

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 103A/09  
5121831**

BETWEEN      CHAO ZENG  
                         Applicant  
  
AND              AIR NEW ZEALAND LIMITED  
                         Respondent

Member of Authority:      Leon Robinson  
  
Representatives:          Tuariki John Delamere, Advocate for Applicant  
                                 Rob Towner, Counsel for Respondent  
  
Investigation Meeting:      Consideration on Papers  
  
Submissions Received:      2 June 2009  
   16 June 2009  
  
Determination:              30 July 2009

---

**DETERMINATION OF THE AUTHORITY**

---

**The problem**

[1] Ms Zeng makes application to reopen an investigation. Air New Zealand opposes the application.

**The facts**

[2] Ms Zeng resides in the People's Republic of China.

[3] By application lodged in the Authority on 17 April 2008, Ms Zeng seeks formal orders from the Authority in resolution of her claim that she was "wrongfully" dismissed by Air New Zealand. That description is incorrect and I deal with the matters as the statutory claim of unjustifiable dismissal. Although the remedies for unjustifiable dismissal are prescribed by statute, Ms Zeng claims various other orders.

[4] Ms Zeng's claim is defended. Air New Zealand says Ms Zeng was never its employee. It also says her employment is not governed by New Zealand law.

[5] In February this year I held a telephone conference with the representatives to make arrangements for an investigation meeting in relation to the correct identity of the employer. That meeting was scheduled for 2 April 2009.

[6] Ms Zeng did not attend at the investigation meeting scheduled on 2 April 2009 and nor did her representative Mr Delamere. By a determination of that same date, I directed that Ms Zeng's application cease to be investigated by the Authority<sup>1</sup>. Ms Zeng did not challenge that determination.

[7] Ms Zeng now asks that the investigation I directed cease, be reopened.

### The merits

[8] Clause 4 of the 2nd Schedule to the *Employment Relations Act 2000*.

#### *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.*

[9] Ms Zeng's application to reopen investigation is dated 13 April 2009 and lodged on 16 April 2009. The stated ground for the application is that "not to reopen the investigation would amount to a miscarriage of justice".

[10] A notice of investigation meeting dated 23 February 2009 was issued confirming the investigation meeting for Thursday 2 April and Friday 3 April 2009. The accompanying covering letter erroneously referred to Thursday 3 April and Friday 4 April 2009. Mr Delamere says that he relied on the covering letter reference to 3 April 2009 "*without realising it was a Friday and not a Thursday*". He says the Authority's determination that Ms Zeng "*failed to be represented without good cause does not reflect the true nature and circumstances of the matter and is thus unfair*".

[11] Mr Delamere further says that given the complexity of the matter and because the meeting was to extend over two days, 37 minutes was not a reasonable time within which to reach the determination the Authority did.

---

<sup>1</sup> unreported, AA103/09, 2 April 2009, L Robinson (member)

[12] Mr Towner for Air New Zealand says the Authority's determination of 2 April 2009 was a fair outcome and there was no miscarriage of justice. It is submitted that the investigation should not be reopened because Ms Zeng has not established sufficient reason to do so and it would result in a miscarriage of justice to the respondent.

[13] Mr Towner argues that the Authority is able to have regard to the merits of the substantive claim in deciding whether to reopen the investigation. He says the evidence is compelling that Air New Zealand was not Ms Zeng's employer and that New Zealand law does not apply. He also says that Ms Zeng's claim of personal grievance was not raised within time and there is no application for leave nor any request for Air New Zealand's consent.

### **The determination**

[14] The question of whether to re-open an investigation is a matter of discretion. I consider that my discretion is not unfettered and must be exercised on a principled basis.

[15] I regard the overwhelming consideration as the interests of justice. I also consider that it is generally undesirable that matters of process should be permitted to deny determination of substantive issues.

[16] After consideration, I have resolved to accept Mr Delamere's explanation as to his client's failure to attend by him before the Authority at the last scheduled investigation meeting. I am led to further conclude that Ms Zeng's claim should not be denied a substantive determination because of a matter of "process". That conclusion informs me to exercise my discretion in Ms Zeng's favour. I regret the inconvenience to Air New Zealand as matters have advanced to this point.

[17] I shall therefore grant the application to reopen the investigation but I consider it is necessary to impose terms aimed at securing the more expeditious disposal of the matter and minimising the prospect of further unnecessary inconvenience.

[18] I have determined not to impose costs as a term of granting the application. In the particular circumstances, I do not consider that would be appropriate. However, I am concerned to resolve without any further delay the attendant preliminary matters. I consider it appropriate in exercising my discretion in Ms Zeng's favour to impose terms.

[19] While I had initially made arrangements to deal with the issue of the employer's identity, I now wish to deal with the question of whether a personal grievance was in fact raised and within time. I direct Mr Delamere to lodge in the Authority **by 4.00pm on Monday 10 August 2009, either** evidence for the purposes of section 114(1) of the *Employment Relations Act 2000* that Ms Zeng raised a personal grievance for unjustifiable dismissal within 90 days of that action arising; **or alternatively** an application for a leave to raise a personal grievance out of time in accordance with section 114(3) of the *Employment Relations Act 2000*.

[20] I direct Mr Delamere to confirm the applicant's physical address to the Authority.

[21] I reserve costs.

Leon Robinson  
**Member of Employment Relations Authority**