IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 42
5388493

	BETWEEN	WAYNE WOODWARD Applicant
	A N D	TOTALLY BOATING 2004 LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Anjela Sharma, Counsel for Applicant David Ballantyne, Counsel for Respondent
Investigation meeting:	Determined on the papers by consent
Submissions Received:	11 February and 11 March 2014 from the applicant 21 February 2014 from the respondent
Date of Determination:	21 March 2014

DETERMINATION No 2 OF THE AUTHORITY

A. Mr Woodward's application to reopen the Authority's investigation in matter [2013] NZERA Christchurch 231 is declined.

B. Costs are reserved.

Employment relationship problem

[1] This is an application by Mr Woodward to reopen a determination by the Authority. The respondent opposes the application.

Background

[2] In its determination dated 11 November 2013, [2013] NZERA Christchurch 231, the Authority found that Mr Woodward had been unjustifiably dismissed by the

respondent because of procedural flaws, but that there had been genuine commercial reasons behind the respondent's decision to make Mr Woodward's position redundant. Mr Woodward was awarded two weeks' gross pay representing the gross salary that he would have earned had proper consultation taken place. He was also awarded $10,000 for humiliation, loss of dignity and injury to his feelings arising out of a failure to follow a proper consultation process.

Mr Woodward's grounds for reopening the investigation

[3] Mr Woodward seeks to reopen the investigation on the following grounds:

(a) That the Authority has the jurisdiction to make an award for loss of income where it concludes there has been a flawed selection process, even if the redundancy was genuine;

(b) That Mr Woodward is entitled to an award for loss of income in accordance with the Authority's findings;

(c) Mr Woodward was not afforded a proper opportunity to make submissions regarding the issue of *comebacks* (essentially, problems with boats that had come back to the respondent's workshop for remedial work after servicing, which was a major factor in Mr Woodward being selected for redundancy);

(d) Mr Woodward did not acknowledge responsibility for nine of the comebacks, contrary to the Authority's finding;

(e) Mr Woodward is entitled to be *properly heard through submissions on this issue*; and

(f) Mr Woodward was entitled to examine the full financial report of the company, rather than a portion of it.

[4] Mr Woodward's application was supported by a sworn affidavit, which deposes that he does not agree that he acknowledged nine comebacks in the investigation meeting and that *this was sprung on me in a way that was unfair*. He deposes that he does not understand how he could have been fairly expected to have made a response in the investigation meeting about the matters on the list of comebacks. He also gives several paragraphs of evidence in his affidavit about events

that occurred during his employment with the respondent, about the clients referred to on the comeback list, and about his view of the fairness of the decision to dismiss him.

[5] Mr Woodward also deposes that, during his employment, the respondent was awarded the Phillip Mills Award (since corrected by counsel to the *Stephen* Mills Award) for excellence in boat service and sales throughout Australasia, and that he was the most experienced workshop technician at the time.

[6] Ms Sharma's submissions are that a substantial miscarriage of justice has occurred. She refers to Mr Woodward's denial of having had any comebacks, and says that the respondent failed to refer to Mr Woodward being *largely instrumental in the company being awarded a prestigious boating award.* The thrust of her argument is that having a large list of comebacks is not consistent with Mr Woodward being *a proven technician in his field*, and that it was unfair to compare Mr Woodward to the other technicians.

The respondent's grounds for opposition

[7] The respondent opposes the application on the following grounds:

(a) That there has been no miscarriage of justice or unfairness to Mr Woodward;

(b) Mr Woodward and his counsel had a full opportunity to present their case;

(c) The substantial merits of the case would not be affected by the new evidence that Mr Woodward proposes to introduce, which is neither fresh, credible or cogent;

(d) Mr Woodward is attempting to re-litigate his case; and

(e) The application has no merit.

[8] Mr Ballantyne submits that five of the seven grounds advanced by Ms Sharma on behalf of Mr Woodward are repetitions of her submissions made following the Authority's investigation meeting. The only new grounds advanced, he says, are that Mr Woodward was not afforded a proper opportunity to make submissions regarding comebacks, and that it is in the interests of justice to reopen the investigation.

[9] Mr Ballantyne also submits that there is nothing in Mr Woodward's affidavit that he could not have raised before the Authority at the investigation meeting on 23 October 2013. Otherwise, Mr Woodward repeats evidence already raised at the investigation.

[10] Mr Ballantyne also submits that there were no defects in the proceedings and that there were rights of appeal (properly called rights of challenge) but that it is an entirely different principle and threshold to try to reopen an investigation while introducing no grounds to do so.

[11] Finally, Mr Ballantyne seeks costs on an indemnity basis in respect of Mr Woodward's application.

The law

[12] The statutory power of the Authority to reopen an investigation derives from Schedule 2 of the Employment Relations Act 2000 (the Act), at paragraph 4:

> ***Reopening of investigation***
>
> *(1) The Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.*
>
> *(2) The reopened investigation need not be carried out by the same member of the Authority.*

[13] The leading case on the law in this area, although it was decided prior to the enactment of the Act, is the Court of Appeal case of *Ports of Auckland Ltd v. New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 which upheld the decision of the Full Employment Court in *New Zealand Waterfront Workers Union v. Ports of Auckland Ltd* [1994] 1 ERNZ 604.

[14] The approach of the Employment Court, approved by the Court of Appeal, can be summed up in the following passages, at [607]:

> *We observe, as the Court did in the* Cavalier Carpets[1] *case, that there were no restrictions on the grant of a rehearing except as to time. It is undesirable that the Court should supply restrictions that appear nowhere in the statute. However, every judicial discretion must be exercised according to clear principle.*

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[1] *Cavalier Carpets (NZ) Ltd v. NZ etc Woollen Mills etc IUOW* [1989] 2 NZILR 378

> *What considerations should move the Court to order to be reheard a case that has already been concluded? Obviously if a positive finding can be made that a miscarriage of justice has taken place that would be enough. The likelihood of a miscarriage of justice should also be enough, especially in a case such as this where contrary to the Court's usual practice the question of rehearing or no is separated from the rehearing. The particular species of miscarriage of justice would include those listed in* Cavalier Carpets *but is not confined to them. A mere possibility or suspicion is however not enough to warrant disturbing a considered judgment reached after a full and well exercised opportunity to the parties to be heard.*
>
> *Our view is that in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by a successful litigant, particularly in dispute resolution cases like this one, to enjoy the fruits of a judgment in its favour.*

[15] The Court of Appeal, in reference to these passages from the judgment of the Employment Court, stated, at [88] the following:

> *Mr Towner challenged the reference to "possibility" in the last of these paragraphs, and submitted that the proper test was therefore there was a substantial risk of a miscarriage of justice* [sic]. *The three paragraphs quoted from the judgment must be read together, however, and we do not think it can be said that the Court has erred. It has stated that an actual miscarriage of justice must be enough, and the likelihood of a miscarriage should also be enough. A mere possibility is rejected as being insufficient. In the next sentence it says the Court must "look toward the possibility". In its context we read this as meaning that the Court should have regard to the degree of possibility, where it is something less than a probability but more than a mere possibility. The Court then refers to the standard of proof required, and to the need to balance the risk of injustice against the importance of certainty. Mr Towner was concerned that the last paragraph cited might suggest that any possibility might be enough, but this is clearly not what is meant if one looks at the context. The possibility that is more than a "mere" possibility could be aptly described as a substantial possibility, which is the same as the "substantial risk" test proposed by Mr Towner. Such a refinement based on semantic differences are not helpful. Parliament has chosen to confer the discretion in wide terms, and we find no error in the approach adopted by the Full Court.*

[16] With respect to the introduction of new evidence to justify a reopening, Travis J reiterates in the Employment Court judgment of *Advikit Para Legal Services Ltd v. Jacqueline Wendy Weston* [2011] NZEmpC 117, that the overriding consideration in any rehearing application is to avoid a real or substantial risk of a miscarriage of justice and repeats the tests originally set out in *Ladd v. Marshall* [1954] 3 All ER 745 at 748, per Lord Denning:

> *… first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.*

Determination

[17] When examining Mr Woodward's application, his affidavit and Ms Sharma's submissions, they appear to boil down to the following arguments:

(a) Mr Woodward has more evidence that he would like the Authority to take into account, which he believes will persuade the Authority that his dismissal for redundancy was not genuine;

(b) Even if the redundancy was genuine, he should still have been awarded a greater sum than he was, in respect of his loss of income;

(c) He (or his counsel) was not given a full opportunity to be *properly heard through submissions on this issue;*

(d) He was not given a reasonable opportunity to answer the Authority's and the respondent's questions at the investigation meeting about comebacks;

(e) The Authority made an error of fact (about him acknowledging nine comebacks);

(f) Mr Woodward was not given access to a full financial report.

I examine each below.

Further evidence

[18] In considering the first argument, I note that none of the evidence set out in Mr Woodward's affidavit is said to have only come to light since the Authority's investigation meeting, and by its very nature, I do not believe that this can have been the case. All of it was, or should have been in the mind of Mr Woodward at the time of preparing his brief of evidence and when giving his oral evidence to the Authority. Clearly, the first limb of the test in *Ladd* has not been met, as the evidence could have

been obtained with reasonable diligence for use at the Authority's investigation meeting. Furthermore, I am not convinced that the second limb of that test has been met either, as I do not believe that the evidence given would have an important influence on the result of the case.

Mr Woodward should have been awarded a greater sum in respect of his loss of wages

[19] As for the second argument, this is essentially a submission that the Authority got the law wrong in its determination. It is, of course, not beyond the bounds of possibility that it has, but in the absence of a clear and cogent indication of how it has got the law wrong, (which has not been furnished by Ms Sharma in my view) I am unable to agree with Mr Woodward in this respect. In any event, the proper approach would have been for Mr Woodward to have challenged the Authority's decision in the Employment Court on a point of law, or by way of a *de novo* challenge, not to seek to persuade the Authority to re-determine an issue.

Opportunity to be properly heard through submissions

[20] It is not clear exactly what is meant by this ground, as Ms Sharma had a full opportunity to make whatever submissions she felt were appropriate. I note that she gave lengthy oral submissions on Friday 25 November 2013, including submissions in reply to Mr Ballantyne's submissions, a total of one hour 20 minutes being spent on submissions on that day by both counsel.

[21] Furthermore, the element of the determination with which Mr Woodward and Ms Sharma take issue is a well-known principle that full loss of wages may not be awarded where a redundancy is determined to be genuine and the dismissal substantially justified. I refer to *Christchurch City Council v Davidson* [1997] 1 NZLR 275, [1996] 2 ERNZ 1 (CA), and *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA), in which the remedy for a personal grievance in respect of a process failure was held to be confined to compensation for humiliation and distress. Indeed, it is for this reason that representatives regularly plead redundancy related dismissals in the alternative, as unjustified disadvantage grievances. Any failure by Ms Sharma to make submissions on this issue cannot justify the investigation being reopened.

Opportunity to make submissions about comebacks

[22] Mr Woodward had been told by the respondent prior to his dismissal about the role that his comebacks were playing in the decision to dismiss him. He says this in his written brief of evidence (referring to *a list of complaints about his performance*). The list of comebacks was therefore in his mind at the time of the dismissal and was certainly in his mind prior to and during the investigation meeting.

[23] For Mr Woodward to say that he did not have an opportunity to make submissions about comebacks is simply not true. That opportunity arose when he prepared his brief of evidence, when he prepared his brief of evidence in reply, and when he was at the Authority's investigation meeting. He was represented by counsel and could have led further evidence in chief had he wished, through her. Mr Woodward was asked questions about the comebacks at the Authority's investigation meeting by both Mr Ballantyne and myself, and was given every opportunity to answer them, which he did. Ms Sharma was also afforded the opportunity to ask re-examination questions of Mr Woodward, which she took advantage of, and I note took 20 minutes doing so.

[24] In summary, I cannot accept this argument.

The Authority made an error of fact about Mr Woodward acknowledging nine comebacks

[25] It is perfectly possible that the Authority misunderstood Mr Woodward's evidence about how many comebacks he acknowledged, although he does not depose in his affidavit as to how many he does now acknowledge. However, in the absence of clear and objective evidence that the Authority has made an error, rather than a mere assertion that it has, it would not be appropriate to reopen the investigation on this basis. Otherwise, any party could apply to be reheard and give its evidence again on an issue of importance in the hope of persuading the Authority to make a different finding of fact. The proper approach was for Mr Woodward to have challenged the Authority's determination *de novo*.

Disclosure of the full financial report of the company

[26] In concluding that the respondent had genuine reasons for disestablishing Mr Woodward's role, I took into account a number of factors about which the

respondent gave evidence, including a statement of financial performance comparing the years ended 30 June 2011 and 30 June 2012, which the Authority had directed to be disclosed by the respondent of its own motion.

[27] Following the investigation meeting I found that the respondent's evidence regarding the reasons for the dismissal to be credible and did not consider that disclosure of more detailed financial information would have assisted me. Most importantly, no formal application for disclosure of the full financial records was made to the Authority by Ms Sharma. I also note that no request for this information was made by her in the personal grievance she wrote on behalf of Mr Woodward.

[28] In summary, if Mr Woodward now regrets not having sought disclosure of full financial records prior to the investigation meeting, then the appropriate step to have taken was to have launched a *de novo* challenge, rather than to seek to reopen the Authority's investigation.

Conclusion

[29] The standard employment relationship problem resolution process in New Zealand already gives parties three bites of the cherry; they may reach a mediated settlement, they may seek a determination in the Authority and, if either or both parties are not content with that determination, they may completely relitigate matters in the Employment Court by way of a *de novo* challenge. Parties also have the right to challenge determinations in the Employment Court on the more limited grounds of a point of law.

[30] When a party seeks to reopen an investigation that has been concluded and determined, there must be a good reason for doing so, as parties expect, and are entitled to certainty in the process they have undertaken, often at considerable cost.

[31] The test is whether there has been a miscarriage of justice or there is a substantial risk of a miscarriage of justice if the investigation is not reopened. For this reason, the Authority reopens its investigations but rarely. Examples include where a determination was issued against the wrong respondent (*Yang v Allen* ERA Auckland AA182A/07), where the name of a respondent needed to be updated for enforcement purposes (*Creevey v Aimex Ltd* ERA Christchurch CA104A/09), where an inconclusive determination was replaced with a conclusive one (*Dittmer v Progressive Investment Enterprise Ltd* ERA Auckland AA179A/09) and where orders

needed to be set aside against an undischarged bankrupt (*Brownie v Fuster* [2010] NZEmpC 127).

[32] In the present matter, I am not satisfied that there is sufficient reason to reopen the Authority's investigation. No new evidence has emerged that was not available at the investigation and there is no clear evidence of an error of fact, law or irregular process followed.

[33] I therefore conclude that there is no substantial risk of a miscarriage of justice if the Authority does not reopen its investigation, and I therefore dismiss Mr Woodward's application. The orders in the determination dated 11 November 2013, [2013] NZERA Christchurch 231, remain unchanged therefore.

Costs

[34] Mr Ballantyne seeks his client's costs incurred in opposing the application on an indemnity basis. However, he has not provided a breakdown of those costs, and the parties should be given the opportunity to seek to agree how they should be disposed of and, if they cannot, Mr Woodward has the right to make submissions on those costs.

[35] The parties are therefore directed to seek to agree between them how costs are to be dealt with. However, if they have failed to reach agreement within 28 days of the date of this determination, the respondent has a further 14 days within which to serve and lodge a memorandum of counsel, and the applicant has a further 14 days within which to serve and lodge a memorandum in reply.

David Appleton
Member of the Employment Relations Authority