IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 133
5305455

	BETWEEN	PETER CONNELLY First Applicant
		BRIAN REGAN Second Applicant
		TREVOR BARNES Third Applicant
		PAT BENTON Fourth Applicant
		TONY CHRISTALL Fifth Applicant
		BRENT STEEL Sixth Applicant
	AND	NELSON PINE INDUSTRIES LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Greg Lloyd, Counsel for Applicants Scott Wilson, Counsel for Respondent
Submissions Received:	25 May 2012 from the Respondent 1 June 2012 from the Applicant
Determination:	29 June 2012

SECOND DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 10 May 2012 I upheld personal grievance claims by Peter Connelly and others against Nelson Pine Industries Limited (NPI). Mr Connelly was awarded compensation for distress (as were others) and compensation for lost remuneration.

[2] On 25 May 2012 counsel for NPI lodged a memorandum seeking recall of the determination as it affected Mr Connelly on the basis that I wrongly concluded that, but for a flawed selection process, Mr Connelly would have retained his position as a finishing utility operator. That conclusion led to an award of compensation for lost remuneration. Counsel points to paragraph [32] where I referred to three of five positions being surplus and then to paragraph [99] where I referred to three of five positions being retained. Following on from the second statement I found that Mr Connelly would have been retained but for an error in the way NPI rated staff for selection for the remaining positions. In essence NPI says that paragraph [32] is the correct finding of fact, paragraph [99] is wrong and therefore the award based on paragraph [99] is wrong. I am asked to recall and amend the determination to remedy that mistake.

Power to recall

[3] There is no express power given to the Authority to recall its determinations. There is an express power to reopen an investigation: see clause 4 of the 2nd Schedule to the Employment Relations Act 2000. However, I am not asked to reopen this investigation. Nor for timing reasons am I in a position to consider of my own motion reopening it. I do not mean to imply any view about the merits or otherwise of reopening.

[4] In *NZ Educational Institute v BOT of Auckland Normal Intermediate School* Colgan J, AEC 33/97, 5 May 1997 the Employment Court mistakenly thought that figures provided in evidence were gross rather than net of tax. The employer taxed the Court's award. On an application to recall the judgment the Court referred to s.104(3) of the Employment Contracts Act 1991, its equity and good conscience jurisdiction. That is now reflected in s.189 of the Employment Relations Act 2000 which applies to the Employment Court. The provision that applies to the Authority is s.157(3) which requires the Authority to act as it thinks fit in equity and good conscience but not inconsistently with the Act, regulations made under the Act or the relevant employment agreement. I accept that s.157(3) gives the Authority power to do what NPI seeks.

[5] The more difficult question is whether it is appropriate to do so in the circumstances.

Recall?

[6] Counsel for NPI refers me to *Horowhenua County v Nash (No. 2)* [1968] NZLP 632 for the categories of cases where a judgment not perfected can be recalled. The category said to be relevant here is *where for some very special reason justice requires the judgment be recalled*.

[7] That case guides the application of Rule 11.9 of the High Court Rules which permits a Judge to recall a judgment at any time before *a formal record of it is drawn up and sealed*. Counsel says that because the Authority has not issued a certificate of determination this rule can be applied by analogy.

[8] I doubt that the analogy is correct. Under s.174(a) the Authority's determination must specify what if any orders it is making in relation to the problem. NPI is really seeking the deletion of the order set out at paragraph [121] of the determination. Determinations are always sealed when issued to the parties and are enforceable immediately or subject to the terms of any order. Regulation 26 of the Employment Relations Authority Regulations 2000 permits but does not require the issue of a certificate of determination which can be used as one means of enforcing an order. There is no reason to say that the issue of a certificate of determination represents a threshold which when crossed somehow changes the status of the already sealed and enforceable determination. That is especially so when there is a broad power to reopen an investigation.

[9] I agree with counsel for Mr Connelly that NPI is really wanting the Authority to correct a slip or omission and that the better analogy is Rule 11.10 of the High Court Rules. That Rule permits correction of an order *if it …(a) contains a clerical mistake or an error arising from an accidental slip or omission …or (b) is drawn up so that it does not express what was decided and intended.* The Court in *NZ Educational Institute* relied on this rule as expressed in the previous High Court Rules.

[10] I also agree with counsel for Mr Connelly that I cannot say which of the two paragraphs mentioned at the outset, if either, is actually an error arising from an accidental slip. If there is an error of fact or analysis in this determination, I would need to reconsider the evidence both written and oral and the parties' submissions to identify that.

[11] While there is power to recall determinations the present case is not one where the power should be exercised.

[12] Any cost issues arising from this matter are reserved.

Philip Cheyne
Member of the Employment Relations Authority