

to the Authority on the company's behalf, seeking to have the Authority investigation reopened pursuant to clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[2] The reason advanced to support the application by HPL is that Ms Kour was unable to participate in the investigation process and meeting due to her being incapacitated and having temporarily relocated overseas. Ms Kour has indicated:

I haven't been able to provide any information and evidence regarding this matter and I believe because of my failure to provide evidence the decision in this matter has not been fair to the company.

[3] Mr Rosantina opposes the application believing Ms Kour had many opportunities to provide the Authority with material to refute his claims and that it would be unjust to reopen the investigation.

The issue/legal position

[4] As observed by Member Robinson in *Pure New Zealand International Travel Services Ltd v Bin*²:

Pursuant to Schedule 2, clause 4 of the Act, the Authority has a statutory discretion to order the reopening of an investigation on "such terms as it thinks reasonable." Such discretion must be exercised on a principled basis. The principles as set out in *Young v Board of Trustees of Aorere College* are:

... at the end of the day the overriding consideration must be the interests of justice, having regard to the likelihood of a miscarriage of justice balanced against other relevant factors such as the importance of finality in litigation. In *Ports of Auckland Limited v NZ Waterforce workers Union* a full Court of the Employment Court put it in this way:

... in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by a successful litigant, ... to enjoy the fruits of a judgment in its favour.

A mere possibility that a miscarriage of justice has occurred does not apply.³

² *Guio Rosantina v Hospitality Partners Limited* [2024] NZERA 272 at [19].

³ *Young v Board of Trustees of Aorere College* [2013] NZEmpC 11 at [9].

[5] Member Robinson after summarising leading Authorities in *Bin* noted that an unsuccessful party can not seek a rehearing merely to re-argue matters already considered or use an application as a “back door” mechanism when the option of a specific challenge under s 179 of the Act to bring the matter before the Employment Court is available. Here, HPL has not identified any new evidence to allow me to consider reopening the investigation and in considering matters I must balance the likelihood of a miscarriage of justice against other factors including the importance to Mr Rosantina of finality in litigation given the objectively modest sum of compensation involved. HPL’s application is solely based on Ms Kour’s claim, that throughout the time leading up to the investigation she was unable to respond and provide HPL’s perspective on the dispute.

The Authority process revisited.

[6] In the determination at issue, I traversed the history of the dispute which in summary was that:

- The parties attended an unsuccessful mediation on 2 November 2023.
- Mr Rosantina filed an application with the Authority on 22 December 2023.
- HPL’s Ms Kour was served the application but did not provide a statement in reply despite being provided an extension to do so.
- Ms Kour maintained only sporadic contact with the Authority throughout management of the process leading up to the investigation meeting on 18 July 2024 that she did not attend nor did any representative of HPL. However, the Authority is satisfied that HPL was aware of the timing of the investigation meeting, had not objected to the timing and had been served all relevant evidential statements from the applicant.
- Ms Kour made an application seeking the investigation be re-opened on 2 October 2024.
- The Authority had difficulty in scheduling a case management teleconference due to Ms Kour’s availability constraints. The teleconference eventually took place on 1 April 2025 and a directions notice set out that the matter was to be dealt with by submissions (due from HPL on 28 April) and noted that Ms Kour

needed to file evidence supporting her claim that she was incapacitated and unable to participate in the previous investigation.

- Despite the notice seeking submissions Ms Kour did not provide a submission but did provide medical documentation on 28 April detailing in her view why she could not attend to the investigation proceedings.
- In an email to Ms Kour of 30 April the Authority noted the health information provided did not address the key issue of ongoing incapacitation and a further report was sought – to date Ms Kour without explanation has not provided any further information
- Mr Rosantina’s advocate noted in a response of 15 May that no submissions had been filed for him to respond to.
- As a result, the Authority indicated to both parties that a determination would be made on the information available.

Assessment/Finding

[14] Having reviewed the medical information provided by Ms Kour I am not convinced a case has been made out that Ms Kour was sufficiently incapacitated at key times to not participate in the Authority’s investigation. I record Ms Kour has had some significant health difficulties but in the absence of specific evidence on the impact on her ability to respond to Mr Rosantina’s application and a history of delayed communication and, the fact she forwent many opportunities to participate, I am unconvinced that grounds are made out for a re-opening of the Authority investigation. I conclude that Ms Kour has advanced insufficient evidence to suggest she was unaware of the investigation meeting and further no compelling, special or unusual circumstances or reasons to suggest that the investigation meeting be reconvened. I have chosen not to discuss in depth, Ms Kour’s health issues as she sought confidentiality of those details.

Order

[15] The orders made in the determination NZERA 535 providing that Hospitality Partners Limited compensate Guio Rosantina for a successful unjustified disadvantage claim remain in place and the application to have the investigation reopened is not successful. The Authority

expects that given the lengthy delay, the compensation ordered be promptly addressed and paid by Hospitality Partners Limited.

Costs

[16] In the circumstances, as Mr Rosantina was represented by a family friend no costs are at issue.

David G Beck
Member of the Employment Relations Authority