IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 394
5464148

	BETWEEN	TITOKI SECURITIES TRUST Applicant
	A N D	SHARON RUTH WALLACE Respondent

Member of Authority:	T G Tetitaha
Representatives:	P Swarbrick, Counsel for the Applicant Respondent in person
Investigation Meeting:	On the papers
Submissions Received:	18 August, 2 and 6 November 2015 from the Applicant 2 September and 13 November 2015 from the Respondent
Date of Determination:	14 December 2015

DETERMINATION OF THE AUTHORITY

A. The application for investigation to be reopened is refused.

B. There is no issue as to costs given Ms Wallace is self-represented.

[1] Titoki Securities Trust (the Trust) was successful in defending the respondent's application for personal grievance.[1] It sought costs. Ms Wallace was ordered to pay $7,000 towards its actual legal costs.[2]

[2] The Trust now seeks to reopen the costs determination in so far as the Authority declined any increase to the daily tariff. The application is made on the grounds a miscarriage of justice occurred because:

(a) The Authority misdirected itself as to the correct factual situation regarding the Trust's willingness to attend mediation; and

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1 *Sharon Ruth Wallace v. Titoki Securities Trust* [2015] NZERA Auckland 94.
2 *Sharon Ruth Wallace v. Titoki Securities Trust* [2015] NZERA Auckland 214

(b) The Authority gave an oral direction the parties were not to attend mediation on 4 December 2014.

[3] The Trust submits but for the Authority's view that it had refused to attend mediation, there should have been an uplift in the costs award. It is appropriate and in accordance with equity and good conscious principles, that the Authority reopen the matter to reconsider providing an uplift of the costs awarded.

Reopening Investigation Meetings

[4] The Authority has a statutory discretion to order the reopening of an investigation on *such terms as it thinks reasonable* and in the meantime to stay the effect of any order previously made.[3]

[5] Any exercise of a discretion must be on a principled basis. Principles have been developed by the Employment Court in respect of its similar discretion to order a rehearing. Those principles include that the mere possibility of a miscarriage of justice is not a sufficient ground for granting a reopening.

[6] The threshold test is whether the party seeking the reopening can establish there would be either 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. The assessment of the possibility of a miscarriage of justice does not require a high standard of proof of that possibility.[4]

Oral direction

[7] One object of the Employment Relations Act 2000 is *promoting mediation as the primary problem solving mechanism.*[5] In carrying out its role, the Authority must further the object of the Act.[6]

[8] Section 159(b) of the Act requires the Authority to direct mediation unless it will not contribute constructively to resolving the matter; will not be in the public interest; will undermine the urgent or interim nature of the proceeding or will be otherwise impractical or inappropriate in the circumstances.

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3 Employment Relations Act 2000, Schedule 2, clause 4.

4 *Davis v. Commissioner of Police* [2015] NZEmpC 38 at [12] – [14]; *Idea Services Limited v. Barker* [2013] NZEmpC 24 at [36] – [37], and [42]

5 Section 3(a)(v) Employment Relations Act 2000.

6 Section 159(2)(d) Employment Relations Act 2000.

[9] It is accepted that the parties did not attend mediation voluntarily or by Authority direction.

[10] The Notice of Direction dated 9 December 2014 does not explicitly record any oral direction the parties not go to mediation being made at the case conference held on 4 December 2015 or subsequently. The Registry file does not contain an application for any oral direction the parties not attend mediation. There is no indication on the Registry file that the then Presiding Member had or intended to make such an oral direction. It would have been unusual for the Member to make such an oral direction upon his own motion without there being firstly notice of his intention to do so and reasons why he believed this was necessary for e.g. evidence that the circumstances in s159(b) of the Act existed to make such a direction. There was no evidence of notice or reasons why any oral direction was allegedly made on the Registry file.

[11] In carrying out its role, the Authority must also comply with the principles of natural justice (s157(2)(a) of the Act). From the Registry file it appears Ms Wallace did not have notice of any application or intention to issue an oral direction the parties not attend mediation. In fact her submissions[7] appear to seek mediation:

> *I have always been ready and willing for mediation and I believe this will progress and ideally resolve matters.*

[12] It is unlikely a Member would have lightly dispensed with mediation in these circumstances. I am of the view the requirement for a direction to mediation was unfortunately overlooked by the then Member. I am not convinced on the balance of probabilities that there was an oral direction the parties not attend mediation.

Unreasonable refusal of mediation

[13] I also take the view that there was evidence the Trust was unreasonably refusing to attend mediation prior to the 4 December case conference.

[14] The Trust's statement in reply dated 15 October 2014 records the matter had not been to mediation because:

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[7] See Applicants notes for 4 December 2014 case conference "Mediation Attempts".

> *The Applicant's approach to the issues from the outset including the tone of her correspondence does not suggest that mediation would be likely to succeed. Further, until such time as the causes of action are clearly specified and matters not within the jurisdiction of the Authority withdrawn, mediation would seem premature.*

[15] Counsel's Memorandum refers to the Trust's letter dated 26 June 2014 *that mediation seemed premature but that it would consider it in future once all of [Ms Wallace's] claims had been disclosed to it.*[8]

[16] Ms Wallace's 4 December submissions and statement of problem indicated a willingness to attend mediation. This does not support an assertion it would be unlikely to succeed.

[17] The inability to properly articulate claims is common with self-represented litigants. They are not legally trained. To require them to properly plead or justify every claim they may wish to raise before they access mediation would be overly onerous. It would also defeat the Act's object that mediation is the primary problem solving mechanism. It would effectively shift that burden to the Authority and/or Court.

[18] It was unreasonable in my view for the Trust to refuse mediation where there was a clearly justiciable claim of unjustified dismissal. It may not agree with her reasoning for bringing her claims but that did not preclude the use of mediation nor indicate it was likely to be unsuccessful. As a consequence there was no miscarriage of justice in the original costs determination declining to uplift costs on this basis.

[19] Even if I am wrong and there was a miscarriage of justice, I would decline to exercise my discretion to reopen this investigation. The Trust has appealed this matter to the Employment Court (EMPC 235/2015) on the same or similar grounds. Where a party is dissatisfied by an Authority determination on grounds that may be the subject of a challenge under s.179 of the Employment Relations Act 2000 (the Act) the Authority should be reluctant to entertain an application for a reopening on the same grounds.[9]

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[8] Memorandum of Counsel in support of application for investigation to be reopened dated 18 August 2015 para 4(f).

[9] *Yong t/a Young & Co (Chartered Accountants) v. Chin* [2008] ERNZ 1 at [22] – [25]

[20] In the circumstances the application for reopening is refused. There is no issue as to costs given Ms Wallace is self-represented.

T G Tetitaha
Member of the Employment Relations Authority