise the Authority what steps, if any, they consider are now necessary in respect of this matter.

[22] On 1 September 2016 GEA's counsel advised the Authority they had written to the solicitors of the Dynaflow directors seeking agreement on use of certain documents listed in the confidential and out of scope sections of their affidavit. The message from GEA counsel ended with this sentence: "We will update you when we have heard from Dynaflow's solicitors".

[23] Five months then passed with no further information or contact from GEA counsel. On 9 February 2017 an Authority Officer sent the following query on my behalf:

> I note from the Authority's file that it appears the last message from Applicant's counsel about progress in this matter was received on 1 September 2016. That message was, in turn, sent in response to an Authority query that noted the previous last message from a party had been received on 9 May 2016. Should this Authority file now be closed?

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[11] *Schicker v GEA Process Engineering Limited* [2015] NZERA Auckland 384.

[24] GEA's counsel replied that day:

> … No, this file should not be closed.
>
> The issue of which documents the Dynaflow witnesses consent to being used in this proceeding is still being worked through between the lawyers for Dynaflow and us (Dynaflow has also changed lawyers, now).
>
> We anticipate filing an application with the Authority in respect of documents whose production cannot be agreed, as soon as that is possible, and then to have the matter set down for a Meeting.
>
> I have copied Dynaflow's new lawyers into this email. …

[25] However GEA had not lodged any application by the time, some 25 days later, that Dynaflow's lawyers lodged their 6 March 2017 memorandum complaining about delay, seeking costs and asking for a case management conference.

[26] Over the following weeks the Authority attempted, from 10 March onwards, to arrange a case management conference with counsel. Six separate dates were proposed: 24 March, 7 April, 13 April, 21 April, 5 May and 12 May 2017. A conference call was eventually able to proceed on 12 May.

[27] In a Member's Minute issued on 24 April 2017 I gave counsel notice of the following preliminary view:

> I have reached the preliminary view that the appropriate next step is for the Authority to issue a determination dismissing GEA's application for want of progress and to order costs lie where they fall. The Authority has been unable to secure sufficient co-operation from the parties to be able to continue its investigation. Such a determination by the Authority could then be subject to challenge to the Employment Court, probably on a de novo basis, so that if dissatisfied by that conclusion, GEA could pursue its claims against Mr Schicker in the Court and/or the Dynaflow business directors and their employee Mr Schicker could ask the Court to determine any costs issues they may wish to have addressed.[12]

[28] On 10 May 2017 Mr Schicker's counsel lodged a memorandum calling for the Authority to strike out GEA's claim. He submitted GEA's conduct of the case was not consistent with what the Act envisaged for Authority investigations. In an accompanying affidavit Mr Schicker deposed he had been in excellent health before GEA began its litigation against him but had since been diagnosed with a stress-related condition and prescribed anti-depressant medication.

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[12] Employment Relations Act 2000, s 160(1)(f), s 173(2) and (3), and s 174D.

[29] In relation to that evidence Mr Schicker's counsel made the following submissions:

> Nowhere is the inherent inequality of power between employer and employee more obvious than in this case. Both Dynaflow, but more particularly GEA, have significant resources at their disposal. …
>
> Conversely Mr Schicker is a 66 year old man who lives in rural Northland with his wife and since his resignation from GEA over 27 months ago has been burdened with the stress and cost of being personally responsible for complex and time consuming litigation.
> …
> The process of this matter to date is neither "speedy" nor "non-adversarial"; it is more akin to a civil proceeding in the High Court than an investigation in the Authority
> …
> This case has done nothing to advance the purposes of the Act and in good conscience the Authority is empowered to and should strike out the Applicant's claim for want of prosecution.

[30] Dynaflow also lodged a memorandum shortly before the 12 May conference call supporting the preliminary view that the proceeding should be dismissed. It repeated a claim made by the Dynaflow directors in an affidavit they lodged in March 2016 expressing concern GEA was "using this proceeding for purposes other than seeking the relief sought against Mr Schicker". It said this purpose was access to Dynaflow's information. Dynaflow submitted that because of "the extent of delay and the extent to which the matter has been allowed to be dormant, there is at least the prospect that [GEA's] case is frivolous … and … being advanced for an ulterior motive."

[31] GEA lodged a memorandum before the conference call too. It opposed dismissal of its claim. It referred to the 10-month period from 6 May 2016 to March 2017. During that time GEA's counsel wrote a letter to Dynaflow's solicitors on 1 September 2016, received a reply on 12 December 2016 and GEA's counsel sent a further letter on 10 March 2017. It submitted that while the Authority appeared to have the powers referred to in its 24 April memorandum to counsel (where dismissal of the proceedings was indicated as a preliminary view), those powers had to be exercised in a reasonable manner having regard to its investigative role, referring to s 173 (1)(b) of the Act.

[32] During the 90-minute long conference call held on 12 May GEA's counsel expanded on those submissions about the delay, which he described as "a little bit of slippage". He said responsibility for the delay, analysed on a month by month basis over the 12 month period between May 2016 and the conference call, lay on Dynaflow's "side of the ledger". He acknowledged the Authority "did prompt us" (referring to the August 2016 and February 2017 queries) and said it was a "fair point" when asked why GEA had not come back to the Authority if there was a problem with Dynaflow.

[33] Counsel acting for Dynaflow at that conference call, Peter Churchman QC (as he was then), described the proceedings as having "overtones of a commercial dispute" and being more suited to be disposed of by the Employment Court. This was because the process for discovery of documents had become technical, substantial and was being conducted under what were effectively High Court rules. Dynaflow supported ending the proceedings in the Authority on the basis that GEA could still pursue the matter in the Employment Court if it wished.

[34] GEA's counsel then had the opportunity to respond to those submissions, both orally during the conference call and under timetable directions set at the end of it. A decision on the notion of dismissal of its application was reserved meanwhile. GEA did lodge further submissions on the issue of removing Dynaflow's costs application to the Employment Court.

[35] Against that extended account of the background GEA cannot reasonably say there was failure to observe the principles of natural justice before the Authority issued its First Determination in June 2017. It was not subject to an arbitrary and unexpected outcome. The Member's Minute of 24 April gave GEA clear notice of what might happen. GEA had an opportunity to comment on what was expressed to be a preliminary view, and therefore subject to persuasion. GEA made written submissions before the 12 May conference call. It was able to respond to written and oral submissions of Mr Schicker and Dynaflow during the conference call. It had a further opportunity to lodge written submissions after that call.

[36] However GEA's application also said a rehearing was needed, to avoid the risk of a miscarriage of justice, because findings made about GEA's actions or omissions during the period from May 2016 to March 2017 were wrong. Its

submissions appeared to address this point under an argument that findings made in the First Determination were "not reasonably open to reach".

[37] I have reviewed the passages identified in GEA's submissions and am satisfied that findings of facts made were open to the Authority, particularly about the limited correspondence between the parties and the long gaps between those letters. GEA did not like an opinion expressed in the First Determination that the limited correspondence and long gaps invited an inference that it had preferred delay to progress but that was not the decisive finding of fact. What was decisive was the delay in GEA responding to the Authority's queries, as identified by the highlighting in the following extracts from the First Determination:

> [38] … On 1 September 2016 GEA said it would update the Authority, once it had heard from Dynaflow's solicitors, but **did nothing during the following five months <u>to indicate to the Authority</u> there were any problems getting a response.** On 9 February 2017, in response to the Authority's next query about progress, **GEA said it "anticipated" filing an application** about documents on which production could not be agreed. However, **GEA had not filed such an application by the time (almost a month later)** that the summonsed witnesses lodged their 6 March 2017 memorandum …
>
> [39] … If GEA was diligently pursuing its claim and there were genuine disclosure issues to resolve, GEA **<u>should have alerted the Authority</u> to those concerns when asked about progress in August 2016 and February 2017**.

[38] There was nothing wrong about the fact of the date of inquiries made by the Authority to GEA's counsel and the extent of response to them. They were known to the parties, were part of a chronology sent with the Authority's 24 April memorandum, and were the subject of discussion during the 12 May conference call. Findings on those facts were reasonably open to the Authority to reach.

[39] Ms Smith's affidavit and GEA's submissions on its reopening application suggested the First Determination also made an unfair conflation between the company and its lawyers by referring to activity of its counsel as what "GEA" did. Referring to those actions in that way is a matter both of convention and of law. A submission, for example, is made by counsel but is often said in an Authority determination or a Court decision to be what X or Y party submitted. In this case GEA's submissions on its reopening application said that "if anyone was to blame for delays, it was counsel … not the applicant". Ms Smith, in her affidavit, referred to the parties' lawyers "running the process to resolve these disagreements [over

documents]". Because of an order for counsel-only access to some confidential documents provided by Dynaflow, Ms Smith said she was not permitted to be shown the documents in issue. She said that, while she had no reason to believe GEA's lawyers were delaying matters, "it would seem a bit unfair to attribute the Authority's criticism of them, to GEA". However the actions of any party's counsel – in participating in an investigation, including document disclosure and communicating with the other party and the decision-making forum – are as the representative or agent of that party. In that respect counsel's deeds are the party's deeds. Again the findings made on that point were reasonably open to the Authority to reach.

