

Investigation

[2] During a telephone conference on 21 September 2009 the parties agreed to the Authority determining the application on the papers and a time line for filing material including submissions.

[3] Because of the history of this matter I was satisfied that mediation would not contribute constructively to resolving this problem: s. 159 of the Employment Relations Act 2000 (the Act) applied.

[4] By email dated 4 November Mr Balfour confirmed his client's agreement to have the matter decided on the papers.

Background

[5] There have been two Authority investigations and determinations involving these parties. Mr Smith seeks the reopening of the first investigation, which resulted in consent determination WA 159/06 (*Smith v Dannevirke High School*, unreported, 7/11/06, G J Wood (member)). The respondent (DHS) opposes his application.

[6] In April 2007 Mr Smith lodged a second statement of problem. It resulted in the second Authority investigation between these parties, which resulted in determination WA 17/08 (*Smith v Dannevirke High School*, unreported, 14/2/08, J Crichton (member)).

[7] In his second statement of problem Mr Smith alleged that, in obtaining the settlement agreement and consent determination, DHS misled him, his representative and the Authority by not disclosing that it had already written to the Teachers Council pursuant to its mandatory duty under s. 139AK Education Act 1989, and a prize giving speech by the principal of DHS breached clause 8 of the agreement, which provided that no additional comment would be made beyond the scope of an agreed statement, because the speech included comment clearly related to the applicant's employment with DHS.

[8] The remedies sought included that the Authority investigate and determine his original claim.

[9] In its second determination (WA 17/08) the Authority preferred DHS' evidence that it had advised the applicant of its communication with the Teachers Council, found that both parties had breached the no additional comment provisions of their settlement and, as the breaches balanced each other out, declined to grant any remedy.

[10] In his latest statements of problem received on 14 April and 14 August 2009 Mr Smith sought a reopening of the original investigation that resulted in consent determination WA 159/06 on various grounds including:

- The Authority's consent determination WA 159/06 (which, at the request of the parties, incorporated their settlement of the issues between them) did not comply with s. 174 (a) of the Act;
- DHS obtained the consent determination by deceit;
- Subsequently, DHS breached the consent determination; and
- Subsequent litigation in the Authority and the Employment Court has failed to clarify what the parties agreed to.

Discussion and Findings

[11] Clause 4 of Schedule 2 of the Act provides that the Authority "*may*" order an investigation be reopened on such terms as it thinks reasonable, and in the meantime stay the effect of any order previously made.

[12] For the following reasons I adopt (and adapt) the respondent's submissions in this application.

[13] The law relating to the exercise of the discretionary power to grant rehearings is well settled: see *Empress Abalone Ltd v Langdon* [2001] ERNZ 441 and *Hardie v Round* [2002] 2 ERNZ 796:

- The overriding consideration in a rehearing application is to avoid a miscarriage of justice;
- The threshold for establishing a miscarriage of justice is a substantial possibility or a real or substantial risk of such a miscarriage occurring; and
- When the discovery of fresh evidence is relied upon, 3 conditions must be fulfilled: it must be shown that the evidence could not have been obtained with reasonable diligence for use at the hearing; the evidence must be such that, if given, it would probably have an important influence of the result of the case although it need not be decisive; and the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible although it need not be incontrovertible.

(par 13, *Hardie* (above))

[14] The Employment Court has a similar discretion (clause 5 of the Third Schedule of the Act).

[15] It recently considered the relevant principles: *Yong (T/A Yong & Co Chartered Accountants) v Chin* [2008] ERNZ 1. In that judgement the Court identified four processes by which the substance and effect of a judgement can be changed after it has been given: appeal, judicial review, recall and rehearing.

[16] The Court commented that, as a matter of principle, practicality and fairness, where a specific process such as appeal/challenge is available, a party should not seek to invoke the exercise of a general power (rehearing) to achieve the same result. The general power should be reserved for those cases in which no other process is available. Thus, where a party is dissatisfied with a judgement on grounds which may be the subject of an appeal the Court should be very reluctant indeed to entertain an application for rehearing on those grounds (pars 25-26).

[17] The Court considered the history of cases in which an order for rehearing as been made and commented that by far the most common ground is that new evidence has been discovered which is material and which could not have been given at trial. In such cases no right of appeal or review is available (par 27).

[18] In this instance Mr Smith is not claiming the discovery of new evidence.

[19] In the *Yong* case the Court found that all the grounds relied on by the plaintiff in support of the application for rehearing were capable of being grounds of appeal/judicial review. As a matter of principle, one strongly reinforced by the fact the plaintiff had filed an application for leave to appeal, it was inappropriate to consider the application and it was declined (pars 29-30).

Application of Principles

[20] Applying the above principles, I am satisfied that – as the claims of deceit and breaches of the agreed settlement were advanced in his second statement of problem and determined by the Authority (WA 17/08), and as Mr Smith had the right following that determination to seek a de novo hearing in the Employment Court in respect of that determination – it is inappropriate to grant this application for a rehearing. Put at its simplest, Mr Smith is attempting to relitigate a matter already determined by the Authority.

[21] I am reinforced in my conclusion by emailed advice from the Court on 2 December 2009, and in respect of WA 17/08, that Mr Smith exercised his right to challenge in March 2008; in August this year he requested the Court – and DHS agreed – that proceedings be ‘put on hold’ pending the outcome of this application. The option of continuing with that challenge remains open to Mr Smith notwithstanding the findings of this determination, particularly as it promises to address one of his grounds for seeking a reopening, namely to obtain clarification of what the parties agreed.

Res Judicata: Estoppel

[22] Consistent with the above, and as anticipated above, I also accept DHS' submission that Mr Smith is estopped from making this application because of the principle of *res judicata*: that is because the Authority has already heard and determined the allegation of deceit inducing the settlement agreement/consent determination (WA 17/08): *Woud v Department of Corrections* [2007] ERNZ 284.

[23] Estoppel also extends to any point which could have been brought forward by Mr Smith in the second investigation, including the assertion that the consent determination breached s. 174 (a) of the Act.

Compliance with Section 174 (a) of the Act

[24] In recording its determination on any matter, and for the purpose of delivering speedy, informal and practical justice to the parties, the Authority must state relevant findings of fact, explain its findings on relevant issues of law, express its conclusions on the matters it considers require determination and specify what if any orders it is making (s. 174 (a) (i) – (iv) inclusive).

[25] The Authority need not set out of record of evidence heard, summarise submissions made, indicate why it made credibility findings and record the process followed in arriving at a determination (s. 174 (b) (i) – (iv) inclusive).

[26] I do not accept Mr Smith's argument that the mandatory sub-clauses, (i), (ii) and (iii), are omitted from WA 159/06. That is because,

- In respect of sub-clause (i), the relevant finding of fact was that the parties had successfully resolved all matters between themselves; they had requested that the terms and conditions of their signed settlement be incorporated into a consent order and they had agreed the terms of settlement would remain confidential;
- In respect of sub-clause (ii), there were no relevant issues of law other than that – pursuant to clause 4 of Schedule 2 of the Act, the parties were

requesting their record of settlement be incorporated into a consent determination;

- In respect of sub-clause (iii), the issue requiring determination is clearly the fact that the parties had reached a settlement and were asking the Authority to incorporate it into a consent determination, which it did; and
- Finally, in respect of sub-clause (iv), the Authority's order was that the settlement agreement became an order of the Authority.

Determination

[27] For the reasons set out above Mr Smith's application to reopen the first investigation that resulted in consent determination WA 159/06 must fail.

Denis Asher

Member of the Employment Relations Authority