IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 32
5408465

	BETWEEN	ELIAS WYBER Applicant
	AND	MIDAS INFOMEDIA LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	Applicant in person Mike Gould, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	16 February 2015
Determination:	1 April 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application from Mr Wyber to reopen an investigation meeting and a request to stay costs. Midas Infomedia Limited (Midas) opposes the applications to reopen and to stay costs.

The law

[2] Clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act) makes provision for reopening an investigation. The provision is as follows:

> ***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 an order previously made.*

(2) The reopened investigation need not be carried out by the same member of the Authority.

[3] Whether or not there has been a miscarriage of justice is an overarching principle for consideration in regard to reopening an investigation The Labour Court set out the main forms of a miscarriage of justice by citing R.494(3) of the High Court Rules, which would apply by analogy to the specialist employment law institutions. [1] This means that clause 4 of Schedule 2 to the Act cannot be used simply to allow a reopening just because it has been requested.

[4] The relevant circumstances applicable in this matter include: (1) improper evidence being admitted; (2) evidence being rejected which ought to have been admitted; and (3) material evidence that has been discovered since the investigation meeting which could not reasonably have been foreseen or known before the meeting. Also, I am able to consider any residual matters, such as any delay in requesting the reopening and whether or not the application is vexatious or frivolous, or any others impacting on the justice of the matter.

[5] Also, the substantial merits of the case can be assessed in the context of the new evidence that the applicant proposes to introduce.[2]

The facts

[6] In the original determination[3], the Authority (with a different member) found that Mr Wyber was not an employee of Midas. The Authority applied legal tests to the question of finding whether or not the applicant was an employee as follows:

(a) Intention of the parties;

(b) Control;

(c) Integration;

(d) Fundamental test.

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1 *Cavalier Carpets New Zealand Ltd v NZ (except Taranaki etc) Woollen Mills etc IUOW* [1989] 2 NZILR 378; *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111

2 *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 (CA)

3 *Wyber v Midas Infomedia Limited* [2013] NZERA Wellington 143

[7] The Member made an assessment as to *the real nature of the relationship* with particular regard to all relevant matters, including the above tests. In addition to the above the Member considered industry practice.

[8] Mr Wyber has requested the Authority to assess material that he alleges to have been withheld by the respondent at the time of the original investigation. The respondent contends that none of the material is significant to the employee/contractor issue, but does not take any issue that the material was not provided earlier. The respondent further claims that none of the material goes to the control, integration and fundamental tests applied by the Authority. Furthermore, the respondent contends that none of the material produced by Mr Wyber refutes the clear evidence of the invoicing by Mr Wyber for his services to the respondent through his company (Exploratory Technology Group (NZ) Limited (ETG)). It further contends that almost all of the material consists of documents created after the relationship between the parties came to an end on 18 May 2012. There is an exception with a small amount of material (in Tab 65) that does not assist the claim by the applicant that he was an employee.

[9] Mr Wyber has produced further information including correspondence from the IRD that is addressed to Mr Wyber's company, ETG. The remaining material consists of allegations by Mr Wyber that witnesses made false statements at the investigation meeting to the Authority. The respondent says these allegations are completely unsubstantiated. They relate to Mr Wyber's opinion in the matter.

[10] Mr Wyber provided a final reply to the Authority (e-mail 16 February 2015). He relies on the company withholding evidence from him for the investigation. Also, he says that Midas made no attempt to refute that the evidence now available contradicts sworn testimony and nor does the respondent provide any argument to show that the evidence now available is not material.

Determination

[11] I am satisfied that the delay in Mr Wyber filing the application for reopening is not an issue. I am satisfied that his application is genuine and not vexatious or frivolous.

[12] I am not satisfied that the information that Mr Wyber now wants the Authority to consider and to assess against the respondent's evidence would have had any

material impact on the original determination. Mr Wyber's submission relates to re-litigating various issues about the evidence from the respondent, and essentially reargues the Authority's determination and is more related to a challenge of the determination. This is not enough to reopen an investigation. It is not my role to revisit the original Authority's determination, and there has been nothing about the material from Mr Wyber that supports his claim that the evidence from the respondent was false, as it is based predominantly on Mr Wyber's opinion. This is not sufficient to give cause to reopen the investigation.

[13] There was also a reasonable opportunity for that material to have been adduced during the investigation meeting if it was important and to influence the outcome by addressing it with the witnesses from Midas. This also includes the ruling about the document that apparently was not admitted. The Authority dealt with it at the time as part of the investigation. Indeed if Mr Wyber had pursued his right to a challenge of the determination in the Employment Court any argument about that document and any other information would have been able to be heard in a *de novo* setting. All relevant documents would have been the subject of trial disclosure. Mr Wyber has not identified anything about the document that would suggest that there has been a miscarriage of justice and the outcome would be any different upon reconsideration.

[14] I therefore dismiss the application to reopen the investigation meeting. It must follow that the Authority's determination on costs as originally set by the Authority now must be complied with because there are no interests to protect following the application to reopen and there has been no challenge to the Authority's determination. Failure to comply with the costs determination could result in enforcement action.

Costs

[15] Costs on this matter are reserved.

P R Stapp
Member of the Employment Relations Authority