

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 335
5383491

BETWEEN TE APITI TRUST
 Applicant

A N D GRANT McLEOD
 Respondent

Member of Authority: James Crichton

Representatives: Kathy Gibbs, for Applicant
 Respondent in person

Investigation Meeting: 1 August 2013 at Auckland

Date of Determination: 2 August 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By determination [2013] NZERA Auckland 228 dated 6 June 2013, the Authority dealt with a claim by the respondent in the present matter alleging that the Te Apiti Trust owed him wages. The Authority made certain findings in that 6 June 2013 determination in favour of Mr McLeod but rejected other claims. Critically, the 6 June 2013 determination issued against a background of the Te Apiti Trust not being represented at the Authority's investigation meeting despite having participated in all of the Authority's preliminary engagements on the file.

[2] The Authority took the view that the failure of Te Apiti Trust to participate in its investigation meeting was deliberate and issued its determination in due course.

[3] On 28 June 2013, Te Apiti Trust filed an application to reopen the Authority's investigation and on 1 July 2013, Te Apiti Trust filed a challenge to the Authority's determination in the Employment Court.

[4] His Honour Chief Judge Colgan issued a Minute on 1 July 2013 requesting a good faith report from the Authority by reason of the failure of Te Apiti Trust to attend the Authority's investigation meeting on 12 April 2013.

[5] The Authority responded to the Chief Judge's Minute with a Minute of its own dated 30 July 2013 in which the Authority recited the above particulars and indicated to the Court what steps the Authority proposed to take.

[6] In brief, the Authority's intimation in its Minute was that it had indicated to the parties its wish to deal expeditiously with the application to reopen, it suggested a process for doing that to the parties, and it obtained their consent to that process.

[7] The matter was then set down for further investigation by the Authority on 1 August 2013 (not 2 August 2013 as the Authority's Minute stipulates).

[8] The Authority's considered view was that if it was persuaded by the representations of the Te Apiti Trust concerning its non-attendance at the Authority's original investigation meeting, one aspect anyway of the disputation between these parties might well be capable of resolution.

[9] When the Authority convened its second investigation meeting in respect of this matter, it made it clear to the parties that in the interests of expedition, it proposed first to hear argument about whether in fact the application to reopen ought to proceed and then, without deciding that question, the Authority wished to hear evidence from Te Apiti Trust in resisting the Authority's original decision and any countervailing argument which Mr McLeod might wish to raise in defence of the Authority's original conclusions, as those conclusions were set out in the 6 June 2013 determination.

[10] The Authority made it clear to the parties that it would reserve its position on both the application to reopen and the substantive issue and would issue a determination or two separate determinations in due course.

[11] In the result, the Authority is persuaded that the proper course is to deal first with the reopening question exclusively, leaving the substantive matter for subsequent consideration and determination.

Determination

[12] Having heard evidence from Te Apiti Trust and rebuttal of that evidence from Mr McLeod, the Authority is persuaded that the absence of Te Apiti Trust at the Authority's original investigation meeting on 12 April 2013 was not deliberate. Indeed, the Authority is persuaded that Te Apiti Trust was as anxious as Mr McLeod to have a decision and even to engage with Mr McLeod with a view to facilitating that decision.

[13] It is common ground that both parties attended a telephone conference with the Authority to set the matter down. It is common ground also that during that telephone conference, the presiding Authority Member referred to a particular date, being the date on which the matter was eventually set down, namely 12 April 2013. Mr McLeod took the view that as that date was referred to by the Authority and accepted immediately by him, that should have been sufficient notice for Te Apiti Trust.

[14] Conversely, while Te Apiti Trust acknowledged the discussion around the date, it also referred to its request to go away and check the suitability of that date in terms of the availability of key witnesses. Such a request is commonly made by parties in the Authority's telephone conferences.

[15] What Te Apiti Trust says happened next was that it never got confirmation that that date was the date that the Authority had fixed upon. Conversely, there is no evidence that it ever confirmed to the Authority that that date was suitable to it either. In any event, it appears that the notification from the Authority's support officer to Te Apiti Trust, while undoubtedly sent, was not actually received. It appears to have gone into Te Apiti Trust's spam file and was not found by Te Apiti Trust until some time after the determination had actually issued.

[16] Whatever the explanation for why a provisional date never became a confirmed date in the minds of Te Apiti Trust, the short point is that the Authority is absolutely satisfied there was no intention on the part of the Trust to avoid engagement with the Authority's process and that its absence from the original investigation meeting was not a deliberate act.

[17] It follows from that brief analysis that the Authority is persuaded that it is appropriate for it to reopen its investigation into the original claim brought by Mr McLeod against Te Apiti Trust.

[18] To facilitate the expeditious disposal of the various matters requiring attention between these two parties, the Authority directs that a copy of this determination be provided to the parties and also to His Honour Chief Judge Colgan. Given the Authority's conclusion in this matter, the Court may think it proper to withdraw the request for a good faith report in respect of this matter.

James Crichton
Member of the Employment Relations Authority