

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 482  
5422497

BETWEEN                      EMMA PAKI  
   Applicant  
  
A N D                              THE WAREHOUSE LIMITED  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Richard McNaughton, Advocate for Applicant  
   Penny Swarbrick, Counsel for Respondent  
  
Investigation Meeting:        On the papers  
  
Date of Determination:       18 October 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Ms Paki) applies to the Authority for leave to reopen an investigation the Authority has concluded. The respondent (The Warehouse) resists that application.

[2]     Ms Paki filed a statement of problem in the Authority dated 4 July 2013 in which she alleged that she had been unjustifiably dismissed from her employment at The Warehouse and, amongst other things, sought reinstatement.

[3]     The Authority proceeded to engage with the parties' representatives in the usual way and, amongst other things, offered the parties the opportunity of dealing first with the reinstatement application and then subsequently, in a second investigation meeting, dealing with the substantive underlying claim.

[4] However, because the Authority was able to undertake to deal with the whole matter expeditiously, the parties agreed that there would be a single investigation meeting at which the whole of Ms Paki's employment relationship problem would be investigated, with the Authority committing to the issue of an urgent determination on the merits.

[5] That investigation meeting just described took place on 19 August 2013 and the Authority completed its investigation at that meeting. Closing submissions were timetabled after the investigation meeting and were subsequently received by the Authority.

[6] In the closing submissions filed for Ms Paki was an intimation that she sought to introduce the evidence of two new witnesses, ostensibly in rebuttal of a particular piece of evidence given at the investigation meeting by The Warehouse's decision-maker.

[7] The Warehouse objected to the Authority considering this new evidence and in an effort to meet its obligations to expedite the matter, in terms of the original commitments made to the parties, the Authority proposed that the new evidence be set aside, that the Authority deal first with the question of justification for the dismissal and only if it found that the decision made by The Warehouse was unjustified would the Authority then engage with the parties' representatives again, with a view to considering the proposed new evidence.

[8] Ms Paki, through her representative, objected to that course of action and on that footing the Authority was forced to deal with the matter more formally. The Authority required an application to reopen to be filed and then for a statement in reply from The Warehouse to be filed and served responding to that application.

[9] Those documents have now come to hand and the Authority is in a position to deal with the matter.

[10] The Authority feels obliged to observe that Ms Paki's original application proceeded on the footing that it was urgent and the Authority responded to that situation to the best of its ability by giving the file urgency, by setting the matter down quickly, and by undertaking to deliberate and issue the determination as a matter of urgency.

[11] Then, despite that background, Ms Paki has chosen to put that whole timetable in jeopardy by seeking to have the Authority consider evidence from first two and now three fresh witnesses, who were not called to give evidence at the investigation meeting.

[12] It follows from the foregoing timeline that the Authority has been unable to deal with the matter as urgently as it would have liked, but that delay is entirely occasioned by the way in which Ms Paki has chosen to run her case in the Authority.

[13] The Authority has adopted a reasonably brisk process in relation to the application to reopen, and in particular sought and obtained the consent of the parties to the reopening application being dealt with on the papers. The Authority has taken this stance because of its conviction that the interests of justice are best served by the substantive matter being dealt with as quickly as is now possible, despite the delay just referred to, and that it is in the interests of both parties that a speedy decision on the substantive matter issues, once the reopening application is disposed of.

## **Discussion**

[14] The Authority must say that it thinks the application to reopen is completely without merit. The thrust of the application is to seek to have the Authority hear fresh evidence. That proposed new evidence seeks to rebut evidence given by The Warehouse's decision-maker, Mr Glasgow-Cox.

[15] The first aspect of the evidence to be challenged is evidence that the decision-maker inaccurately reported on the initial disciplinary meeting between the parties when he explained the treatment to be accorded to previous issues the Warehouse had had with Ms Paki. That aspect relies exclusively on the evidence of Ms Paki herself. Ms Paki was present at the Authority's investigation meeting and she was represented there. If she wanted to take issue with Mr Glasgow-Cox's evidence, she could and should have done so at the investigation meeting. This is particularly so when the evidence complained about was in his filed brief of evidence which was filed three days before the hearing.

[16] In the Authority's view, the Authority ought to be very cautious about granting re-opening applications simply on the basis that a party has failed to adequately rebut evidence that was adduced in an earlier hearing. In effect, Ms Paki is simply asking for an opportunity to correct an earlier error of omission. The evidence which it is

now proposed the Authority should hear was available at hearing and simply not advanced.

[17] The second aspect of the evidence of Mr Glasgow-Cox to be challenged is the contention that The Warehouse branch where Ms Paki worked was happier now that she was not there.

[18] The first point to observe is that no attempt was made in cross-examination to disturb the evidence of the Warehouse's decision-maker that Ms Paki was an unpopular member of staff. One would have thought that that was an obvious contention to attack if it was resisted. In fact, the Authority was left with the impression that Ms Paki accepted the conclusion that she was unpopular with other staff. In any event, the place to challenge the evidence was at the investigation meeting at the time. That is presumably why Ms Paki retained her adviser.

[19] Even more fundamental than that, the evidence complained about from The Warehouse's decision-maker was evidence in his filed brief. If that evidence was to be challenged, then the opportunity was there once the brief was filed and served to obtain rebuttal evidence.

[20] There was no suggestion from Ms Paki's representative that she needed time to prepare that rebuttal or indeed that the point was taken. If extra time had been sought, the Authority would have been able to consider a request for an adjournment of the investigation meeting on the footing that there was rebuttal evidence being sought if that was in fact problematical.

[21] In fact, the proposed rebuttal evidence is so short as to militate against any suggestion that any significant time would be involved in the briefing of the evidence. Of more moment is the fact that the evidence was all available to Ms Paki before the investigation meeting. This was not a situation where the witnesses in question were out of the jurisdiction or in some other way unavailable. In fact the position simply seems to be that Ms Paki or her adviser had not thought to seek the evidence until after the Authority's investigation had been concluded.

[22] Then, as the Authority has been at pains to point out, her request for this evidence to be considered has had the effect of materially delaying what on Ms Paki's own submission was an urgent matter.

[23] The third aspect of the evidence of Mr Glasgow-Cox under challenge is his contention that there were no other roles available for Ms Paki within the Warehouse. The evidence it is proposed the Authority should hear would assert that the employer is currently recruiting for night fill operators and that Ms Paki could aspire to those roles. It is difficult to see how that information could assist the Authority to determine issues of justification. Moreover, the effect of the proposed evidence could only be that at the time the deponent knew of matters, there were or might be vacancies in the night fill staff. That intelligence does not assist in determining what the position was at the point of dismissal, nor does it bear, in any way, on the more fundamental point that if the employer had justifiably lost trust and confidence in the employee, the possible existence of vacancies in another area is neither here nor there.

### **The law**

[24] The general rule is that a re-opening ought to be contemplated if a failure to do so risks a miscarriage of justice. In *New Zealand Waterfront Workers Union v. Ports of Auckland Ltd* [1994] 1ERNZ 604 a Full Court determined that the primary factor was whether there had been a miscarriage of justice but that the Court ought not to seek proof of that possibility to a high standard. Moreover, the Court should look to give equal weight to the importance of certainty in litigation. While that case was decided under the Employment Contracts Act regime, and concerned a rehearing of a decided matter rather than the reopening of an undecided matter, the principles nonetheless should guide the considerations here.

[25] On the specific question of an application for reopening on the basis of fresh evidence, the decision of *Squire v. Waitaki NZ Refrigerating Ltd* [1985] ACJ 839 is directly on point. There the Court held that three conditions must be fulfilled. These were first, that it could be shown the evidence could not have been made available at the original hearing; second that if given the evidence would have had an important, but not decisive effect on the result; and third that the evidence must be credible.

[26] Applying the test in *Squire* it is the Authority's considered opinion that only the third condition can possibly be sustained here and then only by taking a generous view of the matter. That aside, it is plain that neither of the first two conditions can be fulfilled: the Authority is satisfied that, with reasonable diligence, the evidence could have been made available at the original hearing and second, the evidence would have

had little or no influence on the possible result having no probative value in terms of justification and limited value in terms of remedies.

### **Determination**

[27] The first reason that the Authority has for declining the application is that it appears to the Authority that the matter has simply not been dealt with in a business-like fashion. The evidence proposed to be heard seeks to rebut evidence from the investigation meeting and that should have been done at the time.

[28] But the Authority also relies for its decision to reject the application on the fact that the evidence tendered has little or no probative value on the issues the Authority must address in determining whether Ms Paki has a viable personal grievance or not.

[29] The Authority is satisfied that the only possible relevance that this evidence might have is on the question of one of the remedies Ms Paki is seeking, namely the remedy of reinstatement. This is because the witnesses the Authority is being asked to hear at this late stage apparently reject The Warehouse's conclusion that the branch Ms Paki worked at is a happier place now that she is gone and indicate there may be alternative roles for her which the employer had not identified. But if the employer has lost trust and confidence in Ms Paki, as they claim, issues of her continuing in the employment, in any role, cannot apply.

[30] Furthermore, the proposed evidence is from workers who worked at night whereas Ms Paki was a day worker. On that basis, the Authority is at a loss to know what assistance it will be to have evidence about Ms Paki's relationships with co-workers from witnesses who worked a different span of hours from Ms Paki and therefore had no contact with her in the workplace.

[31] Moreover, the short point is that in order for these witnesses to be heard, the Authority would need to timetable that evidence so that the witnesses could give their evidence orally, be examined by the Authority and cross-examined by The Warehouse and that whole process is simply not going to be possible in the balance of this year, given the Member's current workload.

[32] Indeed, with the delay in having to deal with this extraneous matter caused entirely by Ms Paki and her adviser, the Authority will now be in some difficulty in

getting a prompt decision on the substantive matter in any event. This is because of the increase in setting matters down since the point at which the Authority had protected time to consider the evidence on the substantive matter and prepare a determination.

[33] Because of the claim for reinstatement, the matter is urgent for both parties. Consideration of this proposed evidence would delay the Authority's consideration of the substantive matter by some months for the reasons already identified.

[34] The proposed evidence has no probative value whatever for the reasons already advanced and because it is effectively rebuttal evidence of evidence given and taken in the investigation meeting, that would have been the appropriate time to raise the issue, if at all. Ms Paki took no steps at the investigation meeting to distance herself from Mr Glasgow-Cox's evidence. Indeed, in relation to the issue of the happiness of the staff now that Ms Paki had left, Ms Paki gave the Authority to understand that she accepted what Mr Glasgow-Cox said as being a reasonable conclusion in all the circumstances.

[35] Ms Paki cannot have it both ways; if she accepts in cross-examination that her employer's conclusion about a particular matter is correct, she cannot subsequently seek to bring rebuttal evidence to challenge a view that she has already accepted.

[36] The application to reopen the matter so that the Authority can hear further evidence from witnesses for Ms Paki is rejected. There has been no miscarriage of justice and this application does not meet the test in *Squire*. The Authority will now proceed to conclude its deliberations of the evidence it has heard and to produce a determination on the substantive matter as quickly as it can.

### **Costs**

[37] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority