

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 173  
5136412

BETWEEN MARY MACFARLANE  
Applicant  
AND CANTERBURY DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority: David Appleton  
Representatives: David Beck, Counsel for applicant  
Penny Shaw, Counsel for respondent  
Investigation Meeting: On the papers by consent  
Submissions received: 14 July 2013 from respondent  
18 July 2013 from applicant  
Additional information received on 13, 22 and 23 August  
2013  
Determination: 26 August 2013

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**DETERMINATION OF THE AUTHORITY**

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**The Authority declines to reopen its investigation for the reasons  
set out in this determination.**

**Employment relationship problem**

[1] This is an application by Ms MacFarlane to reopen an investigation by the Authority after the discovery of documentary evidence (hereinafter referred to as *the new evidence*) that she asserts will assist her in her dispute with the respondent relating to an alleged agreement for the transfer of her accrued service-related benefits when she changed employment from her previous employer, the Nelson/Marlborough District Health Board, to that of the respondent.

[2] It has been agreed that the determination will be made *on the papers* by reference to the statement of problem, the statement in reply, respective submissions from counsel and other documentation available to the Authority, including the determination of the Authority dated 12 October 2009 (CA49A/09). After preliminary consideration of the issues and the respective submissions, however, it became clear that the Authority needed Ms MacFarlane to give evidence on a small number of limited issues. It was agreed that she would do this by way of a sworn affidavit. That was received by the Authority on 13 August 2013. Some limited further information was received from Ms Shaw on 22 August 2013 and Mr Beck on 23 August 2013.

[3] The statutory power of the Authority to reopen an investigation derives from Schedule 2 of the Act, at paragraph 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.*
- (2) *The reopened investigation need not be carried out by the same member of the Authority.*

**Brief summary of events leading to the current application**

[4] Ms MacFarlane was initially employed by the respondent from 1991 until 1994, and again between 1996 until October 2002, when she commenced employment with the Nelson/Marlborough District Health Board. She worked there until around June 2006, when she returned to the employment of the respondent. Member Montgomery in his determination CA49A/09 records that, in her evidence, Ms MacFarlane used the term *transfer* to describe her movements between the different district health boards. However, it seems to be agreed between the parties that the Nelson/Marlborough District Health Board and the respondent are separate employers and that Ms MacFarlane's movements between them entailed leaving the employment of one and commencing employment with the other under a new offer.

[5] It was Ms MacFarlane's claim in the matter originally before the Authority in 2009 that she had been promised by the respondent before she commenced employment with it in 2006 that her unused sick leave, annual leave and long service

leave entitlements which had accrued during her previous employment with the respondent, and during her subsequent employment with the Nelson/Marlborough District Health Board, would transfer over when she became re-employed by the respondent in or around June 2006. It was Ms MacFarlane's case that 58.5 days' of sick leave had accrued under her previous employments and that this should have been recognised when she started employment with the respondent in 2006.

[6] The respondent denied that accrued entitlements other than accrued DHB service had been agreed with Ms MacFarlane prior to her accepting her employment with the respondent in 2006.

[7] A perusal of the Authority's original determination suggests that the main focus of the investigation was the applicability of terms of the relevant collective agreement (the *CDHB-PSA Clerical and Administration Support Services Collective Employment Agreement, 1 April 2004-30 June 2005*) which was rolled over for another year. Clause 4.2 of the collective agreement was considered in particular. It provided that the agreement superseded the expired collective employment contract (and other relevant agreements) as at the coming into force of the new agreement, provided that accrued annual leave, accrued long service leave and accrued sick leave would remain as entitlements for employees who have qualified for such leave, and that the employer would recognise previous service with the employer insofar as it was consistent with the definition of current continuous service.

[8] In his determination, Member Montgomery analysed the terms of the relevant collective employment agreement and the evidence of the respective witnesses for the parties. In his determination CA49A/09, Member Montgomery found the following:

- *The intention of the parties in agreeing to clause 4.2 of the CEA was to provide protection for the accrued entitlements of employees who were a party to the previous expired collective arrangements.*
- *The clause was therefore not relevant to a person employed after the ratification of the 1 April 2004-30 June 2005 CEA.*
- *I find that no assurance was given by Mr Taylor [Service Manager and Nursing Director for Oncology, who offered Ms MacFarlane the position in 2006] that all accrued leave entitlements would be recognised by the respondent when it employed Ms MacFarlane.*

- *I find Mr Taylor agreed to provide Ms MacFarlane with four weeks' annual leave and to recognise her service within DHBs.*
- *The applicant was not unjustifiably disadvantaged by being denied her accrued leave entitlements.*
- *I find the applicant does not have a personal grievance and therefore is not entitled to any remedy.*

[9] By way of a further determination dated 4 March 2010 (CA47/10), the Authority ordered Ms MacFarlane to pay to the respondent the sum of \$2,250 as a contribution to its reasonably incurred costs.

[10] Ms MacFarlane has now lodged an application for the investigation into her dispute with the respondent to be reopened on the basis that she has discovered new evidence which she asserts warrants the investigation being reopened. The new evidence was discovered by Ms MacFarlane's husband in February 2013 while clearing out personal papers. Specifically, he discovered a facsimile which he had sent to his bank to secure a home loan at the time of Ms MacFarlane's move from Nelson to Christchurch in mid-2006. The facsimile had attached to it as evidence of Ms MacFarlane's job offer, a copy of the first page of an appointment letter dated 8 May 2006 that was different from the letter adduced in evidence during the Authority's investigation in 2009.

[11] Ms MacFarlane points out that the recently discovered appointment letter differs from that which was adduced in evidence during the 2009 investigation meeting as the latter letter did not have any reference to the recognition of service-related benefits. The text of the first page of the letter which is on the Authority's 2009 investigation file, and which was before the Authority as evidence, reads as follows:

*8 May 2006*

*Mary MacFarlane*  
[address omitted]

*Please acknowledge your acceptance by signing and returning this copy to undersigned.*

*Dear Mary,*

*Re: Position of Outpatient Administrator, Haematology*

*It is with pleasure I write to formally offer you the position of Outpatient Administrator, Haematology, effective from 22 May 2006. 6.6.06. [This latter date had been added in handwriting.]*

*Although you will be working in Christchurch Hospital, we ("The Employer") reserve the right to request you to work in any other area of the Canterbury DHB should the need arise.*

*You are employed to work 40 hours per week (1 FTE). The salary that you will be paid on commencement in this position will be on grade 2, Step 4 of the Clerical and Administration Salary Scale at a base rate of \$32,426 per annum (\$15.544 per hour).*

*Please note that bargaining has been initiated for new Collective Agreements covering Clerical and Administration Staff at Canterbury District Health Board. The terms and conditions of this Agreement once finalised will be offered to you. If you are a member of the PSA, you will automatically be covered by the CDHB & PSA Clerical & Administration Support Service Collective agreement Employment Agreement. If you are not a member of the PSA, you will be employed for the first thirty days on an Individual Employment Agreement based on the terms and conditions of the Collective Agreement. If you do not advise us within thirty days of your commencement that you wish to become a member of the union, then your employment will continue on an Individual Employment Agreement, based on the terms and conditions of the CDHB & PSA Collective Employment Agreement, a copy of which is enclosed.*

*If you agree (and where applicable) we can inform the union that you have entered into an individual employment agreement with us. Please advise me in writing should you wish us to do so.*

*This offer remains open for five working days from the date of this letter. If you require further time, please advise me within the five day period. Before accepting this offer of employment, you are entitled to seek independent advice and we provide you with a reasonable opportunity to do so. Should you wish to accept this offer of employment, please signify your acceptance by signing the enclosed copy of this letter and returning it to me as soon as possible.*

[12] The second page of the letter is not on the Authority's 2009 investigation file.

[13] The letter discovered by Ms MacFarlane's husband was identical in its terms except in five respects:

- a. it did not carry the Canterbury District Health Board rubric (although, like the previous letter, it did carry the footer showing the name of the hospital, its address, telephone and fax numbers);
- b. it did not bear the statement *Please acknowledge your acceptance by signing and returning this copy to undersigned*, which had been stamped onto the letter on the Authority's 2009 investigation file;

- c. the font was smaller;
- d. the start date of *22 May 2006* referred to in the first line had been omitted and the date *6 June 2006* typed in; and
- e. an additional paragraph had been inserted between the final and penultimate paragraphs of the original letter, as follows:

*As discussed we agree to the recognition of your previous employment within Health for all service related benefits (including Holiday Leave entitlements, Sick Leave entitlements, Redundancy provisions).*

[14] It is on the basis of this recently discovered letter with its additional paragraph that Ms MacFarlane argues that the investigation into her dispute with the respondent should be reopened.

[15] To complicate matters, however, two other versions of letter have been produced to the Authority. One was produced by Ms MacFarlane's Counsel in the Statement of Problem seeking the reopening of the investigation. This version consists of two pages, and differs from the version on the Authority's 2009 investigation file as follows:

- a. It bears a different stamp, saying instead *FILE COPY PLEASE RETURN TO HR ADMINISTRATORS ONCE AUTHORISED;*
- b. It states the start date was 22 May 2006, without any amendment;
- c. It consists of a second page which sets out administrative instructions to the recipient and other statements which do not appear to be material to the subject matter of the dispute between the parties. This second page is unsigned.

[16] Mr Beck states that he believes that this letter was provided by Ms MacFarlane. There is no apparent reason why it is not on the Authority's 2009 investigation file, which otherwise appears complete.

[17] The other version of the letter was produced by Ms Shaw with her submissions in opposition to the application for reopening of proceedings. This version differs from that on the Authority's 2009 investigation file as follows:

- a. It bears no stamp;

- b. The hand written amendment is initialled by Ms MacFarlane;
- c. There is a second page, identical to the one in the version produced by Mr Beck, save that it has two handwritten additions stating the start date of 6 June 2006, initialled by Ms MacFarlane, and also is signed by Mr Taylor and counter signed by Ms MacFarlane, and dated 11 May 2006.

[18] Ms Shaw states that she believes that this signed version was not disclosed to the Authority in 2009 because it was identical to that produced by Ms MacFarlane at the time and its contents were not in dispute.

### **The parties' respective submissions**

[19] It is Mr Beck's submission on behalf of Ms MacFarlane that the paragraph missing from the letter put before the Authority in 2009 in effect shows that she was given a promise that she would have continuous service for all time spent previously in the health service and that it was not the intention of the parties for her to commence with the respondent as if she were a new appointee with no accumulated benefits. Mr Beck on behalf of Ms MacFarlane asserts that to fail to reopen the investigation in the light of the new evidence would be inequitable as it is evident a miscarriage of justice has occurred.

[20] Ms Shaw, on behalf of the respondent, states that the respondent opposes the application on the grounds that there is no substantial possibility, or a real or substantial risk, of a miscarriage of justice if the Authority does not reopen the investigation, particularly as the new evidence is not the best evidence of the agreement between the parties and it could have been produced at the original investigation meeting.

[21] Ms Shaw refers to what is probably the leading case on the law in this area, although it was decided prior to the enactment of the Employment Relations Act 2000 (the Act). That case is the Court of Appeal case of *Ports of Auckland Ltd v. New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 which upheld the decision of the Full Employment Court in *New Zealand Waterfront Workers Union v. Ports of Auckland Ltd* [1994] 1 ERNZ 604.

[22] The approach of the Employment Court, approved by the Court of Appeal, can be summed up in the following passages, at [607]:

*We observe, as the Court did in the Cavalier Carpets<sup>1</sup> case, that there were no restrictions on the grant of a rehearing except as to time. It is undesirable that the Court should supply restrictions that appear nowhere in the statute. However, every judicial discretion must be exercised according to clear principle.*

*What considerations should move the Court to order to be reheard a case that has already been concluded? Obviously if a positive finding can be made that a miscarriage of justice has taken place that would be enough. The likelihood of a miscarriage of justice should also be enough, especially in a case such as this where contrary to the Court's usual practice the question of rehearing or no is separated from the rehearing. The particular species of miscarriage of justice would include those listed in Cavalier Carpets but is not confined to them. A mere possibility or suspicion is however not enough to warrant disturbing a considered judgment reached after a full and well exercised opportunity to the parties to be heard.*

*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 a successful litigant, particularly in dispute resolution cases like this one, to enjoy the fruits of a judgment in its favour.*

[23] The Court of Appeal, in reference to these passages from the judgment of the Employment Court, stated, at [88] the following:

*Mr Towner challenged the reference to "possibility" in the last of these paragraphs, and submitted that the proper test was therefore there was a substantial risk of a miscarriage of justice [sic]. The three paragraphs quoted from the judgment must be read together, however, and we do not think it can be said that the Court has erred. It has stated that an actual miscarriage of justice must be enough, and the likelihood of a miscarriage should also be enough. A mere possibility is rejected as being insufficient. In the next sentence it says the Court must "look toward the possibility". In its context we read this as meaning that the Court should have regard to the degree of possibility, where it is something less than a probability but more than a mere possibility. The Court then refers to the standard of proof required, and to the need to balance the risk of injustice against the importance of certainty. Mr Towner was concerned that the last paragraph cited might suggest that any possibility might be enough, but this is clearly not what is meant if one looks at the context. The possibility that is more than a "mere" possibility could be aptly described as a substantial possibility, which is the same as the "substantial risk" test proposed by Mr Towner. Such a refinement based on semantic differences are not helpful. Parliament has chosen to confer the discretion in wide terms, and we find no error in the approach adopted by the Full Court.*

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<sup>1</sup> Cavalier Carpets (NZ) Ltd v. NZ etc Woollen Mills etc IUOW [1989] 2 NZLR 378

[24] Ms Shaw also refers me to the Employment Court judgment of *Advikit Para Legal Services Ltd v. Jacqueline Wendy Weston* [2011] NZEmpC 117. Travis J reiterates in that judgement that the overriding consideration in any rehearing application is to avoid a real or substantial risk of a miscarriage of justice and repeats the tests originally set out in *Ladd v. Marshall* [1954] 3 All ER 745 at 748, per Lord Denning:

*... first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.*

[25] It is the submission of Ms Shaw on behalf of the respondent that, first, the letter that has been discovered does not have an important influence on the case and, secondly, that Ms MacFarlane would need to establish that the new evidence is the best evidence of the record of the actual agreement reached between the parties.

[26] Ms Shaw submits that the recently discovered letter does not have an important influence on the case as it simply records the agreement to recognise service and does not recognise any agreement to transfer accrued sick leave. As the agreement to recognise service was always accepted by the respondent, and was part of the Authority's determination, the letter therefore adds nothing further to the evidence already considered by the Authority, she submits.

[27] Ms Shaw also states that the original letter was the one that was submitted by Ms MacFarlane with her original statement of problem. Ms Shaw submits that the new evidence is not on letterhead and is not signed, and so cannot be better evidence of the agreement reached between the parties than the signed and dated letter that was submitted with the original statement of problem.

[28] In addition, Ms Shaw submits that Ms MacFarlane is also required to prove that the new evidence could not have been obtained at the time of the original investigation meeting with reasonable diligence. She states that this new evidence was in Ms MacFarlane's possession at the time of the original investigation meeting and could have been obtained and produced by her if she had taken proper care to identify and produce all relevant materials, as was her obligation. Ms Shaw submits

that Ms MacFarlane cannot establish any reasonable reason why she did not put the letter before the Authority at the time of the original investigation meeting and that the respondent should not have to be put to the expense and inconvenience of another hearing because Ms MacFarlane did not take care to locate all relevant information she had available to her.

[29] Ms Shaw submits that, whilst the Authority must look to a *possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard*, it must give equal weight to the importance of certainty in litigation. Ms Shaw goes on to submit that the respondent is likely to be significantly prejudiced as key witnesses have left the organisation some years ago and their availability is unknown. Presumably, Ms Shaw means here that their present location is unknown, although Mr Taylor's location has been identified, as Ms Shaw records that she has recently spoken to him. Ms Shaw also submits that, even if witnesses were available, the events will be less clear in all the participants' minds and that their recollection of what occurred is not now likely to be as good as it was at the time of the original investigation meeting, given that the events took place over seven years ago.

[30] Ms Shaw concludes her submissions by stating that the only reason the new evidence was not considered by the Authority at the first investigation was that Ms MacFarlane did not place it before the Authority for consideration even though it was in her possession and within her control. She submits that the negative impact of this lack of diligence should be visited on Ms MacFarlane rather than on the respondent.

[31] Mr Beck, in reply to these submissions on behalf of Ms MacFarlane, said she did not discover the error of her employer's failure to carry over accrued service entitlements until August 2006, over two months after she had commenced employment with the respondent. By that time, she had moved house and lost or inadvertently disposed of the original appointment letter. In addition, the letter which was latterly discovered was used for a different purpose (the mortgage application) and only recently came to light during a clear out of the papers.

[32] Mr Beck submits that the respondent wrongly disclosed an earlier copy of the appointment letter and at the Authority's investigation meeting Mr Taylor relied on the wrong letter. Mr Beck asserts that, due to sloppy record keeping by the respondent, it either intentionally or unintentionally misled Ms MacFarlane.

[33] Furthermore, Mr Beck submits that the matter turns on the fact that the respondent had in fact recognised Ms MacFarlane's service with her previous DHB employers and, had the Authority had the new evidence before it at the time, then Ms MacFarlane's entitlement would have been clear and consistent with clause 4.3 of the applicable collective agreement that made reference to *letters of appointment* being a specific exclusion to the exclusivity of clause 4.2. Mr Beck also points out that the respondent has not challenged the authenticity of the newly discovered evidence.

[34] Mr Beck also notes that the copy of the letter provided by Ms MacFarlane in her original statement of problem is different from that provided by the respondent as attached to Ms Shaw's submission. He states in his submission that Ms MacFarlane asserts that she signed a later version of the letter typed up with a proper start date and the appropriate reference to recognising approved service-related benefits after a discussion with Mr Taylor and that that later version is the one that has subsequently been discovered and is attached to the application to have the matter reopened.

[35] Mr Beck submits that the matter simply turns on an analysis of documentation and that there was no need to lead any further witness evidence so that the passage of time and the potential unavailability of the respondent's witnesses is not an issue.

[36] Mr Beck accepts the respondent's exposition of the legal test to be applied in case law cited but makes the observation that it is a discretionary application of a range of factors that predominantly seeks to avoid a miscarriage of justice whilst balancing the issue of certainty in litigation.

[37] Finally, Mr Beck asserts that a disproportionate detriment would have been visited upon Ms MacFarlane should it be established that her case was wrongly decided due to the new evidence directly contradicting the evidence led at the time by the respondent on what was agreed both verbally and in writing at the time of her engagement as an employee. He submits that there is no great inconvenience or negative precedent setting that would adversely impact upon the respondent as it is a large and well-resourced organisation.

**The different versions of the letter**

[38] Prior to identifying and examining the issues, it would be helpful to set out my findings on what is likely to have happened in regard to the different versions of the 8 May 2006 letter.

[39] The Authority has now seen four versions of the letter:

- a. The one that is on the Authority's 2009 file, consisting of one page, an uninitialled hand written amendment to the start date, a stamped notification, and unsigned (version one);
- b. One that was submitted by Mr Beck with the 2013 Statement of Problem, consisting of two pages, no hand written amendment to the start date, bearing a different stamped notification and unsigned (version two);
- c. The copy that was produced by Ms Shaw with her submission, which consisted of two pages, with the same text as the letter that was put before the Authority in 2009 but with the second page signed by Mr Taylor and Ms MacFarlane and dated 11 May 2006, without any stamped notification, and with the handwritten amendment to the start date initialled (version three); and
- d. The one that was recently discovered by Mr MacFarlane (version four).

[40] The differences between the four versions of the letter can be accounted for as follows, I believe. At the time of the 2009 investigation meeting, Ms MacFarlane disclosed to the Authority and the respondent the only copy she had to hand (version one). I cannot account for why she did not disclose the second page, but assume she could not find it. This version of the first page had the stamp telling her to send back the duplicate.

[41] Version two seems to be a CDHB file copy which I infer was disclosed to Ms MacFarlane by the respondent during the discovery process in 2009, but which was not produced to the Authority by either party.

[42] Ms MacFarlane had already sent back to the respondent in 2006 the duplicate of version one of the letter. That is the one that Ms Shaw has on her file I believe,

namely version three. It does not have the stamp on it telling Ms MacFarlane to send back the duplicate because it was the duplicate. That also accounts for why Ms MacFarlane had signed that version and initialled the manuscript amendment to the start date. I infer that, since Mr Taylor had sent Ms MacFarlane the first letter, they had a conversation and it was agreed that her start date would be later, and that Ms MacFarlane could insert the new start date by hand and initial the insertion on the duplicate.

[43] Ms Shaw says she did not disclose the signed version of the letter to the Authority in 2009 because Ms MacFarlane had already disclosed her version, which was substantially identical. As this version did not refer to accrued benefits transferring, and so was of limited value evidentially, I assume that Ms Shaw (when she acted for the respondent at the time) calculated that her signed version added little and so did not disclose it. That was probably a valid conclusion to reach.

[44] The reason that Ms MacFarlane did not disclose the fourth version of the letter to the Authority in 2009 was almost certainly because it was hidden away in her husband's mortgage file and because she had forgotten its existence. This is not unreasonable in my view. It is for this reason that I do not accept Ms Shaw's submission that the letter was in Ms MacFarlane's possession and that she should have disclosed it. Although Ms MacFarlane lived in the same house as her husband throughout the material time, I accept that the letter was more accurately in the possession of her husband. Arguably, it may have been under her control, as it belonged to her and not her husband, but as I infer that she had forgotten its existence, I believe that this argument is debatable.

[45] In addition, I infer that the fourth version of the letter – the new evidence - was first received by Ms MacFarlane after she had received the first version. This is because it refers to the new start date in type, rather than in manuscript. I therefore believe that the fourth version of the letter is likely to have superseded the other versions. This does not mean I necessarily accept it reflects the final, settled position between the parties as there is no second page, bearing the signatures of the parties. Conceivably the letter could have been superseded by a fifth, as yet undiscovered letter with different terms.

[46] The fourth letter does still beg some questions, however. Why does it not have the second page attached, and why does it not have the Canterbury District

Health Board rubric on it? There is no obvious answer to the first question, but it is possible that the CDHB rubric is missing because of the insertion of the extra paragraph. Although the font in the fourth version is smaller than the font on the other versions, presumably to accommodate the new paragraph, the insertion has pushed the start of the text up the page (rather than down it) which suggests that there was no room for the rubric. However, how this can be reconciled with the way such letters were produced by the respondent at the time is impossible to say without further evidence.

[47] Finally, Ms Shaw states that the respondent is not in a position to contest or confirm the authenticity of the third letter. She says that, given the passage of time and turnover of employees, and change of structures in the relevant department, the respondent has not yet been able to identify who may have drafted the letter of offer(s). Ms Shaw says that Mr Taylor has no recollection of the new letter and says it would not have been him who drafted/prepared the offer but cannot recall who it might have been. Investigations into this are continuing, she says. Ms Shaw points out that Ms MacFarlane has not provided any evidence about how the fourth version of the letter had come into her possession originally and why she did not mention its existence at the investigation. Accordingly, she asserts, the respondent cannot investigate or respond to those matters.

[48] Whilst it is true that Ms MacFarlane did not give any sworn evidence about the issues identified by Ms Shaw, the account given in the statement of problem is that the fourth version was only discovered in 2013, and that is why it was not disclosed to the Authority and the respondent in 2009. In the absence of the respondent openly challenging the authenticity of the letter, and further, in the absence of evidence tending to show fabrication, there is a presumption that it is not fabricated. I do not see any evidence to suggest that version four of the letter was fabricated, and so I accept it as genuine for the purposes of the application to reopen the proceedings.

### **The issues**

[49] In deciding whether or not to reopen the investigation into Ms MacFarlane's complaint, the following issues need to be considered:

- (a) Could the new evidence have been obtained with reasonable diligence for use at the original investigation in 2009?
- (b) If the new evidence were to be considered at a fresh investigation, what is the probability that it would have an important influence on the result of the case?
- (c) Is the new evidence apparently credible?
- (d) Is there a real or substantive risk of a miscarriage of justice if the investigation is not reopened?

**Could the evidence have been obtained with reasonable diligence for use at the original investigation in 2009?**

[50] It seems probable that, either the existence of the new evidence had been forgotten by Ms MacFarlane by the time of the 2009 investigation, or its whereabouts had been forgotten. Either way, I am satisfied that there was no deliberate withholding of the evidence as, on its face, it is arguably helpful to Ms MacFarlane's case.

[51] As for whether Ms MacFarlane could have obtained the new evidence with reasonable diligence, Ms MacFarlane has not given direct evidence on what steps she took to find the relevant documents at the time she was preparing for the 2009 Authority investigation. However, it seems safe to infer that:

- a. Ms MacFarlane had searched her employment papers or file, as she came up with the first version of her employment offer and disclosed it; and
- b. She did not find the fourth version of the letter in her employment papers or file, as she would have disclosed it if she had as it would have been arguably helpful to her case (or at least, more helpful than version one); and
- c. Ms MacFarlane had forgotten about the existence of the fourth version, or she would have asked the respondent to have disclosed it as part of the discovery process.

[52] In light of these conclusions I am satisfied that it would have gone beyond reasonable diligence in a case of the kind for which she was preparing in 2009 for Ms MacFarlane to have searched every file of papers in her house, including her husband's files, on the off chance that another version of the letter existed, but of which she had no memory.

**If the new evidence were to be considered at a fresh investigation, what is the probability that it would have an important influence on the result of the case?**

[53] This is a more difficult question. The additional wording in the third version of the letter does not say expressly that Ms Macfarlane would have the benefit of a stated number of accrued days of sick leave. It states:

*As discussed we agree to the recognition of your previous employment within Health for all service related benefits (including Holiday Leave entitlements, Sick Leave entitlements, Redundancy provisions).*

[54] This statement could have two meanings; it could mean, as asserted by Ms MacFarlane, that all the leave that had accrued to her as at the date of her new employment in 2006 would transfer over without abatement. Alternatively, it could mean that she would be treated as a staff member with 15 years' service in the health sector, rather than as a new employee, and so would be entitled to the same level of benefits as a staff member with 15 years' service. The sentence is not precisely drafted enough to capture either possible meaning cogently, and the resultant ambiguity of the imprecise drafting of the sentence cannot be resolved without further evidence.

[55] Ms Shaw has asserted that Mr Taylor has no recollection of the fourth version of the letter, that he did not draft or prepare it, but that he cannot recall who did. Of course, this assertion cannot be taken as evidence as it should come from Mr Taylor in the form of sworn testimony rather than through counsel. However, I must be mindful that over seven years have elapsed since the different versions of the letters were prepared, and that it is unlikely that precise details of such an unremarkable activity as the preparation of an offer of employment would stick in the memory of any witness. This is especially the case when one considers that dozens of such offers will have been prepared by the respondent each year.

[56] Conceivably, a thorough examination of computer records by the respondent (if they still exist), along with detailed questioning of not only Mr Taylor, but also his

secretary at the time (if he had one) and/or the HR administrator responsible for the preparation of the offer letters, could uncover more evidence one way or the other. However, the key point is, that the production of the fourth version of the letter by Ms MacFarlane does not, in itself, move the debate further on, as the two alternative interpretations of the key ambiguous sentence respectively support Ms Macfarlane's position and the respondent's position.

[57] I also agree with Ms Shaw that, on its face, the new evidence is not the best evidence of the agreement between the parties, both because of the ambiguity of the extra sentence and because the second page is missing, and so there is no indication of a signature to indicate acceptance of the terms.

[58] This leads me to conclude that the probability of the new evidence having an important influence on the result of the case is low.

**Is the new evidence apparently credible?**

[59] I am satisfied for the purposes of Ms Macfarlane's application that the new evidence is apparently credible, for the reasons already set out above, when considering the authenticity of the recently discovered letter. This does not imply, though, that I believe that Ms MacFarlane's interpretation of the additional sentence in the fourth version of the letter is more credible than that given to it by the respondent.

**Is there a real or substantive risk of a miscarriage of justice if the investigation is not reopened?**

[60] Ms MacFarlane is clearly adamant that she was promised the transfer over of her accrued leave entitlements. The respondent is equally adamant that she was not promised that. There are different possibilities which could account for this conflict. One is mendacity on the part of one of the parties. Another is forgetfulness. The final possibility is a simple misunderstanding on the part of one or both.

[61] If the proceedings were reopened and the fourth version of the letter put before the Authority, it would not, in itself, resolve the difference because of the ambiguity of the wording of the extra sentence. As stated above, substantial further investigations would therefore have to take place, involving the questioning of witnesses and examination of records. As also stated above, the memories of such

matters, which would be tested nearly eight years after the events in question (by the time the substantive investigation would be held), would likely to be so hazy or unreliable as to vitiate the purpose of the enquiry.

[62] In such circumstances, I do not believe that it can be reasonably said that there is a real or substantive risk of a miscarriage of justice if the investigation is not reopened.

### **Conclusion and Determination**

[63] Apart from the factors identified above, there are two other issues to consider. One is the submission by Mr Beck that the focus of the Authority's 2009 investigation was on clause 4.2 of the collective agreement, and not the alleged agreement between Mr Taylor and Ms MacFarlane. I agree that the Authority's determination supports that submission. However, Ms MacFarlane was obviously aware of the alleged agreement in 2009 and so was able to lead evidence on that aspect of her case then. Whilst version four of the letter was not before the Authority at the time, because of its ambiguity in respect of the alleged agreement, I do not believe that it would have added anything certain.

[64] The second issue is the fact that, to reopen the proceedings will require, as noted above, substantial investigation by the Authority into a number of matters, almost to a forensic level, to ascertain the precise circumstances behind the creation of the fourth version of the letter. Whilst that is the role of the Authority, to do so nearly eight years after the events being investigated occurred would strain the probable efficacy of such an exercise beyond a reasonable point, in my view. It would also be likely to impose an unreasonable burden on the respondent which would have to identify, locate and question relevant witnesses, and uncover and interrogate computer files. Although the respondent is a large employer with significant resources, they should not have to be directed to burdensome activity which is unlikely to result in any significant benefit to either party. Such steps might have been more efficacious in 2009, but far less so in late 2013.

[65] For all these reasons, I conclude that the demands of justice would not be well served by reopening the investigation into Ms MacFarlane's original complaint based upon the contents of the fourth version of the letter dated 8 May 2006.

**Costs**

[66] The parties are to seek to agree how costs are to be disposed of between them. In the absence of agreement within 28 days of the date of this determination, counsel for the respondent may serve and lodge a memorandum setting out the respondent's position, and counsel for Ms Macfarlane may serve and lodge a memorandum in reply within a further 14 days.

David Appleton

Member of the Employment Relations Authority