

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 389
3267819

BETWEEN

MICHELLE MATHESON
Applicant

AND

RAINBOW CONFECTIONERY
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Ronald Jones, advocate for the Applicant
Brent Baillie for the Respondent

Investigation Meeting: On the papers

Submissions Received: 17 April 2024 from the Applicant
18 April 2024 from the Respondent

Date of Determination: 2 July 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 13 November 2023 Ms Matheson's claims for unjustifiable dismissal and unjustified action causing disadvantage were not upheld.¹ Ms Matheson has applied to reopen the investigation of the matter that was subject of that determination.

[2] Ms Matheson's advocate says there is no new evidence to consider; Ms Matheson wants the matter reopened so that the employer's actions in investigating matters relating to Ms

¹ *Matheson v Rainbow Confectionery Limited* [2023] NZERA 672.

Matheson's conduct at work can be fully canvassed by the Member. In support of this the advocate points to the following:

- (a) The Authority's finding that Ms Matheson was not dismissed is contrary to the evidence, including a letter of dismissal.
- (b) The Authority stated that as a casual employee Ms Matheson could have a claim for unjustified action causing disadvantage but then contradicts this by saying that any claim based on the casual employment coming to an end is not successful.
- (c) The Authority did not address two of the three issues it identified.

[3] Rainbow Confectionery simply says the claims raised against it have been determined and this matter is closed. All the questions asked have been answered and the matter has been dealt with sufficiently.

The Authority's investigation

[4] Ms Matheson's application for reopening was investigated on the papers. That is, I reviewed the statement of problem, statement in reply and submissions of the parties. I have not recorded all of the submissions received in this determination. I have set out my summary of the legal arguments and my analysis of the applicable law. Based on this I have then expressed my conclusions on the issues as necessary to dispose of the matter, and then I have specified the result.

Issues

[5] The Authority's power to reopen an investigation is a broad statutory discretion set out in clause 4 of schedule 2 of the Employment Relations Act 2000 (the Act). This clause provides that the Authority may order a reopening of an investigation on terms it thinks reasonable.

[6] In exercising this discretion, I must comply with the Act and the applicable principles.² The applicable principles for a reopening application include the following:³

- (a) The overarching concern is to avoid a miscarriage of justice. 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 is allowed to stand.⁴
- (b) Whilst avoiding a miscarriage of justice is the overarching concern any assessment of a miscarriage is to be weighed against the principle of certainty in litigation. A reopening application is not to be used for the purpose of re-litigating arguments already considered; it is not a backdoor method by which an unsuccessful party can have a second go at having their claim investigated.
- (c) Where a party is dissatisfied by an Authority determination on grounds that may be the subject of a challenge under s179 of the Act, the Authority should be reluctant to entertain an application for a reopening on those same grounds.
- (d) What is required is some special or unusual circumstance that warrants reopening. This is something such as fresh or new evidence that is material to the outcome of the claim which could not have been given at the investigation.

[7] So, the issue is, has Ms Matheson established that there was a miscarriage of justice or a likely miscarriage of justice because of some special or unusual circumstance relating to the investigation and determination of the matter; noting that this is more than a dissatisfaction or disagreement with the outcome.

² *Akazaz v Enterprise IT Limited* [2020] NZEmpC 171.

³ *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111; *Idea Services Limited v Barker* [2013] NZEmpC 24; *Davis v Commissioner of Police* [2015] NZEmpC 38; *Randle v The Warehouse Ltd* [2019] NZEmpC 68; and *Akazaz v Enterprise IT Limited*, above n2.

⁴ *Idea Services Limited v Barker*, above n 3.

[8] I will consider this by assessing each of the three points made by Ms Matheson in her application.

Analysis

Ms Matheson says she was dismissed and the Authority's finding on this issue is wrong

[9] Ms Matheson's argument in support of reopening the investigation is based on a belief that notwithstanding that she was employed on a casual basis she was dismissed by Rainbow Confectionery as a result of an incident on 12 January 2023. Her dismissal was set out in a letter of 19 January 2023. And it is this decision that she says was unjustified both in terms of the process, as Rainbow Confectionery did not properly investigate what occurred, and in terms of the substantive decision, that is her conduct in the incident on 12 January 2023 did not justify dismissal.

[10] The Authority's determination is based on a decision that Rainbow Confectionery did not dismiss Ms Matheson. The Authority decided that Ms Matheson was employed on a casual basis and Rainbow Confectionery decided not to give her further work at the end of the last shift Ms Matheson had accepted. This is the case notwithstanding that in the letter of 19 January 2023 Rainbow Confectionery expressed its decision not to offer further work to Ms Matheson as being that her employment was terminated.

[11] So, the Authority has said there can be no unjustified dismissal as Rainbow Confectionery did what it was entitled to do with a casual employee. And, it follows therefore that what Rainbow Confectionery did in terms of the incident on 12 January 2023, both how it investigated what occurred and what it decided to do as a result, is not something that can be the basis of a claim by Ms Matheson.

[12] The findings of the Authority on this issue were based on its assessment of the facts established in the investigation and the applicable law. That Ms Matheson disagrees with the findings of fact and law does not amount to a miscarriage of justice or even a risk of a miscarriage of justice.

Ms Matheson says she has an unjustified disadvantage grievance and the Authority did not accept this

[13] Ms Matheson says that the Authority stated that as a casual employee she could have a claim for unjustified action causing disadvantage but it contradicted this by saying that any claim based on the casual employment coming to an end is not successful.

[14] Ms Matheson's argument on this point is that Rainbow Confectionery's actions in terms of the investigation of the incident on 12 January 2023 were not justified so she has an unjustified action causing disadvantage personal grievance arising out of that.

[15] The Authority's determination on this claim is that Ms Matheson cannot have an unjustified action causing disadvantage personal grievance based on the incident on 12 January 2023 as that incident relates to the decision not to offer Ms Matheson further work and Ms Matheson does not have a personal grievance relating to that because she was employed on a casual basis. The Authority's point here is that an employer need not justify a decision not to offer a casual employee further work and Ms Matheson's claim regarding the 12 January 2023 incident is seeking to do just that.

[16] The Authority's decision on this claim is one based on its assessment of the facts and law.

[17] Again, Ms Matheson disagrees with the findings of fact and law by the Authority but this does not amount to a miscarriage of justice or even a risk of a miscarriage of justice.

Ms Matheson says all three issues were not addressed by the Authority

[18] Ms Matheson says that in its determination the Authority failed to address two of the three issues it identified as being relevant.

[19] In its determination the Authority identified the relevant issues in Ms Matheson's claim as being as:

- (a) What was Ms Matheson's employment status – was she a casual employee or a part time employee?

(b) Based on Ms Matheson's employment status was she dismissed in a manner that was unjustified?

(c) In any event does Ms Matheson have a personal grievance based on actions by Rainbow Confectionery, when she was working, which were unjustified and caused disadvantage to her employment.

[20] In the Authority's determination each issue analysed in a separate section under the following headings:

(a) What was Ms Matheson's employment status?

(b) Unjustified dismissal.

(c) Unjustified action causing disadvantage.

[21] In the first section the Authority answered the status question, concluding that Ms Matheson was a casual employee.

[22] In the second section the Authority answered the question - based on Ms Matheson's employment status was she dismissed in a manner that was unjustified? The Authority stated:⁵

As Ms Matheson's employment with Rainbow Confectionery was casual the circumstances in which her employment stopped cannot give rise to an unjustified dismissal grievance.

[23] In the third section the Authority answered the question - in any event does Ms Matheson have a personal grievance based on actions by Rainbow Confectionery, when she was working, which were unjustified and caused disadvantage to her employment.

[24] The Authority began this assessment by stating - notwithstanding that Ms Matheson was a casual employee she could still have a claim based on an unjustified action causing disadvantage personal grievance.⁶

⁵ *Matheson v Rainbow Confectionery Limited*, above n 1 at [30].

⁶ *Matheson v Rainbow Confectionery Limited*, above n 1 at [34].

[25] The Authority went on to assess the circumstances that informed Ms Matheson's personal grievance for unjustified action causing disadvantage and concluded there was no unjustified action.⁷

[26] On this review it is clear that the Authority did address all three issues it identified as being relevant.

There is no miscarriage of justice

[27] The findings of the Authority are based on the Member's assessment of the facts and the applicable law. Ms Matheson disagrees with the findings of fact and law but this does not amount to a miscarriage of justice or even a risk of a miscarriage of justice; it simply reflects a view that an unsuccessful party might have.

[28] What Ms Matheson needs to establish in term of a miscarriage of justice is some special or unusual circumstance relating to the investigation and/or determination of her employment relationship problem, which was or would be material to the outcome. This is either something that was overlooked in the process that was material to the outcome such that overlooking it has caused a miscarriage of justice or it is something new that has come to light that would be material to the outcome such that if it is ignored this will cause a miscarriage of justice.

[29] Ms Matheson has not established this; she has shown a disagreement with the Authority's finding of fact and law. This disagreement is not an unusual circumstance leading to a miscarriage of justice but rather it is something that is rightly subject of a challenge in the Employment Court not a reopening.

Summary

[30] Ms Matheson's application to reopen the investigation for *Matheson v Rainbow Confectionery Limited* is not successful.⁸

⁷ *Matheson v Rainbow Confectionery Limited*, above n 1 at [38].

⁸ *Matheson v Rainbow Confectionery Limited*, above n 1.

Costs

[31] Costs are reserved.

[32] As Rainbow Confectionery was successful in defending Ms Matheson's application for reopening it might be entitled to costs, however, as it was not represented in the Authority it appears that there is no basis to award it costs. For these reasons it would seem that no order for costs should be made.

[33] Notwithstanding my observation, if either party thinks it might still be entitled to costs, then it may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum the other party will have 14 days to lodge any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority