



[4] On 31 August 2022, Mr Forster lodged an application in the Authority seeking reopening of the determination on the basis that fresh information, that is relevant to the investigation, had come to light. The Authority adjourned hearing the reopening application until after a police investigation was concluded. This was because the issue of self-incrimination arose given of the nature of the complaint to police and the way in which it involved Ms Marshall.

[5] Mr Foster also lodged a challenge in the Employment Court to the Authority's determination. The Court confirmed it is waiting for the Authority's determination before taking any further steps.<sup>1</sup>

[6] Mr Forster is seeking a fresh investigation and wants to put the new material and the matters raised in his application to Ms Marshall.

[7] The parties agreed to the reopening application in the Authority being heard on the papers and have provided written submissions. Mr McAleer made strong submissions on Ms Marshall's behalf opposing reopening the investigation. In particular, he says the new material is not relevant and Mr Forster's assertions lack veracity.

### **The substantive determination**

[8] Ms Marshall claimed she was constructively dismissed during a period of extended leave she took to take care of her extremely unwell daughter. The Authority found that Mr Forster's actions and communications over text and phone culminated in the final meeting that caused Ms Marshall to believe she had no option other than to resign. The Authority determined Mr Forster had breached his duty of good faith towards Ms Marshall in the context of the employment relationship and the requirements on employers to engage and communicate when proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment.

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<sup>1</sup> *Eric Forster v Carole Marshall* EMPC 301/2022, 7 March 2023.

## The legal framework for considering a reopening application

[9] The Authority has a statutory discretion to order the reopening of an investigation on “such terms as it thinks reasonable.”<sup>2</sup>

[10] The principles developed by the Employment Court in exercising its similar discretionary power to order a ‘rehearing’ provide a useful framework, for the Authority when considering whether to reopen an investigation.<sup>3</sup>

[11] Applicable principles include the following:<sup>4</sup>

- (i) The jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered or to provide 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 evidence that could not with reasonable diligence have been discovered prior to the investigation meeting, which is of such a character as to appear to be conclusive; or
  - a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended; or
  - some other special or unusual circumstance particular to the 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 reopening can establish there would be 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.

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<sup>2</sup> Employment Relations Act 2000, Schedule 2 clause 4.

<sup>3</sup> *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].

<sup>4</sup> *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].

- (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.<sup>5</sup>
- (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.<sup>6</sup>
- (vi) Where a party is 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 same grounds.

[12] For the decision-maker of a reopening application, “[t]he overriding consideration must be the interests of justice balanced against other relevant factors such as the importance of finality in litigation”.<sup>8</sup>

### **The rehearing application**

*What is the new information?*

[13] The new information was discovered by Mr Forster on his computer system after the Authority held its investigation meeting on 14 January 2022 and had issued its determination. The new information consists of:

- (a) emails between Ms Marshall and a work colleague;
- (b) an employment reference for Ms Marshall created on Mr Forster’s computer system that Mr Forster says he has no knowledge of; and
- (c) metadata showing information about the employment reference and the deleted files from the computer system.

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<sup>5</sup> *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607.

<sup>6</sup> *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, above n 2, at [37]. <sup>8</sup> *Young*, above n 3, at [9].

[14] The rehearing application centres on Mr Foster's submissions about what he says the new information means. He argues it shows Ms Marshall had been disaffected with her employment relationship long prior to October 2020 when they started communicating about her leave. The significance of this is said to be that Ms Marshall had a vendetta against Mr Forster and it is asserted that the way in which the employment relationship came to end was in part because Ms Marshall held an "animus" against Mr Forster. In other words, the way the employment relationship ended was because there was an opportunity for Ms Marshall to seek "revenge".

[15] Mr Forster's submissions conclude:

- (a) Ms Marshall's conduct may have been deeply cynical;
- (b) the constant requests by Ms Marshall to be given more response opportunities speaks to her approach – trying to limit the truth coming out;
- (c) Ms Marshall should have the opportunity of putting to her employer that she is the victim of a witch-hunt;
- (d) the employer wants to put the matters raised in this application to Ms Marshall;
- (e) these matters could make a difference and are material;
- (f) given that there is fresh information, relevant to the key determinations, the existing order should be stayed, and a fresh investigation ordered.

### **No valid grounds for re-opening investigation**

[16] I accept that it is new information that was not available at the time the Authority held its investigation meeting and issued its determination. The next question is whether these matters could have made a difference and whether they are material. In order to meet the test for reopening, there must be an actual or at least a real or substantial risk of a miscarriage of justice if the determination was allowed to stand.

[17] The first point to note is that it is Mr Forster's assertion Ms Marshall was unhappy to the point of being disaffected is based on a selection of her correspondence located long after she left. While I understand the point being made, I do not find that is the only conclusion available to an objective person reading through the correspondence.

[18] Even if that was a valid conclusion to be drawn from those emails, the finding of an unjustified dismissal was based on Mr Forster's conduct as an employer towards Ms Marshall. The connection between Ms Marshall's earlier comments about a desire to seek work elsewhere and the discussions and interactions they had about how to manage the leave situation some 10 months later, is weak. The focus of the Authority's investigation was whether or not there was a breach of duty by Mr Forster, and was dismissal foreseeable given what had occurred?

[19] There are several other inferences arising from Mr Forster's submissions including one that Ms Marshall is responsible for the altered employment reference and deleting the material from the work computer system.

[20] Ms Marshall's case was that she was given a strong indication that her position was no longer available. The basis for this included phone calls, texts and an in-person meeting. As a result of that it was Ms Marshall's position that she had no option but to resign because she had lost trust and confidence in her employer. At the heart of the matter was a phone conversation in which Ms Marshall says among other things Mr Forster told her she should resign and go on a carer's benefit. Mr Forster says he was simply exploring options given the situation he was in as the employer. However, Ms Marshall was entitled to interpret that as she did.

[21] To the extent the assertions by Mr Forster are suggesting Ms Marshall's credibility is undermined, much of Ms Marshall's case was supported by later text messages and Mr Forster's acceptance of her evidence. For example, Mr Forster's partial acceptance regarding his conduct at the meeting between the parties when they were attempting resolution and his statement to the Authority about the reasons why his practice may have been wound up the following year.

[22] Mr Forster's case was that as an employer he was in a situation that made it reasonable to discuss leave options with an employee and the Authority accepted that point. He also submitted there was nothing that he said or did that objectively made it reasonably clear to Ms Marshall that he no longer intended to comply with the essential terms of the employment agreement. The Authority did not accept that position after hearing the evidence.

[23] Even if Ms Marshall had been unhappy in her employment prior to the events that unfolded between the parties, or if she is responsible for the various things asserted by Mr Forster in his submissions, that does not mean this is material to resolution of the employment relationship problem, or that there has been a misapprehension of the facts or law, such that there has been a miscarriage of justice.

[24] There does not appear to be a sufficient connection between Mr Forster's conduct as an employer and the assertions or inferences that it is submitted can be drawn from the new information. On that basis the new information is not material to the Authority's determination.

### **Conclusion**

[25] While new information has come to light, measured against the principles about reopening, including the principle of finality of litigation, Mr Forster has not established any actual miscarriage of justice or real or substantial risk of a miscarriage of justice. No grounds for reopening were established. Mr Forster's application for reopening of the Authority's investigation is declined.

### **Costs**

[26] 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, Ms Marshall 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 Forster 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.

[27] 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.<sup>7</sup>

Sarah Kennedy-Martin  
Member of the Employment Relations Authority

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<sup>7</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)