

NOTE: This determination contains an order prohibiting publication of certain information at .

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 626
3369063

BETWEEN NICKOLA MAKING
Applicant

AND ALAN WINDLE
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Noreen Making for the Applicant
Glenn Mason for the Respondent

Investigation Meeting: On the papers

Submissions and information received up to: 14 May 2025 from the Applicant
9 July 2025 from the Respondent

Determination: 6 October 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 5 March 2025, the Authority upheld four disadvantage claims by Nickola Making against Alan Windle in relation to being suspended from work, regular teasing and joking in the workplace, unilateral removal of Ms Making's supervisory duties and failure by the employer to address Ms Makings personal grievance at the same time as commencing an investigation into her conduct.

[2] Ms Making was not successful with her grievance claims for unjustified dismissal for medical incapacity and discrimination in the workplace on the grounds of disability due to dyslexia.

[3] On 2 April 2025 an application was lodged on behalf of Ms Making seeking a rehearing and corrections. The issues listed in the statement of problem for rehearing can be summarised as:

- (a) There was no refusal to undergo a medical assessment as recorded at [97] of the determination and the finding the unjustified dismissal for medical incapacity was wrongly decided;
- (b) The workplace was causing Ms Making to be unwell;
- (c) The non-publication order referred to the wrong year an incident had occurred;
- (d) The date of a trespass notice was incorrectly recorded;
- (e) The finding Ms Making was not discriminated against on the basis of a disability was incorrect for two main reasons:
 - (i) Ms Making did communicate to her employer that she had dyslexia including when she was first employed in 2015;
 - (ii) the Authority did not consider s21, 22 and 23 of the Human Rights Act 1993;
- (f) The wage losses and statutory entitlements remain unresolved.

[4] Ms Making has also lodged a challenge to the Authority's determination in the Employment Court. Counsel for Mr Windle advised the Authority the Court granted an extension to Mr Windle for the filing of the statement in defence until 14 days after the Authority has determined Ms Making's reopening application. It is relevant to this determination that a challenge has been lodged in the Court.

[5] The reopening application is opposed by Mr Windle on the basis there is a challenge lodged in the Court and no new evidence that was not or could not have been available at the Authority's investigation has been disclosed. It is also noted no miscarriage of justice has been identified. A concern about the length of the submissions and continued assertions about Mr Windle is also raised and it is submitted the reopening application is an attempt to relitigate the matter.

[6] The Authority issued an erratum on 4 September 2025 correcting the errors at (c) and (d) above and references to two witnesses who were incorrectly recorded as giving evidence for Mr Windle.

The legal framework for considering a reopening application

[7] The Authority has a statutory discretion to order the reopening of an investigation on “such terms as it thinks reasonable.”¹

[8] The principles developed by the Employment Court in exercising its similar discretionary power to order a ‘rehearing’ provide a useful framework, for the Authority when considering whether to reopen an investigation.² Applicable principles include the following:³

- (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 investigation meeting, 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.⁴

¹ Employment Relations Act 2000, Schedule 2 clause 4.

² *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].

³ *Davis v Commissioner of Police* [2015] NZEmpC 38 [30 March 2015] at [12]-[14] and *Idea Services Limited v Barker* [2013] NZEmpC 24 at [36]-[37] and [42].

⁴ *Ports of Auckland Limited v NZ Waterfront Workers Union* [1994] 1 ERNZ 604 at 607.

- (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 reopening.⁵
- (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 s179 of the Employment Relations Act 2000 (the Act), the Authority should be reluctant to entertain an application for a reopening on those same grounds.

[9] For the decision-maker of 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

Analysis

[10] The submissions on behalf of Ms Making extend to 42 pages but it is not immediately evident there is new any evidence that was not available at the time the Authority investigated Ms Making’s claims. The nature and length of the submissions suggest the Authority’s findings in relation to medical incapacity and discrimination are not accepted.

[11] For example, with reference to an email to Mr Windle on Ms Making’s behalf suggesting two medical practitioners confer, it is stated there was no refusal to undergo a medical assessment. The relevant clause in the employment agreement enabled the employer to require the employee to obtain a medical report once the medical incapacity process was engaged.

[12] This submission does not engage any new evidence but seeks to draw on information that was before the Authority and re argue to claim in light of the Authority’s determination.

[13] Similarly in relation to the finding on discrimination, it is submitted Ms Making did inform her employer she had a disability. Ms Making is said to have provided her literacy references and hospitality qualifications at the start of the employment

⁵ *Autodesk Inc v Dyason (No 2)* (1993) HCA 6, (1993) 173 CLR 300 at 303 cited with approval in *Idea Services*, above n 2, at [37]. ⁸ *Young*, above n 3, at [9].

relationship in 2015. The Authority made a finding based on the evidence that differed from that position. There does not appear to be any new evidence in relation to this.

[14] The submission the Authority did not consider discrimination under the Human Rights Act 1993 fails to take into account the choice of procedures provision in s 112 of the Employment Relations Act 2000. It is noted for completeness this provision was brought to Ms Making's representative's attention by the Authority.

[15] There is also no new information to support the submission that the alleged wage losses and statutory entitlements remain unresolved.

Conclusion

[16] I have considered the applicable principles about reopening. Noting a challenge is already lodged in the Court, that there is no new information relied on that was not available at the time the Authority determined the matter and that the general thrust of the submissions is a challenge to the parts of the Authority's determination where Ms Making was unsuccessful, the application for reopening is declined.

Costs

[17] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[18] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Alan Windle may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Nickola Making will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[19] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.⁶

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁶ www.era.govt.nz/determinations/awarding-costs-remedies