

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 40
3190939

BETWEEN HAPPY EATING LIMITED
Applicant

AND LILI WANG
Respondent

Member of Authority: Rachel Larmer

Representatives: Martin Lyttelton, advocate for the Applicant
David Kim, advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 4 October 2022 from Respondent
24 November 2022 from the Applicant

Date of Determination: 27 January 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Re-opening application

[1] Happy Eating Limited (Happy Eating) applied to re-open the substantive investigation in order to have the Authority's findings that Ms Wang had been unjustifiably dismissed, and was entitled to \$4,000 distress compensation, relitigated.¹

[2] The re-opening application was based on new evidence Happy Eating received from Ms Jessie Bo, who is a director and shareholder of Greentree NM Catering Limited (Greentree), that proved Ms Wang had been employed by Greentree from 2 October 2020 to 17 November 2020.

¹ *Wang v Happy Eating Ltd & Ors* [2022] NZERA 424.

[3] Happy Eating alleged that during the substantive investigation meeting, Ms Wang was asked if the following deposits into her bank account were wages she had been paid by other employers:

- (a) From Greentree on 30 October, 9, 16, 20 and 26 November 2020;
- (b) From Prince Bubu Limited (Prince Bubu) on 14 and 24 December 2020 and on 8 and 14 January 2020;²
- (c) From Hebridies on 28 January 2021 and on 11 and 25 February 2020.³

[4] Happy Eating alleged Ms Wang had denied these payments were wages and said that she did not know, and had not been employed by, Ms Bo, Greentree, Prince Bubu or Mr Hebridies.

[5] Happy Eating said its “*new evidence*” contradicted what Ms Wang had told the Authority, and therefore established that Ms Wang had “*perjured herself*” when giving evidence at the substantive investigation meeting.

The new evidence

[6] Happy Eating relied on the following documents that were not provided to the Authority before it issued its substantive determination:

- (a) A conditional employment agreement that Ms Wang signed on 17 August 2020 with Greentree NM Catering Limited (Greentree);⁴
- (b) A variation to her work visa that Immigration New Zealand (INZ) issued on 30 September 2020 that permitted Ms Wang to work for Greentree (trading as Master Bao) at Westfield Shopping Centre in Newmarket, Auckland;
- (c) A personal grievance letter dated 24 March 2021, that Ms Wang’s advocate (Mr David Kim) sent Greentree that stated Ms Wang had been employed by it from 2 October 2020 to 17 November 2020.

² Prince Bubu is a restaurant on Karangahape Road in Auckland.

³ Mr Hebridies was the owner of Prince Bubu.

⁴ It was conditional on Ms Wang obtaining a variation to her work visa, to enable her to work for Greentree.

Issues raised by Happy Eating that were outside the scope of the re-opening application

[7] Happy Eating's re-opening application also raised concerns that:

- (a) Ms Wang still had other audios of the parties that she had not disclosed;
- (b) Ms Wang had worked for Greentree from 2 October 2020 until 17 November 2020, after having provided a medical certificate to Happy Eating that said she was medically unfit to work from 1-14 October 2020;⁵
- (c) Ms Wang had worked for Prince Bubu after her employment with Greentree ended.

[8] Those three matters were outside the scope of this re-opening application because:

- (a) The allegation that Ms Wang had not disclosed all of the audios she had made was put before the Authority during its substantive investigation, so it knew that Happy eating believed that before it issued the substantive determination.⁶ There was no new evidence about this, so concern about the audios had to be dealt with by a challenge;
- (b) Ms Wang's work for Greentree from 2-14 October 2020 was not relevant to the Authority's decision that a dismissal had occurred, because Ms Wang's employment with Happy Eating had ended before then. Paragraph [60] of the substantive determination also noted Ms Wang's evidence that she had "*officially left*" her employment with Happy Eating by 1 October 2020;
- (c) The allegation that Ms Wang had worked for Prince Bubu had already been made during the substantive investigation and was repeated by Happy Eating in its submissions for the substantive matter. This allegation was therefore considered by the Authority before the substantive determination was issued. There was also no new evidence produced about this issue.

Ms Wang's position on the re-opening application

[9] The re-opening application was opposed by Ms Wang.

⁵ Ms Wang said she was unfit to work for Happy Eating because of the humiliation she suffered due to her dismissal on 17 September 2020.

⁶ Above n1, at [34] – [39].

[10] Although Ms Wang submitted that the basis for the re-opening was “*groundless*”, she did not challenge Happy Eating’s claims that, when questioned during the substantive investigation meeting, she had told the Authority she had not worked for, been paid wages, or had even known the three people/entities that had deposited money into her bank account.

[11] Ms Wang’s position was that confirmation of her employment by Greentree was not relevant to her unjustified dismissal on 17 September 2020. She said she would have resigned from her employment with Happy Eating on 30 September 2020 (after INZ had issued her work visa variation) if Happy Eating had not already dismissed her on 17 September 2020.

Authority’s investigation

[12] By agreement with the parties, the re-opening application has been determined ‘on the papers’.

[13] Both parties had an opportunity to file any affidavits and submissions they wanted taken into account before the application was determined. Happy Eating filed submissions and documents in support of its application. Ms Wang relied solely on the information in her Statement in Reply.

[14] I was able to review the witness statements, bundles of documents and submissions the parties filed for the substantive investigation, along with the substantive determination.

[15] The Authority is not a court of record, so there is no authorised recording or transcript of the oral evidence that witnesses gave during the substantive investigation meeting. Because the substantive investigation meeting was conducted by the previous Member, I did not have personal knowledge of what Ms Wang did or did not say in her oral evidence.

[16] However, significantly Ms Wang did not deny Happy Eating’s allegations about what she had said during the substantive investigation meeting. If Ms Wang had not said what Happy Eating claimed she had said, then the Authority expected her to have expressly denied those allegations.

[17] In the absence of a denial or dispute over what Ms Wang did or did not say during the substantive investigation meeting, the Authority has inferred that Ms Wang likely did deny being employed by Greentree. If so, then her denial about that has been contradicted by the new evidence.

Relevant law

[18] Clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act) gives the Authority discretion to re-open an investigation, on such terms as it thinks reasonable. This discretion must be exercised on a principled basis.

[19] The Authority's discretionary power to re-open an investigation recognised that there may be some limited circumstances in which the public interest in avoiding a miscarriage of justice, or serious risk of a miscarriage of justice occurring, outweighed the considerable public interest in the finality of litigation.

[20] The relevant principles have been summarised by the Employment Court as:⁷

The [re-opening] jurisdiction is not to be exercised for the purposes of relitigating arguments already considered or so as to provide a backdoor method by which unsuccessful litigants can seek to re-argue their case. Some special or unusual circumstance must be found to exist to justify re-opening. This may include where fresh or new evidence has been discovered that is material to the outcome of the case and that could not have been given at hearing.

[21] A mere possibility of a miscarriage of justice is insufficient to warrant re-opening an investigation. What is required is an “*actual miscarriage of justice*” or a “*real or substantial possibility or substantial risk of a miscarriage of justice*” occurring if the determination that is the subject of the re-opening application was allowed to stand.⁸

[22] Three qualifying criteria apply to an application by a party to adduce fresh evidence:⁹

- (i) The evidence could not have been obtained with reasonable diligence to be produced to the Authority during its initial investigation;
- (ii) The evidence must have an important influence on the result of the case, although it need not be decisive; and
- (iii) The evidence must be credible, although it did not need to be incontrovertible.

⁷ *Randle v The Warehouse Ltd* [2009] NZEmpC 68 and *Alkazaz v Enterprise IT Ltd* [2020] NZEmpC 171.

⁸ *Alkazaz* above n7 at [9].

⁹ Above n7.

Issues

[23] The following issues are to be determined:

- (a) Was the new evidence material to the substantive determination?
- (b) Did the new evidence meet the three qualifying criteria for a re-opening application?
- (c) Would there be a miscarriage of justice, or a serious risk of a miscarriage of justice occurring, if the substantive investigation was not re-opened?
- (d) Was re-opening the substantive investigation in the overall interests of justice?

Is the new evidence material to the substantive determination?

[24] The new evidence was not directly relevant to whether or not Ms Wang had been dismissed on 17 September 2020, but it was relevant to the Authority's assessment of Ms Wang's credibility.

[25] Ms Wang and Mr Sun gave conflicting accounts of what was said and done on 17 September 2020 and on the subsequent days after that. The Authority had to resolve that conflict on the balance of probabilities, by determining what was more likely than not to have occurred.

[26] Whether or not a dismissal had occurred involved an intensely factual inquiry that included many elements and was far wider, and more nuanced, than simply deciding whether or not anything Ms Wang had said anything during the investigation meeting was untrue.

[27] The possibility that Ms Wang could have been proven to have given untruthful evidence about whether she had been employed by Greentree would therefore not have been decisive of the dismissal claim.

[28] That meant the new evidence was therefore relevant but, when viewed within the overall context of the entire substantive investigation, it would have been of limited relevance, so it was unlikely to have been material to the outcome.

Did the new evidence meet the three qualifying criteria for a re-opening application?

Could the new evidence have been obtained during the initial investigation?

[29] Happy Eating could have obtained the new evidence from Ms Bo immediately after the investigation meeting, and before it had filed its submissions, if it had made appropriate inquiries at that time. The new evidence existed, so was therefore potentially available, prior to the substantive investigation meeting.

[30] Ms Bo is the director of Greentree and she operates a number of restaurants in Auckland. Ms Bo's contact details are recorded on the Companies Register so she was easily contactable. Therefore, a reasonably diligent inquiry could have obtained the new evidence for the Authority prior to the issuing its substantive determination.¹⁰

Would the new evidence have had an important influence on the outcome?

[31] The new evidence was unlikely to have had an important influence on the outcome.

[32] Other findings in the substantive determination indicated the previous Member had not considered Ms Wang a credible witness. The dismissal decision had therefore occurred within the context of Ms Wang having been viewed by the Authority as someone whose credibility was already impaired.

[33] The new evidence would also not have been decisive of whether or not a dismissal occurred on 17 September 2020. It would have merely been one of a range of factors that were considered by the Authority when it was determining what had likely been said and done by the parties on 17 September 2020 and the subsequent days after that.

[34] Paragraphs [63] to [69] of the substantive determination indicated that the dismissal finding was based on the Authority's view that Mr Sun's evidence about what had transpired on 17 September 2020 was unsatisfactory, as opposed to a finding that Ms Wang was an entirely truthful witness.

[35] The previous Member also had far more evidence available to her than what was recorded in the substantive determination, including but not limited to:¹¹

- (a) Mr Sun's witness statement dated 26 January 2022 that admitted (on behalf of the other respondents) Ms Wang was unhappy on 15 September 2020 because she had been informed that Happy Eating "*cannot give you full time work right*

¹⁰ There were six and a half months between the investigation meeting and the substantive determination.

¹¹ Above n1, at [10].

now”, so she could only work 80% of her normal working hours (with a corresponding reduction in her pay);”¹²

- (b) Happy Eating’s submissions dated 18 February 2022 that stated Mr Sun had agreed with Ms Wang on 17 September 2020 that Happy Eating would support her to obtain a higher paying job elsewhere.

Was the new evidence credible?

[36] The new evidence was credible.

Finding on qualifying criteria for new evidence

[37] Two of the three qualifying criteria for re-opening a matter based on new evidence were not established. That undermined the need for this matter to be re-opened to consider the new evidence.

Would there a miscarriage of justice, or a serious risk of a miscarriage of justice occurring, if the investigation was not re-opened?

[38] Whether or not Ms Wang had been dismissed was dealt with in paragraphs [53] to [69] of the substantive determination.

[39] The dismissal finding involved an intensely factual inquiry. In accordance with s 174E of the Act, not all of the evidence that influenced that finding was recorded in the substantive determination.

[40] The previous Member was aware that Happy Eating claimed that Ms Wang was a liar, her evidence was not credible and that she had perjured herself during the substantive investigation meeting and that Ms Wang had been applying for jobs before her alleged dismissal on 17 September 2020.¹³

[41] The previous Member was therefore aware of all of these factors when she made the finding that it was more likely than not that Mr Sun had verbally dismissed Ms Wang on 17 September 2020. The new evidence was therefore another attempt by Happy Eating to further undermine Ms Wang’s credibility, post the substantive determination.

¹² This reduction in hours was due to Covid-19 related financial pressures.

¹³ Happy Eating’s submissions on the substantive matter made that clear.

[42] However, I was not satisfied that there has been a miscarriage of justice because the previous Member did not have the new evidence available to her. Nor was there a serious risk of a miscarriage of justice occurring if the substantive investigation was not re-opened.

[43] Happy Eating was effectively seeking to isolate out a small part of Ms Wang's evidence, namely that she said she had not been employed by Greentree, that was not directly relevant to the dismissal finding, so it could relitigate the Authority's finding that there had been a dismissal, without filing a challenge.

[44] That approach ignored the reality that a wide range of evidence was given careful consideration by the Authority before the dismissal finding was made. While an assessment of Ms Wang's credibility was part of that exercise, it was not the only factor that was taken into account.

