

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 657
3245359

BETWEEN CRUZ BAR LIMITED
Applicant

AND TIHEI KEREOPA-REREKURA
Respondent

Member of Authority: Helen Doyle

Representatives: Bruce Williamson, counsel for the Applicant
Lawrence Anderson, advocate for the Respondent

Investigation Meeting: On the papers

Date of Determination: 7 November 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Cruz Bar Limited (Cruz Bar) applies to reopen the substantive investigation of the Authority.¹

[2] The sole director of Cruz Bar is Bruce Williamson.

[3] The grounds in the application for reopening are that the Member disregarded or ignored critical evidence and closing submissions and that the reason for dismissal was because of a genuine redundancy and redeployment was not a possibility. One of the grounds is that there is new evidence that nobody filled a position of barperson once an employee who had occupied that position prior to April 2022 had resigned.

[4] Mr Williamson on behalf of Cruz Bar says that the matter should be re-opened and not to do that or to consider the new evidence amounts to a miscarriage of justice.

¹ *Tihei Kereopa Rerekura v Cruz Bar Limited* [2023] NZERA 376.

[5] A document described as an affidavit of Mark Clegg dated 11 August 2022 was attached to the application. Mr Clegg had been a witness at the investigation meeting. For completeness the document was only signed by Mr Clegg, was not witnessed, and not sworn or affirmed. It is not in the required form for it to be regarded as an affidavit but has been considered for this matter as a statement.

[6] Mr Anderson on behalf of Mr Kereopa-Rerekura lodged a statement in reply. The view of Mr Kereopa-Rerekura was that there was no actual miscarriage of justice, no special or unusual circumstances to justify reopening the Authority's investigation, and that the evidence that Cruz Bar wished to introduce could have been presented at the Authority's investigation meeting. Further, that the Authority is not required to record all evidence and submissions in its determination under s 174E of the Employment Relations Act 2000 (the Act).

The substantive determination

[7] The substantive determination found that Mr Kereopa-Rerekura had been unjustifiably dismissed from his employment with Cruz Bar. The reason for dismissal was that it was considered he had abandoned his employment when he was isolating following a household contact testing positive for COVID-19. In reaching that conclusion reliance was placed on messaging between Mr Williamson and Mr Kereopa-Rerekura on 5 March 2022. Reliance was then placed on the processing of a final pay claim seeking clarification from Mr Kereopa-Rerekura about time sheets for final pay from 11 March 2022. The determination states that after this redundancy was given as a reason to terminate but the emails in delivering that message showed decision making was to do with dissatisfaction about the way in which the government had made rules about isolating meaning Mr Kereopa-Rerekura was unavailable to work.²

[8] Mr Kereopa-Rerekura was awarded \$15,000 in compensation, reimbursement of lost wages and two weeks wages for the failure to pay notice in the sums of \$1,893.86 gross and \$1,458 gross respectively.³

² Above n 1 at [39].

³ Above n 1 at [43] to [51].

The investigation process

[9] The original Member held a case management conference with Mr Williamson and Mr Anderson on 5 October 2023. A notice of direction dated 5 October 2023 confirms that the application for reopening is to be dealt with by another Authority Member. Submissions were timetabled as follows:

- (a) Cruz Bar to lodge and serve submissions by no later than 16 October 2023; and
- (b) Mr Kereopa-Rerekura to lodge and serve submissions no later than 24 October 2023.

[10] It was set out that the matter was then to be determined on the papers after submissions were received.

[11] Mr Williamson confirmed on 16 October 2023 in an email that there was nothing further the company wished to submit. After 24 October 2023 an Authority officer made enquiries of Mr Anderson whether he wished to provide submissions. There was no response.

[12] The Authority officer then advised Mr Williamson and Mr Anderson that the Member would proceed to determine the matter.

The issues

[13] The Authority needs to consider the following issues:

- (a) What is the legal framework for a reopening application?
- (b) Would there be an actual miscarriage of justice, or a real or substantial possibility or substantial risk of a miscarriage of justice, if the investigation is not reopened and the determination allowed to stand?

What is the legal framework for a reopening application?

[14] Clause 4 of Schedule 2 of the Act provides that 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 award previously made.

[15] The Authority must exercise a discretion to reopen on a principled basis. The main concern in the exercise of the discretion is to avoid a miscarriage of justice. The desirability of

certainty for litigation in the public interest and that there be an end to litigation, needs to be considered.⁴

[16] The Employment Court described the principles for the exercise of a discretionary power to order a reopen in *Randall*⁵. Some of the principles that are material are set out below:

- (a) The jurisdiction is not to be exercised for the purposes of re-agitating arguments already considered or providing a back door method by which unsuccessful litigants can seek to reargue their case.
- (b) Some special or unusual circumstances must be found to exist to warrant the reopening, such as that fresh or new evidence has been discovered which is material to the outcome of the case, and that could not have been given at the hearing.
- (c) The mere possibility of a miscarriage of justice is not a sufficient ground for granting reopening. What is required is an actual miscarriage of justice, or a real or substantial possibility or substantial risk of miscarriage of justice, if the determination is allowed to stand.

Would there be an actual miscarriage of justice or a real or substantial possibility or substantial risk of a miscarriage of justice if the investigation is not re-opened?

Conflated evidence and not acknowledging evidence that supported the genuineness of the redundancy?

[17] In concluding the redundancy was not genuine the Member found in the substantive determination that Mr Kereopa-Rerekura's role continued to be required after his employment terminated.⁶

[18] The determination provided that Mr Williamson in a letter to Mr Kereopa-Rerekura dated 14 March 2022 indicated he would take over the security role. The material aspects with which Cruz Bar takes issue is what was then stated:

⁴ *Randall v The Warehouse Limited* [2019] NZEmpC 68 at [15] and [18].

⁵ Above n3 at 17.

⁶ Above n 1 at [33].

However, Mr Clegg's evidence confirmed that he himself obtained a security guard certificate after Tihei left, to give Mr Williamson a break, and that while Mr Williamson did the role after Tihei left, the role was then filled by someone from an on-hire agency.⁷

[19] Cruz Bar say that the Member "deliberately conflated evidence" of a witness Mr Clegg that he engaged in employment at Cruz Bar as a security guard after termination of Mr Kereopa-Rerekura's employment with his obtaining of a security certificate. Mr Clegg in his statement in support of re-opening the investigation accepted he had said in evidence he was worried about Mr Williamson working as a doorman and gave evidence that he had obtained a security certificate. He says in his statement that at no stage did he state he was employed in a security role at the nightclub. He could not recall ever helping Mr Williamson at the door but was there to do so if required.

[20] The determination does not specifically state that Mr Clegg undertook the security guard door duties after Mr Kereopa-Rerekura's dismissal. To the extent that this could be inferred the reference to Mr Clegg obtaining a security certificate is closely followed by a statement that Mr Williamson did the role until the duty was undertaken by someone from an on-hire agency. There is no dispute that a third-party undertook those duties at a later point as the determination records. The application for reopening clarifies this with details of payments made to that third party from on or about 10 July 2022.

The advertisements for staff

[21] Cruz Bar says that the Member made no acknowledgement of the material in closing submissions that proved there were ongoing and permanent applications for team members on "Facebook" social media. It says that the advertisements were designed to attract the attention of potential applicants for work regardless of whether actual positions were open and to be filled. Cruz Bar say that this was the regular practice for most hospitality businesses.

[22] There was reference in the determination to the continuing advertisement for staff and that this seemed inconsistent with a genuine redundancy with reference to the bar remaining open. The determination concluded that reasons for the advertisement were "implausible."

⁷ Above n 1 at [31].

There was consideration alternatively in the determination if the Member was wrong about the advertisement

[23] Cruz Bar referred to this as removing any substance to the conclusion of implausibility and that the Member was on a path to “taint” Mr Williamson’s evidence.

[24] I could not be satisfied that the Member overlooked what Mr Williamson had to say in his evidence about the advertisements. There was reference in the determination to the advertisement and that it was a “continual advert.” Mr Williamson’s explanation about the basis for the advertisement was not accepted.⁸ To the extent that a lack of impartiality is suggested considering the matter alternatively does not support that the Member did not have an impartial approach to the resolution of the issue.

New evidence

[25] Cruz Bar says that there is new evidence that after the second bar person left Cruz Bar in or about April 2022 no-one was employed to fill the position of bar person. The substantive determination refers to an option for Mr Kereopa-Rerekura to be considered for redeployment to the bar.⁹

[26] New evidence can justify a reopening but three matters need to be satisfied. The evidence could not have been obtained to produce to the Authority at the time of the original investigation, it must have an important but not decisive influence on the result of the case and it must be credible but not incontrovertible.¹⁰

[27] The Authority investigation meetings are not recorded to provide a record of oral evidence. I have had regard to the written statements of evidence that were provided in advance of the substantive investigation meeting. There is reference in Mr Williamson’s written statement of evidence to a barperson resigning and there being a vacancy not filled.¹¹ There is a further statement to that effect in the final submissions for Cruz Bar.¹²

⁸ Above n 1 at [31].

⁹ Above n 1 at [31].

¹⁰ Above n 4 at [16].

¹¹ Statement of evidence of Bruce Williamson dated 22 February 2023 at [46].

¹² Final submission of Cruz Bar at [24].

[28] I cannot be satisfied that there is new or fresh evidence about the barperson role that was not or could not have been provided at the time of the original investigation meeting.

Cruz Bar says all evidence all pointed to a genuine redundancy.

[29] Cruz Bar says in its application for reopening that its financial difficulties, awareness by Mr Kereopa-Rerekura that redundancy was a possibility, the fact that the position of security guard was filled by Mr Williamson for several months and the absence of redeployment options confirm the redundancy was genuine.

[30] The facts related to the findings about the reasons for termination of employment included evidence in the form of messages and emails. This was set out in some detail in the substantive determination. There was reference to the absence of a proper redundancy procedure including the lack of financial information and consultation.¹³ It was stated that this further supported that the redundancy was not genuine.¹⁴ The Member recorded some oral evidence that Mr Kereopa-Rerekura was aware of general discussions about the business not making money and Mr Williamson's concerns.¹⁵

Conclusion about miscarriage of justice if reopening of the investigation not granted

[31] Cruz Bar is dissatisfied with the Authority determination. The primary process for a party dissatisfied with a determination of the Authority is a challenge.¹⁶ The Employment Court has been clear that there is a public interest in the finality of litigation and that it is unusual for the Authority to grant an application to reopen in circumstances where a challenge under s 179 of the Act could have been pursued.¹⁷ A challenge to the Employment Court if a party is dissatisfied with an Authority determination can be by a hearing de novo which means a matter can be heard anew.

[32] The Employment Court has stated that an order for rehearing is not a step to be taken lightly.¹⁸ This is because it would involve:

¹³ Above n 1 at [34], [35] and [36].

¹⁴ Above n 1 at [36].

¹⁵ Above n 1 at [35].

¹⁶ *Yong t/a Yong & Co Chartered Accountants v Chin* [2008] ERNZ 1 at [16].

¹⁷ *Alkazaz v Enterprise IT Ltd* [202] NZEmpC 171 at [5] and [6].

¹⁸ Above n 16 at [23].

...setting aside a judgment which would otherwise be binding and compelling the parties to engage again in the trial process which they were entitled to regard as over.

[33] Where reopening has been ordered there have been special or unusual circumstances usually discovery of new evidence unable to have been discovered and provided before the Authority investigation. I have not concluded that there was new evidence or evidence that could not have been provided earlier for the Authority investigation.

[34] That leaves the grounds for reopening that there was a failure to consider relevant evidence and conclusions reached were incorrect or overlooked other evidence.

[35] The Employment Court has stated it has only been in exceptional circumstance that any court has entertained an application for rehearing on grounds that the judgment contained an error of law.¹⁹ The same exceptional circumstances must exist for any apparent misapprehension of the facts where the primary process would be a challenge of the determination.

[36] The Authority is not required to set out a record of all evidence heard or received or record or summarise any submission made under s 174E of the Act. In the substantive determination there is reference to whether the reason for termination was redundancy as Cruz Bar maintained. For reasons referred to in the substantive determination it was not found that there was a genuine redundancy. The whole of the evidence relating to the circumstances of the ending of the relationship was traversed in the determination and that included messaging and emails within the relevant timeframe before termination.

[37] A reopening would permit what the Employment Court has specifically said is not permitted. That is an opportunity for the parties to reformulate their claim, improve arguments or have a second bite at the litigation cherry.²⁰

[38] I am not satisfied having considered the grounds advanced earlier in this determination for reopening that there has been an actual miscarriage of justice, or there is a real or substantial possibility of risk of a miscarriage of justice, if the determination is allowed to stand. In so concluding I have considered the determination in its entirety including remedies awarded.

[39] I do not conclude the interests of justice favour a reopening.

¹⁹ Above n 16 at [27].

²⁰ Above n 17 at [54].

[40] The re-opening application is not successful.

Costs

[41] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Anderson may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Williamson would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[42] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²¹

Helen Doyle
Member of the Employment Relations Authority

²¹ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1