IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 68
EMPC 278/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KIM RANDLE Plaintiff
AND	THE WAREHOUSE LIMITED Defendant

Hearing: 15 April 2019
(Heard at Auckland)

Appearances: G Bennett, advocate for plaintiff
P Swarbrick and M Bowan, counsel for defendant

Judgment: 30 May 2019

JUDGMENT OF JUDGE J C HOLDEN

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[1] The plaintiff, Ms Randle, was dismissed by the defendant, The Warehouse Ltd (The Warehouse) for serious misconduct. She brought a claim for unjustifiable dismissal in the Employment Relations Authority (the Authority) but was unsuccessful.[1]

[2] She has not challenged the Authority's substantive determination. However, more than three months after that determination was issued, Ms Randle applied to the Authority to have the investigation reopened. The Authority declined to do so.[2]

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1 *Randle v The Warehouse Ltd* [2017] NZERA Wellington 108 (substantive determination).
2 *Randle v The Warehouse Ltd* [2018] NZERA Wellington 70 (reopening determination).

[3] Ms Randle challenges the reopening determination. This judgment resolves her challenge.

Ms Randle claims important new evidence

[4] The Warehouse received a complaint from a staff member alleging Ms Randle had sexually harassed her. The allegation was that Ms Randle had grabbed the complainant's breasts on two occasions in a hotel room during the course of a conference for regional staff. [3]

[5] In its investigation into Ms Randle's alleged sexual harassment, The Warehouse interviewed several people who it understood were in the hotel room, including Ms Randle and the complainant. Notes of interviews were prepared by the investigators and copies given to Ms Randle and her representative.

[6] In the Authority, The Warehouse investigators gave evidence of The Warehouse's internal investigation. Apart from Ms Randle, none of the people who were in the hotel room gave evidence.

[7] Two people who say they were in the hotel room at the relevant time have now provided affidavits in support of Ms Randle's application to reopen the Authority's investigation. Ms Randle claims the affidavits contain new and important evidence.

[8] The two people are a married couple. The wife was a colleague of Ms Randle and was interviewed by The Warehouse investigators during their investigation. The husband, who was not employed by The Warehouse, was not interviewed.

[9] The two witnesses say they came forward after they saw an article in the New Zealand Herald that they felt misconstrued some of the facts.

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[3] The background and circumstances of the incident are more fully set out in the Authority's substantive determination.

[10] The witnesses' evidence is principally in relation to three matters:

(a) whether The Warehouse's record of its interview with the colleague is accurate;

(b) whether two other people who were interviewed by The Warehouse investigators were present when the alleged sexual harassment occurred; and

(c) what Ms Randle did and whether her actions towards the complainant were deliberate.

The positions of the parties

[11] The grounds on which Ms Randle says the Authority's investigation should be reopened are that Ms Randle:

(a) could not have obtained the additional evidence for the Authority's investigation; and

(b) believes there is a serious risk of miscarriage of justice if the investigation is not reopened.

[12] The Warehouse opposes the application on the following grounds:

(a) Ms Randle has not shown (and it is denied) that the evidence now sought to be adduced could not have been obtained with reasonable diligence for use at the Authority's investigation meeting.

(b) The evidence now sought to be adduced is, because of the effluxion of time, not as reliable as the evidence adduced by The Warehouse in its internal investigation, or that given in the Authority, but, even if it is correct, would make no difference to the result of the case, because:

(i) it does not dispute the fundamental issue of whether the conduct at the heart of the dismissal occurred, and in fact corroborates that it did occur; and

(ii) it does not show that witnesses relied on by The Warehouse to the conduct (including the complainant and including Ms Randle's admission of the conduct) were not in fact in the room at the time of the incident.

(c) There is accordingly no risk of an actual or potential miscarriage of justice.

(d) Ms Randle failed to pursue a challenge to the Employment Court in relation to the Authority's substantive determination.

(e) Ms Randle then unreasonably and without explanation delayed the application to reopen the Authority's investigation.

(f) This proceeding is an attempt to overcome the failure to lodge a de novo challenge to the Authority's substantive determination within the requisite timeframe.

(g) The Warehouse should be entitled to regard the litigation as final.

(h) It is not in the interests of justice for the Court to exercise its discretion and order that the Authority's investigation be reopened.

The Authority may order an investigation to be reopened

[13] The Authority may order an investigation to be reopened upon such terms as it thinks reasonable.[4] There is no timeframe within which an application to reopen an investigation must be made, and the Authority's discretion is broad. Nevertheless, it must be exercised according to principle.

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4 Employment Relations Act 2000, sch 2 cl 4(a).

[14] Although this is an application to reopen the investigation, rather than to rehear the matter in the Authority, the principles developed by the Courts in relation to applications for rehearing can be applied by analogy.[5]

[15] The overarching principle that applies to applications for a rehearing is that they will be granted where a rehearing is necessary to avoid a miscarriage of justice.[6] This may be because material evidence has been discovered since the trial that could not reasonably have been foreseen or known before the trial. This is the ground upon which Ms Randle relies – that there has been material evidence discovered since the Authority's investigation that could not reasonably have been foreseen or known before the investigation meeting.

[16] Both parties accept that, to succeed in her argument, Ms Randle must show:[7]

(a) the evidence could not have been obtained with reasonable diligence for use at the Authority's investigation meeting;

(b) the evidence is such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

(c) the evidence is apparently credible although it need not be incontrovertible.

[17] In more recent cases, the Employment Court has described the principles for exercising its discretionary power to order a rehearing:[8]

(a) The jurisdiction is not to be exercised for the purposes of re-agitating arguments already considered or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case.

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5 *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].

6 *Cavalier Carpets NZ Ltd v NZ (except Taranaki etc) Woollen Mills etc IUOW* [1989] 2 NZILR 378 at 381 (LC).

7 *Squire v Waitaki New Zealand Refrigerating Ltd* [1985] ACJ 839 at 842; *Cherrington v Auckland Farmers Freezing Co-op Ltd* [1988] NZILR 1032 at 1032-1033.

8 *Davis v Commissioner of Police* [2015] NZEmpC 38, [2015] ERNZ 27 at [12]-[14]; *Idea Services Ltd v Barker* [2013] NZEmpC 24 at [36]-[37]; *P v A* [2018] NZEmpC 42 at [8].

(b) Some special or unusual circumstance 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 at least a substantial risk of a miscarriage of justice, if the determination were allowed to stand.

(d) Where a party is dissatisfied by an Authority determination on grounds that may be the subject of the specific statutory process 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 those grounds.[9]

[18] Another factor in the balance is certainty in litigation, so successful litigants get their normal rights to enjoy the fruits of judgments in their favour. As accepted by Ms Randle, the public interest requires that there be an end to litigation.[10]

Evidence could have been obtained for the Authority's investigation

[19] Ms Randle claims that she did not seek to speak to her colleague during the course of The Warehouse's internal investigation because she believed The Warehouse would act in good faith. Her representative put it that Ms Randle believed that The Warehouse would follow a proper and thorough process and that it would not do anything that would mislead her, such as falsifying a witness's statement.

[20] She also says that she did not speak to any of The Warehouse staff because she was told not to by The Warehouse investigators.

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9 *Yong, (t/a Yong and Co Chartered Accountants) v Chin* [2008] ERNZ 1 (EmpC) at [25].

10 *New Zealand Waterfront Workers Union v Ports of Auckland Ltd* [1994] 1 ERNZ 604 (EmpC) at 607; *Young v Board of Trustees of Aorere Colleg*e, above n 5, at [9]; *Green v Broadcasting Corporation of New Zealand* [1988] 2 NZLR 490 (CA) at 505 per Casey J.

[21] The evidence of The Warehouse was that there was no instruction given that people could not speak with Ms Randle. The former Regional Human Resources Business Partner for The Warehouse, who investigated the complaint against Ms Randle, gave evidence before the Authority and by affidavit in Court. She said that there was one point where she was contacted by employees who were concerned about Ms Randle's representative attempting to talk with them. She says she explained to those employees that they were under no obligation to talk to Ms Randle or her representative if approached, but, if they wished to do so, they could.

[22] That evidence was not challenged in the Authority, and neither of the witnesses who have now sworn affidavits in support of Ms Randle's application said they felt unable to speak to Ms Randle or her representative. Ms Randle's colleague continues to be employed by The Warehouse.

[23] In any event, the real issue is whether the witnesses' evidence could have been obtained for the Authority's investigation. In that context, in the course of a case management conference held by the Authority on 1 March 2017, well before the Authority's investigation meeting, Ms Randle's representative was explicitly advised that she could have relevant witnesses summonsed. She did not avail herself of that opportunity.

[24] Accordingly, regardless of what Ms Randle and her representative may have thought during the course of The Warehouse's investigation, it is clear that they could have had Ms Randle's colleague, and her husband, called as witnesses before the Authority. She could have, with reasonable diligence, obtained their evidence.

[25] This means that Ms Randle's challenge fails. Nevertheless, I also address the possibility of a miscarriage of justice and the other relevant considerations.

The proposed evidence would not have had an important influence on the case

[26] Ms Randle's colleague says she did not see two people who were recorded as being present. The colleague's husband says he did not recall one of those two people being in the room, but he accepts that she may have been there. He states categorically

that the other person was not in the room, but bases that on his recollection that he left her in her own room.

[27] Ms Randle had copies of the record of The Warehouse's interviews with these two people and never previously suggested that they were not present. Both people said they were present when they were interviewed by The Warehouse's investigators, and described what they say occurred. The complainant also refers to them being there.

[28] The fact that the colleague does not recall those two people being there is not compelling in the face of the other evidence that they were present. The husband's evidence about the second person also is unlikely to be influential, when seen against the other evidence The Warehouse investigators and the Authority had that she was present when the incident occurred.

[29] Importantly, on the key issue, both Ms Randle's colleague and the colleague's husband say Ms Randle touched the complainant's breasts. This evidence corroborates other evidence that this happened.

[30] They then say that they do not believe Ms Randle's actions were deliberate. That evidence, being opinion, would be of very limited weight.

[31] Overall, the additional evidence would not have had an important influence on the case.

The evidence is weak

[32] Although Ms Randle's colleague now says the record of her interviews with The Warehouse investigators is inaccurate, she also says in her affidavit that she is "a little blurry on all the details of the night, and especially given the time lapse". This detracts from the credibility of her affidavit evidence. The Warehouse's record of what she said to the investigators shortly after the incident would carry greater weight than her evidence now.

[33] The husband did not previously give a statement, but other people did. It is likely that, where there is a conflict between his evidence and their statements, their statements, given shortly after the events of the night in question, would be preferred.

[34] Overall the affidavit evidence is weak in comparison to the other evidence that was before the Authority.

[35] The risk that there has been a miscarriage of justice is very small.

Other factors count against Ms Randle

[36] The New Zealand Herald article was published on 9 November 2017, and the deadline by which Ms Randle could have challenged the substantive determination as of right was 27 November 2017. If Ms Randle had brought a de novo challenge, she could have called her colleague and her colleague's husband as witnesses in the Court. There is no explanation for why a challenge was not filed before 27 November 2017. Nor is there a good explanation as to why it took until 7 February 2018 for the application to reopen the substantive determination to be lodged with the Authority.

[37] The Warehouse ought to have been able to be satisfied that, with no challenge filed, the matter was at an end.

[38] I am also conscious that if the investigation was to be reopened, other people, including the complainant and the two people who it is now alleged were not present in the room, would need to be called as witnesses.

[39] These matters also go to the Court's discretion and would weigh against any order reopening the Authority's investigation.

[40] Even if Ms Randle had been able to show that she could not have, with reasonable diligence, obtained the witnesses' evidence, the challenge to the reopening determination would have failed.

The Warehouse is entitled to costs

[41] The Warehouse seeks costs against Ms Randle on a Category 2A basis. That is appropriate and should now be able to be agreed between the parties. If that is not possible, The Warehouse may apply for costs within 20 working days of the date of this judgment. Ms Randle then is to file and serve any response within 15 working days with The Warehouse having five working days thereafter to reply.

J C Holden
Judge

Judgment signed at 11.30 am on 30 May 2019