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Milne v Air New Zealand Limited (Auckland) [2016] NZERA 522; [2016] NZERA Auckland 353 (20 October 2016)

Last Updated: 2 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 353
5242829

BETWEEN KATHLEEN ANN BEATTIE MILNE

Applicant

AND AIR NEW ZEALAND LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person

David France, Counsel for the Respondent

Investigation: On the papers

Determination: 20 October 2016

DETERMINATION OF THE AUTHORITY

- A. The application by Kathleen Milne for reopening of an Authority investigation into her dismissal by Air New Zealand in 2004 is declined.**

Ms Milne's application

[1] In an application received by the Authority on 29 August 2016 Kathleen Milne sought reopening of an Authority investigation that had included a two-day investigation meeting held on 1 and 2 September 2010. The investigation resulted in a determination issued on 3 February 2011.¹ The determination found Air New Zealand acted justifiably in its decision to dismiss Ms Milne six years earlier, in 2004.

[2] In response to an Authority Minute about shortcomings in her initial application for a reopening of that investigation Ms Milne lodged an amended

application, received by the Authority on 12 October 2016.

¹ *Milne v Air New Zealand Limited* [2011] NZERA Auckland 45.

[3] This determination explains why Ms Milne's application, both in original form and as amended, does not meet the threshold necessary for the granting of a reopening.

The legal framework for considering a reopening application

[4] The Authority has a statutory discretion to order the reopening of an

investigation on “such terms as it thinks reasonable”.²

[5] The [Employment Relations Authority Regulations 2000](#) require such applications to be lodged on a specified form. The form requires an applicant to set out the grounds on which reopening is sought. The forms states the applicant should “state grounds fully but concisely”.

[6] The discretion to reopen an investigation must be exercised according to principle. Principles developed by the Employment Court in exercising 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.³

[7] Applicable principles include the following:⁴

(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; or
- 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

² [Employment Relations Act 2000](#), Schedule 2 clause 4.

³ *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].

⁴ *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].

or at least a *real or substantial risk* of a miscarriage of justice if the determination were allowed to stand.

(iv) The assessment of the possibility of a miscarriage of justice does not require a high standard of proof of that possibility. However of equal weight as a factor in the balance is certainty in litigation so successful litigants get their normal right to enjoy the fruits of judgments in their

favour.⁵

(v) 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.⁶

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

[8] 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”.⁷

Considering Ms Milne’s application

[9] Ms Milne’s original application stated four grounds for a reopening. In

summary, they were:

(i) There was a disparity of treatment [presumably between Ms Milne and other employees] because Air New Zealand did not follow the terms of an applicable collective agreement in how it dealt with Ms Milne’s circumstances before deciding to dismiss her.

(ii) Air New Zealand “provided incorrect witness evidence” to the Authority investigation.

(iii) Ms Milne had raised the problem of disparity of treatment with the Authority.

(iv) The Authority's determination of 3 February 2011 included "incorrect statements".

⁵ *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607.

⁶ *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, above n 4, at [37].

⁷ *Young*, above n 3, at [9].

[10] With reference to the legal principles on reopening applications, set out above, those grounds appeared to be nothing more than an attempt to re-agitate her earlier unsuccessful case. They failed to identify any of three elements, that if present with supporting information, might warrant reopening – firstly, that there was new and apparently conclusive evidence that was not available at the time of the Authority's investigation in September and October 2010 or, secondly, some statute or authoritative court decision was overlooked or, thirdly, there was some other special or unusual circumstance.

[11] By Minute dated 15 September 2016 Ms Milne was advised of the applicable legal principles and the requirement for a full and concise statement of the grounds. The Minute also identified some specific questions about her alleged grounds. On grounds (i) and (iii) Ms Milne was asked whether she had raised a personal grievance about disparity of treatment and, if so, what evidence there was Ms Milne was treated differently from others in similar circumstances. On ground (ii), Ms Milne was asked to identify what she said was incorrect witness evidence – where it was referred to in the Authority determination or statements provided to the investigation and what was incorrect about it. On ground (iv), Ms Milne was asked what statements in the determination were said by her to be incorrect and why they were incorrect.

[12] She was given an opportunity to lodge an amended application. Meanwhile Air New Zealand was not required to lodge a statement in reply to her application.

[13] The grounds for reopening Ms Milne set out in her amended application were, in full, as follows:

(a) On the grounds that there was some other special or unusual circumstance particular to the case.

(i) I [was] employed in Australia and there were different terms and conditions of employment which were not followed by the Company prior to the termination of employment.

(ii) There is alleged fraud in the use of the medical certificate that I procured from the Company doctor.

(iii) There was disparity of treatment where others in similar circumstances of illness and injuries were being managed by the Company.

(b) On the ground that a relevant statutory provision has been inadvertently overlooked.

(i) There was an arm work injury and work injuries of hearing loss and tinnitus, which required injury management by the company.

(ii) The employment was terminated before the use of annual leave, long service leave and leave without pay had been used.

(iii) There was no counselling, verbal warning, written warning, final written warning before the termination of employment.

(iv) I was employed in Australia and there were different terms and conditions of employment which were not followed by the Company prior to the termination of employment.

(v) I was not informed that the termination on medical grounds (a medical retirement) was a dismissal with a loss of staff travel. The problem was addressed at the hearing with the Authority.

[14] Ms Milne's amended application did nothing to really advance her argument that she had grounds on which a reopening

of the Authority's investigation could properly be granted. Each item and allegation concerned matters Ms Milne's evidence canvassed, or could have canvassed, at the original investigation meeting, during which she was legally represented. The evidence about what had happened to her at work and how Air New Zealand came to dismiss her, after finding she was not fit to fly for medical reasons and because no suitable alternative positions were available, was extensively canvassed by the Authority member, the late Rosemary Monaghan, in her 23-page written determination issued in February 2011. Nothing in Ms Milne's reopening application identified any new evidence not available at the time of the Authority's investigation in 2010. No relevant statutory provisions, allegedly overlooked, were specified.

[15] On the basis of the contents of Ms Milne's amended application there was no need for Air New Zealand to be given an opportunity to respond. Neither was it necessary to carry out any further investigation or call for any further submissions from Ms Milne. Although Ms Milne was given the opportunity to put her application for reopening on a stronger footing, the amended application plainly failed to show any prospect of passing the threshold test, referred to earlier in this determination, of establishing there was a substantial risk of a miscarriage of justice if the 2011 determination was allowed to stand.

[16] In reaching that conclusion the history of Ms Milne's litigation against Air New Zealand was relevant. In 2012 Ms Milne was also unsuccessful in a further Authority investigation of other claims by her about the terms on which she was employed.⁸

⁸ *Milne v Air New Zealand Limited* [2012] NZERA Auckland 236.

[17] In 2014 the Employment Court struck out Ms Milne's challenges to the Authority's 2011 and 2012 determinations.⁹ In that decision the Court noted the following orders of the Court and the Authority remained unpaid by Ms Milne:

- \$10,000 security for costs on the first challenge; and
- \$1,250 costs in relation to that security for costs application; and
- \$1,500 security for costs on the second challenge; and
- \$500 costs in relation to that security for costs application; and
- \$8000 costs in the Authority.

[18] More recently, on 31 March 2016, the Authority declined to investigate a claim by Ms Milne that she should be awarded damages relating to her unemployment since her dismissal in 2004.¹⁰

[19] In that context Ms Milne's latest application, for reopening, is an attempt by an unsuccessful litigant to re-argue her case. She has not established any interest of justice that outweighed what Air New Zealand could reasonably rely on as the finality of the litigation struck out by the Court in 2014.

[20] For the reasons given, and in the context described, the application for reopening is declined.

Costs

[21] As Air New Zealand has not been to the expense of responding to Ms Milne's reopening application no issue of costs arises.

Robin Arthur

Member of the Employment Relations Authority

⁹ *Milne v Air New Zealand Limited* [2014] NZEmpC 101.

¹⁰ *Milne v Air New Zealand Limited* [2016] NZERA Auckland 98.