IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 478
3072152

	BETWEEN	MICHAEL JOHN BURT Applicant
	A N D	DRUCE NILSEN Respondent

Member of Authority:	David G Beck
Representatives:	Naoimh McAllister and Kristin Macdonald, counsel for the Applicant Mary-Jane Thomas, counsel for the Respondent.
Investigation Meeting:	On the papers
Submissions Received:	16 November 2020 from the Respondent 18 November 2020 from the Applicant
Date of Determination:	19 November 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael John Burt asserts that he was employed by Druce Nilsen as a deckhand on Mr Nilsen's fishing vessel FV Motuara operating out of Bluff from 8 March 2019 to 28 May 2019. There was no written agreement covering the relationship and the now disputed remuneration arrangement was that Mr Burt would receive a percentage of the fishing catch. Mr Burt also claims he was unjustifiably dismissed.

[2] Mr Nilsen by contrast denies being Mr Burt's employer claiming variously that the employer was his father Olaf Nilsen or that Mr Burt was a share fisherman or contractor and that in any case if he is deemed to be an employee his personal grievance was raised outside of 90 days.

[3] Mr Burt, as background, filed a Statement of Problem with the Authority on 13 September 2019 seeking an order for payment of unpaid wages from 1 April 2019 to 10 May 2019 and after engaging counsel, he raised a personal grievance by letter of 5 February 2020 with Mr Nilsen alleging that he had also been unjustifiably disadvantaged and unjustifiably dismissed and was owed unpaid wages calculated on a percentage of catch.

The Authority Process

[4] Mr Nilsen, despite filing a statement in reply and responding to Mr Burt's personal grievance letter by corresponding with Mr Burt's counsel (in which he claimed he was not Mr Burt's employer), did not as directed file a brief of evidence or participate in the investigation meeting nor did his father Olaf Nilsen.

[5] Subsequently, on being provided by the Authority with additional submissions from Mr Burt's counsel for comment, Mr Nilsen claimed by email that he was unaware of the investigation meeting occurring. The Authority had previously provided the investigation meeting notice by the same email address and a directions notice alluding to the investigation meeting date. In addition, on 27 June 2020, the Authority using a document server, had delivered to Mr Nilsen's address for service a copy of the investigation notice that was accepted by a person identifying as his sister. I am satisfied that Mr Nilsen had adequate notice of the investigation meeting date.

[6] At the investigation meeting I heard from Mr Burt and his partner Jess Burt and a submission from Mr Burt's counsel. Given there was a 90 day issue and dispute about the identity of the employer I then provided Mr Nilsen with an additional period of time up to 16 November to respond to additional submissions filed by Mr Burt's counsel on the 90 day issue and his newly engaged counsel provided one on 12 November.

Application to reconvene investigation

[7] On 16 November 2020 counsel for Mr Nilsen, submitted an application to reconvene the investigation, inviting me to do so pursuant to section 160 Employment Relations Act 2000 ("the Act"). I observe that the section of the Act cited in the application does not specifically relate to the reopening of an investigation. Notwithstanding, I do have the discretion to consider the application under Schedule 2, clause 4 of the Act and will do so.

[8] This discretion must be exercised according to principle. Principles developed by the Employment Court in the exercise of its similar discretionary power to order a "re-hearing" provide a useful framework for the Authority when considering whether or not to reopen an investigation. [1] Applicable principles include the following: [2]

> (a) The rehearing jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered or to provide a back door method by which unsuccessful litigants can seek to re-argue their case.
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> (b) Some special or unusual circumstance must be found to exist to warrant the reopening, such as:
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> (i) fresh or new evidence which could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive;
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> (ii) a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended; or
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> (iii) some other special or unusual circumstance particular to the case.
>
> (c) A 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 reopening can establish there would be a miscarriage of justice or at least a real or substantial risk of a miscarriage of justice if the determination were allowed to stand.
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> (d) An apparent misapprehension of the facts or relevant law will not

[1] *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9]
[2] *Davis v Commissioner of Police* [2015] NZEmpC 38 at [12]

warrant a reopening where the misapprehension is attributable solely to the neglect or the fault of the party seeking the re-hearing. [3]

(e) Where a party is dissatisfied by an Authority determination on grounds that may be the subject of a specific statutory process of a challenge under s 179 of the Employment Relations Act 2000 (the Act), the Authority should be reluctant to entertain an application for reopening on those grounds.

[9] The overriding consideration must be the interests of justice, having regard to the likelihood of a miscarriage of justice balanced against other relevant factors such as the importance of finality in litigation. [4]

Reasons advanced for reconvening

[10] Ms Thomas initially acknowledged that Mr Nilsen's non-attendance at the investigation meeting of 1 October was "inexcusable and may be answered by a costs award irrespective of the result of the matter".

[11] Without detailing what it was, even in a general sense, Ms Thomas proceeded to claim Mr Nilsen had "material evidence and information relating to the problem or matter put before the Authority" and went on to claim that a "miscarriage of justice would occur if the investigation is not reconvened". Ms Thomas rounded off her brief request stating:

> There are factual matters that need to be traversed before a decision can be made. The Respondent has a valid affirmative defence to the issues. As stated above, the failure to attend the scheduled Authority hearing can be addressed by costs.

Factors opposing reconvening

[12] The applicant's counsel in a memorandum filed on 18 November 2020 opposed the reopening of the investigation on the following grounds:

(a) Mr Nilsen failed to attend an Authority directed mediation.

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[3] *Autodesk Inc v Dyason (No 2)* (1993) HCA 6; (1993) 173 CLR 300 at 303
[4] *Young* above at [9]

(b) Ample time was provided for Mr Nilsen to put material before the Authority and he had failed to do so including a brief of evidence and he was provided with all of the applicant's pleadings and briefs of evidence by email and courier.

(c) Both parties had advance notice of the Investigation Meeting.

(d) That granting the application would cause unreasonable delay and increased attendance costs overly prejudicing the applicant who has been waiting eighteen months to have his claims resolved that include outstanding wages**.**

Finding

[13] I conclude that Mr Nilsen has advanced no evidence to suggest he was unaware of the investigation meeting and further no compelling, special or unusual circumstances or reasons to suggest that the investigation meeting be reconvened. I will proceed to issue a determination in due course.

Costs

[14] In the circumstances, the applicant Michael Burt has successfully resisted the application sought to reopen the investigation and is entitled to costs for the preparation of a response by counsel. I urge the parties to resolve this matter by agreement and if no such agreement occurs Mr Burt has 14 days from the issuing of this determination to make a costs application and Mr Nilsen has a further 14 days to respond – then I will determine the issue.

David Beck
Member of the Employment Relations Authority