

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 115
3194319

BETWEEN TANIWHA RETAIL LIMITED
Applicant

AND STEVEN DOBBS
Respondent

Member of Authority: Helen Doyle

Representatives: Bryce Ede advocate for the Applicant
Respondent in person

Investigation Meeting: On the papers

Submissions Received: 12 October 2022 from the Applicant
23 February 2023 from the Respondent

Date of Determination: 08 March 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Taniwha Retail Limited (Taniwha) applies to reopen a substantive investigation of the Authority.¹ It seeks to re-open the investigation to which the Authority's determination of 12 September 2022 applies on the basis that there is documentary evidence that was supplied in file 3117859 that "contradicts the Member's decision."

[2] Bryce Ede is the sole director of Taniwha.

[3] The reopening application was opposed by Mr Dobbs on the basis that there was no new or significant evidence that would justify the reopening of the matter.

¹ *Steven Dobbs v Taniwha Retail Limited* [2022] NZERA 455 [3117859].

The substantive determination

[4] Claims by Mr Dobbs and Taniwha against the other were investigated separately. Both were determined in the same determination because it was stated evidence from one would inform the other. The reopening application is only in respect of file no. 3117859 which is Mr Dobbs' claim.

[5] Mr Dobbs had several claims determined and I will set out the claims and the conclusions from the substantive determination.

Unjustified actions and constructive dismissal

[6] Mr Dobbs claimed that he was treated in an unjustified manner by Taniwha during his employment including bullying behaviour and racist comments. Further, that Taniwha was trying to dismiss him when there was no basis for that to force him out of the business.

[7] It was concluded that Mr Ede was not racist in his approach to Mr Dobbs but that his communications were unnecessarily inflammatory and contained unsubstantiated criticism that was aggressive and intimidating. Further that the disciplinary process appeared to be retaliatory and part of a course of conduct to intimidate Mr Dobbs because of its timing and commencement. The Member was not satisfied that Taniwha properly investigated the concerns about the alleged breach of the COVID 19 lockdown requirements. It was stated that attempts to intervene in the deteriorating relationship were inconsistent with Mr Ede's approach and that compounded the effect on Mr Dobbs with mixed messages. Further that Taniwha disconnected Mr Dobbs' email and mobile telephone without warning because it believed he had taken steps with social media accounts which were unacceptable.

[8] There was a conclusion that actions were unjustified and that much of it was unnecessarily aggressive and based on assumptions or conclusions that had not been properly articulated and discussed with Mr Dobbs. The Member was not satisfied in the substantive determination that the actions were a deliberate attempt to make Mr Dobbs resign or amounted to bullying

[9] It was found that the unjustified actions breached the duty Taniwha owed to Mr Dobbs to not without proper cause act in a manner likely to destroy or seriously damage the

relationship of trust and confidence. Further that Mr Dobbs resigned as a result of the breach of duty and it was foreseeable that he would resign. The unjustified constructive dismissal was upheld which finding appears to have absorbed the unjustified disadvantage claims. By way of compensation the sum of \$8,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) was awarded. It was concluded that Mr Dobbs did not contribute to the situation and the compensatory award was not reduced.

Failure to pay holiday pay and for time worked for the notice period

[10] It was found in the substantive determination that there may be some inaccuracy in what Taniwha attributed as annual leave to Mr Dobbs but that there was more annual leave taken than accrued. The Member was unable to properly quantify that on the evidence. Looking at the monetary claims overall the Member concluded in the substantive determination that it was not appropriate to call for more evidence about the overpayment of annual leave. A non-technical approach was taken on the basis that Taniwha could retain the final wages owed to Mr Dobbs and not pay him for any notice period. Mr Dobbs was not required to pay any more overpaid annual leave.

[11] This resulted in an outcome that compensation for non-financial loss was cancelled out by any overpayment of annual leave and that neither Mr Dobbs nor Taniwha had to pay any additional money to the other.

Failure by Taniwha to return to Mr Dobbs his mobile telephone number

[12] There was a conclusion in the substantive determination that Mr Dobbs had a contractual right to the return of his mobile telephone number at the end of his employment and that Taniwha had no right to withhold the transfer based on leverage or set-off. Compliance was ordered in respect of the mobile number. The Member did not find Mr Dobbs had suffered any financial loss because of the breach.

Payment for damage to Mr Dobbs' car

[13] The Member did not find that Mr Dobbs was owed any money for damage to his car.

