

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 77
3017812

BETWEEN HEMANT KUMAR
Applicant

A N D SELWYN FRESH LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: M. Gwizo, Advocate for Applicant
K. Canli, Advocate for Respondent

Investigation Meeting: 23 May 2018 at Christchurch

Submissions Received: 23 May 2018 from both parties

Date of Oral
Determination: 23 May 2018

Date of Written
Determination 28 May 2018

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

This determination is a written record of an oral determination delivered on 23 May 2018.

Employment Relationship Problem

[1] Both parties appeared before me today in person. The applicant's representative, Mr Gwizo also attended by telephone.

[2] The purpose of today's hearing is to determine an application for reopening that has been filed by Mr Kumar. He seeks reopening of a determination that declined to admit

evidence from the parties mediation and also imposed a non-publication order in respect of the same (the “Determination”)¹.

[3] The excluded evidence relates to an alleged breach of good faith by the behaviour of the respondent at a directed mediation. The Determination held that s.148 of the Employment Relations Act 2000 (the Act) required “any statement, admission or document created or made for the purposes of mediation ... and any information ... disclosed orally in the course of mediation” is kept confidential. This evidence fell within the section. Therefore it could not be produced to the Authority in support of Mr Kumar’s breach of good faith cause of action. The Determination also made a non-publication order specifying the evidence to be covered in paragraph [24]. This included parts of an ex-parte application seeking payment of redundancy money of \$9,600.

[4] Mr Kumar alleges there has been a miscarriage of justice. Initially he was primarily concerned that the excluded evidence from mediation and the non-publication order prevented him bringing a claim of breach of good faith but this position changed at hearing. He also believed the suppression of parts of the ex-parte application for payment of redundancy money meant he was also unable to progress that claim as well.

[5] At a telephone conference on 4 April 2018 issues were raised about the causes of action that were before the Authority and the merits of the reopening application. At that stage the statement of problem only referred to two personal grievances of unjustified dismissal and in the alternative, unjustified disadvantage arising from the same behaviour. It did not refer to any breach of good faith by the respondent’s behaviour at a mediation that occurred after he had been dismissed. It also did not refer to the payment of redundancy money.

[6] Therefore the reopening may be declined because no miscarriage of justice can arise if there are no relevant causes of action before the Authority. I directed Mr Kumar to file an amended statement of problem containing these two new claims around the breach of good faith due to the respondent’s behaviour at mediation and the allegation he was owed redundancy money of \$9,600. This ought to have resolved the necessity for the reopening application at this stage.

¹ *Kumar v Selwyn Fresh Limited* [2018] NZERA Christchurch 11

[7] Mr Kumar filed an amended statement of problem seeking resolution of, amongst other things:

- (a) Section 131 arrears: money payable under redundancy provisions of the individual employment contract ...
- (c) Breaches of the contract as well as the statutory duty of good faith, including respondent conduct towards the second scheduled MBIE facilitated mediation process.

[8] However, this did not resolve the reopening because he now sought to reopen the Determination on a different basis. This was only made known to the Authority and respondent by way of memorandum filed by Mr Gwizo at 10 pm the evening prior to hearing. Neither the Authority nor respondent had any lengthy opportunity to consider the memorandum. Despite this the respondent still wished to proceed today to dispose of this matter.

[9] At the start of the hearing Mr Gwizo went through the memorandum and reasons for reopening the Determination. In summary those reasons are:

- There are errors in the Determination at paragraphs [9] and [14]. These give rise to reputational concerns for Mr Gwizo in particular and by association, Mr Kumar.
- The Determination failed to explain why Mr Kumar was unsuccessful;
- The non-publication order did not refer to the law as required by the Act and its making was not in the overall interests of justice;
- The Determination should not have granted confidentiality over the mediation evidence given the respondent's behaviour.

Reopening of investigation

[10] The Authority has a statutory discretion to order the reopening of an investigation on “such terms as it thinks reasonable” and to stay the effect of any order previously made.² The

² Schedule 2, clause 4 of the Act.

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. A mere possibility of a miscarriage of justice is insufficient to warrant granting a re-hearing.³

Were there errors in paragraphs [9] and [14] that give rise to a miscarriage of justice?

[11] As indicated to the parties during the hearing, I can discern no error. Both paragraphs refer to the Member's view of Mr Gwizo's correspondence and her conclusions about the material before her at that time. The submissions today strongly disagree with her views but there has not been, in my opinion, a miscarriage of justice. That is a matter for challenge or appeal.

[12] Although there is reference to reputation damage for Mr Kumar in the event of publication of the Determination, I disagree that is in fact the case. The comments by the then Member, on their face, appear innocuous. They do not, in my view, cast any dispersion on Mr Gwizo and somehow by association upon Mr Kumar. Mr Kumar shall have the opportunity to give evidence at the substantive hearing in front of a different Member. She shall have the opportunity to assess his credibility with fresh eyes. Commentary about the representative is insufficient to warrant reopening.

Does this Determination give rise to a miscarriage of justice because it fails to explain why Mr Kumar was unsuccessful?

[13] The Determination explains in great detail why Mr Kumar was unsuccessful. That is set out in paragraphs [12] and [16] to [21]. This is an insufficient ground to warrant reopening.

Does a miscarriage of justice arise because of the granting of the non-publication order?

[14] I do agree the Determination does not discuss the law that pertains to non-publication. However, non-publication orders are discretionary matters. From the Determination non-publication orders were made because the Member was concerned to prevent publication of the material filed given her ruling it was confidential under s.148 of the Act.

³ *Young v Board of Trustees of Aorere College* [2013] EmpC 111 at paragraph [9]

[15] Mr Kumar sought to overturn the non-publication order or alternatively to redact the party names and (possibly) the representatives. The respondent did not agree to redaction of names. This was then not pursued by the applicant.

[16] The Authority has the discretion to “order that all, or part of any evidence, given or pleadings filed or the name of any party ... or other person not be published”⁴ It does not prevent parties bringing justiciable causes of action before the Authority in the form of a statement of problem. The making of the non-publication order was within the Member’s powers and was appropriate given her ruling regarding confidentiality. If the applicant disagreed that was a matter for challenge or appeal. I can ascertain no miscarriage of justice in the circumstances.

Should the Determination not have granted confidentiality over the mediation evidence given the respondent’s behaviour and does this give rise to a miscarriage of justice?

[17] Finally, Mr Kumar submits the Determination failed to lift confidentiality over the mediation, and that this was a miscarriage of justice. There is no application for confidentiality to be lifted here. I have some doubt whether the Authority could do so at all given the clear statutory directive in s148 of the Act. The alleged respondent’s behaviour was not more or less than what in my experience often occurs in mediation. This may be more properly an issue for challenge.

[18] The application is dismissed. Costs are reserved.

Tania Tetitaha
Member of the Employment Relations Authority

⁴ Schedule 2 Clause 10 of the Act.