IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 380
3017395

	BETWEEN	GEA PROCESS ENGINEERING LIMITED Applicant
	A N D	TONY SCHICKER Respondent

Member of Authority:	James Crichton
Representatives:	Stephen Langton, Counsel for the Applicant David Grindle, Counsel for the Respondent
Submissions Received:	1 December 2017 from Applicant 4 December 2017 from Respondent
Investigation Meeting:	On the papers
Date of Determination:	7 December 2017

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The only issue to be considered in this determination is whether an application to reopen the Authority's investigation into this matter ought to be heard by the Member who presided over the original process, or not.

[2] The wider question of whether or not the reopening application ought to be allowed, or not, is specifically not addressed in this determination. For present purposes, the only issue is whether or not Member Arthur, who dealt with this file when it first became before the Authority, ought to consider the application to reopen, or not.

The submissions for the applicant

[3] GEA submit that it would be inappropriate and contrary to principle for Member Arthur to consider the application to reopen and that if he did, that "…. would give rise to

a reasonable apprehension of pre-judgment … and offend against the rule against apparent bias in *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2010] 1 NZLR at 35.."

[4] The argument proceeds on the footing that Member Arthur failed to carry out his statutory role of investigating the employment relationship problem identified by GEA and that therefore there will need to be an inquiry as to whether the Member's approach was or was not legally flawed.

[5] It is alleged that the process in the Authority is fundamentally different from the approach in other jurisdictions in that, typically, where a decision of a Court or Tribunal is challenged, it is a higher Court (and critically for the purposes of the argument, a different Court) that considers the challenge.

[6] Moreover, it is submitted that it is a principle of law that a judicial officer should not hear an appeal of their own judgment because that would create a reasonable apprehension of bias: see for instance the decision of the Supreme Court in *A v The Queen* [2016] NZSC 31.

The respondent's submissions

[7] Very brief submissions were filed on behalf of the respondent, confirming the respondent's initial position that he did not oppose the application to reopen the matter and that he otherwise reserved his position.

[8] The brevity of the submissions was properly explained by reference to the respondent's desire to marshal his financial resources judiciously and the submissions conclude with a brief observation to the effect that the allegation of pre-judgment directed at Member Arthur is not accepted by the respondent.

Determination

[9] I am not persuaded that Member Arthur should not consider this application to reopen this matter. He is the Member who knows this case better than any other and accordingly, on the basis of a proper utilisation of the Authority's scarce resources, it is difficult to see, in the absence of other countervailing arguments, why Member Arthur ought not to address this issue.

[10] I have not been persuaded that there are arguments against Member Arthur considering the application to reopen principally because I consider that the submissions filed by GEA proceed on a mistaken application of the law. GEA draw an analogy between the application to reopen an Authority investigation which is provided in schedule 2 clause 4 of the Employment Relations Act 2000, and appeals, challenges and the like, from decisions of Courts or Tribunals.

[11] The application to reopen is not an appeal or a challenge to a determination issued by the Authority. It is just what it says: an application to reopen a matter so that the Authority can continue its investigation.

[12] If GEA wanted to challenge the Authority's determination in the instant matter then of course that process was readily available to them by making the appropriate application to the Employment Court. The Authority's determination on the matter that GEA wants reopened explained that point in this way:[1]

> [41] GEA can, as a result of this determination, now proceed by way of challenge to have its claim heard by the Employment Court, without having first incurred the time and expense of a full Authority investigation. The outcome in the Authority has determined GEA's substantive rights. It is not merely a conclusion on a procedural matter. It automatically generates a statutory right for GEA to file a challenge in the Employment Court and have the whole matter heard there. In this way GEA still has access to justice, with the right to have its claim decided in an appropriate forum in the employment jurisdiction.

[13] And GEA has already taken that step by filing a challenge in the Court on 25 July 2017. It did so before lodging its application in the Authority for a reopening on 10 August 2017. The Court has stayed that challenge pending news on the reopening application.

[14] The law on reopening matters in the Authority is well settled and is based on applications for rehearing in the Employment Court. While re-hearings are subject to the normal rules that apply in a court of record, and reopening applications in the Authority are dealt with far less formally because of the different process, nonetheless, the principles are not dissimilar.

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[1] *GEA Process Engineering Limited v Schicker* [2017] NZERA Auckland 183

[15] In particular it is settled law that the principal basis on which an application for a reopening can be made is on the footing that there has been a miscarriage of justice.

[16] No such claim is made here; all that is alleged is that by virtue of errors made by the Member that resulted in him misdirecting himself, there ought to be a reopening of the matter, but by another Member.

[17] It has been the policy of the Authority throughout its existence for reopening applications to generally be dealt with by the Member most familiar with the matter, that is to say the Member who presided at first instance. Sometimes, in the interests of administrative convenience, another Member has taken up the reopening application and dealt with it but certainly in complex matters such as the current issue, I am satisfied that any other Member would take an inordinate period of time to become familiar with the file.

[18] One of the reasons that the Authority has traditionally referred reopening applications back to the original Member is to avoid allegations of "judicial officer shopping". Put simply, the Authority is desirous of avoiding a situation wherever possible, where parties can seek to gain tactical advantage by avoiding a particular Member in a particular matter. This will obviously particularly be the case where that Member has already expressed some views about the matter such as in the present case.

[19] My expectation is that Members will have the judgment and ability not to be unduly influenced by any views or conclusions they may have already reached and even expressed as they look with fresh eyes at an application to reopen a matter that they have previously engaged with.

[20] In this respect, the Authority is doing no more and no less than falling in with the general judicial rules on judicial recusal.

[21] In that regard, I refer to the recent statement of the Chief District Court Judge published in the October 2017 edition of *Law Talk*. In her statement, Her Honour Judge Jan-Marie Doogue set out the obligation of practitioners not to seek to interfere in the allocation of judges to particular cases that practitioners are involved in.

[22] The following passages from Her Honour's statement are apt:

> It seems that this is often occurring (that is when practitioners ask for a change of Judge) in situations where the Judge may have expressed an opinion in an earlier

> case and that is not necessarily a ground for recusal. The mere fact that a Judge earlier in the same case, or in a previous case, has commented adversely on a party or a witness or found the evidence of a party or a witness to be unreliable would not without more be found to be a sustainable objection to that Judge presiding…the issue of recusal does not arise merely because a Judge has ruled against the defendant on a pre-trial matter even if the decision made was erroneous and adverse to the party now alleging bias.
>
> Likewise an expression of opinion in an earlier stage of proceedings is not necessarily a ground for recusal.
>
> A Judge is only disqualified if he or she has expressed views in the course of the hearing, in such extreme and unbalanced terms, as to throw doubt on his or her ability to try the issue with an objective judicial mind. The threshold for recusal is high in these types of circumstances.

[23] Her Honour concludes by saying that the only proper basis on which an application for a Judge to recuse herself or himself can be made is to the Judge concerned, served on the other party, and then dealt with by that Judge in open Court.

[24] It seems to me that those principles ought to apply according to their tenor, in respect to requests for another Member to preside over an application to reopen.

[25] In the particular case, and applying the precepts set out by the Chief District Court Judge, I have carefully reviewed the decision which Member Arthur issued. I cannot find within it any expression which could properly be characterised as "extreme" or "unbalanced" and I am therefore not persuaded that Member Arthur cannot deal with this present application to reopen in a sensible, practical and objective fashion.

[26] If GEA wishes to continue with its application for a reopening of the Authority investigation, that now is a matter for Member Arthur to consider, after hearing from the parties about any reasons that may be appropriate.

Costs

[27] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority