

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 215/09
5028425

BETWEEN ALAN JOHN MASON
 Applicant

AND K
 Respondent

Member of Authority: James Crichton

Representatives: Len Andersen, Counsel for Applicant
 Jenny Beck, Counsel for Respondent

Submissions received: 22 October 2009 from Applicant
 26 November 2009 from Respondent

Determination: 14 December 2009

DETERMINATION OF THE AUTHORITY

The application to reopen

[1] In a determination dated 1 May 2008, my colleague Member Cheyne dealt with the original application which proceeded as a statement of problem filed by the applicant K against Alan Mason as respondent. The Authority determined that the applicant K had a personal grievance and was entitled to remedies.

[2] In the original determination, the Authority prohibited the publication of the name of the applicant or any identifying details. This was because the applicant was the complainant in allegations of indecent assault against her perpetrated by Mr Mason. Mr Mason pleaded guilty to representative charges and was convicted of indecent assault. The original grievance was about the same conduct. The District Court at Dunedin prohibited publication of the applicant's name or any identifying

details and in order to continue the protection to the respondent, that prohibition continues.

[3] Then, by letter dated 16 March 2009, counsel for Mr Mason gave notice of an intention to apply for a reopening of the Authority's 1 May 2008 determination. That application for the investigation to be reopened was eventually filed on 3 September 2009 together with an affidavit in support. On 5 October 2009, the respondent filed a notice of defence to the application for reopening, an application to strike-out the application to reopen, and an affidavit in support.

[4] I convened a telephone conference on 12 October 2009 to agree a process for dealing with the matter and, amongst other things, offered the parties the opportunity of arguing the matter before me in Dunedin. That opportunity was not taken up and, by agreement, the matter proceeded on the basis of written submissions being timetabled and the application being dealt with on the papers.

[5] The application to reopen and the supporting affidavit of Mr Mason alleges that the determination of the Authority of 1 May 2008 was *obtained by default* and is *a miscarriage of justice* because Mr Mason was not the employer of K. The affidavit in support identifies the bases on which it is contended that the employment relationship was with a limited liability company and not with Mr Mason and evidences a number of items which it is contended K would have seen, which clearly identified her employer as a company and not as Mr Mason personally.

[6] The affidavit in support also deals with Mr Mason's absence from the Authority's investigation meeting and his failure to progress the matter until a year later.

[7] The notice of defence to that application filed by K denies that the determination of the Authority was *obtained by default* and contends that Mr Mason's non-participation in the Authority's process was a conscious choice and not a function of unfortunate circumstances, denies that Mr Mason was not the employer, denies that K knew that Mr Mason was not her employer and notes that Mr Mason had ample opportunity to engage in the Authority's investigation after the investigation meeting because the Authority stayed its hand in the issue of any determination for some nine months in part to give Mr Mason the opportunity to be heard.

The law

[8] It is settled law that the Authority's obligation is to consider whether there is a possibility of there being a miscarriage of justice in the assessment of applications of this kind. That prospect must be balanced against the desirability of certainty in litigation and the opportunity for the successful party to *enjoy the fruits of a judgment in its favour*: *Ports of Auckland Ltd v. NZ Waterfront Workers' Union* [1995] 2 ERNZ at 88, quoting from the decision of the Full Court of the Employment Court which decision was reported at [1994] 1 ERNZ 604.

[9] Mr Mason relies on a decision of the Authority *Yang v. Allen* ERA Auckland (AA63/08) which turned on a similar point to the present case. In that decision, the Authority decided that the question to be asked was whether there was a possibility that the company was the employer rather than Ms Yang. In that particular case, the Authority granted the application to reopen and then determined the matter on the papers. The result of that determination left the original determination of the Authority unchanged, in that the Authority was not satisfied that the employee ever knew that she was employed by a company.

[10] While I accept that the issue is a similar one to the present case there are obvious factual differences as well. First, Ms Yang engaged with the Authority's process in a responsible fashion and in particular attended at the Authority's investigation meeting and participated. The essence of the Authority's decision in the case seems to me to rest on Member Campbell's conclusion that, by reason of Ms Yang's lack of fluency in English, she failed to convey adequately the reality of the employment situation. In the end, though, the Authority declined to reopen the matter on the footing that it was not clear that Ms Allen (the former employee) ever knew that she was employed by a company, an issue which is also highly relevant in the present case.

[11] There is another relevant decision of the Authority in *Eastern Bay Independent Industrial Workers' Union Inc v. Carter Holt Harvey Ltd* (AA322/06) another decision of Member Campbell. Again, this is a decision where the Authority has declined to reopen a matter, this time essentially on the footing that it was reasonable for the Authority to expect that a reopening application would be timely and where there was no explanation for the unreasonable delay and no evidence of unfairness, the application should be dismissed.

[12] In addition, the Authority makes some considered observations about the doctrine of *res judicata* which was pleaded in that case. The essence of the doctrine is that a matter, once raised and decided in a Court or tribunal of competent jurisdiction, ought not to be re-litigated between the same parties. The Authority then goes on to refer to the doctrine having been relied upon by Chief Judge Goddard in *Reid v. New Zealand Fire Service Commission (No 2)* [1998] 3 ERNZ 1237.

Issues

[13] The Authority will need to answer the following questions in order to determine this matter:

- (a) Is a miscarriage of justice apprehended?
- (b) Did Mr Mason participate in the Authority's process?

Is a miscarriage of justice apprehended?

[14] Mr Mason says that the decision of the Authority which issued on 1 May 2008 was obtained *by default* an apparent reference to his non-participation in the Authority's process. I deal with that aspect later. However, the central focus of Mr Mason's submissions in support of the application to reopen is that a failure to direct the matter be reopened could lead to a miscarriage of justice. It is said this is because Mr Mason was not the employer of K and because the Authority's determination proceeds on the footing that he was, a miscarriage of justice would result if the matter is not reopened.

[15] The issue for the Authority then is to try to assess whether there is a real possibility of a miscarriage of justice and to balance that against the obvious need for certainty in the legal process. In his determination of 1 May 2008, Member Cheyne carefully assessed the evidence before him and concluded that Mr Mason was the employer. The evidence that Mr Cheyne relied upon in that regard was primarily the evidence of K. That is hardly surprising because she involved herself in the Authority's process whereas Mr Mason did not. Mr Mason now says that he was never the employer and that the whole claim against him personally was misconceived.

[16] I have before me affidavits from both Mr Mason and K. K stoutly maintains the evidence that she gave to the Authority in 2008 that she was employed by Mr Mason personally, paid by Mr Mason personally, and had no knowledge whatever of the existence of any limited liability company.

[17] Conversely, Mr Mason says that the business in which both the principal protagonists worked was operated by a limited liability company which employed both him and K. He also contends that K knew that and that there is ample evidence to prove that. Of particular interest is an Inland Revenue Department document which appears to confirm that K was paid her wages through a limited liability company.

[18] The difficulty with this evidence is that K, who was in the employment relationship, gave evidence on oath before the Authority and now swears in her affidavit on the reopening, that she never understood she was employed by a company, had no knowledge of the existence of a company and was, in the main, paid in cash. The legal position, of course, is clear; even if it is true that K was, as it were, on the books of the company as its employee, if she did not know that then the company becomes the undisclosed principal and Mr Mason, its agent, has personal liability.

[19] Certainly, I am satisfied on the evidence before me that K's only relationship as such was with Mr Mason and I believe her when she says that she was paid in cash by Mr Mason (from the till) and that she had no knowledge of any other entity in the employment relationship.

Did Mr Mason participate in the Authority's process?

[20] What is particularly curious about Mr Mason's claim that he is not K's employer is that he never raised this issue at any point during the Authority's investigation of the matter in 2008. While it is true that Mr Mason did not participate in the Authority's investigation meeting, it is not true that he had no part in the Authority's process. He was at various times represented by various counsel and the investigation meeting for example was set down by agreement between Mr Mason's counsel and K's counsel. So, factually, no representative of Mr Mason conveyed to the Authority that Mr Mason claimed he was not the employer, despite the fact that at least one of those representatives had sufficiently detailed instructions to attend on a

telephone conference to set up the investigation meeting which subsequently took place.

[21] Furthermore, Mr Mason himself was in contact with the Authority, via email, on 8 August 2007, on 20 August 2007 and by letter on 13 September 2007. On not one of those occasions did Mr Mason raise any issue about the status of the employer. Yet he could have been in no doubt whatever about who the proceedings were brought against because the only basis on which he would have been able to engage in correspondence with the Authority at all was on the basis that he was apprised of the proceedings.

[22] Furthermore, over this period I have just referred to (a period when the Authority had stayed its hand in respect of the issue of a determination), not only did the Authority hear on those occasions from Mr Mason himself, but it also had contact from a succession of lawyers acting for Mr Mason. From 14 August 2007 down to 18 October 2007 the Authority was in communication with three of four solicitors, each of whom indicated at the time that they were acting for Mr Mason. Neither Mr Mason's counsel at the time of the telephone conference nor any of the subsequent three counsel acting for Mr Mason during the period I have just catalogued gave the Authority to understand that Mr Mason claimed he was not the employer. This is particularly curious because even on Mr Mason's own evidence before me in his affidavit, one of the practitioners who Mr Mason dealt with during this period was adamant that he was not the employer and specifically advised Mr Mason to tell the Authority that that was the position. This advice was given by email dated 24 September 2007, some seven months before the Authority issued its determination in the matter. Of course, that practitioner's view of who the employer was has no probative value for the purposes of this application to reopen because the practitioner's only source of information was Mr Mason himself. What is important about the practitioner's advice is that Mr Mason was told to tell the Authority that that was his position. He did not; nor did any of the practitioners acting for him tell the Authority that that was his position.

[23] Mr Mason says that he was not well and that precluded him from dealing appropriately with the matter. Indeed, he says, that was the explanation for him failing to draw the Authority's attention to his conviction that he was not the employer. But as I have made clear already, I am satisfied that Mr Mason must have

known who the proceedings K had brought were against because he would have received material from the Authority making that explicit and the succession of lawyers he engaged would have been available to him to clarify any issues that were in doubt from his perspective.

[24] Furthermore, the very fact that one of the practitioners who was engaged by Mr Mason during this period gave him advice that he should tell the Authority that he was not the employer makes it clear that, at that date anyway, there was an issue in his mind about the status of the employer.

[25] I am told that the reason Mr Mason took no steps to clarify this absolutely fundamental point is because he was unwell. I find that contention frankly incredible. Mr Mason was well enough it seems to engage with the Authority in a discursive correspondence from shortly after the investigation meeting and for several months thereafter, but apparently not well enough to identify something of critical importance, even when one of his lawyers makes clear how important this is and tells him what to do about it.

[26] The factual position is that neither Mr Mason nor any of the lawyers acting for him took any steps to deal with this issue, despite it being an obvious way of deflecting the possibility of an adverse finding against him personally.

[27] In the result, Mr Mason and his various legal advisers continued to take no steps and eventually, after a succession of very patient attempts by the Authority to get Mr Mason to engage with it, the Authority issued its determination and made findings against Mr Mason as employer. It is worth remembering that the investigation meeting was on 26 July 2007 and the Authority issued its determination on 1 May 2008. While it is accepted without reservation that the delay in the issue of the Authority's determination was not exclusively to give Mr Mason the opportunity to be heard, it is nonetheless a fact that during that period, the Authority did everything it reasonably could to engage with Mr Mason or one of his representatives with a view to giving him the opportunity to be heard. Various deadlines were set and broken by Mr Mason. At no stage did Mr Mason ever communicate with the Authority that he did not believe that he was the employer.

Determination

[28] I do not think that the information before me suggests any realistic possibility of a miscarriage of justice having occurred. I am satisfied that the only basis on which Mr Mason has sought to reopen this matter is because he is now being vigorously pursued to settle the award made against him by the Authority in its 2008 determination. Until K's representatives developed some traction in respect of making a claim against Mr Mason, he took no steps and it is my considered view that his display of activity now is simply a function of K's recovery actions.

[29] In my view, the original decision of the Authority was fair and balanced and Mr Mason was given every courtesy and every reasonable opportunity to be heard on the issues. On the fundamental point which he now raises for the first time (the status of the employer), there has not been a whisper of a suggestion from Mr Mason since the proceedings were first on foot that he was not the employer. I am satisfied that Mr Mason has had every opportunity to flag that issue with the Authority, either personally or through counsel. A succession of legal practitioners have acted for Mr Mason and the issue of the status of the employer has clearly been discussed with one of them who has given Mr Mason trenchant, straightforward advice which he appears to have taken no notice of.

[30] The real question is, I suppose, what the Authority might have done if Mr Mason had claimed that he was not the employer. My considered view is that the Authority might well have discounted Mr Mason's claim on the footing that it was simply a basis to avoid liability. However, the more important question which I alluded to earlier is the question whether, even if it could be shown that the company was K's employer in an abstract sense, as a matter of law, if she did not know that was the position, then personal liability must continue to rest with Mr Mason: *Cuttance v. Purkiss* [1994] 2 ERNZ 321 applied.

[31] As well as not being satisfied that a miscarriage of justice could result from a failure to reopen, I am not persuaded that Mr Mason has dealt with this matter in a timely fashion and I do not accept his evidence that he was too unwell to deal with it. It is plain he was not too unwell during the period the Authority was considering the position; as I have detailed, he had a number of email and letter exchanges with the Authority as did his various counsel. The obvious time to raise this issue (if it is genuine) would have been before the Authority issued its decision. The fact that there

was no suggestion while the Authority was still considering the matter that there was an error in who the employer was, suggests to me that the contention that K was in fact employed by the company is no more than a fanciful rationalisation after the fact.

[32] I refuse the application to reopen on the basis that I do not detect any prospect of a miscarriage of justice having occurred, and the further basis that it is reasonable to expect an application to reopen to be on a timely basis, and this was not.

Costs

[33] Costs are reserved.

James Crichton
Member of the Employment Relations Authority