



- [3] On 9<sup>th</sup> September 2009, a conference call was convened by the Authority with Mr Bailey and Mr Faltaus, the outcome being that it was agreed that the Authority would determine the application for reopening on the papers received and that no further information was required.

#### **The Grounds for the Application**

- [4] In summary (and paraphrased), the grounds for the application are that:
- (1) There has been no decision made by the member;
  - (2) The member seems to have misdirected herself in regard to the onus of proof falling on the applicant to prove employee status;
  - (3) The member seems to have misunderstood, or not taken into account, submissions on behalf of the applicant dated 16<sup>th</sup> October 2008;
  - (4) That the determination was made without the further evidence for the respondent as requested from Mr Dong;
  - (5) That a dispute as to the end date of the applicant's employment was not resolved and the applicant's submissions on this matter were not addressed;
  - (6) The member has contradicted herself in paragraphs 6 and 17 of the determination and was incorrect in her conclusions at paragraphs 9, 13, 14 and 20 of her determination.

#### **The Respondent's Objection to the Application**

- [5] The respondent objects to the reopening of the investigation and submits (paraphrased) that:
- (1) There is no proper basis for a reopening of the investigation;
  - (2) There is no substance in the grounds advanced and they are misconceived;
  - (3) The time allowed for the applicant to challenge the determination and make submissions as to costs has expired and the applicant has now resorted to a reopening application as a "backdoor" appeal;
  - (4) No credible claim or indication of a miscarriage of justice has been advanced and dissatisfaction with the determination of the Authority should not be a ground for reopening;
  - (5) The application is unmeritorious and no valid argument has been put that a new determination would be any different than that which has been issued;
  - (6) Reopening the investigation would be unfair on the respondent and unnecessary costs would be incurred;

[6] Mr Faltaus also referred the Authority to the legal principles applicable to a rehearing (in the Employment Court) as set out in *Yong t/a Yong and Co Chartered Accountant v Chin* AC (unreported), AC 1/08. The Employment Court, Colgan J (as he was then), has concluded that the tests for a rehearing in the courts, are not applicable to the Employment Relations Authority in regard to the reopening of an investigation.<sup>1</sup> Judge Colgan placed some store on the “overriding requirement” of the Authority to act as it thinks fit in equity and good conscience under s.157 (3) of the Employment Relations Act 2000 (“the Act”).

[7] The effective provisions pertaining to the Employment Relations Authority, as applicable to the reopening of an investigation, are at Clause 4 of the Second Schedule to the Act:

**4. Reopening of investigation**

- (1) The Authority may order an investigation to be reopened on such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.
- (2) The reopened investigation need not be carried out by the same member of the Authority.

**Determination**

[8] Having closely examined the totality of the submissions for both parties and the determination of the Authority dated 11 June 2009, my conclusions are:

1. The substantial majority of the grounds and the evidence advanced for the reopening of the investigation are largely misconceived as they are matters which may be more appropriate to a challenge to a determination of the Authority pursuant to s. 179 of the Act. The applicant has failed to exercise this option within the 28 days allowed and he is not permitted to access another avenue via a reopening of an investigation application.
2. However, I accept that the determination is inconclusive in that while the Authority member conducted an appropriate analysis of the accepted tests that apply to determining whether the applicant was an employee or a contractor, and she arrived at separate findings in regard to each of the tests, unfortunately, she did not provide a conclusive and final determination as to

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<sup>1</sup> *Shore v Aqua-Cool Limited* (unreported), AC 73/05, 5 December 2005.

whether the applicant was an <sup>4</sup>employee or a contractor. While a legally trained person could possibly arrive at a conclusion about this by examining the outcome of each test, the applicant is entitled to an absolute and clear determination from the Authority as to the relationship that existed between him and the respondent.

- [9] I therefore order that the investigation be reopened on one specific ground only. This is that the determination dated 11<sup>th</sup> June 2009 is inconclusive and it should be recalled to allow Ms Urlich to provide a replacement determination that provides certainty to the parties in regard to the findings of the Authority as to whether the applicant was an employee or a contractor.

### **Costs**

- [10] Costs are reserved.

**K J Anderson**  
**Member of the Employment Relations Authority**