IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 363
3021274

	BETWEEN	ICON CONCEPTS 2012 LIMITED Applicant
	A N D	UNG HIEP Respondent

Member of Authority:	Anna Fitzgibbon
Representatives:	Masla Mani, Director of the Applicant Respondent in person
Investigation Meeting:	On the papers
Affidavits Received:	6 November 2017 from Applicant 13 November 2017 from Respondent
Date of Determination:	22 November 2017

DETERMINATION OF THE AUTHORITY

A. The application by Icon Concepts 2012 Limited (Icon) for the reopening of an Authority investigation into the respondent's claims for payment to him of the minimum wage, holiday pay and bereavement leave, is declined.

B. No order as to costs.

Application by Icon to reopen Authority's investigation

[1] On 19 October 2017, Icon filed an application in the Authority, seeking the reopening of an investigation carried out by the Authority into claims brought by Mr Ung Hiep (the respondent in this application). The Authority held an investigation

meeting on 10 October 2017 and issued an oral determination on 10 October 2017[1]. The determination found that Icon had failed to pay the respondent, Mr Hiep the minimum wage, failed to pay him bereavement leave when his mother died, and failed to pay him holiday pay when his employment finished.

[2] Icon was ordered to pay Mr Hiep the sum of $3,680 gross being the underpayment of the minimum wage, $3,865 gross in holiday pay arrears, $366 gross for unpaid bereavement leave, and the filing fee of $71.56. Icon was ordered to make payments of these amounts within twenty-one days of the date of the determination.

[3] The Authority further determined that Icon had failed to engage with the Authority and failed to attend the investigation meeting on 10 October 2017.

Framework for considering a reopening application

[4] The Authority has a statutory discretion to order the reopening of an investigation upon "such terms as it thinks reasonable"[2].

[5] The Employment Relations Authority Regulations 2000 require such applications to be lodged on a specified form. The form requires an applicant to set out the grounds on which reopening is sought. The form states the applicant should "state grounds fully but concisely".

[6] The discretion to reopen an investigation must be exercised according to principle.

[7] I agree with and apply the approach taken by Member Arthur in *Milne v Air New Zealand*[3] to an application to reopen an investigation**.**

[8] Member Arthur refers to the principles developed by the Employment Court "in exercising its similar discretionary power to order a rehearing" which he describes "as providing a useful framework, applicable by analogy, for the Authority when considering whether to reopen an investigation." [4]

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1 [2017] NZERA Auckland 315

2 Employment Relations Act 2000, Schedule 2 clause 4

3 [2016] NZERA Auckland 353 at para[7]

4 *Young v Board of Trustees* of Aorere Collete [2013] NZEmpC 111 at [9]

The applicable principles include the following: [5]

(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 hearing, 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.

(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.[6]

(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 rehearing.[7]

(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 s 179 of the *Employment Relations Act 2000* (the Act), the Authority should be reluctant to entertain an application for a reopening on those grounds.

(vii) For the decision-maker in 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".[8]

5 *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [12]-[14] and *Idea Services Limited v Barker* [2013] NZEmpC at [36]-[37] and [42]

6 *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607

7 *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, above n 4, at [37]

8 *Young*, above n 3, at [9]

[9] The grounds cited for a reopening of the matter in the statement of problem are: "My letter was sent to wrong address. I did not receive the notice".

[10] In support of the application to reopen the investigation, the Director of Icon, Mr Masla Mani filed a sworn affidavit dated 6 November 2017. Mr Mani stated in the affidavit that Mr Ung Hiep did work for Icon, that he started work at 9.00am, immediately left the premises to take his daughter to Howick, and returned at 11.00am. There were further references to Mr Hiep's hours of work. The affidavit

concluded as follows: “at work he was disrespectful and disobedient. His work production was unsatisfactory. Above events took place every day.”

[11] Mr Hiep filed a sworn affidavit on the 13 November 2017, disputing the claims by Icon and confirming that the required documents for the Authority’s investigation had been personally served by him at Icon’s registered office.

[12] The affidavit filed on behalf of Icon appears to be an attempt by it to belatedly respond to claims by Mr Hiep about non-payment by Icon of minimum and contractual entitlements owing to him. These claims have been investigated and determined by the Authority.

[13] In the Application form filed in the Authority to reopen the Authority’s investigation, Icon states: “My letter was sent to wrong address. I did not receive the Notice”.

[14] The reasons for Icon failing to engage in the Authority’s investigation was a matter considered by the Authority and dealt with in its determination. The Authority was provided with details of personal service of documents by Mr Hiep, including the Notice of Investigation Meeting, at Icon’s registered office. Mr Hiep gave evidence and provided the Authority with proof of service at the investigation meeting. This was confirmed by him in the affidavit filed in this matter.

[15] On the basis of the information that was provided to the Authority at the investigation meeting, I was satisfied that Icon had been served with a statement of problem and the notice of investigation meeting but failed to attend the investigation meeting.

[16] I do not consider that Icon has established there would be an actual miscarriage of justice if its application to reopen is not granted. Mr Hiep is entitled to enjoy the fruits of the Authority’s determination in his favour and is entitled to finality. For these reasons and those given, the application for reopening is declined.

Costs

[17] Neither party is represented. There is no order as to costs.

Anna Fitzgibbon
Member of the Employment Relations Authority