**Denial of a statutory right to an Authority investigation?**

[40] GEA submitted the First Determination was issued in breach of the Authority's duty to investigate under s 157(1) of the Act. It submitted the Authority had misused its s 175(3) obligation to act as it thinks fit in equity and good conscience because the Authority was prohibited from acting on such thoughts if doing so would be inconsistent with the Act.

[41] Two difficulties arose in GEA's submissions on this point. Firstly, it overstated the nature of what the Authority is required to do by way of investigation. Secondly, it mischaracterised what had happened from 15 June 2015 to 27 June 2017 as not being an investigation.

[42] On the first point the Act established the Authority as "a specialist decision-making body … not inhibited by strict procedure" (s 143(f)) and "an investigative body" (s 157(1)). It is given powers to investigate any matter within its jurisdiction (s 160). Limits and requirements are set on the use of those powers – see s 157(2) and (3), 160(2)-(4) and s 173. There is however no mechanical direction about how, as an investigative body, the Authority is to carry out its role of resolving employment relationship problems. Rather the Act states resolution is to be achieved by "establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities". The process is investigative but it does not require the event of an investigation meeting in every case for a determination to be made (s174D). What must be done is for the Authority to comply with the principles of natural justice and to act as it thinks fit in equity and good conscience. While GEA might consider conclusions expressed in the First Determination were

wrong, expressing them (as what was thought fit about the equities and substantive merits of the situation faced in those proceedings to that point) was consistent rather than inconsistent with what the Act directs the Authority to do.

[43] On the second point, this was not a case where no investigation took place. The circumstances were substantially different from those which led to the Court of Appeal's judgment in *Employment Relations Authority v Rawlings*.[13] In *Rawlings* the Authority had said it would not investigate a matter unless the applicant lodged an amended statement of problem, removing certain abusive comments, within four week. When he did not do so the application was treated as withdrawn. On the facts of that case the Court of Appeal only went as far as to say it was "arguable" the Authority had a duty to resolve the problem and there was "arguably" no statutory basis for declining to exercise the relevant statutory jurisdiction.[14]

[44] By contrast the Authority's investigation since GEA's application was lodged in 2015 had a lengthy chronology. Case management conferences were held on 5 October 2015, 13 November 2015, 7 December 2015 and 30 March 2016. These included discussion and inquiries about relevant documents, who held them and what might be done to ensure they were available for the Authority and the parties to use in preparation for an investigation meeting. The inquiries made of counsel in August 2016 and February 2017 were also part of that investigative process. So too was the consideration given to the submissions made before, at and after the 12 May 2017 conference call.

[45] It was against that background of endeavours to progress an Authority investigation that a determination was made, after hearing from the parties on that prospect, that the merits and equities of the situation meant no further investigation should occur and the application should be dismissed. Part of the First Determination's assessment of those equities was the likely ability of GEA to proceed to have its claim against Mr Schicker heard and determined in a judicial forum:

> [41] GEA can, as a result of this determination, now proceed by way of challenge to have its claim heard by the Employment Court, without having first incurred the time and expense of a full Authority investigation. The outcome in the Authority has determined GEA's substantive rights. It is not merely a conclusion on a procedural matter. It automatically generates a

[13] [2008] NZCA 15.
[14] At [21].

> statutory right for GEA to file a challenge in the Employment Court and have the whole matter heard there. In this way GEA still has access to justice, with the right to have its claim decided in an appropriate forum in the employment jurisdiction.
>
> [42] If GEA considers the Authority's conclusion has been arbitrary or unreasonable, a hearing and decision by the Court can correct those errors. There was nothing to suggest GEA was a party with resources so limited that it could not continue to pursue this matter in the Court. If GEA now chooses to exercise its right to have its claim heard in the Court, it will do so without having first incurred the cost of preparing for and participating in an Authority investigation meeting but after having begun a process of disclosure of documents which is still of use in a Court proceeding. This is to GEA's advantage as much as its disadvantage.

[46] GEA submitted the problem of having to proceed by way of challenge in the Court was that its claims would be decided by an adversarial process, not an investigation of them. It said the adversarial process was not a satisfactory replacement for its right to have its claims actively investigated by the Authority.

[47] While there are differences in the methodologies applied in the processes of the two statutory institutions, the Court has cautioned against "the unfortunate perception of jurisdictional chauvinism involving claims to the superiority of one methodology of decision making over the other".[15] Both result, albeit in a different order and way, in the evidence being gathered and thoroughly tested.

[48] By May 2017 issues in the court-like discovery process (begun on GEA's initiative in late 2015) were arguably more suitable for resolution in the Court in any event. What counsel called "document issues" still to be resolved meant the Authority investigation was still some way off from being able to consider all the substantive evidence. On that view it would have been open to the Authority, on its own motion, to have removed the matter to the Court anyway.[16] And, with the benefit of hindsight, that may have been the better option for the Authority to have considered in May 2017. However that would have been to the same effect as the outcome of the First Determination and would not have resulted in continuation of the Authority investigation anyway. It was not a reason to re-open the investigation.

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[15] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [41].
[16] Employment Relations Act 2000, s 178(1) and (2)(d).

**Denial of a statutory right to challenge?**

[49] GEA submitted one factor favouring reopening of the investigation was that to do so would prevent the injustice of it having lost an important statutory right to be able to file a challenge in the Court against an Authority determination of its substantive claim against Mr Schicker, should GEA choose to do so.

[50] Consideration of the same factor, about the loss of a stage of challenge, arises in removal cases so they are a useful guide on this point. It is clear from a reading of those cases that this is one factor among many and has no primacy or greater weight when the circumstances of each case are being considered. They acknowledge parties may thereby be deprived of a general right of appeal against findings of fact in the Authority at first instance but note that the Act envisages that to be an acceptable consequence in some cases. Issues of costs and proportionality may be of greater importance than the loss of the stage of participating in an Authority investigation. As noted in the Employment Court's decision in *Johnston v The Fletcher Construction Company Limited*:[17]

> … Litigation tends to be expensive. Employment litigation is no exception, particularly where an investigation meeting runs for days or weeks, and calls for numerous procedural steps (the exchange of briefs of evidence, disclosure, preparation of bundles of documents, and the preparation and filing of written submissions) which will inevitably be replicated if the matter proceeds to an adversarial hearing in the Court. Litigants have an interest in where their (generally limited) financial resources are applied. … A case which, for example, is likely to consume weeks of hearing time in the Authority, requiring a more formal, procedure-laden approach, and where the unsuccessful party is likely to wish to pursue their statutory right of de novo challenge, may well be better suited for hearing in the Court. Much will depend on the circumstances of each case.

[51] Those considerations apply in equal measure to the circumstances of the present case at the stage it had reached by the time of the First Determination. GEA had lost whatever benefit there might have been of a continued Authority investigation and the ability to challenge whatever finding of facts might have been made in it, however it retained its right to challenge the First Determination and have the Court hear and decide the substance of its claim against Mr Schicker. It has already exercised that right by lodging its challenge (which has been stayed pending the outcome of GEA's subsequent application for a reopening of the Authority investigation). Whatever dissatisfaction GEA might have with loss of a stage before

[17] [2017] NZEmpC 157 at [36] and [39].

challenge did not outweigh the other circumstances of the case that warranted that loss, so was not sufficient to amount to a miscarriage of justice warranting reopening of the Authority investigation.

**A check against relevant principles**

[52] Returning to the principles outlined in paragraph [13], I reached the following conclusions.

[53] GEA's reopening application largely re-argued points either made, or able to be made, at the time of the 12 May 2017 conference call held by the Authority to consider whether the matter should be dismissed. It has now provided, through the affidavits of Ms Smith and Mr Schofield, some additional information about the background of correspondence between the solicitors of GEA and Dynaflow. This additional information did not change the substance of the information that was available to the Authority on 12 May (which included a page-and-a-half of GEA's memorandum setting out what it called "information on the process being worked through"). Even if additional detail in the affidavits of Ms Smith and Mr Schofield was substantively different, it was information that could have been disclosed at the earlier time and did not amount to a special or unusual circumstance warranting reopening.

[54] GEA has submitted that the Authority, in its First Determination, misapprehended or overlooked relevant statutory provisions. I was not persuaded GEA's lengthy written submissions about the interpretation and the proper application of those provisions were correct or that the application of those provisions in the outcome reached in the First Determination amounted to an actual miscarriage of justice or the real risk of one. If GEA wished to pursue its substantive claim against Mr Schicker, it retained access to justice in the form of a hearing and decision in the Employment Court by using the statutory process of a challenge under s179 of the Act. Reopening of the investigation was not necessary to provide GEA access to justice.

**Determination**

[55] For the reasons given in this determination GEA's application for reopening of the investigation of its claim against Mr Schicker is declined.

**Costs**

[56] There appeared to be no issue as to costs in relation to GEA's reopening application. Mr Schicker did not oppose the reopening question being considered by the Authority but opted not to participate in it.

Robin Arthur
Member of the Employment Relations Authority