

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 171  
EMPC 397/2019**

IN THE MATTER OF      a challenge to a determination of the  
Employment Relations Authority

BETWEEN                AHMED ALKAZAZ  
Plaintiff

AND                      ENTERPRISE IT LIMITED  
Defendant

Hearing:                8–9 September 2020  
(Heard at Auckland)

Appearances:          Plaintiff in person  
R Bryant, counsel for defendant

Judgment:              22 October 2020

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**JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS**

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[1] Mr AlKazaz was employed by Enterprise IT Ltd for around 90 days. The company terminated his employment, erroneously relying on a trial period provision in his employment agreement. Mr AlKazaz pursued a successful claim of unjustified dismissal.<sup>1</sup> The Employment Relations Authority awarded him lost remuneration totalling \$28,749.99 and \$15,000 by way of compensation for humiliation, loss of dignity and injury to feelings. The Authority also ordered the company to pay a penalty of \$1,500 for breach of an employment agreement (\$1,000 of which was to be paid to Mr AlKazaz). The amounts ordered in Mr AlKazaz's favour were reduced by 20 per cent for contribution (the company had argued that no remedies should be awarded having regard to contributory conduct).

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<sup>1</sup> *AlKazaz v Enterprise IT Ltd* [2017] NZERA Auckland 400 (Member Craig).

[2] Neither party pursued a challenge to the Authority's substantive determination. Over a year later Mr AlKazaz sought an order that the Authority's investigation be reopened. The Authority declined the application.<sup>2</sup> Mr AlKazaz has challenged the reopening determination on a de novo basis. That means that the Court must make a fresh decision on the application. The challenge is opposed by the company.

[3] The focus of Mr AlKazaz's concern, which he wishes to address via a fresh investigation in the Authority, centres on the findings as to contribution. It is convenient to set them out at this point because they help put the grounds of challenge into context. The Authority Member noted that she was obliged under s 124 of the Employment Relations Act 2000 (the Act) to consider the extent to which Mr AlKazaz's actions contributed to the situation that gave rise to the personal grievance; that the actions must be both causative of the outcome and blameworthy to be taken into account in reducing remedies; and that the conduct must have been known to the employer at the time the dismissal occurred.<sup>3</sup> She went on to say:

[66] Mr AlKazaz had not worked in a support role for some years. His recent experience was predominantly in training. I do accept that he seemed unable to perform at the level which [the company] expected from a senior DBA within the 90 day period which [the company] gave him. In addition, he appears to have acted as someone who does not readily accept that he has erred or has deficits. I am satisfied that a reduction should be made regarding Mr AlKazaz's performance and unwillingness to recognise inadequacies in that. I assess that a 20% reduction is appropriate. That means that the awards are \$22,999.99 as lost remuneration and \$12,000 as compensation for non-pecuniary loss.

[4] There are two (related) limbs which Mr AlKazaz says support the application to reopen. First, that false evidence was given by company witnesses in the Authority's substantive investigation; if it had not been given the Authority would likely not have made reference to performance deficits and an unwillingness to recognise inadequacies; and would not have made a reduction for contributory conduct. Second, that documentation has come to light since the Authority's substantive investigation which, had Mr AlKazaz had it at the time, would have made a material difference to the outcome. Threaded through these two limbs is a concern

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<sup>2</sup> *AlKazaz v Enterprise IT Ltd* [2019] NZERA 560 (Member Craig).

<sup>3</sup> *AlKazaz v Enterprise IT Ltd*, above n 1, at [64].

about the quality of the legal advice and assistance he says he received during the Authority's investigation.

### **The framework for analysis**

[5] There is a public interest in the finality of litigation. That broad interest may be overcome in appropriate circumstances, but the circumstances are limited. The desirability of dealing with issues at an early stage and resolving matters is reflected in a number of provisions in the Act. So, for example, an employee is required to raise a personal grievance with their employer within 90 days (absent exceptional circumstances);<sup>4</sup> the Authority is designed to investigate matters and give prompt determinations;<sup>5</sup> and a party who is dissatisfied with a determination of the Authority has 28 days to file a challenge (absent exceptional circumstances).<sup>6</sup>

[6] The Act also makes it clear that there are a number of routes by which a party can seek the Authority/Court's intervention to remedy perceived deficiencies. These routes have been carefully constructed and do not provide options that can be selected from at will. Rather the ability to pursue a challenge, appeal, judicial review and a re-hearing are largely engaged at different times and in differing circumstances. It is, for example, unusual for the Authority to grant an application to reopen in circumstances where a challenge under s 179 could have been pursued;<sup>7</sup> and challenge rights need to be exercised before an application for judicial review can be advanced.

[7] Because the matter now before the Court is a challenge to a determination declining an application to reopen an investigation in the Authority, the starting point is cl 4, sch 2 of the Act. It provides that:

#### **4 Reopening of investigation**

- (1) 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.

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<sup>4</sup> Employment Relations Act 2000, s 114(1).

<sup>5</sup> Section 157.

<sup>6</sup> Section 179(2).

<sup>7</sup> See, for example, *Yong, (T/A Yong and Co Chartered Accountants) v Chin* [2008] ERNZ 1 (EmpC) at [25]; *Katz v Mana Coach Services Ltd* [2011] NZEmpC 92 at [6].

[8] While the Authority has a broad discretion to order an investigation to be reopened, including as to its terms, the discretion must be exercised within the four corners of the Act and consistently with principle. The applicable principles have recently been gathered together by Judge Holden in *Randle v The Warehouse Ltd*.<sup>8</sup> As she observed, the overarching concern is to avoid a miscarriage of justice. The jurisdiction is not to be exercised for the purposes of re-agitating arguments already considered or so as to provide a backdoor method by which unsuccessful litigants can seek to re-argue their case. Some special or unusual circumstance must be found to exist to justify reopening. This may include where fresh or new evidence has been discovered that is material to the outcome of the case and that could not have been given at the hearing.

[9] The mere possibility of a miscarriage of justice will not suffice.<sup>9</sup> 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. The power to grant a reopening of the Authority’s investigation is not directed at allowing parties free reign to reformulate their claim, improve their arguments or otherwise have a second bite at the litigation cherry.

## **Discussion**

### *Alleged false evidence*

[10] As I have said, there are two interrelated threads to Mr AlKazaz’s argument that the Authority’s substantive investigation ought to be reopened. The first relates to alleged false evidence given by witnesses for the company in the Authority. That evidence centred on performance concerns, later referred to by the Authority in reducing remedies by 20 per cent for contribution. A reopening of the investigation is said to be necessary to enable the truth to come out, presumably via cross-examination. The truth, I infer, would be that the company did not have legitimate performance concerns about Mr AlKazaz; that he was performing well throughout his time with the

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<sup>8</sup> *Randle v The Warehouse Ltd* [2019] NZEmpC 68 at [13]–[18].

<sup>9</sup> *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 (CA), at 88.

company; and that he did accept constructive criticism, contrary to the Authority Member's findings.

[11] A reopening of an Authority investigation may be appropriate where there are concerns about the quality of the evidence that was before the original decision-maker, but a concern which is speculative will not suffice. The reality is that in this case there could have been no confusion about the case the company was intending to advance in the Authority. If there was any doubt, it would have been made crystal clear when the company claimed that Mr AlKazaz had misrepresented his abilities and suitability for the role when he applied for it, that it believed that Mr AlKazaz was not competent to carry out the role he had been employed to do and that he did not accept feedback. In addition, comprehensive witness statements were filed in advance of the Authority's investigation meeting, each of which was directed at these matters.

[12] Each of the company's witnesses could have been cross-examined on their evidence, including the basis for it. It may be that Mr AlKazaz, or his lawyer, did not anticipate some of the responses that came out of cross-examination, but that is not an uncommon occurrence in litigation. It would create an intolerable burden on the courts and the successful litigant if a party could seek a reopening simply because they wish that, with the benefit of hindsight, they had asked further questions, put additional documents to a witness or pursued a different line of inquiry.<sup>10</sup> Additional difficulties would likely have arisen in any event, in light of the contemporaneous documentation which tends to support concerns within the company about Mr AlKazaz's ability to undertake aspects of the role he had been engaged to do. This documentation does not weigh in favour of a conclusion that something has misfired which would warrant reopening of the investigation.

[13] Mr AlKazaz says that new documentation has come to light which would have made a difference in terms of his ability to test the company's evidence. While a reopening may be appropriate in circumstances where there is a concern that a witness has lied, the usual conditions for the introduction of fresh evidence apply, a point I turn to next.

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<sup>10</sup> *Marx v Southern Cross Campus Board of Trustees* [2017] NZEmpC 4, [2017] ERNZ 1 at [31].

*Fresh evidence?*

[14] The emergence of fresh evidence is a well-established ground for granting a reopening. Generally three qualifying criteria apply:<sup>11</sup>

- (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- (b) the evidence must be such that, if given, it would likely have an important influence on the result of the case, though it need not be decisive;
- (c) the evidence must be apparently credible, though it need not be incontrovertible.

[15] There was a distinct lack of clarity at the hearing as to what documentation had and had not been before the Authority prior to its substantive determination. The company submitted that much of the material contained within the bundles of documents had been before the Authority and was accordingly not fresh. The problem was that there was no evidence that this was so, and the company's witness who gave evidence at the hearing had not attended the investigation meeting and was unable to say what documentation had been available in that forum. Mr AlKazaz was adamant that less documentation had been filed in the Authority but was unable to cast any real light on what it might have been. I was informed from the bar that there had been difficulties obtaining a comprehensive set of documents from the Authority for the hearing in this Court. All of this is, of course, compounded by the fact that the Authority, as a matter of procedure, does not record the evidence given at investigation meetings and, as a matter of law, need not set out a record of all or any of the evidence heard or received.<sup>12</sup>

[16] The company is on stronger ground in its argument that the bulk of the material which Mr AlKazaz referred to in support of the challenge was available at the time of

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<sup>11</sup> *Ladd v Marshall* [1954] 1 WLR 1489 (EWCA) at 1491; *Dragicevich v Martinovich* [1969] NZLR 306 (CA) at 308–309; *Lewis v Greene* [2005] ERNZ 142 (EmpC) at [6].

<sup>12</sup> See Employment Relations Act 2000, s 174E(b).

the substantive investigation meeting and, although he and/or his lawyer may not have had it, could have been sourced with reasonable diligence.

[17] It is accepted that one of the documents (an email trail between Mr AlKazaz and the company between May and June 2018) was not before the Authority. It post-dates the Authority's investigation meeting. The email train reflects Mr AlKazaz's concerns about the way in which the company was dealing with requests for personal information and concludes with a comment that Mr AlKazaz would be approaching Air New Zealand (one of the defendant's major clients, who Mr AlKazaz did work with) for documentation. Air New Zealand responded to the request, providing a number of documents. Mr AlKazaz considers that this documentation undermines the performance concerns raised by the company, shows that the company was deliberately misleading him about the purpose of regular meetings it held with him, and reflects the fact that fabricated evidence was given about various matters in the Authority.

[18] I understood Mr AlKazaz's overarching point to be that these documents would make a difference if the Authority's investigation is reopened because they reflect the successful completion of a number of tasks and expose the company's improper purposes in the way in which it dealt with him and the lies that were given in evidence at the Authority. I further understood the email trail was said to be relevant because it reflects the steps Mr AlKazaz was taking to obtain information from the company, the difficulties he was confronting in this regard, and that he ultimately sourced the information from Air New Zealand.

[19] While the email trail occurred after the Authority's investigation meeting there was nothing preventing a request for information being made to Air New Zealand at an earlier date. Mr AlKazaz says he was unaware of the potential avenues for seeking information to advance his proceedings in the Authority, including that he did not know that he could make a request for information under the Privacy Act 1993 or summons witnesses. He was, however, represented by an experienced lawyer. I do not accept that this documentation could not have been obtained with reasonable diligence in advance of the Authority's investigation, and given that Mr AlKazaz was on notice of the case the company was proposing to advance.

[20] Even if I had found that the documentation which Mr AlKazaz now wishes to put before the Authority could not have been obtained with reasonable diligence, that would not have led to an order that the investigation be reopened. That is because I do not accept that the documentation would likely have made any material difference to the outcome.

[21] The complaint that Mr AlKazaz wishes to pursue by way of reopening is about the level of contribution arrived at by the Authority in the exercise of its discretion. The documentation which Mr AlKazaz seeks to rely on needs to be relevant to that issue, not the broader issue of the justification for his dismissal. In this regard, and as Mr Speers (the company's National Managing Partner) explained, the Air New Zealand documentation needs to be viewed in context, including against the purpose of the entries, evidence that Mr Speers was well placed to give and which I accept. The evidence reflects a concern within the defendant company about Mr AlKazaz's capacity to do the job and the extent to which he was willing to accept feedback, while acknowledging his enthusiasm. All of this is reflected in the contemporaneous documentation. I do not accept that evidence about a change ticket number which appears (and the company accepts) to have been erroneously attributed to Mr AlKazaz by one of the company's witnesses in the Authority, apparently in support of concerns about his performance, would materially alter the position.

[22] The short point is that it is unlikely that any of the evidence which Mr AlKazaz wishes to refer to would have an important influence on the result of the Authority investigation.

### *The procedural route*

[23] It is well accepted that the Court will be slow to exercise its general power to order a reopening of an investigation where a complaint is susceptible to challenge and/or judicial review.<sup>13</sup> That reflects the underlying purposes of each remedial route. Mr AlKazaz was unhappy with the Authority's findings as to contribution from the outset, believing them not to be well founded. He says that he expected the company to challenge the Authority's determination and was waiting for that to happen. That

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<sup>13</sup> See *Yong, (T/A Yong and Co Chartered Accountants) v Chin*, above n 7, at [25].



does not provide an adequate explanation for not pursuing a challenge against the contribution findings within the statutory timeframe for doing so.

[24] Mr AlKazaz also says, and I accept, that he was going through a difficult time and was dealing with a number of issues. It is not uncommon that reasons such as these are relied on to support an application for leave to extend the time to file a challenge based on exceptional circumstances. This route was not taken either – again Mr AlKazaz says he was unaware that this was an option. I pause to note that there is publicly available information on both the Authority’s and Court’s websites in relation to the options available in such circumstances.

[25] The fact that Mr AlKazaz could have, but did not, seek at any stage to challenge the Authority’s determination as to contribution does not assist his current challenge.

## **Conclusion**

[26] I am not satisfied that there has been an actual miscarriage of justice or that a real or substantial possibility or risk of a miscarriage of justice has been made out. Nor do I consider that granting the application would be consistent with the interests of justice. The challenge is accordingly dismissed.

## **Costs**

[27] Mr AlKazaz applied for, and was granted, leave to amend his statement of claim to incorporate a challenge to the Authority’s costs determination.<sup>14</sup> I directed that this part of the challenge would be dealt with after the substantive judgment had been given. Directions will be issued in respect of the costs challenge. In the meantime, it is convenient for costs on the substantive part of the challenge to be reserved.

Christina Inglis  
Chief Judge

Judgment signed at 8 am on 22 October 2020

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<sup>14</sup> *AlKazaz v Enterprise IT Ltd* [2020] NZERA 332 (Member Craig).