IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 261
5525591

	BETWEEN	NATHAN BERG Applicant
	AND	EMERGENCY.CO.NZ LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Geoff Mackley, director of the Respondent
Investigation Meeting:	27 August 2015
Determination:	31 August 2015

THIRD DETERMINATION OF THE AUTHORITY

A. The application by Emergency.Co.NZ Limited for reopening of the Authority's investigation into Mr Berg's holiday pay claim is declined.

B. Costs are reserved.

Application for reopening of an Authority investigation

[1] Emergency.Co.NZ Limited (ECNZL) sought a re-opening of the Authority's investigation of a claim for holiday pay made by Nathan Berg.[1]

[2] ECNZL's business, run by its sole shareholder and director Geoff Mackley, provides camera and satellite link services to various clients, including TV3. According to Mr Mackley the business generally has between four and six people working for it. Between March 2013 and October 2014 Nathan Berg was one of those people. At the beginning of this period he was working on what were called 'PA'

[1] Employment Relations Act 2000 Schedule 2 Clause 4.

duties (which included preparing pay and tax records for himself and others working for ECNZL) and for which he was paid an hourly rate that Mr Mackley described as "minimum wage". Mr Berg then began also doing broadcast work, involving assignments for particular events, that was paid at what Mr Mackley said was roughly (or on average) $100 an hour. For a time Mr Berg had what Mr Mackley called dual roles but he had stopped doing PA duties from around March 2014. For the remainder of the time that he worked for ECNZL – until 6 October 2014 – Mr Berg did only broadcast work. He claimed holiday pay for all his earnings during the time he worked for ECNZL but Mr Mackley refused to pay it because he said Mr Berg was employed as a contractor, not as an employee.

[3] The Authority has issued two determinations on Mr Berg's holiday pay claim – one determining that he was an employee and one determining the amount due to him.

[4] The first determination followed an investigation meeting held on 14 April 2015.[2] The parties were directed to confer on the amount of holiday pay Mr Berg was owed as an employee but, if they were not able to agree, to lodge submissions by 12 May 2015 so the amount due could be determined 'on the papers'. The second determination, issued on 22 May 2015, ordered ECNZL to pay Mr Berg $5578.96 (less deductions for PAYE) as holiday pay.[3]

[5] Using the process available under s 141 of the Employment Relations Act 2000 (the Act) Mr Berg has since sought to enforce payment of the holiday pay found to be owed to him by filing a certificate of determination in the District Court.

[6] On 17 April 2015 he also lodged a further application in the Authority alleging he was unjustifiably dismissed from his employment with ECNZL. He did so because the Authority's first determination said he had not properly put that issue before the Authority in the initial application he had lodged on 2 December 2014. Mr Berg's further application said he had raised a personal grievance with ECNZL on 24 November 2014.

---

[2] *Berg v Emergency.Co.NZ Limited* [2015] NZERA Auckland 110.
[3] *Berg v Emergency.Co.NZ Limited* [2015] NZERA Auckland 148.

[7] The potential effect of ECNZL's application for a re-opening of the investigation – if granted and resulting in a further investigation that reached different conclusions – was that the first determination on Mr Berg's status as an employee would be overturned so the order for holiday pay would have become invalid and he would then also not be able to pursue his claim of unjustified dismissal (as personal grievance proceedings are available only to employees). As the re-opening application has been denied, Mr Berg may continue with enforcement of the earlier order for holiday pay and the Authority can proceed to investigate his dismissal grievance.

Principles on the power to reopen an investigation

[8] The Authority has a statutory discretion to order the reopening of an investigation on "*such terms as it thinks reasonable*" and in the meantime to stay the effect of any order previously made.[4]

[9] The discretion must be exercised according to principle. The principles developed for the Employment Court's exercise of its similar discretionary power to order a 'rehearing' provide a useful framework – applicable by analogy – when the Authority is considering whether to reopen an investigation.[5] Those principles include that:[6]

(i) The jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case.

(ii) Some special or unusual circumstance must be found to exist to warrant the reopening, such as:

- Fresh or new (and apparently conclusive) evidence that could not with reasonable diligence have been discovered prior to the hearing; or
- a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended; or
- some other particular circumstance or aspect of the individual case.

(iii) The mere possibility of a miscarriage of justice is not a sufficient ground for granting a reopening. The threshold test is whether the party seeking the

[4] Employment Relations Act 2000 Schedule 2 clause 4.
[5] *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].
[6] *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [12]-[14] and *Idea Services Limited v Barker* [2013] NZEmpC 24 at [36]-[37] and [42].

reopening can establish there would be *either* an actual miscarriage of justice *or* at least a real or substantial risk of a miscarriage of justice if the determination were allowed to stand.

(iv) The assessment of the possibility of a miscarriage of justice does not require a high standard of proof of that possibility. However of equal weight as a factor in the balance is certainty in litigation so successful litigants get their normal right to enjoy the fruits of judgments in their favour.[7]

(v) An apparent misapprehension of the facts or relevant law will not warrant a reopening where the misapprehension is attributable solely to the neglect or default of the party seeking the reopening.[8]

(vi) Where a party dissatisfied by an Authority determination on grounds that may be the subject of the specific statutory process of a challenge under s179 of the Employment Relations Act 2000 (the Act), the Authority should be reluctant to entertain an application for a reopening on those grounds.[9]

[10] Blanket or automatic application of every aspect of the principles developed by the courts about rehearings may not, however, always be appropriate. Those principles have been developed in relation to the courts' adjudicative methodology where relevant evidence is tested through adversarial contest. Some adjustment might be needed in light of the Authority's investigative methodology. In the courts each party must marshal all the elements of their own case and stand or fall on the evidence put before the presiding judicial decision-maker (through filing of documents and testimony given, either as evidence-in-chief or as answers to questions in cross examination). The parties are responsible, in that fully adversarial forum, for any and all shortfalls in, or failure to provide, the evidence and arguments to be considered. However the Authority's investigative role includes particular powers for the investigating member to call for evidence and information from the parties or any other person and, in the course of an investigation meeting, to fully examine witnesses.[10] In some circumstances it might be arguable that a party was not 'solely' responsible for some neglected fact or for not having raised a relevant legal argument, because it was something that the Authority could or should have dealt with in exercise powers of investigation and determination. Such a point may more likely be

[7] *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607.
[8] *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303, cited with approval in *Idea Services*, above n 6, at [37].
[9] *Yong, (T/A Yong & Co Chartered Accountants) v Chin* [2008] ERNZ 1 at [22]- [25].
[10] Section 160(1)(a) and (d) of the Act.

arguable where a party had limited means or capacity so that the Authority might reasonably have needed to be more active in the extent of its investigation rather than relying – as it can and does in most cases – on parties gathering and lodging evidence in response to the Authority's directions. The argument would be consistent, in those circumstances, with the overall statutory objective of acknowledging and addressing the inherent inequality of power in employment relationships and the Authority's jurisdiction in equity and good conscience.[11]

[11] Taking those principles into account, the overriding consideration for the decision-maker on a reopening application "must be the interests of justice balanced against other relevant factors such as the importance of finality in litigation".[12]

The reopening application

[12] The reopening application lodged by Mr Mackley attached both the first and second determinations.

[13] Under the heading of 'Grounds' on the application form (which includes a note requiring the grounds to be stated fully but concisely) was written the words "*Attached Documents*". The documents referred to comprised copies of the first and second determinations and six-and-a-half pages of typewritten notes beginning with a heading "*Problems with the ERA determination are as follows*". The notes then disputed whether four particular points in the first determination were factually correct by stating:

(i) Mr Berg's hours were sporadic and erratic, rather than from 10am to 4pm on Monday to Friday as described in the determination; and

(ii) Mr Berg was not authorised to change an invoice template to provide for the deduction of PAYE; and

(iii) Mr Berg's role was not continuous over two years and he performed services as required; and

(iv) Mr Berg had two clearly distinct roles or positions, firstly as a personal assistant and then another role "sub-contracting performing satellite services for TV3" and he had, for a short period, performed dual roles.

[11] Section 3(a)(ii) and 157(1) and (3) of the Act.
[12] *Young*, above n 5, at [9].

[14] Mr Mackley's notes then described Mr Berg's earnings, separating them into what he earned from "doing PA work" and "contract work performing digital satellite services". This analysis was said to have been made from invoices that set out Mr Berg's hours. Mr Mackley wrote that the tax rates applied "fluctuated wildly". He wrote that seven of 32 invoices submitted by Mr Berg for his PA work included a percentage "claimed from me without my knowledge or consent for KiwiSaver".

[15] His notes then continued under the heading "Discussion" with a number of allegations about Mr Berg's conduct during his time working for ECNZL and his evidence in the Authority investigation, including that:

(i) Mr Berg had not asked for or got holiday pay and paid sick leave while he was employed as "he knew he was a contractor and therefore not entitled to receive any employee benefits".

(ii) Mr Berg was wrong to say he had a full understanding of GST and PAYE because he made "unorthodox and … fabricated tax deductions … on his own invoices".

(iii) Mr Berg had "removed and retained confidential documents pertaining to other contractors".

(iv) Mr Berg had wrongly stated he was unemployed from 6 October 2014 because his last invoice, received by Mr Mackley on 25 October, included a retainer fee paid through to 12 October 2014.

(v) The unjustified dismissal claim lodged by Mr Berg on 17 April 2015 was "void" because it was lodged five months after he "abandoned his job" on 6 October and not within 90 days of 12 October 2014.

(vi) Mr Berg knew before 6 October that work was slowing down and Mr Mackley had told him that the digital contract with TV3 could end.

(vii) No set hours or consistent work was promised, as was then reflected in fluctuating hours and jobs paid on the invoices.

(viii) The "vast difference" between the hourly rates Mr Berg claimed for the PA and digital work made the difference in the nature of the work obvious because "as an employee he would have made a consistent hourly rate" and "this proves at the very least that [Mr] Berg knew he was a contractor while performing the digital work".

(ix) Mr Berg did not have set start and finish times and had the choice to work from home when working as a PA and knew he was not required to always be available to do digital work.

(x) Mr Berg knew "the nature of contracting within the media business means you get paid when you work, unlike most employees who are required to turn up at a set time to a set place each day and receive hourly remuneration".\

(xi) Mr Berg had "openly and fraudulently admitted to changing his own invoice template from WHT to PAYE". The initials WHT referred to withholding tax (which IRD now calls 'schedular payments').

[16] Mr Mackley's notes then continued on a page headed "Additional Information" with the following statements (emphasis added):

> I felt there was overwhelming evidence pointing to Nathan Berg being a contractor for most of the time he worked for me and lying about being an employee, so much so that I didn't even hire a lawyer for the first hearing.
>
> I spent a lot of money on a detailed audit of all of Berg's invoices after the first hearing. This very clearly showed the pattern of employment that Berg had with me.
>
> I have already previously stated that for a small period of time Berg worked as a personal assistant for me and was paid the minimum hourly wage, I fully concede that falls within the bounds of an employee. But he then moved on to working in a completely different manner operating a live news van for me and was paid on a per job basis, not minimum wage, but per job, as a contractor at roughly $100 an hour. This can easily be proved by working out Bergs hours of actual work in the last year.

[17] Mr Mackley then set out his calculation of what he considered Mr Berg would have been earned if he was paid the minimum wage as an employee for the hours he had done live broadcast work (instead of the average of around $100 an hour that he was paid on what Mr Mackley said was a contractor basis).

[18] He then alleged Mr Berg and his representative at the Authority investigation meeting "deliberately misrepresented" the hours and days Mr Berg spent on PA duties as being the basis on which he was employed and did "not even mention once how he derived most of his income". Mr Mackley then suggested that "it's possible that [the Authority member] was confused about the fact that there were two distinct and very different types of work that Berg did."

[19] Mr Berg's reply to the reopening application said ECNZL had not supplied any new evidence that was not accessible at the time of the first investigation meeting and determination. He stated that his own evidence at that investigation meeting was, to the best of his understanding, correct and truthful.

Investigation of the reopening application

[20] Investigation of ECNZL's re-opening application has comprised reading the two determinations already issued, reviewing the Authority file (including the original statement of problem and statement in reply, the witness statements that Mr Berg and Mr Mackley provided before 14 April investigation meeting, the application for reopening and Mr Berg's reply to it along with the many emails from Mr Mackley setting out his views throughout the whole period), hearing from Mr Mackley and Mr Berg at an investigation meeting called for the purpose on 27 August, and considering what the two men have written and said against the content of the two earlier determinations. I have not spoken about the reopening application to the Authority Member who conducted the 14 April investigation meeting or seen any notes she may have taken of what Mr Mackley and Mr Berg said in it. I have relied on what was said about that evidence in the first two determinations and what Mr Berg and Mr Mackley told me about it at the 27 August meeting on the reopening application.

Were grounds for reopening sufficiently established?

Fresh evidence?

[21] There was no 'fresh' evidence advanced by Mr Mackley that he could not have presented or had considered at the first investigation. When speaking about the reopening application on 27 August, Mr Mackley himself noted that "a lot" of things he had identified as anomalies in Mr Berg's account of events were points he had made during the 14 April investigation meeting. Mr Mackley's real concern was that more weight was not given to those points by the Member because what he saw as her failure to do so had, in his view, resulted in the wrong outcome. Examples included Mr Berg not having asked for holiday pay during his employment and his pay slip not showing accumulated totals for holiday and sick leave entitlements – both pointing, in

Mr Mackley's view, to the relationship not being one of employment (in respect of the broadcast work at least).

[22] The further analysis Mr Mackley made of what were called Mr Berg's 'invoices' was something that he could – with reasonable diligence – have done before the 14 April meeting. He had not done so before then because he was highly confident that Mr Berg's claim would be dismissed. It proved to be a misplaced confidence but he did not identify anything 'new' about the content of those invoices – which totalled 32 – that differed in any significant or material way from the information that was available from the 12 or so pay slips (which Mr Mackley also referred to as 'remittance advice' notices) in the evidence available at the 14 April investigation meeting. Certain details written on those documents and on which Mr Mackley relied – such as a standard heading that referred to "contractors" and "WHT" and the different pay rates for PA and broadcast work – were shown on the samples of those documents that Mr Berg had attached to his original statement of problem. Mr Mackley said he had approved Mr Berg's 'invoices' for payments on each occasion and had printed out those pay slips (or remittance advice notices). Those documents showed Mr Berg had PAYE deducted from his pay. Mr Mackley said he had never noticed the line for PAYE deductions as he only ever looked at the (net) figure paid at the bottom. What more Mr Mackley has had to say since the 14 April investigation meeting – based on his later, fuller analysis of ECNZL's records of payments made to Mr Berg – were things that (on his own account of what he said at that meeting) he had said there or had ample opportunity to prepare and present either before or at that meeting.

Wrong principles applied?

[23] The first determination referred to the statutory test of whether a person was an employee. The test involves assessment of the real nature of the relationship by considering all relevant matters, including intention of the parties, without treating any statements made by them as necessarily determining the status as an employee.[13]

[24] The determination also referred to the control, integration and fundamental tests used to assist the assessment. It made nine specific findings about the operation and context of the relationship in support of its conclusion that Mr Berg was an

[13] Employment Relations Act s 6(2) and (3).

employee. The findings each related to application of aspects of the three tests referred to and the question of whether there was any evidence regarding industry practice.

[25] At the 27 August reopening investigation meeting Mr Mackley accepted the following five propositions as a fair summary of the basis on which he said the Authority's earlier determination was wrong about Mr Berg's status (while carrying out broadcast duties):

(i) Mr Mackley had intended Mr Berg to be a contractor.

(ii) Mr Mackley said Mr Berg was a contractor, so he was a contractor

(iii) Mr Mackley paid Mr Berg around $100 an hour for the broadcast work that Mr Mackley said Mr Berg did as a contractor and that was the rate Mr Mackley paid for other people he engaged to do such work (whom he also said were contractors) so that showed Mr Berg was a contractor.

(iv) The PAYE element on the invoice was irrelevant because Mr Berg had made that change on the template for invoices that he was provided.

(v) The invoices (in a subject heading on the template Mr Mackley provided) referred to 'contractors' and WHT.

[26] Each argument could be rejected – as it was either expressly or impliedly was in the Authority's first determination – without misapprehending or misapplying relevant principles in assessing the real nature of the relationship between ECNZL and Mr Berg when he was carrying out broadcast work.

[27] Intention was relevant but not definitive. Mr Mackley's statements about what he considered the situation to be did not trump any other considerations. The inference Mr Mackley wanted taken – that the rate paid for broadcast work was the same rate paid to other people Mr Mackley also labelled as contractors and Mr Berg, therefore, was a contractor – was based on the internal logic of Mr Mackley's subjective declaration of what he thought was so and what he said was typical throughout the television industry. It may have accurately described a common practice and the belief of many people but was not necessarily a correct description of the real nature of the relationship when measured against the relevant legal principles. Objectively the relatively high hourly rate may have inherently been no more indicative of a contractor relationship than of high value casual employment.

[28] Mr Mackley said the arrangements he made with people to work for ECNZL, including Mr Berg, were all made 'on trust' with no written agreements. The broadcast work was day-by-day assignments of varying lengths. It was, on Mr Mackley's description of it, indistinguishable from the arrangements that could also be made for 'as required' casual employment. The elements of control and integration – where the work was done for and co-ordinated by the client (in the example of TV3 that he gave) – indicated little that would help distinguish between the arrangements that might be made for a casual employee from those made for a supposed 'labour-only' contractor. In those circumstances the tax arrangements could be an important indicator (but not necessarily determinative) of the true nature of the relationship. It was open for an Authority member, applying the relevant principles, not to accept Mr Mackley's argument that payment of PAYE did not show Mr Berg was 'in reality' an employee as the change of tax arrangement – from WHT to PAYE – was made by Mr Berg without Mr Mackley knowing it had been done. The Member clearly considered Mr Mackley's likely knowledge of the PAYE payments because one of her nine findings in the first determination was that Mr Mackley had confirmed to her in his evidence that he approved invoices for payment (which showed PAYE deduction information). The pay records – which Mr Mackley described as both a "pay slip" and a "remittance advice" and which he said he had printed out regularly during Mr Berg's employment – clearly showed the PAYE deduction in lettering of the same size as other words (including the word 'contractors' also printed on the page).

[29] Against that background I did not consider I could reasonably conclude there was a misapprehension or misapplication of relevant statutory provisions or applicable principles from case law that might justify a reopening of the investigation. As noted by the Employment Court in *Atkinson v Phoenix Commercial Cleaners Limited* decisions on employee status under s 6 of the Act are "intensely factual".[14] And, as described by the Court in that case, tax arrangements can be ambiguous:

> [48] In true and uncontroversial circumstances of employment, most taxation arrangements will follow the PAYE model. In true and obvious independent contractor circumstances, deduction of withholding tax, or payment of an invoice without deduction, will occur. In the less distinct middle ground as illustrated by

[14] [2015] NZEmpC 19 at [69].

> this case, one party's unilateral determination of the taxation arrangements adopted will not be determinative of or persuasive about s 6 status.
>
> …
>
> [58] Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties' common intention. It focuses on the nature of the relationship in law for the purpose of determining whether the rights and obligations of employer and employee arose from that relationship. …

[30] The nature of Mr Berg's employment clearly changed during its term. Mr Mackley, since the Authority's first determination, had accepted that Mr Berg was properly described as an employee for the PA duties he carried out. However Mr Mackley insisted that the broadcast assignments – which was the only work Mr Berg did for ECNZL from around March 2014 and which the invoices show were for varying hours on varying days – were on a "call out" basis. There was no written agreement setting out the terms of Mr Berg's initial employment on PA duties and nothing in writing to confirm the change of duties also amounted to a change of employment status – from being an employee to being an independent contractor. The broadcast work – of varying hours on varying days – may, in reality, have become 'as required' casual employment if it was no longer on-going employment. Although Mr Mackley disputed this in answer to questions on 27 August, Mr Berg was clearly required to provide personal service rather than being permitted to assign the work to someone else working for him (which he could have done if he were truly an independent contractor). Mr Berg was able to decline work on particular days – in the way that an independent contractor may do – but as that work then went to another person who also worked for ECNZL, it was indistinguishable from an 'as required' casual employee exercising her or his option to turn down a particular assignment.

Allegations of 'fraud' and lying

[31] Mr Mackley's evidence contained a number of vitriolic comments about the veracity and reliability of Mr Berg's evidence. Some – such as one describing Mr Berg as "a lying and deceitful piece of garbage" (email to the Authority, 3 August 2015) – went beyond what was acceptable in proceedings of this kind, even allowing for robust and plain language from the parties.

[32] Putting aside such extreme comments, I considered whether some real doubt about the truthfulness of the evidence from Mr Berg was established sufficiently to warrant a reopening of the investigation. I was not persuaded that anything Mr Mackley now said on that score about what Mr Berg had said and done earlier showed the impugned evidence was either relied on in the substance of the earlier determinations or otherwise created a real or substantial risk of a miscarriage of justice.

[33] Mr Berg's pay had included some deductions for KiwiSaver with a small element of employer contribution. It was a factor that favoured a finding of employee status. However Mr Berg accepted that Mr Mackley had not approved such contributions (although, from what Mr Mackley said, those deductions were clear on pay slips he saw and printed off). More importantly there was nothing in the Authority's first determination that suggested KiwiSaver deductions were a factor in its findings about Mr Berg's status.

[34] Mr Berg was said to have changed his own tax status on a template he was given to use for the so-called 'invoicing' of his hours. He accepted he had done so and that was in the evidence admitted in the 14 April investigation meeting. What was also apparent from Mr Mackley's own evidence – both on 14 April and 27 August – was that the fact of PAYE deductions was not hidden from him as it was on the 'pay slips' that he approved and printed out at the time payments were being made.

[35] Mr Mackley also said Mr Berg had lied by stating in his witness statement (said to have been affirmed by him as correct at the 14 April investigation meeting) that he had worked from 10am to 4pm Monday to Friday. The Authority's first determination referred to those hours in its summary of facts. However, as Mr Berg said at the 27 August investigation meeting, Mr Mackley's witness statement provided well in advance of the 14 April meeting had not taken issue with that description of the hours. Mr Berg also said Mr Mackley had not challenged that detail during the 14 April investigation meeting. It was not clear from the Authority's first determination that the hours of work were a factor in its conclusion about the employment status. Even if it were, the facts on that point were well within ECNZL's power to have disputed and established through evidence from Mr Mackley on 14

April. If the Authority member had misapprehended those particular facts, reopening was not warranted because it appeared that ECNZL had neglected to correct them when it had the opportunity to do so (either in Mr Mackley's witness statement lodged earlier or in his oral evidence at the 14 April investigation meeting).[15]

[36] Mr Mackley also criticised Mr Berg for having offered to provide to the earlier Authority investigation copies of pay information about other people who worked at ECNZL. The information was offered to support Mr Berg's account of events. Mr Mackley had then criticised Mr Berg for having what he called "stolen documents" and demanded they be destroyed. He also threatened to pursue what he called "civil charges" for "theft as a servant" against Mr Berg (email to Authority, 24 August 2015). Mr Berg's account on that point was that he had used his personal laptop computer for work on pay records when doing PA duties for ECNZL and Mr Mackley knew he did so. In that respect Mr Berg cannot be said to have 'stolen' the documents. He said he had since deleted the records in response to Mr Mackley's complaint and now had no ECNZL pay information other than the records about his own pay.

Right of challenge not exercised

[37] ECNZL had two opportunities to challenge the earlier Authority determinations by applying to the Employment Court for either a full hearing of the entire matter (that is a hearing *de novo*) or for a specific question or alleged error of law or fact to be considered and decided by the court.

[38] For the first determination, issued in writing on 15 April, ECNZL had until 13 May to file a challenge in the Court. For the second determination, issued on 22 May, ECNZL could have filed a challenge by 20 June 2015.

[39] From the outset Mr Mackley indicated he would appeal any decision of the Authority that did not confirm his view that Mr Berg was not an employee. In an email to the Authority on 8 April 2015 he wrote:

---

[15] *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303, cited with approval in *Idea Services*, above n 6, at [37].

> I will appeal any finding by ERA to the contrary that Berg was a contractor and I will never pay a cent to Berg no matter was the outcome of this fiasco.

[40] The 15 April determination was sent to Mr Mackley with a covering email that stated the right to challenge it within 28 days. The email advised he needed to contact the Employment Court if he wanted to file a challenge and provided the Court's contact details. Mr Mackley responded on the same day with a request, to the Authority officer, for "the forms for an appeal" and said he would appeal. The officer replied by email on 17 April again advising that Mr Mackley needed to contact the Court and repeating the contact details.

[41] On 17 April Mr Mackley was also provided with Mr Berg's calculation of his holiday pay entitlement and advised any submissions should (as directed in the Authority's first determination) be lodged by 3pm on 12 May. He was reminded of that deadline in an email from an Authority officer on 11 May. Mr Mackley responded with an email saying he had "taken advice" and had hired an accountant to go through Mr Berg's invoices and would need a further week "to have all the contractor invoices worked through and work out the two different types of work and then you can decide what to do about it".

[42] In an email on the next day Mr Mackley also stated that he:

> intend[ed] to appeal this endlessly, counter claim and then sue Berg for his actions, time wasting and costs, and have no intention of ever paying Berg a single cent …

[43] Later on 12 May, in a further email, he again advised he would not provide any information or submission on the holiday pay issue that day, with the following comment:

> It wont be done by 3pm either, a week, end of story, I am going to be blunt here, I couldn't care less about your determination, there is no holiday pay oweing (sic).

[44] A week later Mr Mackley had provided no further information. Ten days after its 12 May deadline for submissions on the holiday pay issue the Authority issued its second determination. The 22 May determination was sent to Mr Mackley with a covering email that stated the right to challenge it within 28 days. The email advised he needed to contact the Employment Court to do so and provided the Court's contact

details. He responded with an email setting out information based on his review of Mr Berg's invoices to which an Authority officer responded with a message stating "if you wish to appeal the determination that was sent out, then you need to do this through the Employment Court".

[45] On 28 May Mr Mackley sent a further email in which he said that it had taken him longer than a week to go through Mr Berg's invoices and included the following comments (emphasis added):

> … At no stage did anyone come back to me to ask me where I was at with this process, and once again ERA comes back with a truly ridiculous decision without my additional evidence.
> …
> Again I say, incompetent part time agency, and the member who made this determination twice probably couldn't determine if it was raining if she was standing in it.
>
> Its (sic) hard to tell which is more ridiculous, ERA for believing any of Bergs lies, or Berg himself who is so short of brain cells he thought he could claim to be an employee …
>
> This issue needs to move to a proper court, not the kangaroo court of ERA, I've been mucked around and disrupted for over 6 months now, had my name dragged through the muck with this ridiculous claim, and now I am starting to incur costs as a result, such as the auditing of the invoices and the lawyer we have now hired, all because an ex "contractor" who was paid vastly more as a contractor, wants to then claim he is an employee and try to get holiday pay … and ERA is silly enough to believe it!
>
> I intend to get this decision overturned if it takes forever …

[46] For present purposes the two important points in that 28 May email was Mr Mackley's expressed desire to have the case considered by a court and his reference to having engaged a lawyer. On that date the challenge period for the first determination had expired but the challenge period for the second determination still had more than 20 days to run. In a further email on 2 June Mr Mackley said "we are now engaging legal counsel on this" however on 10 June an email from him to the Authority included the following comments (emphasis added):

> "I am advised that that determination cannot be overruled as I was supposed to appeal to a different authority rather than for ERA to re hear it. The time limit for me to make that appeal has expired. Even if I had known this it would have been expensive and I would not have spent more money in defending this than I have been ordered to pay Berg …"

> I am tallying up all the rising costs of this with a view to sueing (sic) ERA and Berg when this fiasco is eventually sorted out.

[47] Mr Mackley's statement about what he might have done if he "had known" about the time limit for a challenge was plainly inaccurate. He was advised by Authority officers twice on the occasion of each of the two determinations being issued that ECNZL had 28 days to file a challenge in the Employment Court.

[48] At the 27 August investigation meeting Mr Mackley described his failure to file a challenge in the Employment Court as "a complete cock up in my department". He acknowledged that he had immediately said (on receiving the first determination) that he wanted to 'appeal' but also repeated his previous and plainly incorrect assertion that he "had no idea it was to another authority".

[49] ECNZL did not file a challenge to the second determination by the expiry of its challenge period on 20 June. It was not until 2 July that Mr Mackley sent an email to the Authority requesting "a reopening of this matter and hearing by another member". He was sent the appropriate statutory form and ECNZL's application for a reopening of the investigation was recorded as lodged on 13 July.

The overall balance

[50] Having considered Mr Mackley's arguments about the basis for a reopening, and having reviewed events in the course of the investigation and challenge periods for the Authority's two determinations, I concluded the application was merely a 'backdoor method' by which ECNZL sought to re-argue its case. There was ample opportunity (and information about the process) for ECNZL to have done so sooner by the proper means provided in the Act for challenge to the Employment Court where an Authority determination may be wrong. As shown by its possibly belated search for advice, ECNZL also had the means to find out what needed to be done in that process.

[51] There was neither sufficiently fresh evidence nor an application of relevant principles so plainly outside the Member's discretion to assess the evidence before her at the time that was sufficient to establish more than a mere possibility of a

miscarriage of justice. Mr Berg's right to some finality in that aspect of the litigation, in the absence of a timely challenge to the Court, outweighed any residual doubt.

Next steps

[52] In its reopening application ECNZL had not sought a stay of the Authority's order for payment of holiday pay to Mr Berg. There is presently no impediment to him continuing action in the District Court for enforcement of that order.

[53] The Authority will need to make arrangements for its investigation, in due course, of Mr Berg's personal grievance regarding the end of his employment by ECNZL.

[54] I advised Mr Mackley at the end of the 27 August investigation meeting that the period for challenge to the Authority's determination of ECNZL's reopening application runs for 28 days from the date of issue of this determination.

Costs

[55] Costs, if any, in respect of the reopening application are reserved.

Robin Arthur
Member of the Employment Relations Authority