IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 168
5429937

	BETWEEN	NAPOLEONE TAMALEAOA Applicant
	A N D	A1 ONEHUNGA TOWING SERVICES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Tim Toilolo, Advocate for Applicant I M Davidson, Advocate for Respondent
Investigation Meeting:	On the papers
Date of Determination:	2 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by the applicant (Mr Tamaleaoa) to reopen the Authority's investigation into his alleged personal grievance.

[2] Mr Tamaleaoa was employed by the respondent (A1) and alleges that he was unjustifiably constructively dismissed from his employment.

[3] The Authority (Member Tetitaha) convened a telephone conference with the parties on 19 December 2013 in response to Mr Tamaleaoa' filing of a statement of problem alleging personal grievance. In that telephone conference, a timetable for the filing of evidence was agreed to and a date for the Authority's investigation meeting was set.

[4] Both parties complied with the timetable for the exchange of evidence, but at the investigation meeting, neither Mr Tamaleaoa nor his advocate were in attendance.

Member Tetihaha arranged to have a Support Officer attempt to contact Mr Tamaleaoa through his representative, but was unsuccessful, the telephone going to voicemail.

[5] In the absence of Mr Tamaleaoa or his representative, and without any evidence that Mr Tamaleaoa or his representative was intending to participate in the Authority's investigation, Member Tetihaha determined to proceed and subsequently issued a determination on the day of the investigation meeting (3 March 2014) dismissing Mr Tamaleaoa's claim.

[6] However, by way of an addendum to the determination, Member Tetihaha noted that on the late afternoon of the hearing date, Mr Tamaleaoa's representative contacted the Authority and sought a rehearing. Member Tetihaha directed that any application for a rehearing should be by formal memorandum setting out the grounds for the rehearing and in particular identifying the reasons for the non appearance of Mr Tamaleaoa or his representative. She also indicated that the matter of a reopening would be dealt with by another Member. This determination is concerned exclusively with the application to reopen.

[7] The application for a reopening filed on Mr Tamaleaoa's behalf on 12 March 2014 comprises five brief paragraphs. I am unable to discern from that application why it is that Mr Tamaleaoa or his representative were absent from the Authority's investigation meeting. The most that can be derived from the application is the claim that Mr Tamaleaoa's advocate's receptionist failed to print off the attachment of the original email setting the time and date for the investigation meeting.

[8] However, there is no supporting evidence from the receptionist that that is in fact what happened and on the face of it, the memorandum would appear to confirm that the notice of hearing was received by the office of Mr Tamaleaoa's advocate. It was simply not dealt with properly.

[9] Not surprisingly, A1 opposed the reopening and in doing so made a number of pertinent observations. First amongst them is the point I have already made that it is apparent from the application that Mr Tamaleaoa's advocate received the Authority's notice of hearing. Moreover, A1 correctly identify that if A1 received the notice of hearing, it is inconceivable that the notice of hearing would not have also been received by the other side.

[10] A1 also refer to the fact that Mr Tamaleaoa's representative participated in the Authority's telephone conference in December, agreed to the date for the investigation meeting at that time, agreed to a timetable for the filing of evidence and actually complied with that timetable.

[11] Perhaps most persuasively, A1 point out that the Authority's email attaching the notice of hearing was clearly received by Mr Tamaleaoa's representative (witness Mr Tamaleaoa's representative's claim that the email was received but that a receptionist in his office failed to print off the attachment) but that, first the electronic message was sent not to a general office but to Mr Tamaleaoa's representative's personal email and the electronic message from the Authority, undoubtedly in two parts, contained both an email from the Support Officer and the formal notice of hearing. But A1 emphasised to me that even the covering email from the Authority Support Officer refers to the date of the hearing. It follows, so the submission goes, that it is difficult to contend that notice of the time and place for the hearing was not conveyed to Mr Tamaleaoa and received by his representative because all of the information was in the covering email (which by common consent was received) as well as in the formal notice of hearing.

[12] When the reopening application was allocated to me, I convened a telephone conference with the parties' representatives and this was set down for 8 April 2014 at 10.15am. At the appointed time for the telephone conference to proceed, the representative for Mr Tamaleaoa was not available and accordingly I was forced to engage first of all with A1's representative, Mr Davidson (who was available at the appointed time) and subsequently Mr Tamaleaoa's representative in a separate telephone call. It is difficult to avoid making the observation that the failure of Mr Tamaleaoa's representative to be available at the appointed time, notwithstanding his earlier agreement that the time and date suited him, is further evidence of the slap-dash approach being taken to the Authority's process by Mr Tamaleaoa's representative. One would have thought that given a complete failure to engage with the Authority's investigation meeting at first instance, the last thing that a representative would do is to miss the telephone conference with the Authority which was for the very purpose of discussing Mr Tamaleaoa's application for a reopening.

[13] In any event, by dint of this rather unsatisfactory process, I was able to convey to both representatives my willingness to have further submissions on the application to reopen and to agree with the representatives on a timetable for that to be effected.

[14] Those submissions have now come to hand and fall for consideration. I observe first that the submissions for Mr Tamaleaoa do not take his claim any further than was the position when he filed his initial memorandum seeking a reopening. The Authority is told nothing more about why Mr Tamaleaoa and his representative simply failed to turn up to the original hearing and indeed the bulk of the submission from Mr Tamaleaoa in support of the application to reopen concerns his various representations about the substance of the dispute between Mr Tamaleaoa and A1.

[15] I was at pains to point out to both representatives that I was not interested in argument about the substance of the matter because that was not germane to the question of whether the Authority should reopen the investigation. The issue for decision remains whether it is just to reopen an investigation that was closed by the Authority because the applicant party had not attended the investigation meeting.

[16] The outcome of that failure to attend the investigation meeting was that Mr Tamaleaoa's application was dismissed and costs were reserved. That is an absolutely stock standard process for Authority cases involving an applicant who does not attend the investigation meeting.

[17] This is because the applicant is the originating party in any proceeding and by failing to attend the investigation meeting, to prosecute their claim and assist the Authority with its investigation, they run the grave risk of having the matter dismissed for want of prosecution, which is precisely what happened in the present case.

[18] In the brief and to the point submissions filed by A1, I am told that A1 continues to oppose the reopening on the entirely proper basis that A1 has been put to trouble and expense in defending its position once, and it would be unfair and unjust for A1 to be required to do that again with presumably a notional doubling of its legal costs as a consequence.

[19] Moreover, A1 emphasise the fact that Mr Tamaleaoa's representative has still not explained how it was that neither the representative nor Mr Tamaleaoa himself failed to attend the Authority's investigation meeting.

Determination

[20] I am satisfied this is not a case where the Authority should exercise its discretion and reopen a closed investigation. This is not a situation where there is new evidence that has become available after the investigation or where there is a legitimate and clear basis on which a party was unable to attend the Authority's investigation meeting.

[21] The test the Authority must apply is whether the failure to grant a reopening would result in a miscarriage of justice. That principle must be set against the countervailing principle that certainty in litigation is a desirable end in itself and the successful litigant is entitled, all things being equal, to the fruits of his victory.

[22] I remain unsure about exactly how it was that Mr Tamaleaoa and his representative failed to attend the investigation meeting of Mr Tamaleaoa's personal grievance. This is so despite my giving Mr Tamaleaoa and his representative ample opportunity to explain themselves. As I have already noted, the thrust of the material provided to justify the reopening goes to the substance of Mr Tamaleaoa's claim and does not address why it was that Mr Tamaleaoa failed to attend the Authority's investigation meeting. Put simply, incompetence by a representative is not a basis for reopening particularly in circumstances where the behaviour of the representative (as evidenced by the failure to attend the telephone conference with the Authority) simply seems to be dismissive of the Authority and its processes.

[23] The effect of a reopening in the present case would be to require a small employer to attend an investigation meeting again to confront and address Mr Tamaleaoa's claims. A1, understandably, say they have done this once and they see no reason why they should have to do it again. I agree. Indeed, I think it can be fairly contended that a reopening of this matter would result in unfairness to A1 precisely because they have already dealt with this matter once and seek not to have to do so again.

[24] If Mr Tamaleaoa had been able to explain to me how and why the obligation to attend the investigation meeting had been overlooked, I might have taken a more sympathetic view of the matter but the material before the Authority simply neither explains nor excuses the breach of a fundamental obligation to prosecute one's own case. The failure to identify any extenuating circumstance is fatal to the application,

given that the Authority must balance the interests of both parties in applying the law. The ability to provide the sort of explanation I refer to here was sullied further by the failure of Mr Tamaleaoa's representative to attend the Authority's telephone conference to discuss this very application.

[25] In the absence of any clear evidence of how it was that Mr Tamaleaoa and his representative failed absolutely to attend the investigation meeting of the Authority despite the clear evidence that they received the Authority's communication confirming the time and date for the investigation, a time and date which they had already agreed to in the Authority's previous telephone conference, I now determine that this matter not be reopened and the decision of the Authority issued as [2014] NZERA Auckland 76, stands.

Costs

[26] Costs are reserved.

James Crichton
Member of the Employment Relations Authority