

**Attention is drawn to the order
prohibiting publication of certain
information in this Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 418
3206159

BETWEEN	NICOLA MAREE WATKINS Applicant
AND	HIGHMARK HOMES LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Applicant, in person Danny Jacobson, representative for the Respondent
Investigation Meeting:	On the papers
Information and submissions received:	24 December 2022, 1 January, 29 March, 13 May 2023 from the Applicant 11 May 2023 from the Respondent
Determination:	4 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Watkins applies to reopen two determinations of the Authority issued on 30 November 2022 and 1 December 2022 respectively.¹ In the determination issued on 30 November 2022 the Authority found Ms Watkins' claims of a personal grievance of unjustified disadvantage and wage arrears were unsuccessful and ordered her to pay Highmark Homes Limited (HHL) \$3,500.25 in damages.² In the determination dated 1

¹*Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 632 and *Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 638.

² *Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 632 at [52] – [54].

December 2022 Ms Watkins' application to reopen a determination of the Authority issued on 13 November 2020 was declined.³ The 13 November 2020 determination found Ms Watkins had raised a personal grievance for unjustified action and had not raised a personal grievance for unjustified dismissal within the statutory timeframe.⁴ Leave was not granted to raise a personal grievance out of time. For completeness, Ms Watkins has not filed a challenge in the Employment Court to any of these determinations of the Authority.

[2] Highmark Homes Limited (HHL) opposes the reopening application of both determinations.

The Authority's investigation

[3] By consent this application is determined on the papers. The parties have lodged submissions and information in accordance with the timetable set by the Authority on 20 February 2023 and subsequently varied to accommodate matters before the High Court between the parties.

[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. It has not recorded all the information received. In determining this matter the Authority has considered all the material before it.

Issues

[5] The issues for investigation and determination are:

- a) whether there are grounds to reopen either of the determinations *Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 632 and *Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 638.
- a) is either party entitled to an award of costs?

³ *Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 638 at [14].

⁴ *Nicola Maree Watkins v Highmark Homes Limited* [2020] NZERA 467 at [46] – [47].

Relevant law

[6] The Authority may order an investigation to be reopened on “such terms as it thinks reasonable.”⁵ The principles applicable in exercising this statutory discretion have been considered in this determination including:⁶

- (i) the overarching concern is to avoid a miscarriage of justice – an actual miscarriage of justice is required or a real or substantial possibility or substantial risk of such;
- (ii) re-agitating arguments or aspects of a case already considered is not the purpose of the reopening jurisdiction;
- (iii) something special or unusual must be found;
- (iv) in the case of fresh or new evidence the question is whether it is material to the outcome and could not have been given at the investigation; and
- (v) reopening is not free reign for a party to reformulate their claim, improve their arguments or otherwise have a second bite at the litigation cherry.

Discussion

[7] Ms Watkins seeks reopening on a range of grounds. In broad terms she says:

- (i) the information she submitted in relation to the employment relationship problems was mishandled;
- (ii) the investigation meeting was unfair and the determinations unreasonable; and
- (ii) the evidence she has produced, including new evidence, if fairly considered will establish she did not breach any obligation owed to HHL and was treated unfairly and unreasonably in her employment including that she was unjustifiably constructively dismissed.

[8] Attached to the reopening application are documents marked exhibit A – L.⁷ The documents contain hand written annotations and include sections of the Crimes Act 1961, documents, including emails related to Ms Watkins and HHL in the period 2015 - 2017, information regarding the deletion of information from the work laptop

⁵ Employment Relations Act 2000, schedule 2, clause 4.

⁶ *Alkazaz v Enterprise IT Ltd* [202] NZEmpC 171 at [5] – [9].

⁷ Lodged 21 December 2022.

provided in HHL’s disciplinary investigation, a police case summary report dated 1 June 2022 regarding a complaint Ms Watkins reported on 13 October 2017, information including witness statements filed in respect of the 30 November 2022 determination for which reopening is sought, documents filed in respect of proceedings between the parties in other jurisdictions and email correspondence between the Authority and the parties.

[9] On 1 January 2023 Ms Watkins lodged a document titled “Reopening of investigation Watkins v Highmark Homes Ltd” in support of the reopening application the subject of this determination.

[10] On 6 March 2023 Ms Watkins lodged the police response to a privacy information request she had made dated 3 March 2023. The police response is a case summary report dated 6 March 2023, with some redactions and records complaints by the parties made about each other. There does not appear to be any ongoing police investigation into any of the complaints.

[11] Ms Watkins accepts most of this information was already before the Authority.

Discussion

(i) information mishandled

[12] Ms Watkins’ is concerned all the information she filed was mishandled. This is a concern she raised during the investigations which have resulted in the determinations for which reopening are sought. In the 30 November 2022 determination and the 1 December 2022 determination these concerns held by Ms Watkins are recorded as is the Authority’s consideration of those concerns.⁸

[13] Ms Watkins attended and participated in the investigation meeting held over two hearing days on 28 and 29 April 2022 which resulted in the 30 November 2022 determination. The investigation meeting included examination of the information filed and Ms Watkins was provided the opportunity to question witnesses regarding that information. Subsequent to the investigation meeting Ms Watkins was invited to file closing submissions including filing reply submissions to those filed on behalf of HHL. Ms Watkins took the opportunity to file such submissions. I am satisfied Ms Watkins

⁸ Refer [4], [5], [14] – [23] determination issued 30 November 2022 and [2], [8] – [12] determination issued 1 December 2022.

has been provided a fair opportunity to put all relevant information, including her comments and submissions on that information before the Authority for consideration.

[14] With regard to the process leading up to the determination issued on 1 December 2022. That determination records the span of time over which information and submissions were received as is the investigation process followed by the Authority. The determination records and considers Ms Watkins' substantive concerns about how that information was handled and assessed by the Authority. Again, Ms Watkins has fully participated in the process and been given and taken the opportunity to put all relevant information and comment before the Authority.

[15] The concerns of mishandling have been fully aired and considered by the Authority.

(ii) *investigation unfair and determinations unreasonable*

[16] Ms Watkins filed information and submissions including in response to information filed by HHL, attended the investigation meeting held on 28 and 29 April 2022 and filed further written information and submissions subsequent to the investigation meeting. The determinations record the time span over which this information was received by the Authority. The particular issue concerning the handling of without prejudice material was expressly addressed in the 30 November 2022 determination.⁹

[17] Ms Watkins has raised a specific concern about reference to an entity name in the determination issued 30 November 2022.¹⁰ This occurred in the context of a quote from the first preliminary determination issued on 13 November 2020.¹¹ The quote is an email from Ms Watkins to HHL in which the entity is referred to.

[18] No order was sought with respect to the identity of that entity at the time the matter was first considered by the Authority or in the first reopening application. Ms Watkins now raises a concern the reference may identify that entity and that may cause unnecessary distress to family members. That concern is not grounds for a reopening and could not be cured by the grant of a reopening because the determinations would remain published.

⁹ Above n 4, at [4] - [5].

¹⁰ Above n 2 at [12].

¹¹ *Nicola Maree Watkins v Highmark Homes Limited* [2020] NZERA 467 at [14].

[19] The non-publication order sought for the identity of the entity may address that concern and is appropriate to be granted. A non-publication order is to apply to the name of the entity identified at [28] of Ms Watkins reopening application lodged 21 December 2022: Employment Relations Act 2000, schedule 2, clause 10. The determinations *Nicola Maree Watkins v Highmark Homes Limited* [2022] NZERA 638 and *Nicola Maree Watkins v Highmark Homes Limited* [2020] NZERA 467 are to be removed from the Authority website.

[20] A concern is also raised that the Authority failed to consider the issues between the parties in the round that is, in the wider context of the employment relationship and the ongoing litigation between the parties including the Disputes Tribunal, District Court and most recently, the High Court.¹² A ground for reopening cannot be established on that ground. The scope of the matters before the Authority for determination, including potential jurisdictional issues was raised with the parties and they were invited to provide submissions on that issue and their attention specifically drawn to *FMV v TZB* [2021] NZSC 102.¹³

(iii) evidence not fairly considered and new evidence

[21] This ground of reopening falls into two categories. The first category is information concerning HHL's accounting system, delays with updating accounts, the IT and backup systems. The information has been continuously in Ms Watkins possession.

[22] Ms Watkins says this evidence shows the damages claim brought by HHL was unfounded because there were IT backup systems, she had been told to delete information from her work laptop and HHL was aware she was having difficulty maintaining the system and there was a backlog of work to do. She does not dispute that she was on notice of the claim HHL brought against her or that she had an opportunity to consider and respond to it and the information provided in support including providing information in support of her position.

[23] The matters raised were canvassed in the determination issued on 30 November 2022.¹⁴ The determination records and has taken into consideration that Ms Watkins was under work pressure and there was a backlog in the accounting work. A

¹² *Highmark Homes Ltd v Nicola Watkins* [2022] NZHC 353 [1 March 2023].

¹³ Above n2 at [13] – [23].

¹⁴ Above n2 [38] – [49].

specific finding was made in relation to the deleted information in the particular circumstances the parties found themselves in at that time.

[24] The second category is information relating to police complaints the parties have made about each other. Ms Watkins has filed information received from the police on 6 March 2023 as a result of a privacy information request made on 3 March 2023. It contains a reference to a police complaint made about her on 15 October 2017. The identity of the complainant and the details of the complaint are redacted. The information also contains a narration of a complaint Ms Watkins made to police on 24 December 2022 which records she found out on 20 June 2022 about the 15 October 2017 complaint.

[25] Ms Watkins says the information privacy request shows HHL complained to police about her conduct in relation to her use of its computer systems on 15 October 2017. She says this is significant because she did not return her laptop until after that date and around 15 October was when she was required to take a period of leave. She says this demonstrates HHL's actions in dismissing her were predetermined.

[26] In compliance with a timetable set by the Authority to progress the investigation of 3085319 on 16 February 2022 Ms Watkins lodged a bundle of documents with the Authority titled "Affidavit of Nicola Maree Watkins 13 February 2022". The bundle contains the following documents relating to police complaints:

- (i) Exhibit K, an email dated 20 December 2021 from the Independent Police Conduct Authority acknowledgement of complaint IPCA Ref: 21-1075 to Ms Watkins date 20 December 2021. The email does not describe the complaint and the complaint itself is not included; and
- (ii) Exhibit O, a series of emails in late January 2022 regarding HHL's agent serving documents on her at that time and referring to a police complaint she made about that action and a police complaint acknowledgement form dated 26 January 2022.

[27] Also on 16 February 2022, Ms Watkins emailed the Authority attaching a letter dated 15 February 2022 from the IPCA. The letter advised a complaint she had made about accessing of her records would not be taken further and acknowledged her concern about a complaint Mr Hunt had made to police about her. The acknowledgement of concern extended to Ms Watkins being unaware of the complaint because police had taken the complaint no further having decided it was a civil and not

a criminal matter. Ms Watkins' submission to the Authority on this matter, as set out in her email 16 February 2022, locates these events before the District Court on 14 July 2021 and information HHL had taken in account in dismissing her on 17 November 2017. This information was before the Authority and Ms Watkins had a fair opportunity to advance that information before the Authority. Grounds for reopening are not made out in relation to this information.

[28] Is a miscarriage of justice likely if the matters are not reopened to allow information about the 15 October 2017 police complaint to be considered by the Authority? It appears Ms Watkins had this information in her possession from at least 20 June 2022.¹⁵ She did not put it before the Authority for consideration before the determinations which she seeks reopened were issued and has not provided a reason why she did not provide the information so it could be considered. Even if it could be said Ms Watkins did not have a fair opportunity to provide the information the best she could hope for would be a further opportunity to argue it amounted to an exceptional circumstance to raise a claim of unjustified dismissal out of time. In such a setting it is unlikely evidence that HHL may have predetermined Ms Watkins' dismissal would amount to grounds to bring leave to raise a personal grievance for unjustified dismissal out of time because that inquiry does not involve an assessment of the merits of the substantive claim. The risk of a miscarriage of justice in not reopening the matters has not been established.

[29] Weighing all the relevant factors, including desirability for certainty of litigation, the reopening application is declined.

Outcome

[30] It is clear to the Authority Ms Watkins is dissatisfied with the process and the outcome of the determinations which she seeks to reopen. It is acknowledged and accepted that she has put considerable time and resources into these proceedings and that it has taken a toll. The concerns Ms Watkins has raised have been considered and the grounds to reopen the subject determinations have been found not to be made out because any actual or substantial risk of a miscarriage of justice has not been established.

¹⁵ Page 5 of 6 Police case summary report 6/03/23.

[31] The proceedings, at least at the Authority stage are now finalised. Ms Watkins' application to reopen the determinations is declined.

Costs

[32] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves which may include the outstanding costs for the matters for which reopening have been sought.

[33] If they are not able to do so and an Authority determination on costs is needed Highmark Homes Limited 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 Ms Watkins would 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.

[34] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. 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.¹⁶

Marija Urlich
Member of the Employment Relations Authority

¹⁶ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.