

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 193
3075292

BETWEEN SITARAM MUKKAMALA
Applicant

AND SAVJOT SINGH
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Hayley Coles, counsel for the Applicant
Luke Meys, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further Information Received: 11 March 2020 from the Applicant
4 May 2020 from the Respondent

Date of Determination: 13 May 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Sitaram Mukkamala applies to reopen an investigation completed by the Authority in December 2019.¹ Pursuant to the determination issued at that time, the Authority found there was no employment relationship between Mr Mukkamala and Mr Singh and therefore it had no jurisdiction to investigate Mr Mukkamala's claims.

[2] Mr Mukkamala's application is opposed by Savjot Singh.

The Authority's process

[3] By consent this matter was determined on the papers. In light of COVID-19 restrictions, an extension of time for the filing of evidence were sought and granted.

¹ *Mukkamala v Singh* [2019] NZERA 695.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The applicable law

[5] The Authority has a statutory discretion to order the reopening of an investigation on “such terms as it thinks reasonable”.² This discretion must be exercised according to principle.

[6] Applicable principles include the following:³

- a. The jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered, or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case.
- b. Some special or unusual circumstance must be found to exist to warrant the reopening, such as:
 - i. 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
 - ii. A significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended; or
 - iii. Some other special or unusual circumstance particular to the case.
- c. 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.
- d. 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

² Employment Relations Act 2000 (the Act) Schedule 2 Clause 4.

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].

factor in the balance is certainty in litigation. This is to ensure successful litigants get their normal right to enjoy the fruits of judgments in their favour.⁴

- e. 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.⁵

What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases.

- f. For the decision-maker on a reopening application the overriding consideration must be the interests of justice balanced against other relevant factors such as the importance of finality in litigation.

Special circumstances?

[7] The grounds on which Mr Mukkamala submits the Authority's investigation should be reopened are, in summary, that:

- a. A significant and relevant statutory provision was inadvertently overlooked, namely s 134(2) of the Act.
- b. Section 134(2) was significant and relevant in light of the finding that Mr Singh was not Mr Mukkamala's employer. Mr Singh acted for Mr Mukkamala's employer, Savman Solutions Limited, and aided and abetted that company in breaching its employment agreement with Mr Mukkamala.
- c. There will be a risk of a miscarriage of justice if Mr Mukkamala is not given the opportunity to be heard on the question of the application of s 134(2).

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

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].

Analysis

[8] Section 134(2) of the Act provides that every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[9] In the present case no allegation was made, either in the Statement of Problem or at the Authority's investigation meeting, that Mr Singh had aided or abetted a breach of Mr Mukkamala's employment agreement. Nor was there any claim for a penalty against Mr Singh. At all material times Mr Mukkamala maintained that Mr Singh was his employer and sought compensation for "unfair disadvantage action and unfair manner and discrimination on me".

[10] In the circumstances, I decline to re-open the Authority's investigation. There are no special circumstances warranting the re-opening of the Authority's investigation. The Authority did not misapprehend the relevant law. Section 134(2) was not considered by the Authority due to the neglect or default of Mr Mukkamala to raise it. As the Court said in *Idea Services v Barker*, the purpose of the re-opening jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases. The interests of justice would not be met by reopening this case.

Costs

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

[12] If they are not able to do so, and an Authority determination on costs is needed, Mr Singh may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, Mr Mukkamala will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[13] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

Outcome

[14] The overall outcome that I have reached is:

- a. Sitaram Mukkamala's application to re-open the Authority's investigation is declined.
- b. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority