

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 182A/09
5113907

BETWEEN HOBDEN SCREEN ART 2007
 LTD
 Applicant

AND VISHAAL KUMAR
 Respondent

Member of Authority: James Wilson

Representatives: Ashok Kumar for the applicant
 Rashida Syed for the respondent

Investigation Meeting: On the papers

Determination: 14 September 2009

**DETERMINATION OF THE AUTHORITY
APPLICATION TO REOPEN INVESTIGATION**

The Authority's Determination

[1] In a determination dated 15 June 2009 (AA 182/09) I found that Mr Vishaal Kumar had been unjustifiably dismissed by Hobden Screen Art 2007 Ltd (Hobden Screen) and had been underpaid at a rate of \$5.00 per hour for the approximately 8 months he was employed. In that determination I ordered that Hobden Screen pay Mr Vishaal Kumar the wages he had been underpaid, \$2937.64 for the wages he lost as a consequence of his dismissal and \$4000.00 by way of compensation for the hurt and humiliation his dismissal had caused.

The application to reopen

[2] On 6 August 2009 Hobden Screen's filed an application to have this matter reopened. The main ground for reopening, according to that application, is that Mr Vishaal Kumar's qualifications, as produced at the time of his employment with Hobden Screen, were fraudulently obtained. As part of the application to reopen Mr Ashok Kumar has produced what he says is evidence of this fraudulent application.

[3] In his statement in reply to this application, Mr Vishaal Kumar strongly objects to the application. He suggests that Hobden Screen is simply attempting to delay payment of the money owed. Mr Vishaal Kumar strenuously denies that his qualifications were fraudulent and that in any event Hobden Screen's allegations in this regard were placed before the Authority during the original investigation.

Legal considerations

[4] In *Waterfront Workers Union v. Ports of Auckland* [1994] 1 ERNZ, 604 at 609 (subsequently confirmed by the Court of Appeal) a full bench of the Employment Court said:

We observe, as the Court did in the Cavalier Carpets case, that there are no restrictions on the grounds of a re-hearing except as to time. It is undesirable that the Court should apply restrictions that appear nowhere in the statute. However, every judicial discretion must be exercised according to clear principle.

What considerations should move the Court to order to be reheard a case that has already been concluded? Obviously if a positive finding can be made that a miscarriage of justice has taken place that would be enough. The likelihood of a miscarriage of justice should also be enough, especially in a case such as this where contrary to the Court's usual practice a question of rehearing or no is separated from rehearing. The particular species of miscarriage of justice will include those listed in Cavalier Carpets but is not confined to them. A mere possibility or suspicion is however not enough to warrant disturbing a

considered judgement reached after a full and well exercised opportunity to the parties to be heard.

[5] Clause 4 of the 2nd schedule to the Employment Relations Act (the Act) provides:

4. Reopening of investigation

(1) 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 order previously made.

As in the Court and as the Court said in the *Ports of Auckland* case, the Authority's discretion to reopen its investigation or not, must be exercised in accordance with clear principle. It is appropriate that the principles applied in the Authority should be the same as those applied by the Employment Court.

Discussion

[6] It is difficult to avoid the conclusion that Hobden Screen, in applying to have this matter reopened, is simply attempting to delay or avoid paying Mr Vishaal Kumar the monies he is owed. The allegations that Mr Vishaal Kumar had falsified his qualifications and employment record in Fiji in order to obtain employment as a screen printer in New Zealand, were made by Hobden Screen during the Authority's original investigation. I rejected those allegations at the time and, having reviewed the "new" evidence, do so again. Even if Mr Vishaal Kumar was not entirely open regarding his qualifications and experience (and I do not suggest that that is the case) this would have no direct bearing on the factors, set out on my original determination, which led to his being underpaid or to his constructive dismissal.

[7] There is no evidence that there has been a miscarriage of justice in this matter. On the contrary to reopen my investigation at this point would simply cause further delay in Mr Vishaal Kumar receiving the monies he is owed.

Determination

[8] **Hobden Screen's application to reopen the Authority's investigation in this matter is declined.**

Costs

[9] Costs are reserved. It seems that the parties have been unable to settle the question of costs arising from the substantive determination nor have I determined that matter. I strongly urge Hobden Screen to discuss the question of costs, both for the substantive investigation and for this application, with Mr Vishaal Kumar's representative. If the parties are unable to settle the question of costs between themselves then Mr Vishaal Kumar has a further 28 days in which to file a revised submission. Hobden Screen will then have 14 days in which to file a response.

James Wilson

Member of the Employment Relations Authority