

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 348
5445955

BETWEEN LABOUR INSPECTOR (KATE
FEENEY)
Applicant

A N D DANUJA INTERNATIONAL
(PVT) LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Kate Feeney, for the Applicant
Presanna Thilakaratne, for the Respondent

Investigation Meeting: Consideration on the papers

Date of Determination: 26 August 2014

DETERMINATION OF THE AUTHORITY

- A. The application by the respondent for reopening the investigation is granted.**

- B. Costs are reserved.**

Application for investigation to be reopened

[1] The original employment relationship problem was investigated by the Authority at a meeting on 1 May 2014. A determination by the Authority was issued on 2 May 2014¹. On 29 May, a challenge to the Authority's determination was filed by Danuja International(PVT) Limited (Danjuja) in the Employment Court. On 23

¹ [2014] NZERA Auckland 165

July, Danuja filed an application in the Authority for the investigation to be reopened. The ground for seeking the investigation to be reopened is that Mr Presanna Thilakaratne, Director of Danuja could not attend the investigation meeting on 1 May and gave reasons for not being so able.

[2] The Labour Inspector opposes the application on the basis that the non attendance of Mr Thilakaratne will have *“no impact on the outcome of the claim in relation to the Compliance Order and the Improvement Notice issued for unpaid holiday pay”*.

[3] The Authority has a discretionary power to reopen an investigation pursuant to clause 4 of the Second Schedule of the Employment Relations Act 2000 (the Act). While the power is discretionary, it must be exercised in accordance with principle.

[4] The principal test for determining whether a matter ought to be reopened or not is whether a failure to do so would constitute a miscarriage of justice. The Authority must balance the risk of miscarriage of justice against the counter-principle that certainty in litigation is important.

[5] With regard to the original claim. Mr Thilakaratne filed a statement in reply to the Labour Inspector’s statement of problem on 10 February 2014. By email dated 12 February 2014, both parties were asked to advise their availability for an investigation meeting on either Wednesday, 30 April or Thursday 1 May 2014. The Labour Inspector responded promptly to the Authority’s request, but Mr Thilakaratne failed to do so.

[6] A notice of investigation meeting was confirmed for 1 May 2014 and was sent to Danuja by courier on 14 February 2014. As set out in the Authority’s determination of 1 May, on 29 April, two days before the investigation meeting was due to proceed, an email was received by the Authority from Mr Thilakaratne stating that he was in Sri Lanka and unable to attend. Mr Thilakaratne did not provide full details for being unable to attend the investigation meeting and as there had been ample time for Mr Thilakaratne to organise his attendance at the meeting, the meeting proceeded.

[7] In the application to reopen the investigation Mr Thilakaratne says he left New Zealand on 11 April knowing that he had to return on or before 30 April 2014 in order to attend the investigation meeting. Through the failure of his travel agent, who was trying to obtain cheap airline tickets so that he could travel to New Zealand, he did not

get tickets enabling him to travel before 30 April. Mr Thilakaratne says he informed the Authority on 29 April that he would not be able to attend the investigation meeting on 1 May but would be available to attend an investigation meeting on 7 May.

[8] Mr Thilakaratne says *“if I knew that I could nominate a representative for this investigation, I could have asked my wife and the lawyer to attend it. Unfortunately I did not have much knowledge on these issues”*.

[9] The question of whether to reopen an investigation is a matter of discretion to be exercised in a principled basis. The overwhelming consideration is the interests of justice.

[10] After consideration, I have resolved to accept Mr Thilakaratne’s explanation as to his inability to attend the Authority’s investigation meeting as scheduled for 1 May 2014. The explanation provided in the application for reopening the investigation is more detailed than what was provided to the Authority before its investigation meeting on 1 May 2014.

[11] Mr Thilakaratne wishes to attend the Authority and be heard in relation to allegations that Denuja had failed to comply with its statutory obligations under the Holidays Act 2003.

[12] I do not wish to deny Mr Thilakaratne the opportunity of being heard, given the further reasons that he has provided to the Authority as to his inability to attend the investigation meeting on 1 May. That conclusion informs me to exercise my discretion in Danuja’s favour.

[13] I regret the inconvenience to the Labour Inspector as matters have advanced to this point.

[14] I shall therefore grant the application to reopen the investigation, but I consider Danuja is to take all steps possible to cooperate with the Authority to ensure the most expeditious disposal of the matter and to minimise the prospect of further unnecessary inconvenience.

[15] An investigation meeting is to be reconvened at the earliest possible date. In the event Mr Thilakaratne leaves New Zealand prior to the date of the investigation meeting, he is to ensure that he or a representative is able to attend the investigation meeting.

Anna Fitzgibbon
Member of the Employment Relations Authority