

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 90
5328688

BETWEEN ELAINE MANDER
Applicant

AND IHC NEW ZEALAND
INCORPORATED
Respondent

Member of Authority: P R Stapp

Representatives: Ms Mander representing herself
Paul McBride, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: By 10 January 2013

Date of Determination: 19 March 2013

DETERMINATION OF THE AUTHORITY

Application to reopen investigation meeting

[1] Elaine Mander has applied to reopen an investigation into an employment relationship problem in regard to a determination issued by an Authority member on 11 September 2012 [2012] NZERA Auckland 317. She claims:

- (i) that the Authority Member was biased;
- (ii) that issues were not addressed by the Authority member in reaching his determination;
- (iii) that Ms Mander's evidence/statements were not given due consideration by the Member;
- (iv) that disparities in the respondent's evidence were ignored by the Member in making his determination;

- (v) that the respondent's inadequate paperwork was not given appropriate weight by the Member;
- (vi) that the appropriate legal test was not applied;
- (vii) that the information in the Authority Member's determination was incorrect and misinterpreted;
- (viii) that various factors were not taken into account and overlooked by the Member; and
- (ix) that the employer's failure to meet its obligations were not given appropriate weight by the Member.

[2] The respondent opposes the reopening of the application.

The Law

[3] I have to assess whether there has been an arguable miscarriage of justice identified by the applicant.

[4] The Employment Court has held in *Ports of Auckland Limited v. New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85, 88 that the principles applying to a rehearing (amounting to the same as an application to reopen an investigation) include:

... 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, ... to enjoy the fruits of a judgment in its favour.

[5] Also the Court referred in *Reid v. New Zealand Fire Service Commission (No.2)* [1998] 3 ERNZ 1237 referred to Spencer, Bower and Turner, The Doctrine of Res Judicata (2nd Ed), London, Butterworths 1969, para.10 quoting a statement of the House of Lords:

The Doctrine ... is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issues to be litigated afresh between the same parties.

[6] The Chief Judge then set out the following to apply p 1249:

- (i) *Where a final decision has been pronounced;*
- (ii) *By a Court or Tribunal of competent jurisdiction;*
- (iii) *Over the parties to;*
- (iv) *And the subject-matter of;*
- (v) *Litigation*

each party is estopped or precluded from disputing or questioning such decision on the merits as against the other party in subsequent litigation.

[7] Further the Court held in *Advikit Para Legal Services Ltd v. Jacqueline Wendy Weston* [2011] NZEmpC 117:

... The overriding consideration in a rehearing application is to avoid a real or substantial risk of a miscarriage of justice: Ports of Auckland Ltd v. New Zealand Waterfront Workers Union [1995] 2 ERNZ 85 (CA).

[8] In *Advikit v. Weston* the Court further held:

[18] *In cases such as Dragicevich v. Martinovich [1969] NZLR 306 (CA) and Green v. Broadcasting Corporation of New Zealand [1988] 2 NZLR 490 (CA) it has been held that Courts have a discretion whether or not to order a new trial where fresh evidence is sought to be introduced and, in exercise of that discretion, they should apply the following tests LADD v. Marshall [1954] 3 ALLER 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, although it need not be incontrovertible.

Background

[9] IHC New Zealand Incorporated (IHC) is a charity with limited means, surviving on donations plus government subsidies. Ms Mander was employed by IHC

as a volunteer co-ordinator. After an extended consultation process, her employment ended for redundancy.

[10] Ms Mander brought a personal grievance claim contending that the redundancy was other than genuine. Her other complaints were statute barred by s.114 of the Employment Relations Act 2000.

[11] The Employment Relations Authority held an investigation meeting on the employment relationship problem on 11 September 2011, and after hearing the relevant witnesses, the Authority issued a determination. The applicant's complaints were dismissed as being without factual or legal basis, although some level of criticism was levelled at IHC's communications.

[12] The reopening application was filed in the Authority on 1 November 2012. IHC provided its statement in reply on 15 November 2012. Ms Mander challenged the Authority's determination in the Employment Court, but I am not clear that her challenge is proceeding. In any event that is an independent matter.

[13] The applicant's application for a reopening of the Authority's investigation is based on:

- (i) That the Authority was biased in its approach to the investigation. In this regard she relies on her own feelings and observations about that;
- (ii) That fresh evidence is available to support her case;
- (iii) That the Authority gave weight to evidence on various matters incorrectly;
- (iv) That the application of the legal test was not properly applied;
- (v) That the Authority Member made omissions in regard to what evidence was relevant in accepting and rejecting evidence in reaching its determination.

Determination

[14] The Authority member's determination outlined the employment relationship problem and identified Ms Mander's role at IHC. The Authority member outlined the

background in regard to Ms Mander's role, consultation and the management of change. In outlining the background the Authority assessed the issues as:

- (a) *Was the redundancy a genuine one;*
- (b) *Was the redundancy effected in a fair manner; and*
- (c) *Was Ms Mander bullied or harassed.*

[15] Then in his determination the Authority member outlined and provided reasons for his finding as to whether the redundancy was a genuine one, whether the redundancy was executed in a procedurally fair manner and, finally, whether Ms Mander was bullied or harassed.

[16] Ms Mander genuinely believes and considers that the Authority Member's consideration of her employment relationship problem was biased and unfair in the handling of the investigation meeting and in the written determination. I accept that she genuinely believes that, but she has not identified in sufficient detail and specificity the evidence to support such a grave allegation. Furthermore she has not been able to show that such an allegation based on the determination that the Authority issued, would result in a miscarriage of justice if the investigation meeting was not reopened. To allow the investigation to be re-opened would mean rehearing the matter seemingly because Ms Mander does not like the outcome. Ms Mander had the right to challenge the determination and she did so, negating any risk of injustice.

[17] I am satisfied that the further evidence that Ms Mander wishes to put before the Authority, including a copy of a spreadsheet and information contained in it and an article about the culture within IHC, were matters that she had a reasonable opportunity to raise in the Authority's investigation meeting. Such information should have been reasonably available then and provided during the Authority's investigation meeting. I am not satisfied that there would be an injustice in not reopening the Authority's investigation to permit such evidence to be produced.

[18] Further Ms Mander is attempting to redirect the attention of the Authority to matters that she raised at the hearing and is now dissatisfied as to the sufficiency of attention that she believes they should have been given. Those are grounds for challenge not rehearing.

[19] I am therefore not satisfied that the absence of any comment by the Authority Member on the consideration of the various matters that she has raised in regard to the fresh evidence and/or rejection of the evidence and the weight of any evidence means that there would be a miscarriage of justice in the event of the investigation process not being reopened.

[20] Furthermore the allegations of bias relate fully to Ms Mander's genuine belief about the factual situation at the time at IHC and are not sufficiently supported by any references to failures in the Authority's determination. Nobody else has been able to provide some assistance in regard to this matter.

[21] In any event, many of the matters that Ms Mander has raised could have been incorporated in a challenge to the Employment Court. The very matters she has raised are matters that relate more to a challenge process than a reopening of the Authority's investigation. The IHC is entitled to the certainty of an outcome given the hearing that was held by the Authority Member.

[22] The application for reopening is declined.

Costs

[23] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority