

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 37/06  
ARC 111/05**

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

AND IN THE MATTER    of an application to declare a witness  
   hostile

BETWEEN                 ALISON MARY SCHNELLER  
   Plaintiff

AND                         RANWORTH HEALTHCARE LTD  
   Defendant

Hearing:                 Auckland  
   6 and 7 July 2006

Appearances: Paul Wicks, Counsel for Plaintiff  
   Tony Drake and Mark Donovan, Counsel for Defendant

Judgment:               7 July 2006

Reasons:                11 July 2006

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**Reasons for Ruling of Chief Judge GL Colgan  
Declaring a Witness Hostile**

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[1] These are my reasons for what is, in both civil litigation generally and in this Court in particular, a rare ruling that a witness was hostile and permitting cross-examination of that witness by counsel leading her evidence.

[2] Alison Schneller is challenging, by hearing de novo, the determination of the Employment Relations Authority that her employment with Ranworth Healthcare Limited (Ranworth) ended upon the expiry of a lawful fixed term employment agreement and not by dismissal challengeable by personal grievance. A fundamental question in the case is whether the employment relationship between the parties was

governed by a lawful fixed term agreement. That question will be determined by assessing the form and contents of a number of documents (including the written employment agreement) and determining what was said by representatives of Ranworth to Alison Schneller at relevant times. An important, perhaps the principal, witness for the defendant is Karen Schneller, the plaintiff's sister, who was, at material times, Ranworth's general manager. In matters relating to the formation of the employment relationship between these parties, Karen Schneller was certainly the principal, and perhaps even the sole, representative of Ranworth who dealt with Alison Schneller.

[3] As the Employment Relations Authority's determination records, the Authority was faced with a conflict between what Karen Schneller told its investigation meeting had happened and the contents of a written statement dealing with these matters that Karen Schneller had signed as a statement of evidence shortly after Alison Schneller's proceedings were issued in the Authority. Although, I infer, Karen Schneller gave evidence to the Authority on oath or affirmation, it concluded erroneously that her earlier written statement had been "*sworn*". Nevertheless, its account was to be preferred because it had been given closer in time to the events in issue. So the Authority concluded that when giving oral evidence before it during the investigation, Karen Schneller was an unreliable witness. It found her statement made to the defendant's solicitors was a truthful account of events, therefore making her reliable at that earlier time.

[4] Alison Schneller issued proceedings against Ranworth in March 2005. In early April 2005, whilst Karen Schneller was still associated with the company and may indeed have still been its general manager, she was asked to furnish to the defendant's solicitors notes and other records from which a brief of her evidence would be prepared. These included recordings of meetings, her notes, and other written material.

[5] Together with other managerial representatives of Ranworth, Karen Schneller visited the defendant's solicitors' offices on 4 April 2005 where she was presented with a statement of evidence that purported to be in the form of a statutory declaration. I have so categorised the document because, on its face, it does not appear to comply with Schedule 1 to the Oaths and Declarations Act 1957 and in particular contains none of the appropriate recitals at the beginning of a statutory

declaration. As I have already noted, even if the requirements of Schedule 1 had been met, the document could not have been a “*sworn*” affidavit as the Authority concluded. Affidavits and statutory declarations are separate and distinct forms of deposition with different consequences if the content of the deposition is untrue. It is surprising that both the solicitors who prepared the statement of evidence and the solicitor who purported to take Karen Schneller’s statutory declaration did not notice that an essential formal requirement of it was absent. Nevertheless, the brief or proof of evidence was signed by Karen Schneller and, for the purposes of this ruling, amounted to a signed statement.

[6] Although in evidence before me Karen Schneller said that she felt under some pressure to sign the statement as presented to her because arrangements had been made for another solicitor to be available at a certain time to witness the document and because other senior executives of Ranworth were present, she conceded that she had been given an opportunity to make any changes to the statement and indeed some had been made at her instigation. In my assessment, also, Karen Schneller was an experienced company general manager and an intelligent person used to dealing with professional advisers including lawyers: her free will was not in the circumstances overborne. Karen Schneller knew that the contents of her statement were made for the purpose of giving evidence in defence of Alison Schneller’s proceedings. In these circumstances I concluded that, on their own, the contents of the signed witness statement bore prima facie credibility.

[7] Karen Schneller later ceased her association with Ranworth and indeed had subsequent personal grievance issues with the company but the details of which I am unaware.

[8] There was no evidence as to whether the defendant’s solicitors who called Karen Schneller had attempted to brief her evidence-in-chief for the purpose of this hearing or indeed for the purpose of the Employment Relations Authority’s previous investigation meeting.

[9] Karen Schneller is arguably the defendant’s most important witness for the company’s defence of the proceeding. If the defendant is to succeed, it will have to refute evidence given by Alison Schneller. Although other witnesses for Ranworth will give evidence of other events that may make the company’s case more

inherently likely to be true, it is the direct evidence of the discussions between Alison and Karen Schneller that will have the greatest impact.

[10] Karen Schneller appeared before me on summons, was given a copy of her 4 April 2000 evidence statement and asked by counsel to read it to the Court. A substantial way into reading that statement, Karen Schneller expressed concern that what she was saying was not accurate. The reading exercise then ceased and Mr Drake, as counsel for the defendant leading the evidence, went back over previous paragraphs, sentence by sentence, asking Karen Schneller to confirm the accuracy or otherwise of those sentences. In circumstances where she said it was inaccurate, she was permitted by counsel to give an account that she said was the correct one.

[11] Although not in every respect by any means, it transpired that Karen Schneller did not adhere to a number of significant sentences in the written evidence statement.

[12] It was at this point that Mr Drake sought and was granted leave to cross-examine Karen Schneller on those discrepancies over the objection of Mr Wicks who submitted that Mr Drake had not established that she was a hostile witness.

[13] Generally, and at common law, a witness is put up by a party as a witness of truth. If any party has cause to doubt the reliability of what a witness will say, such party will generally elect not to call that witness. That is especially so where, as here, there has been a previous rehearsal in another forum.

[14] The law primarily governing the decision whether to permit Mr Drake to cross-examine Karen Schneller is set out in s189(2) of the Employment Relations Act 2000 that allows the Court to accept, admit and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. That is a broad discretionary power but is to be exercised by reference to the rules of evidence in civil litigation generally and the practices of other courts in similar cases. Ultimately the question for the Court to determine is what happened at relevant times. This is done in the context of adversarial litigation unlike the investigative process that took place in the Employment Relations Authority.

[15] The evidence to that point in the trial established clear inconsistencies between what Karen Schneller was telling the Court under oath and what she had written in a statement of her evidence given to the defendant's solicitors in the preparation of its

defence to Alison Schneller's claim. This led me to the conclusion that Karen Schneller was a witness hostile to the defendant in the sense that she was giving evidence that contradicted in material respects a statement that she had previously provided to the defendant's solicitors for the purpose of its defence of this case.

[16] In these circumstances I considered the most just course for determining what actually happened in late 2003/early 2004 and perhaps early 2005 in this case was to permit Mr Drake to cross-examine Karen Schneller on these inconsistencies. I concluded, also, that it would be just to allow Mr Wicks for the plaintiff to cross-examine Karen Schneller in the usual way.

[17] Although not following the statutory process contemplated for the impeachment of credit set out in ss9, 10 and 11 of the Evidence Act 1908 that govern both civil and criminal cases, the point had been reached (without objection from Mr Wicks for the plaintiff) that Mr Drake had established that Karen Schneller had made a former statement relevant to the subject matter of the proceeding that was inconsistent with her present testimony.

[18] The only other issue that requires to be dealt with is the consequence of the declaration of hostility and the grant of leave to cross-examine. As the authors of the leading New Zealand text, Mathieson (ed), *Cross on Evidence*, (8<sup>th</sup> ed, 2005) note at 9.53, it does not necessarily follow as the Authority seemed to conclude in this case that the Court will accept the veracity of the earlier statement and thereby reject the veracity of the viva voce evidence given by Karen Schneller where it contradicts the contents of that statement. Although I have concluded that the written statement bears a prima facie credibility, that status may or may not survive examination of its contents in the light of all other evidence in the proceeding. So, put shortly, it may be open to the Court to conclude that either the statement or the viva voce evidence is correct. As the authors of *Cross* note, another conclusion that may be open to the Court is that because of these inconsistencies, Karen Schneller is an unreliable witness in respect of these matters whose evidence (including the written statement) should be given little or no credence because of that unreliability. So the Court may reject both of her accounts (oral and written) of relevant events for this reason and be driven to consider what other evidence has been adduced credibly in respect of these matters.

[19] As I had cause to note later in the hearing when Mr Wicks objected to some of Mr Drake's questions of Karen Schneller as being improper cross-examination, the ruling that I had made allowing Mr Drake to cross-examine only related to areas of identified inconsistency. Karen Schneller remained a witness called for Ranworth who was its general manager and principal managerial representative at the relevant times. It bears responsibility for what she did as its general manager at relevant times.

[20] I simply note here for future reference, and with the benefit of hindsight, that this may have been a case better dealt with by an application before trial (supported by proper evidence of attempts to brief Karen Schneller's evidence) in which the Court was asked to itself call the witness with each party having opportunity to cross-examine and the effect of the cross-examination upon the two accounts of events given by the witness. A foundation for such an application could have included reference to the credibility findings of the Employment Relations Authority. Although such a course is not unknown in the courts of general jurisdiction, there is specific power for the Employment Court to do so although this occurs on rare and special occasions. Parties in the position in which the defendant was immediately before and during the trial may wish to consider such a course of action in the no doubt rare events that such circumstances arise in future.

GL Colgan  
Chief Judge

Judgment signed at 12.15 pm on Tuesday 11 July 2006

Solicitors: