

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Francis Weston t/a Sportscar World (Applicant)

AND Gary Fraser (Respondent)

REPRESENTATIVES N R Harding for Mr Weston
MWS Nutsford for Mr Fraser

MEMBER OF AUTHORITY P R Stapp

**CONFERENCE CALL WITH
REPRESENTATIVES** 18 September 2006

ON THE PAPERS 1 and 11 August 13, and 25 October and 9 November 2006

DATE OF DETERMINATION 23 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem: Background

[1] Francis Weston has applied to the Authority to reopen an investigation held into an employment relationship problem between Gary Fraser and Sportscar World (SOP filed 25 November 2005). In that application the Employment Relations Authority issued an oral determination: *Gary Fraser v Francis Weston t/a Sportscar World* WA 68/06; WEA 5024356, 26 April 2006, Denis Asher Authority Member (Unreported). The Authority's determination has been challenged de novo in the Employment Court. I am informed the matter in the Court has not been set down and is awaiting a hearing.

[2] There was no appearance by or for the Respondent, Francis Weston, at the Authority's investigation meeting presided over by Mr Denis Asher on 18 April 2006 in New Plymouth.

[3] In that matter the Statement in Reply filed on 7 December 2005 referred to the Respondent as Sportscar World Limited but there was no formal change in the citation of the proceedings. Mr Asher made a finding that Mr Fraser was employed by Mr Weston.

[4] Francis Weston's grounds for reopening the investigation meeting are that there has been a miscarriage of justice in that the Respondent in the original proceedings was named incorrectly since the employer was a limited liability company, Sportscar World Limited. He has also relied upon a miscarriage of justice on facts and law relating to the Authority's determination on the issues because the evidence was heard unchallenged, how the Authority applied the law and that Mr Fraser's evidence was at least equivocal and that there was in particular new material that should have been put to Mr Weston. Nothing prevented Mr Weston being represented at the Authority's investigation meeting or for him to arrange to observe it and for such a request to be made at the time. There was proper notice given of the investigation meeting and Mr Weston and his lawyer, who was representing him at the time, knew of the details of the investigation meeting. Moreover the Authority decided that the Respondent had not put up any good cause for non attendance at the investigation meeting. Upon making its decision to proceed without the Respondent it did so "*acting as fully in the matter before it as if that party had duly attended or been represented*" (applying clause 12 Schedule 2 of the Employment Relations Act 2000). On those grounds I have decided that the matter should not be reopened.

[5] Further to this I have noted that Mr Weston's counsel has argued that Mr Weston's failure to attend the Authority's investigation meeting is not a ground that relates to the miscarriage of justice because he could not attend, for practical reasons to avoid any breach of the Companies Act.

[6] Mr Weston did not attend the investigation meeting. He says he had a genuine reason for not attending. Mr Weston was convicted for trading whilst he was bankrupt and barred from being or acting as a director and did not attend the Authority's investigation meeting to avoid breaching s 382 (1) (a) of the Companies Act 1993. Since the company now has another director Mr Weston says he can attend in a private capacity to give evidence. Indeed in the lead up to the Authority's investigation meeting Mr Weston's lawyer at the time produced a letter dated 22 March 2006 claiming that Mr Weston was unable to attend the meeting due to advice from the companies' office which would not allow him to do so. There is some real doubt that this was a genuinely the case because Mr Fraser has produced information that there was nothing to prevent Mr Weston turning up to the Authority's investigation, or even being represented, and further that the prohibition under s 382 was irrelevant considering that Mr Weston had only been cited personally in the statement of problem. The Authority dealt with this matter and considered the information available at the time

from Mr Weston and his representative in its Determination. Mr Weston should have reasonably understood what would happen given that he was represented prior to the investigation meeting. No other requests and alternatives to proceeding were made to ameliorate the situation by Mr Weston.

[7] In the circumstances Mr Weston has not satisfied me that the issues in the Authority's Determination and Mr Weston's decision not to attend personally, or have his interests represented at the Authority's investigation meeting, and now that he is now available, satisfy the test of a substantial possibility, or a real or substantial risk, of a miscarriage of justice occurring. The Authority considered the issues when it decided to proceed: "*acting as fully in the matter before it as if that party had duly attended or been represented*". This means that Mr Weston's arguments for a reopening have no foundation.

[8] Applying my discretion in a principled way, with the reasons above, the application from Francis Weston to reopen the investigation on the *Gary Fraser v Francis Weston t/a Sportscar World* employment relationship problem determined in WA 68/06; WEA 5024356, 26 April 2006, Denis Asher Authority Member (Unreported) is declined.

[9] Costs will be reserved.

P R Stapp
Member of the Authority