[45] A careful analysis of the deficiencies in Mr Sun's evidence was also undertaken which led the previous Member to conclude "*Mr Sun was less able to furnish a coherent account of events. He also appeared to evade a direct answer to some initial questions.*"¹⁴

[46] The previous Member's view of the unsatisfactory nature of Mr Sun's evidence was clearly fundamental to the dismissal finding.¹⁵ This was not a situation where the Authority had concluded that Ms Wang was an entirely truthful witness, but was rather one in which Mr Sun's oral evidence about the alleged dismissal discussions was found to have been deficient.

[47] The new evidence was not relevant to the Authority's assessment of Mr Sun's account of his discussions with Ms Wang on 17 September 2020, so it was not material to the dismissal decision.

[48] Therefore the fact that Ms Wang may have been untruthful about not having been employed by Greentree could, at best, still only be viewed as a very small piece of the overall evidential puzzle. For example, the dismissal finding was made within the context of other findings that indicated adverse conclusions had already been drawn about Ms Wang's credibility:

¹⁴ Above n1, at [64].

¹⁵ Above n1, at [63] to [69].

- (a) Paragraph [24] noted a discernible difference in the pattern of recording of hours of work and Ms Wang's handwritten records;
- (b) Paragraphs [27] and [28] suggested Ms Wang had edited the Google records she had provided, so they were not accepted as an accurate representation of the hours she had worked;
- (c) At paragraph [47], Ms Wang's evidence about her hours of work was not accepted;
- (d) At paragraph [48], the Authority held that Ms Wang's evidence contradicted her rest breaks claims; and
- (e) At paragraph [51], the Authority concluded that Ms Wang had not proven any of her wage arrears claims.

[49] The previous Member also had sufficient evidence (the bank statements, Ms Wang's failure to comply with the Authority's direction to provide an IRD print out of her earnings, and the lack of a lost remuneration claim) that also suggested she may not been truthful when she had denied knowing, or being employed by, Greentree or Prince Bubu/Mr Hebrides.

[50] The previous Member did not record Ms Wang's evidence denying employment with Greentree, which indicated it was not considered material. That was likely because an employee may seek, and even obtain, employment elsewhere but still be dismissed by their employer before they have resigned.

[51] An employee who has resigned from their employment may also still be dismissed during their notice period. The new evidence was therefore unlikely to have been material to the dismissal finding.

[52] Happy Eating was unable to establish that there has been a miscarriage of justice, or that there was a substantial risk of a miscarriage of justice occurring, if the substantive investigation was not re-opened.

Was re-opening in the overall interests of justice?

[53] Even if Ms Wang had given untruthful evidence during the substantive investigation meeting, the previous Member was already on notice about that, so that possibility had already been taken into account before the substantive determination was issued.¹⁶

[54] In *Alkazaz* the Employment Court stated that:¹⁷

The power to grant re-opening 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.

[55] The dismissal finding was based predominantly on the inadequacy of Mr Sun's evidence. A re-opening would effectively provide Mr Sun with a further opportunity to re-argue his case and would provide a backdoor method for him to address the deficiencies in his oral evidence. That should not be permitted, because a challenge was the appropriate mechanism to revisit the Authority's findings about Mr Sun's evidence.

[56] This re-opening application was based on a speculative concern about the weight that would have potentially been given to evidence that would likely have impacted on an assessment of Ms Wang's overall credibility. That in itself was not sufficient to justify re-opening the substantive investigation.

[57] The considerable public interest in ensuring that there is finality of litigation, must take precedence in this case. The overall interests of justice therefore strongly weigh in favour of not re-opening the substantive investigation.

Outcome

[58] There has not been a miscarriage of justice. There was also no real or substantial risk that a miscarriage of justice would occur if the substantive investigation was not re-opened.

[59] Allowing the substantive investigation to be re-opened was contrary to the overall interests of justice, which in this case strongly favoured finality of litigation.

[60] Accordingly, Happy Eating's re-opening application did not succeed.

¹⁶ Happy Eating had made that clear in its submissions.

¹⁷ Above n8.

Costs

[61] Because this matter was determined ‘on the papers’, Ms Wang’s participation in the re-opening investigation was limited to her filing a Statement in Reply. Costs should therefore be modest to reflect that. Ms Wang’s advocate charges her \$300 plus GST per hour, so costs have been awarded on that basis.

[62] Happy Eating is ordered to pay Ms Wang \$1,000 plus GST towards her legal costs. That amount must be paid to Ms Wang within 28 days of the date of this determination.

Rachel Larmer
Member of the Employment Relations Authority