Money owed for stereo speakers

[14] Mr Dobbs' evidence that he did not owe any money for the speakers and that he had paid the full amount at the time was accepted and there was a conclusion that he did not owe any money in that regard.

Investigation of the reopening application

[15] The Authority held a case management conference on 16 February 2023. Mr Ede participated on behalf of Taniwha and Mr Dobbs attended in person. Mr Ede had provided submissions immediately preceding the case management conference on behalf of Taniwha. These supplemented earlier information and documents provided with the application for reopening. An opportunity was given to Mr Dobbs to respond to these submissions by 23 February 2023.

[16] The Authority received Mr Dobbs' email that he had nothing to add. There was therefore nothing for Mr Ede to reply to within the time frame the Authority had set to do so by 2 March 2023.

[17] The Authority proceeds therefore to determine the matter and by agreement with the parties the reopening application has been determined on the papers.

The legal framework when there is a reopening application

[18] Clause 4 of Schedule 2 of the Employment Relations Act 2000 (the Act) provides that the Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and in the meantime to stay the effect of any order previously made.

[19] It is clear from the case law that the Authority must exercise the discretion to reopen on a principled basis. The main concern in the exercise of the discretion is to avoid a miscarriage of justice. With that the desirability of certainty in litigation and the public interest that there be an end to litigation needs to be weighed.²

² *Randle v The Warehouse Limited* [2019] NZEmpC 68 at [15] and [18].

[20] The Employment Court described the principles for the exercise of a discretionary power to order a re-hearing:³

- (a) The jurisdiction is not to be exercised for the purposes of re-agitating arguments already considered or providing a back door method by which unsuccessful litigants can seek to re-argue their case.
- (b) Some special or unusual circumstances must be found to exist to warrant the reopening, such as that fresh or new evidence has been discovered which is material to the outcome of the case and that could not have been given at the hearing.
- (c) The mere possibility of a miscarriage of justice is not a sufficient ground for granting a reopening. What is required is an actual miscarriage of justice or a real or substantial possibility or substantial risk of a miscarriage of justice if the determination is allowed to stand.
- (d) -----

The issues

[21] The issues that the Authority needs to determine are:

- (a) Were the documents and other evidence relied on in support of the application to reopen already before the Authority?
- (b) If the documentary evidence was already before the Authority, is there some special or unusual circumstance which exists and would warrant the reopening?
- (c) If the reopening of the investigation is not granted, would there be an actual miscarriage of justice or at least a substantial risk of a miscarriage of justice?

Were the documents and other evidence referred to on behalf of Taniwha already before the Authority?

[22] The documents and other evidence referred to were already before the Authority at the time of the substantive determination. Reliance in this matter is not placed on new or fresh evidence.

Is there some special or unusual circumstance that would warrant the reopening?

[23] Taniwha has asked the Authority to “re-examine the decision” and “reconcile the claims against the documentary evidence that was provided to the Member in the first instance.” The

³ Above n 2 at [17].

Authority must exercise caution in the exercise of its discretion so as not to offend against the rule that a reopening is not to provide a backdoor method to re-argue a matter.

[24] The basis for reopening must also be considered with the fact that the primary process for a party dissatisfied with a determination of the Authority is a challenge.⁴ There is a broad right of challenge in s 179 of the Act from an Authority determination. That enables parties dissatisfied with the determination to have the matter heard by the Employment Court. This can be by way of de novo challenge (starting afresh). Taniwha elected within the time frame to challenge to pursue a reopening and not a challenge.

[25] There has been reference by the Employment Court to the principle that where a specific process such as a challenge under s 179 of the Act is available, a party should not seek to invoke the exercise of a general power such as a reopening to achieve the same result. Rather the general power should be reserved for those cases where no other process is available. Applications for reopening often involve material new evidence which was not available at the time of the Authority investigation meeting. A challenge is not the primary process to invoke in those circumstances. Where a party is dissatisfied with a determination of the Authority which could be the subject of a challenge under s 179 the Authority will be very reluctant to grant an application for a rehearing on those grounds.⁵

[26] In addition to considering the above matters in the exercise of my discretion I've looked broadly at whether there was an apparent misapprehension or misunderstanding of the facts by the Member and whether aspects of the evidence were overlooked. Case law supports that to reopen on that basis would not be precluded but would be an exceptional step.⁶ Even with an error of law the Employment Court has stated that it is only in exceptional circumstances such an application is entertained.⁷

Conclusions about unjustified actions and unjustified constructive dismissal

⁴ *Yong t/a Yong & Co Chartered Accountants v Chin* [2008] ERNZ 1 at [16].

⁵ Above n 1 at [25].

⁶ *Idea Services Limited v Valerie Baker* [2013] NZEmpC 24 at [37] with reference to *Autodesk Inc v Dyason (No 2)* (1993) HCA 6; (1993) 173 CLR 300.

⁷ Above n 1 at [27].

Conclusions about investigation

[27] Mr Ede takes issue with the conclusion that Taniwha did not properly investigate the concern about the alleged breach of the lockdown requirements. He refers to the Member allegedly missing an admission by Mr Dobbs that he filmed an advertisement in the company premises and was not truthful about it prior asking for permission in the documentation. Further that given the timing and the resignation Taniwha says it never had an opportunity to investigate the concerns and it is at a loss as to what more it could do to investigate the breach.

[28] The quality of the investigation into the COVID-19 breach was expressly referred to in the determination. I do not conclude that the matters referred to by Mr Ede were overlooked but rather a conclusion was reached in the substantive determination that Taniwha does not agree with. This was only one event that was considered as a series of events resulting in the conclusion that Mr Dobbs was unjustifiably constructively dismissed.

Disconnection of the email and mobile phone

[29] It is clear from the substantive determination that Taniwha's reasons for disconnection were recorded and not overlooked or misunderstood. The disconnection was nevertheless considered with other events as a series to conclude breaches of duty which is a matter that Taniwha disagree with.

Ability to raise issues with Mr Dobbs

[30] Taniwha in its application to reopen says that it could not have raised issues with Mr Dobbs because he would not respond and had made threats about the business. The Member had this information. I do not conclude it was overlooked or misunderstood.

Contribution

[31] There is an issue raised about contribution. The Member concluded Mr Dobbs did not contribute in a way that should reduce compensation in the circumstances. Contribution was assessed with the finding of an unjustified constructive dismissal. There is nothing apparent from the substantive determination to suggest issues now advanced were overlooked but rather

Taniwha is unhappy with the failure to reduce the remedy of compensation for reason of contribution.

Annual Leave

[32] Mr Ede submits that the leave was calculated by the software accounting package and checked by the accountant in calculating the final pay and could not be misrepresented. The Member reached a different view in the substantive determination. Whilst satisfied that Mr Dobbs had been overpaid some of his annual leave the quantum was found not to be clear. There was a decision that rather than call for more evidence the matter would be approached on a non-technical basis. This enabled Taniwha to retain final wages owed and not pay for any notice period. I do not conclude the matters now raised were overlooked or misunderstood.

Stereo Speakers

[33] Mr Ede takes an issue with the Member accepting Mr Dobbs' evidence that he did not owe any money for the speakers without proof of payment. The determination does not support that the Member overlooked or misunderstood the documentary evidence but rather preferred Mr Dobbs evidence.

[34] In conclusion I do not find any special or unusual circumstances that would warrant the reopening of the Authority investigation.

Would there be an actual miscarriage of justice or at least a substantial risk of a miscarriage of justice if the application is not granted?

[35] There is no new evidence relied on in the reopening application. I have not concluded that aspects of the documentary evidence referred in support of the application for reopening were overlooked or misunderstood by the decision maker to support the exceptional step of reopening on that ground. Taniwha was dissatisfied with conclusions reached but those matters raised were capable of being challenged under s 179 of the Act. Instead of taking that step Taniwha is seeking to achieve the same result through a reopening.

[36] I am not satisfied that there has been an actual miscarriage of justice or that there is a substantial risk of a miscarriage of justice if the application is not granted.

[37] I do not consider that granting the application would be consistent with the interests of justice. Mr Dobbs is entitled to some certainty and the right to the success that he achieved in the Authority.

[38] The reopening application is not granted.

Costs

[39] Mr Dobbs was not represented, and no issue of costs would ordinarily arise.

[40] If there is an issue of costs then Mr Dobbs may lodge and serve a costs submission within 14 days from the date of this determination. Mr Ede will have a further 14 days from receipt of the submission to lodge and serve a reply submission as to costs. Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[41] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.⁸

Helen Doyle
Member of the Employment Relations Authority

⁸ Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2> .