**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**[2011] NZEmpC 117**
**WRC 32/10**

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| IN THE MATTER OF | an application for rehearing |
| BETWEEN | ADVKIT PARA LEGAL SERVICES LTD<br>Plaintiff |
| AND | JACQUELINE WENDY WESTON<br>Defendant |

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| Hearing: | By submissions filed by the plaintiff on 20 May, by the defendant on 8 June and in reply by the plaintiff on 14 June 2011<br>(Heard at Wellington) |
| Counsel: | Jervis Cleary, counsel for plaintiff<br>John Gwilliam, counsel for defendant |
| Judgment: | 26 September 2011 |

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**JUDGMENT OF JUDGE B S TRAVIS**

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[1] Advkit Para Legal Services Ltd (Advkit) has applied for a rehearing of the proceedings which resulted in my substantive judgment of 26 October 2010.[1] In those proceedings Mrs Weston had challenged a determination of the Employment Relations Authority which found that her resignation from her employment with Advkit was not a constructive dismissal and that she did not have a personal grievance.

[2] I found, to the contrary, that her resignation was inevitable and her resignation therefore amounted to a constructive dismissal. I awarded her the equivalent of three months ordinary time remuneration less 10 per cent contribution and $6,750 being $7,500 for distress, humiliation and injury to feelings, less 10 per cent contribution.

[1] [2010] NZEmpC 140.

[3] Advkit's grounds for applying for a rehearing were that Mrs Weston gave false evidence about her psychological status as a result of Advkit's treatment of her and about her inability to obtain any gainful employment as a result. It is said that both affected the Court's awards in her favour. It is also contended that had the Court known of the false evidence, her credibility as to her account concerning the end of her employment might have been affected and prevented the Court from finding in her favour.

[4] The application was accompanied by affidavits verifying the grounds from Mr Dixon-McIver, the managing director of Advkit, and his wife, Mrs Dixon-McIver. The affidavits refer to enquiries Mr Dixon-McIver made of people in Upper Hutt about Mrs Weston subsequent to her employment by Advkit. They annex statements allegedly made by two potential witnesses and refer to advertisements from Upper Hutt's local newspaper allegedly showing regular advertisements from Mrs Weston offering "quilling" classes since early 2009. Copies of the advertisements were not annexed to the affidavits. Both affidavits refer to information allegedly given to them by a manager at the Upper Hutt Women's Centre (the Centre).

[5] The application was opposed on the grounds that Mrs Weston had not given false evidence and any material relied upon by Advkit was not fresh and could easily have been produced at the hearing.

[6] On 8 March 2011 timetabling directions were given and it was agreed that the matter would proceed on the basis of an exchange of written submissions. I directed that the question of costs on the substantive judgment be put on hold until the application for rehearing had been disposed of.

[7] Further affidavits were then filed on behalf of Advkit. The first in time, was from Kay Henry of Upper Hutt, retailer, who was the proprietor of "Something Crafty" a craft shop in Upper Hutt where she also holds craft classes. Ms Henry deposed as follows. Mrs Weston was one of her customers and had attended Ms Henry's classes on 8 and 29 November and 5 December 2008 on card making and "quilling". The craft requires repetitive hand work and artistic imagination as well

as concentration and dexterity as the aim is to produce something quite different from mass produced classes. Mrs Henry had ample opportunity to observe Mrs Weston who struck Mrs Henry as a confident person who was able to concentrate on the task involved and to use her imagination well and there was no suggestion that Mrs Weston had any pain or disability limiting her from doing the work. Mrs Weston offered to undertake the teaching of the skills as part of Mrs Henry's business but, as Mrs Henry had no opening available, she suggested that Mrs Weston enquire at the Centre as she knew various courses were run there. She understood Mrs Weston to have taken up the suggestion and to have run courses there and elsewhere. She has seen Mrs Weston occasionally in the past two years and deposes Mrs Weston is confident in placing herself as a teacher and has not presented as a disturbed or distressed person but quite the opposite.

[8] The second affidavit was from Patricia McDonald who is a retired person and a volunteer at the Upper Hutt Citizen's Advice Bureaux and who attended a demonstration of card quilling in June 2010 at which the demonstrator was a person named "Jackie" and that she also attended quilling card making at "Jackie's" home. The address she gave was the same address as that of Mrs Weston. Ms McDonald deposes that "Jackie" has a very well set up room for teaching and making fancy cards and was very professional and proficient in the way she taught and that she was well accomplished in promoting her art.

[9] In a second affidavit from Mr Dixon-McIver he deposes to have been present when his wife spoke to a Ms Tracy Harker, the manager of the Centre, in November 2010. However, when Ms Harker was approached to provide an affidavit verifying the facts, Ms Harker told Mr Dixon-McIver that she had obtained legal advice not to provide an affidavit on the employment relationship between the Centre and Mrs Weston. Mr Dixon-McIver advised Ms Harker that she could well be required to attend the Court to provide evidence and she responded, "that is fine".

[10] The balance of the affidavit contained Mr Dixon-McIver's speculations on what might have been the employment relationship between Mrs Weston and the Centre.

[11] Mrs Dixon-McIver provided a second affidavit, deposing that she was told certain things by Mrs Pat Owen and in turn advised Mrs Owen that she might be required to attend Court for a personal examination under oath, to which Mrs Owen allegedly responded, "be that as it may".

[12] These affidavits were accompanied by a memorandum from Mr Cleary who advised that two of the deponents that Advkit had intended to have swear affidavits had refused to do so "out of sympathy with" Mrs Weston. Mr Cleary submitted that the obvious action was to seek an order that the persons involved swear as required but expressed the view that this would be both oppressive of the deponents and also expensive. He submitted that rather than have contested affidavits, the statements of fact made on behalf of Advkit should be accepted as true and the Court should then decide whether or not they were sufficient to sustain the application for rehearing.

[13] Mr Gwilliam responded that the only new evidence that Advkit had put before the Court in support of its application was that contained in the affidavits of Mrs Henry and Ms McDonald and that the Court should not have regard to the unsworn statements of Ms Parker and Mrs Owen, given their reluctance to be involved in the proceedings. He also made submissions about the obligations on an applicant for rehearing and submitted that the Court could initially determine the matter on the basis of affidavit evidence. The question of whether there would be a hearing on the rehearing application could then be dealt with later. He submitted that a rehearing was not warranted.

[14] Mr Gwilliam then filed an affidavit from Mrs Weston in response in which she reiterated that she had been extremely traumatised by the events that led to her leaving her employment with Advkit. She deposed that the one skill that she had and enjoyed was quilling, that is card making, and that she therefore became involved in quilling classes. She deposed that she continued to receive a ACC benefit and the money she received from the quilling classes did not even cover the costs of materials and travel. She complained about the behaviour of Mr Dixon-McIver who had tried to elicit further evidence from her friends and acquaintances and claimed that this amounted to further harassment.

[15] Ms Harker, the co-ordinator of the Centre, provided an affidavit on Ms Weston's behalf in which she deposed as follows. She knew Mrs Weston only as an acquaintance and not as a close friend. Mrs Weston had commenced facilitating card making classes at the Centre in 2009. The amount of money that Mrs Weston had received was little more than the cost of petrol for travel and the materials used by participants during the first class. Mr Dixon-McIver came to the Centre on 18 March 2011 and asked her to sign a prepared affidavit which contained inaccuracies and about which she wanted to seek legal advice. The advice she received was not to sign it. She duly advised Mr and Mrs Dixon-McIver when they returned an hour later that she would not be signing the affidavit. Mr Dixon-McIver's manner then became aggressive and intimidating and he threatened to summons her to Court. He then made a personal attack on her own integrity, morals and ethics, which upset her. She had never met the man before and deposed that he knew nothing about her. She was unaware of Mrs Weston's involvement with Mr Dixon-McIver or of the employment dispute, but knew that Mrs Weston had been very traumatised by the assault and was still affected.

[16] An affidavit from Mrs Owen was also filed in which she deposed as to the following. The amount of money Mrs Weston received for holding classes would not have been sufficient to cover material costs or travel costs. In November 2010 she had an unexpected visit at her home from Mr Dixon-McIver. He told her that he was an advocate for ACC and then proceeded to ask some general questions about Mrs Weston. He then came back with a statement which he asked her to sign. He told her that matters would not be going any further and that he really just wanted to confirm what she had told him the day before. Recently Mr Dixon-McIver showed up with his wife unexpectedly with an affidavit for Mrs Owen to sign. She declined to do so as she had assumed the matters would not go any further after the earlier conversation. There were words in the affidavit which were not her words and which she did not even understand. Quilling, while it involved craft work, did not require the "great dexterity" as Mr Dixon-McIver was suggesting in the affidavit he had prepared for her to sign. The motor skills involved are not all that complicated but it is the use of one's creativity and satisfaction in seeing the end product which appeals to people attending the courses. She was totally unaware of the circumstances surrounding Mrs Weston's employment claim, but was aware that she

had been assaulted as she was very upset at one stage. Mrs Weston never told her the details about that particular assault. Mr Dixon-McIver's behaviour was very controlling and insistent when Mrs Owen declined to swear the affidavit and she was threatened with a summons to Court. On the earlier occasion she had understood that Mr Dixon-McIver was still assisting Mrs Weston with her ACC claim as he proceeded to tell Mrs Owen about all the things he had done for Mrs Weston in relation to her ACC claim. Mrs Owen considered these matters were of a personal nature and were not her business. She had agreed to swear an affidavit for Mrs Weston, not because she was a friend, although they have been friends for some three years, but because Mrs Owen was concerned that the statement she had earlier made may have been placed before the Court as some record of her evidence and could be misleading.

[17] Counsel then proceeded to exchange helpful submissions. There is no issue that the Employment Court has jurisdiction under clause 5 of the Third Schedule to the Employment Relations Act 2000 to order a rehearing "upon such terms as it thinks reasonable". The power to order a rehearing has also been considered by a full Court in *Empress Abalone Ltd v Langdon*.[2] The overriding consideration in a rehearing application is to avoid a real or substantial risk of a miscarriage of justice.[3]

[18] In cases such as *Dragicevich v Martinovich*[4] and *Green v Broadcasting Corporation of New Zealand*,[5] it has been held that Courts have a discretion whether or not to order a new trial where fresh evidence is sought to be introduced and, in exercise of that discretion, they should apply the following tests:[6]

> … first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

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[2] [2001] ERNZ 441.
[3] Ports of *Auckland Ltd v New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 (CA). For a recent application of the test see *Katz v Mana Coach Services Ltd* [2011] NZEmpC 92.
[4] [1969] NZLR 306 (CA).
[5] [1988] 2 NZLR 490 (CA).
[6] *Ladd v Marshall* [1954] 3 All ER 745 at 748 per Lord Denning.

[19] Mr Cleary, who was not counsel at the substantive trial, accepted that the original hearing was extremely exhaustive, covering a wide range of incidents and events. I entirely agree. Mr Cleary then contended that because of the extent of that material, reasonable diligence would not necessarily have led Advkit to have anticipated the need to call the additional evidence it now was claiming was available to it.

[20] I do not accept that submission insofar as it relates to the evidence of earnings after the termination of the employment with Advkit.

[21] Much of the material in Mrs Dixon-McIver's first affidavit appears to have been in relation to what I considered in the substantive hearing to be a minor ancillary matter raised on behalf of Advkit as a peripheral attack on Mrs Weston's credibility as to whether she was in Upper Hutt at a certain point in time. I did not find that attempt on behalf of Advkit to be successful noting in paragraph [19] of my substantive judgment that it was not of assistance either way in resolving an accurate conflict of evidence as to whether Mr Dixon-McIver had said to Mrs Weston that if his son had not assaulted her, he would have. I am not persuaded that the material Advkit now seeks to put before the Court in support of its application for a rehearing takes that matter any further.

[22] What I found to support Mrs Weston's evidence that Mr Dixon-McIver's actions constituted a serious breach of the employer's duty to provide a safe workplace and not to be abusive, which made her resignation reasonably foreseeable, two days after a serious assault on her by Mr Dixon-McIver's son, was the disarmingly frank entry in Mrs Dixon-McIver's diary the night of the incident. Nothing in the material filed in support of the rehearing application deals with that critical matter which was at the heart of the finding of constructive dismissal.[7]

[23] As to the evidence of the classes held by Mrs Weston, Mr Cleary contends that this undermines her evidence at trial as to her inability to obtain gainful employment as a result of the assault she suffered during the course of her employment with Advkit. Mr Gwilliam submitted that the material filed by Advkit

[7] See [20] of the substantive judgment.

is largely of a hearsay nature. I agree. He submitted that it went no further than showing from time to time after her dismissal the plaintiff undertook quilling classes for which she was reimbursed essentially for expenses only. These courses did not start until late January or early February, 2009 and the other courses did not begin until July 2009 at the Centre. Mr Gwilliam submitted that the evidence of Mrs Owen and Ms Harker was consistent with the evidence given at trial by Mrs Weston who had given evidence of her attempts to obtain part time work. That is correct.

[24] I accept Mr Gwilliam's submission that because the quilling classes did not start until after three months post the dismissal and the award was only three months lost remuneration, the further evidence sought to be adduced did not undermine my earlier finding and indeed supported it.

[25] I also have some considerable reservations as to whether Advkit has satisfied the first requirement in establishing that the evidence it now seeks to lead could not have been found by the exercise of reasonable diligence before both the Employment Relations Authority investigation and the substantive challenge.

[26] As Mr Cleary acknowledged in his submissions, there is a strong public interest that litigation be brought to an end unless an injustice would otherwise result. I am not persuaded that any injustice would result to Advkit if a rehearing was not granted. The application for rehearing is therefore dismissed.

[27] Mrs Weston is entitled to costs which may be addressed, if they cannot be agreed, by an exchange of memoranda, the first of which is to be filed and served within 30 days of this judgment with 30 days to reply.

B S Travis
Judge

Judgment signed at 1pm on 26 September 2011