

Holidays Act 2003 and the Employment Relations Act 2000. The Authority also issued a costs determination against UCL on 27 May 2022.²

[3] This determination explains why UCL’s application does not meet the necessary threshold for an order to reopen the investigation of the matter between Mr Branscombe and UCL.

The legal framework for considering a reopening application

[4] The Authority may order the reopening of an investigation on “such terms as it thinks reasonable”.³ The Authority’s discretion is broad but must be exercised according to principle.

[5] 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.⁴ The Employment Court’s rehearing power is similar to the Authority’s power to ‘reopen’ an investigation. These principles include the following:⁵

- (i) Some special or unusual circumstance must be found to exist to warrant the reopening, such as:
 - a. 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
 - b. a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended; or
 - c. some other special or unusual circumstance particular to the case.
- (ii) These circumstances must be subject to the threshold test of whether the party seeking the reopening can establish there would be an actual miscarriage of justice or at least a real or substantial risk of a miscarriage of justice if the determination were allowed to stand.

² *Branscombe v Ultimate Cleaning Limited* [2022] NZERA 218 (Member Leon Robinson).

³ Employment Relations Act 2000, Schedule 2 clause 4.

⁴ *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].

⁵ *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] and more recently in *Randle v The Warehouse Ltd* [2019] NZEmpC 68 at [13]-[18].

- (iii) The mere possibility of a miscarriage of justice is not a sufficient ground for granting a reopening. 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.⁶
- (iv) The assessment of the possibility of a miscarriage of justice does not require a high standard of proof of that possibility.
- (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 reopening.⁷
- (vi) 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.
- (vii) 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.

[6] 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”.⁸

Considering UCL’s Grounds for Reopening

[7] Both parties have provided written submissions to the Authority on the reopening application. In support of its application, UCL has also lodged an affidavit from its director Jasbir Singh who was the representative for UCL at the time of the investigation.

[8] UCL’s submissions summarises its reopening application under the following three grounds:

⁶ *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607.

⁷ *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, above n 7, at [37].

⁸ *Young*, above n 4, at [9].

- (i) *That there has been a miscarriage of justice.*
- (ii) *UCL was ready and willing to participate in this proceeding right from the outset but was unable to do so due to lack of proper understanding of the procedure.*
- (iii) *UCL has an arguable defence against Mr Branscombe's claim.*

[9] In support of these three grounds, UCL relies on two arguments presented under the headings "Delay" and "Arguable Defence".

Delay

[10] UCL's submits that during the investigation, there was a delay by the Authority in "progressing with the matter" and identifies reasons associated with the COVID-19 epidemic and Authority staff changes as possible reasons for the delay. Although I accept that there was a significant period that had passed during the initial stages of the investigation, it's not clear from UCL's submission how this delay supports its reopening application.

[11] The main argument under this heading appears to be about why UCL had not sought leave to file a Statement in Reply and why it failed to attend the scheduled Case Management Conference (CMC) and the Investigation Meeting.

[12] UCL maintains that Mr Singh's failure to engage with the investigation was not because he was ignoring Mr Branscombe's claims. Instead, UCL submit that Mr Singh had been in ongoing contact with Authority officers during scheduling engagements and had attended mediation with Mr Branscombe on 9 December 2020. Mr Singh also confirms that he:

- i. couldn't participate in the CMC because he contracted COVID-19 and was unable to communicate by telephone;
- ii. was ready and able to attend the Investigation Meeting but was unable to do so by Zoom; and
- iii. did not file a Statement in Reply because he was not familiar with the Authority's investigation process and misunderstood what was required from him.

[13] UCL's submits that if Mr Singh understood the Authority's investigation process, he would have been able to seek leave to file a Statement in Reply out of time. UCL is also of the view that because it had a strong arguable case, leave would likely have been granted.

[14] Mr Branscombe argues that UCL had 'been given every opportunity' to participate in the Authority's investigation process. Although, he acknowledges that UCL had participated in mediation, there had been little engagement thereafter. In summary, Mr Branscombe submits that Mr Singh on behalf of UCL was fully aware of what was happening and what he needed to do, but elected to do nothing.

[15] I am satisfied that reasonably clear communications were provided from the Authority and received by both parties on how, when and why attendance was required at both the CMC and the Investigation Meeting. This included instructions on how Mr Singh was able to use the Zoom platform to join the Investigation Meeting.

[16] Shortly after the Investigation Meeting was due to commence, the Authority member also contacted Mr Singh by telephone to confirm his attendance at the Investigation Meeting. Mr Singh said he would join the meeting, but he did not dial into the Zoom meeting.

[17] There is no evidence to suggest that UCL had contacted the Authority objecting to the delay in progressing the matter or an objection to the Investigation Meeting being heard by Zoom. The Authority's directions on 9 March 2022 also gave the parties an opportunity to notify the Authority if they were dissatisfied with the process of investigation. No such notice was received from UCL or Mr Singh.

[18] I accept that UCL was given every reasonable opportunity to participate in the investigation and failed to do so. This included seeking leave of the Authority to file a Statement in Reply out of time. This was an option that was available to UCL and the requirement to do so was communicated to UCL from as early as December 2020 and reiterated in Authority minutes on 8 and 9 March 2022 and directions on 21 April 2022.

[19] UCL's failure to engage in the investigation to present its case appear to arise from its own neglect and in accordance with the applicable principles does not on its own merits warrant a reopening of the investigation.⁹

Strong Arguable Evidence

[20] Under its second heading, UCL argues that it has an arguable defence to Mr Branscombe's claims against UCL for unjustified dismissal, reduction of hours and late payment of wages.

[21] In support of UCL's argument, Mr Singh has provided some additional documents in the form of text messages, business records and bank records in opposition to Mr Branscombe's claims that were upheld during the Authority's investigation. UCL further submits that this evidence would have had a significant impact on the outcome of the Authority's investigation.

[22] If UCL had engaged with the investigation, I am satisfied that Mr Singh's evidence would likely have been discovered either prior or during the Investigation Meeting. As I have determined, UCL had sufficient opportunity to present its case and it failed to do so.

[23] Even in the event that Mr Singh's evidence had been available at the investigation meeting in April 2022, I disagree with UCL's view on the potential significance of it in relation to the Authority's determination. The evidence on its own is not conclusive and the probability that it would have had an important influence on the Authority's determination is low.

No Miscarriage of Justice

[24] UCL's failure to participate in the investigation and not having the additional documents Mr Singh wanted to provide now, does not amount to a substantial risk of a miscarriage of justice if the determination were allowed to stand.

[25] For reasons set out above the application for reopening is declined.

⁹ *Autodesk Inc*, above n 9, at [302-303].

Costs

[26] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, Mr Branscombe may lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum UCL will then have 14 days to lodge any reply memorandum.

Alex Leulu
Member of the Employment Relations Authority