

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 53
5446354**

BETWEEN DAVID GEORGETTI
 Applicant

AND COMPASS COMMUNICATIONS
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Dean Organ, Advocate for Respondent

Investigation Meeting: On the papers

Submissions received: 22 January 2015 from Applicant
 9 February 2015 from Respondent

Determination: 20 February 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr David Georgetti has applied to the Authority for a reopening of an investigation¹ pursuant to clause 4 of Schedule 2 to the Employment Relations Act 2000 (the Act).

[2] The basis for Mr Georgetti's application to reopen is to revisit the amount ordered to be paid to him in respect of unpaid bonus payment set out in determination [2014] NZERA Auckland 530. In so doing Mr Georgetti seeks to submit further evidence and/or detail on the methodology used by the Respondent, Compass Communications Limited (Compass), to calculate the bonus payments.

[3] Mr Dean Organ, on behalf of Compass, opposes the application to reopen the investigation made by Mr Georgetti on the basis that the Authority has considered Mr Georgetti's arguments prior to issuing its determination.

¹ [2012] NZERA Auckland 117

Background Facts re: litigation

[4] During 2014 Mr Georgetti filed a claim in the Authority that he was owed monies by Compass in respect of unpaid bonuses earned by him during the period March 2012 to August 2013.

[5] The parties agreed to have the matter determined 'on the papers' by the Authority with Mr Georgetti filing submissions on 25 November 2014, and Compass on 2 December 2014. Mr Georgetti and Compass had the opportunity to, and did in fact, file supporting evidence in addition to submissions in support of their positions.

[6] On 22 December 2014 the Authority issued its determination in the matter involving the parties. At that time and subsequently, Mr Georgetti was advised of his right to challenge the determination in the Employment Court should he wish to do so.

[7] On 19 January 2015 Compass exercised its right pursuant to s 179 of the Act to have a portion of the determination by the Authority reheard in the Employment Court.

[8] On 21 January 2015 Mr Georgetti filed an application for reopening the investigation in the Authority pursuant to clause 4, schedule 2 of the Act which states:

4 Reopening of investigation

(1) 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.

Determination

[9] The general principles relating to the orderings of rehearings in the Employment Court are applicable to reopenings in the Authority. In *Cavalier Carpets NZ Ltd v NZ (except Taranaki etc) Woollen Mills etc IUOW*² the then Labour Court set out as an overarching principle in respect of whether or not a rehearing should be granted if there has been a miscarriage of justice.

[10] The Labour Court set out the main forms of a miscarriage of justice by citing r 494(3) of the High Court Rules, which would apply by analogy to the specialist employment law institutions. The relevant circumstances applicable in this case include:

² [1989] 2 NZILR 378

(b) The Judge has admitted improper evidence, or rejected evidence which ought to have been admitted;

(e) Material evidence has been discovered since the trial which could not reasonably have been foreseen or known before the trial

[11] In this case the evidence now sought to be admitted by Mr Georgetti is not “*rejected evidence*” or “*material evidence*” which was not available at the time of the investigation meeting. Rather it is in the nature of further submissions on evidence which had already been filed with the Authority.

[12] On this basis I do not find grounds for re-opening my investigation in which provision was made for the parties to file their evidence in ample time for me to give such evidence my full consideration. I reiterate that Mr Georgetti had agreed that the investigation meeting be conducted on an ‘on the papers’ basis.

[13] An importance consideration in addition to that of the possibility of a miscarriage of justice, is that of the importance of finality in litigation. In *Ports of Auckland Ltd v NZ Waterfront Workers Union*³ the Court of Appeal stated:⁴

... Our view is that in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by the successful litigant, particularly in dispute resolution cases like this one, to enjoy the fruits of a judgment in its favour.

[14] In this case, whilst finality in litigation is an important consideration, the determination has been appealed to the Employment Court by Compass and therefore I do not find it as weighty a consideration as the possibility of a miscarriage of justice. As stated, I do not find that there is substance in an argument that my determination constituted a miscarriage of justice for the reasons set out above.

³ [1995] 2 ERNZ 85

⁴ Ibid at [88]

[15] As a final observation, now the Employment Court is apprised of the matter, Mr Georgetti will have a further opportunity to present his submissions on his evidence at that time.

[16] In all the circumstances, the application to reopen is dismissed.

Costs

[17] Costs are reserved. The Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority