IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 522
5454093

	BETWEEN	AUCKLAND HARBOUR OAKS LIMITED Applicant
	A N D	ABRAHAM and NANCY AUGUSTIN Respondents
Member of Authority:	James Crichton	
Representatives:	Matthew Dearing, Counsel for the Applicant Frances Joychild QC with Lee-Lon Wong, Counsel for the Respondents	
Investigation Meeting:	16 December 2014 at Auckland	
Date of Determination:	17 December 2014	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Auckland Harbour Oaks) seeks an order from the Authority reopening the Authority's investigation which culminated in the issue of my determination dated 18 July 2014 in *Augustin v. Auckland Harbour Oaks Ltd* [2014] NZERA Auckland 316. That claim is resisted by the respondents (the Augustins).

[2] Put shortly, the Augustins were employed severally by Auckland Harbour Oaks and alleged that they had been short paid wages during the employment. The matter eventually came before me and based on the evidence I heard and sighted, I concluded that the Augustins had made out their case and made orders accordingly.

[3] Subsequent to the issue of the determination, Auckland Harbour Oaks filed a challenge to the substantive decision and made this application to reopen the Authority's investigation, alleging that it had discovered material which, if proved,

would deal with some or all of the alleged short payment in respect of the both Mr and Ms Augustin.

[4] A brief investigation meeting on the reopening was convened by me, to enable counsel to address me on the helpful submissions which they had previously filed.

[5] The law conferring the Authority's power to reopen an investigation is in clause 4 of the Second Schedule to the Employment Relations Act 2000 (the Act).

[6] It is common cause that that power is a discretionary one and the overriding consideration in its exercise is the avoidance of a miscarriage of justice.

[7] Again it was common cause that the miscarriage of justice must be likely to take place if the investigation is not reopened – a mere suspicion will not suffice: *NZ Waterfront Workers Union v. Ports of Auckland Ltd* [1994] 1 ERNZ 604.

[8] Moreover, where, as in this case, the alleged miscarriage rests squarely on putative discovery of fresh evidence, the test that must be applied is threefold, namely:

(a) It must be shown that the evidence in question could not have been put before the Authority in its original investigation with the exercise of *"reasonable diligence"*; and

(b) The evidence in question must be persuasive in terms of outcome without being decisive; and

(c) The evidence must be credible without being completely unchallengeable.

[9] That test was eloquently set out by Lord Denning in *Ladd v. Marshall* [1954] 3 All ER 745 at 748 and has been referred to with approval in a number of New Zealand decisions including, for instance, *Squire v. Waitaki NZ Refrigeration Ltd* [1985] ACJ 839.

Issues

[10] The focus of this determination must be on an analysis of the three conditions just identified. Accordingly, I will consider the following questions:

(a) Could the evidence in question have been obtained with reasonable diligence for the substantive investigation; and

(b) Would the proposed evidence have an important influence on the outcome without being decisive; and

(c) Is the evidence credible without being unchallengeable?

Could the evidence have been obtained for the substantive hearing with reasonable diligence?

[11] I am satisfied that the answer to this question must be in the affirmative. I have not been persuaded by the arguments for Auckland Harbour Oaks that it was unable to produce this material in order for it to be before me at the substantive investigation.

[12] Auckland Harbour Oaks submits that it was *"not familiar"* with the Authority's processes when it undertook the defence to the Augustins' wages claim and it notes that it did not seek legal advice at the time. It is submitted that had it done so, it would have been better able to respond appropriately to the claim against it.

[13] But it seems to me inconceivable that a good and fair employer would not make it its business to understand the relevant employment law that applies and in particular would not make sure that it had a clear understanding of the very modest requirements about the keeping of wage and time records which the law mandates.

[14] As I have said before in an earlier determination, the requirements of employment law in respect of wage and time keeping are no more onerous for a business than the process of keeping proper records of debtors and creditors; all businesses must, for accounting purposes, retain proper records of entities that they pay money to and/or that owe money to them and in that context, the requirement to maintain proper accessible wage and time records is no different.

[15] As I made clear in the substantive determination, the failure to provide what I referred to as source records was fatal to Auckland Harbour Oaks' defence of the claim and yet that is the heart of its legal obligation.

[16] I agree with the submissions for the respondents to the effect that allowing latitude in this regard would set an unsavoury precedent because, as the Court has observed in a number of cases, a good and fair employer will obey the law and a failure to maintain proper wage and time records and make them available when required by law, is a legal requirement which is not able to be abrogated. As Chief Judge Colgan said in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825, *"... a fair and reasonable employer will comply with the law"*, para.[65].

[17] Moreover, it appears that Auckland Harbour Oaks employs somewhere around 100 persons and on that footing, I would have expected that it would take all practicable steps to ensure that it had a complete grasp of its fundamental obligations as an employer and to maintain, as it does, that it did not understand what was required of it seems frankly unbelievable.

[18] It is not as if Auckland Harbour Oaks was left in the dark about what was required of it. There were numerous requests for the source information from the Augustins, a formal direction from me for Auckland Harbour Oaks to attend the investigation meeting with the material I required together with a further opportunity for Auckland Harbour Oaks to provide the material after the investigation meeting had been concluded. As I made clear in the determination, the material that was provided was not source material; it was not the material which the law requires an employer to keep concerning the wage and time records of an employee.

[19] Nor could the requirement to produce this material be considered a surprise to Auckland Harbour Oaks. The matter has been on foot for months, the claim from the Augustins having been clearly enunciated from the start. There have been a number of mediations between the parties at which the Augustins' claim was front and centre and it ought to have been self-evident that the only way to confront the claim was to produce the source documentation.

[20] Given the magnitude of the claim also, it is hard to understand why an employer in Auckland Harbour Oaks' position would not have obtained proper advice at first instance and had it done that, the present application might well have been unnecessary.

[21] In the end, I am simply not persuaded that with reasonable diligence Auckland Harbour Oaks could not have attended the investigation meeting on the substantive matter with the evidence it now says is available.

[22] It is contended for Auckland Harbour Oaks that its records were stored in a variety of places and that it took it some little time to obtain access to those records, but that frankly is an excuse rather than an explanation; with reasonable diligence, a good and fair employer concerned to obey the law of the land, would ensure that they have ready access to the documents that they are required to keep and make available by force of law.

Does the proposed evidence have probative value?

[23] If proved, I accept that the evidence would be influential. But the respondents challenge the veracity of some of the evidence which apparently comprises three elements, namely bank records, weekly timesheet information, and the evidence of the supervisor who it is said the Augustins reported to.

[24] While the bank records are not challengeable per se in terms of their veracity, the submission made on the Augustins' behalf was that the other evidence advanced by Auckland Harbour Oaks, which apparently the Augustins have reviewed, is simply wrong and they go so far as to allege that it is manufactured.

[25] I am in no position to make a judgment about that claim, but I think I am able to say that if the evidence in question is so disputed by the Augustins as to encourage them to allege fabrication, it is difficult to see how this same evidence will have as important an influence on any outcome as Auckland Harbour Oaks maintains.

Is the evidence credible?

[26] For reasons which I have just commented upon, it is difficult to conclude that all of the evidence being proffered is credible. As I have already noted, the Augustins say in so many words that some of the evidence advanced is "bogus".

[27] As submissions on their behalf correctly observe, that means that in any consideration of that evidence, whatever the forum for that consideration, issues of credibility are going to be front and centre.

Determination

[28] For reasons which I have canvassed in this determination, I have not been persuaded that this is a case where the evidence proffered in support of a reopening meets the legal test for a reopening and on that basis I decline to order a reopening of the subject investigation. Given the difficulties with the evidence I have identified, it seems to me impossible to conclude that a miscarriage of justice is likely, if a reopening is denied: *NZ Waterfront Workers' Union* case, *supra*, applied.

[29] I desire to make two other points that have influenced me in reaching this conclusion. The first is the interesting submission from the Augustins' eminent counsel to the effect that the evidence being proffered by Auckland Harbour Oaks is not, as a matter of law, "fresh" at all and therefore does not fall within the terms of the test at all. What that submission contends is that this evidence is actually old evidence (at best) and therefore cannot be said to be newly minted and to be brought before the tribunal for the first time.

[30] While that is a novel submission, it may simply be another way of addressing the first leg of the legal test; if the evidence in question could with reasonable diligence have been produced to the tribunal at the proper time, then a subsequent claim to have that evidence considered cannot allow such evidence to carry the label "fresh".

[31] The other matter that has influenced me and which I discussed frankly with counsel during this investigation meeting was the concurrent challenge to my original substantive determination which was filed at around the same time as the application to reopen was made.

[32] One of the arguments advanced for the Augustins was that Auckland Harbour Oaks, in seeking a reopening, was simply trying to put another process in the way of paying the Augustins what they were legally entitled to and if the Authority had been minded to grant a reopening on that footing, and the Authority had then reached a similar conclusion to the one it reached in the original determination, Auckland Harbour Oaks would still challenge and so, in effect, the reopening would constitute another layer of cost and anxiety for the Augustins.

[33] While I have chosen to apply the legal test in making the decision I have rather than to consider the practical realities that apply and are referred to in that submission,

I think it is proper to observe that a challenge has been filed, there are disputes between the parties, evidence which ought to have been available for testing in the Authority, is apparently now available, and, given I am satisfied Auckland Harbour Oaks has not met the legal test for a reopening, the proper course now for the parties is to address the matter in the Employment Court.

[34] I note for the sake of completeness that the parties have very properly agreed to continue talking to each other with a view to trying to resolve matters by agreement, and they are to be commended for that stance.

[35] I also observe that the Augustins are legally aided and given that fact, anything that reduces the impost on the public purse is to be welcomed.

Costs

[36] Costs are reserved.

James Crichton
Member of the Employment Relations Authority