

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 560
3036052

BETWEEN AHMED ALKAZAZ
Applicant

AND ENTERPRISE IT LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: Applicant in person
 Robbie Bryant for Respondent
Investigation Meeting: On the papers
Submissions received: 14 August 2019 from both parties
Date of determination: 30 September 2019

DETERMINATION OF THE AUTHORITY

The Authority's determination

[1] On 22 December 2017 the Authority issued a determination (the Authority's determination) which found that Ahmed Alkazaz was unjustifiably dismissed by Enterprise IT Limited (e-IT or the company).¹ Mr Alkazaz was awarded lost wages and compensation. The company was also penalised for breaching Mr Alkazaz's

¹ *Ahmed Alkazaz v Enterprise IT Limited* [2017] NZERA Auckland 400, file number 3005551.

employment agreement by failing to pay him in lieu of notice on termination of his employment.²

[2] Mr Alkazaz did not challenge the Authority's determination.

Re-opening application

[3] Mr Alkazaz filed an application to re-open the Authority's determination. The application is lengthy at 35 pages and is accompanied by over 200 pages of documents. E-IT strongly opposes the application.

[4] Mr Alkazaz's application is multi-faceted and not straightforward. It includes some new evidence which he wishes to be considered in relation to his original claims. However, it was much wider than that. The Authority sought and received submissions about how to deal with the application.

[5] In a Minute I identified a number of issues arising from the application including whether:

- (a) Mr Alkazaz is attempting to raise new claims;
- (b) some claims are outside of the Authority's jurisdiction; and
- (c) some claims are time barred either by s 114 of the Act as not having been raised out of time or by reason of a limitation period.³

[6] I record below my decision that new grievances should be dealt with in another way, if Mr Alkazaz wishes to pursue them. Other issues raised are more in keeping with a re-opening application and I sought evidence and submissions on them. It was agreed that these would be provided in writing and the application would be considered on the papers. I received a 35-page affidavit from Mr Alkazaz, which is described as prolix in submissions for the company. E-IT decided not to file any affidavit evidence. Both parties then provided submissions.

[7] Under s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all of the evidence or submissions received but have stated findings and expressed conclusions.

² This was paid some months before the investigation meeting in 3005551.

³ Member's Minute of 12 April 2019.

New grievance claims

[8] Mr Alkazaz's re-opening application includes new personal grievance claims of unjustified action by e-IT to his disadvantage and of discrimination, seemingly on the grounds of marital and family status, as well as ethnic and national origin. These were not grievances considered in the September 2017 investigation meeting or in the Authority's resulting determination.

[9] The Authority is not focused on technicalities and is able to find grievances which are different to those alleged⁴. However, I am not prepared to re-open the original investigation in order to look at grievances which appear mostly unrelated to the dismissal grievance originally pursued. Mr Alkazaz was represented throughout the process leading to the Authority's determination.

[10] As pointed out in the Minute, Mr Alkazaz faces another difficulty as it appears the new grievances were raised with e-IT for the first time in 2018, whereas his employment finished in 2016. They therefore appear to have been raised well outside the 90-day period set for raising grievances by s 114 of the Act. There also appears to be the prospect of a leave application under s 114(3) of the Act.

[11] In the event that Mr Alkazaz wishes to pursue new grievance claims, he would need to file a statement of problem setting those out and, if he accepts these were not raised within the 90-day period, apply for leave under s 114(3) of the Act. These are not issues that should be dealt with under any re-opening of the original investigation.

Re-opening principles

[12] I go on to consider other matters relied on for re-opening. The Authority is able to re-open investigations on such terms as it thinks reasonable.⁵ This discretionary power enables the Authority to prevent injustice.⁶ As noted recently by the Employment Court in *Randle v The Warehouse Ltd*, the discretion must be exercised according to principle and the mere possibility of injustice is not enough.⁷ There must be an actual miscarriage of justice or at least a substantial risk. The party applying must satisfy the Authority to exercise the discretion in its favour.

⁴ Section 122 of the Act

⁵ Clause 4, Schedule 2 of the Act.

⁶ *Heritage Expeditions Ltd v Fraser* [2010] NZEmpC 85 at [21]

⁷ *Randle v The Warehouse Ltd* [2019] NZEmpC 68 at [13] and [17]

[13] In *Puna Chambers Inc v Christensen* Judge Inglis, as she then was, noted that the “principle of finality is founded on the desirability of bringing litigation to an end and avoiding re-litigation in the same forum”.⁸

[14] Re-opening enables determinations based on fraudulent evidence to be set aside however the threshold is high. Full particulars are required, along with new evidence which would be “likely to have a determinative effect on the outcome”.⁹

What are the grounds for applying for re-opening?

[15] Although not entirely clear, it appears that the application is based on the grounds of fresh evidence coming to light and the determination being obtained by unfair or improper practice, especially perjury by the company’s witnesses. These grounds are at least somewhat related.

What are the fresh evidence principles?

[16] Where fresh evidence is relied on the party applying must show:

- (a) The evidence could not have been obtained with reasonable diligence for use at the investigation meeting;
- (b) The evidence is such that, if given, would probably have an important influence on the result of the case, albeit not necessarily decisive; and
- (c) The evidence should be apparently credible, although not necessarily incontrovertible.¹⁰

Is there fresh evidence?

Evidence which is not fresh

[17] Mr Alkazaz’s affidavit includes repetition of his written and oral evidence heard at the investigation meeting and his representative’s submissions, as well as questions Mr Alkazaz has about documents available at the meeting. This is not fresh or new evidence. Similarly witness statement and correspondence were filed as attachments to his affidavit, which were before the Authority at the investigation meeting and are thus not new.

⁸ *Puna Chambers Inc v Christensen* [2014] NZEmpC 218 at [17].

⁹ Above n 8 at [17].

¹⁰ Above n 7 at [16].

Evidence which is fresh but was in existence at the time of the investigation meeting

[18] Much of what is new comes from e-IT's client who, in response to a privacy request, provided evidence which was in existence (although not necessarily in this form) at the time of the investigation meeting:

- (a) completed ticket (job) information;
- (b) change request details; and
- (c) email and message conversations between Mr Alkazaz, other e-IT staff and staff of the client organisation.

[19] The messages mostly show what appear to be ordinary interactions with minimal evidence of client dissatisfaction.

[20] There are also a few e-IT emails and meeting invites. The message invites appear in keeping with the evidence given at the investigation meeting. A November 2016 email from an e-IT witness outlines his observations on Mr Alkazaz's performance, indicating attempts to improve, some shortfalls and a view that it will take more time for him to come up to speed.

[21] In addition, some of Mr Alkazaz's new evidence concerns matters which were within his own knowledge, or documents within his possession or control, at the time of the investigation meeting. These included evidence regarding his wife's visa and e-IT's discussion of that issue with him. There are also emails between his legal representative and e-IT.

Evidence which is fresh and was not in existence at the time of the previous investigation meeting

[22] There are a few pieces of evidence which were not in existence at the time of the investigation meeting in September 2017. This includes 2018 emails between Mr Alkazaz and a director of e-IT. Mr Alkazaz asserts that this evidence shows that another e-IT person or people were involved in the decision to dismiss.

[23] In addition, Mr Alkazaz wishes to summons a named person who appears to be related to an organisation which it is suggested e-IT talked with. A social media comments on the Authority's earlier determination and mentions that the writer knows e-IT management.

Could the fresh evidence have been obtained by reasonable diligence for use at the investigation meeting in September 2017?

Client evidence

[24] From soon after his dismissal in December 2016 Mr Alkazaz was represented by senior counsel experienced in employment and civil litigation.

[25] It should not have come as a surprise to Mr Alkazaz or his representative that his performance was going to be an important subject at the Authority's investigation meeting. It was evident during Mr Alkazaz's employment that e-IT had performance concerns and also throughout the Authority's process that performance was at issue. For example, the Statement in Reply from April 2017 mentioned performance concerns as contributing to the situation giving rise to the dismissal and that conduct was so egregious that no remedies should be awarded. Comprehensive witness statements were filed by Mr Alkazaz and e-It witnesses before the investigating meeting.

[26] Although Mr Alkazaz's privacy request to e-IT's client was not straight forward, the material was received by him within two and a half months of making contact with the organisation's global privacy officer. This could have been done before the investigation meeting.

[27] Summonses for additional witnesses and directions requiring the provision of documents or other evidence could have been sought from the Authority. A case management conference was held by the Authority with the parties informed in advance that they had the opportunity to identify witnesses and information they viewed as relevant.

[28] Mr Alkazaz's affidavit does not adequately explain why he could not have sought and obtained the evidence which he did not hold prior to the investigation meeting.

Conclusion

[29] The same points apply to Mr Alkazaz's evidence of events within his knowledge and documents within his control, as well as to e-IT documents.

[30] In conclusion I am not satisfied that the fresh evidence which existed before September 2017 could not have been obtained by reasonable endeavours in the nine months between the dismissal and the investigation meeting.

Would the fresh evidence have an important influence on the outcome?

Evidence in existence in September 2017

[31] In the event that I am wrong about the matters discussed above, I go on to assess the possible impact of this evidence by examining the remedies now sought by Mr Alkazaz:

- (a) a finding that his dismissal was procedurally unfair and substantively unjustified. He already has a finding of unjustified dismissal against e-IT so I see no purpose in re-opening the investigation for this reason.
- (b) larger awards for lost wages and compensation. I will discuss the contribution issue below;
- (c) a determination that e-IT breached his employment agreement regarding the notice payment and a penalty against it. This claim was already decided under the Authority's determination;
- (d) a determination that e-IT committed other breaches of the employment agreement and penalties against it. These actions by e-IT were captured under the dismissal claim or the payment in lieu of notice claim;
- (e) a determination that the e-IT breached its good faith obligation and a penalty against it. It is not evident that Mr Alkazaz's good faith claim captures any matters that were not incorporated in the unjustified dismissal claim;
- (f) claims for penalties under the Privacy Act 1993 and the Human Rights Act 1993. It is not within the Authority's jurisdiction to make awards under either of these statutes. Mr Alkazaz appears to accept this in his submissions as he mentions pursuing those claims in the Human Rights Review Tribunal.

Contribution reductions

[32] The contribution finding in the Authority's determination was based on two issues. First, Mr Alkazaz being unable to perform at the level e-IT expected from a

senior data base analyst within the first months of his employment. Secondly, Mr Alkazaz acting as someone who does not readily accept that he has erred or has deficits. A twenty percent deduction was made for contribution.

[33] This is perhaps Mr Alkazaz's strongest claim. The fresh evidence may establish that Mr Alkazaz satisfactorily completed some tasks and had some seemingly uneventful interactions with the client.

[34] However, I am not satisfied that the new evidence presents a sufficient picture to be confident of overturning the evidence of performance issues. It is not evident that the satisfactorily completed job tickets represent a full picture of Mr Alkazaz's work. They do not show what occurred before the successful completion of the work, such as for example, errors by Mr Alkazaz and guidance from other e-IT staff. The fresh evidence also does not cover all of the issues which e-IT had about Mr Alkazaz's performance.

[35] I am not satisfied that this evidence would be sufficient to support a finding that there were few, if any, legitimate performance problems and thus have a substantial impact on the contribution finding.

Limitation issues

[36] I also note a significant prospect of the penalty claims being outside the limitation period. Mr Alkazaz's work at e-IT ended in December 2016 and he was legally represented from the same month. Actions for penalties must be filed within 12 months of the earlier of the date when the cause of action first became known to the person claiming or when they could reasonably have become known.¹¹

Evidence not in existence in September 2017

[37] I am not satisfied that the emails with e-IT's director which Mr Alkazaz says show that other people were involved in the dismissal decision, would have an important impact on the outcome. The dismissal has already been found to be unjustified and it is hard to see how that evidence could impact on the remedies ordered.

¹¹ Section 135(5) of the Act.

[38] Regarding the social media comment, it is not evident that the writer has spoken with e-IT about Mr Alkazaz or the case. My impression is that having seen a media article about the Authority's determination the writer comments about the decision as he seems to know the company's management. This would not impact on the outcome.

Is the fresh evidence apparently credible?

[39] The information in the form of ticket listings, emails and messages is credible in the sense that the documents appear genuine.

Was there an improper practice?

[40] I take Mr Alkazaz's other ground for re-opening to be that the Authority's determination was obtained by unfair or improper practice. Mr Alkazaz makes a number of serious allegations, including that there was widespread perjury at the investigation meeting, on the basis of the fresh evidence. I have already dealt most of the fresh evidence matters above.

[41] Perjury requires a wilful or intentional telling of an untruth. Mr Alkazaz refers at one point to all the company's witnesses being involved but elsewhere categorically excludes one of the witnesses, commending his honesty.

[42] I take a significant part of the perjury allegation to relate to an issue about the availability of the documents obtained from e-IT's client by privacy request. Two witnesses said documents were unavailable being electronically lost (during a server failure) or automatically purged after six months. Mr Alkazaz says that "this is an explicit fabrication as it is evident now that those emails exist". He says the emails were retained on the client's servers and not e-IT's servers.

[43] Even from Mr Alkazaz's affidavit, it is clear that the evidence given at the investigation meeting was limited, namely that e-IT did not have those documents. The evidence at the investigation meeting was not that the client did not have the documents. The fact that the client did have the documents does not establish perjury.

[44] I will mention some further examples of alleged perjury. Mr Alkazaz points to one of the tickets mentioned in a lengthy December 2016 email outlining Mr Alkazaz's performance shortfalls. He asserts from the client's information that the

ticket number was run by someone else, shortly before he started employment, rather than by him. I do not see that as sufficient to establish perjury.

[45] Likewise I am not satisfied that a suggestion that a witness “noticeably exaggerated” his evidence by referring to a period of leave as “extended leave”, which turned out to be four weeks, provide proof of perjury.

[46] Mr Alkazaz also alleges another type of impropriety, saying that his former legal representative struck a deal with e-IT whereby it discontinued its application for obstruction in return for a reduction in the remedies being sought by Mr Alkazaz. I was unable to identify any further evidence provided to support this serious allegation.

[47] My impression is that Mr Alkazaz is using this application to re-litigate arguments which have already been considered and re-argue his case in the hope of achieving a better outcome. He states in his affidavit that he was “disappointed” that the determination imposed a reduction in remedies given what he describes as the lack of documentary evidence.

[48] Although this view presumably formed on reading the determination, he chose not to challenge the Authority’s determination to the Employment Court. He provides no explanation as to why that route was not adopted.

[49] There was sufficient time in the lead up to the investigation meeting to obtain such evidence and further, there was the opportunity to challenge the Authority’s determination, which he chose not to take.

Is a re-opening necessary to avoid a miscarriage of justice?

[50] The finality of litigation is an important principle, without which parties would be forced to return again and again to re-argue cases against parties who believed that another chance may lead to an improved result for them.

[51] I do not consider that Mr Alkazaz has established that a re-opening of the investigation meeting is necessary to avoid either an actual miscarriage of justice or a substantial risk of such a miscarriage.

[52] Most of the fresh evidence could have been obtained by reasonable efforts prior to the investigation meeting. The fresh evidence would not have had an

important influence on the outcome. I am not been satisfied regarding Mr Alkazaz's perjury claim.

[53] I decline to re-open the investigation.

Costs

[54] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, e-IT shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Alkazaz shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority