

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 72/06  
ARC 71/05**

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

BETWEEN MELISSA JANE WILLIAMS  
Plaintiff

AND KIMBERLEYS FASHIONS LIMITED  
Defendant

Hearing: 30 and 31 October 2006  
(Heard at Auckland)

Appearances: Edwin Telle, Counsel for Plaintiff  
Penny Shaw, Counsel for Defendant

Judgment: 12 December 2006

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**JUDGMENT OF JUDGE ME PERKINS**

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**Introduction**

[1] Ms Williams was employed as an assistant manager at the defendant's retail store in Newmarket. She commenced employment in July 2002. She resigned her employment in June 2004. She then worked out one month's notice. She claims to have been unjustifiably constructively dismissed. In addition she claims discrimination in her employment upon the grounds of sex and disability and unjustified disadvantage as a result of being victimised by the defendant.

[2] One of the issues, which received some prominence during the hearing, was the plaintiff's refusal to wear facial makeup while at work. Aspersions were also cast by the defendant upon the plaintiff's personal cleanliness, appearance and grooming.

[3] The remedies sought are: reimbursement of lost salary for a period of 15 months and one week; compensation for humiliation, loss of dignity and injury to her feelings of \$30,000; interest on lost income; and costs.

[4] The proceedings were originally commenced in the Employment Relations Authority resulting in an outcome unfavourable to the plaintiff. She filed a challenge against the determination of the Authority and sought a hearing de novo.

### **Employment Relations Authority determination**

[5] The Authority determined, following its investigation, that a disciplinary meeting conducted in advance of the plaintiff's resignation was not unfair. It further held that she was not suspended from her employment. The requirement of the employer that Ms Williams was to wear facial makeup was regarded as not being in breach of the relationship of trust and confidence nor was it contrary to her human rights. The raising of the issue of the appearance of Ms Williams at the end of a disciplinary meeting was regarded by the Authority Member as not being the most sensitive conduct by the employer. However, that was not held to be repudiatory conduct and Ms Williams was therefore not constructively dismissed. She was not victimised nor discriminated against. There was a finding that the employer did not breach its duty of good faith in failing to take steps to "*reconcile the situation*" before or after resignation.

[6] The issue of costs was reserved by the Authority. The bundle of documents contains a supplementary decision of the Authority on costs. This document was not referred to me in evidence.

### **Factual discussion**

[7] The appropriateness of the actions of the defendant towards Ms Williams and whether she was constructively dismissed need to be considered in the context of the employment history. It is therefore necessary to set out the events leading up to the resignation.

[8] Ms Williams commenced employment as assistant manager at the defendant's St Luke's store in July 2002. She transferred to the Newmarket store in August 2002. Difficulties arose between Ms Williams and the then store manager. Such difficulties also affected other staff at the Newmarket store. The defendant, upon

being appraised of the position, took steps to have that manager's behaviour towards the staff modified. Shortly after that the manager resigned and was replaced by Ms Seyed (Sheri) Toumadj. Ms Toumadj commenced as manager of the Newmarket store in February 2003.

[9] The relationship between Ms Toumadj and other staff in the Newmarket store soon deteriorated. Her treatment of Ms Williams appears to have been particularly bad. Ms Yaxley, who was still employed by the defendant and who gave evidence on its behalf, confirmed the evidence of Ms Williams in respect of the behaviour of Ms Toumadj towards her. I regard Ms Yaxley as a very credible witness. Both Ms Williams and Ms Yaxley confirmed that Ms Toumadj asked them and other staff to lie about her whereabouts to management when she was late for work or away from the store. Ms Toumadj had an arrangement with management that she would have some flexibility with working hours. This caused dissension with other staff who were not made aware of the arrangement and saw Ms Toumadj taking what they thought to be excessive absences from the store. However, the absences described by Ms Williams and Ms Yaxley, where they were asked to lie to management, were beyond the agreed flexibility, which had been afforded to Ms Toumadj. When Ms Toumadj gave evidence she specifically denied that she had asked other staff to lie for her. I do not believe her evidence and find her to be not a credible witness. She denied having a poor relationship with staff and customers and yet other witnesses described her behaviour in this regard. This involved rudeness to other members of staff and customers. Ms Williams described capricious and sometimes spiteful behaviour towards her. Ms Toumadj, I understand, is still employed but at another store. Ms Yaxley, who has remained at the Newmarket store, said in evidence that she was pleased that she was no longer working with Ms Toumadj.

[10] While at the Newmarket store, Ms Williams suffered two serious episodes at work as a result of stress arising from Ms Toumadj's treatment of her and the conflict between them. One was an epileptic seizure and the other was a severe migraine attack. In addition to being an epileptic and a migraine sufferer, Ms Williams had other difficulties in her life at this time. She had had to undergo a cervical biopsy as a result of previous adverse cervical smear results. This resulted in an occasion when she suffered an excessive bleed at work. Fortunately, she was eventually diagnosed as free of cancer. However, she also had relationship

difficulties with her then partner, which later resulted in their parting company. Also a friend had committed suicide. It was altogether not a happy time for Ms Williams. Her general health deteriorated and she was then forced to take time off work.

[11] Ms Toumadj appeared to lack understanding of these problems. For instance she tried to persuade Ms Williams to remain working at the time of her biopsy site bleeding. Fortunately, the human resources manager, Amy Harrison, and the national retail manager, Sonya Kidd, during that time, acted humanely towards Ms Williams with her difficulties. She was allowed time off to deal with her problems although eventually she ran out of sick leave entitlements, some of which had been given to her in advance.

[12] During this period Ms Williams applied to work part-time. This was declined. She applied for a manager's position in the city store but was unsuccessful.

[13] By June 2004 the proprietors of the business, Mr Thomas McLaughlan, who gave evidence, and his wife, Marilyn McLaughlan, clearly became concerned at Ms Williams's absenteeism and lateness for work. Ms Toumadj was directed to conduct a disciplinary meeting to administer a warning. Initially it seems, this meeting was to be conducted or overseen by Ms Harrison or Ms Kidd. On the day of the meeting another staff member, who was Mrs McLaughlan's sister, attended with Ms Toumadj instead.

[14] Prior to this meeting being notified, Ms Williams had raised the difficulties she was having with Ms Toumadj with upper management. She spoke to Ms Harrison about it. Ms Harrison told Ms Williams that they would have to sort it out between themselves. Ms Harrison, according to her evidence, formed the view that indeed they did sort out their problems between them and that the relationship improved. However, the company clearly knew of the previous difficulties between the two when it directed Ms Toumadj to conduct the disciplinary meeting. Mrs Shaw for the defendant submitted that the plaintiff's relationship with her manager in the store does not go to the core of the case. I am not satisfied that that is so. In a situation where the company knew previous conflicts had resulted in epileptic seizure and severe migraine, it was not appropriate to have Ms Toumadj discipline Ms Williams.

[15] Ms Williams conceded that her absenteeism and lateness probably was justification for her being summoned to a disciplinary meeting. She thought,

however, in the context of Ms Toumadj also taking excessive time away from work, that the meeting was to be part of a general crack-down, not specifically or necessarily aimed at her. She had anticipated that Ms Harrison would be in Auckland to conduct the meeting. When she found it was to be conducted by Ms Toumadj plus another staff member, she became distressed. She says in evidence, and it does not appear to be disputed, that throughout the meeting she was crying and shaking. She indicated that she would hand in her notice. This I take to have been a spur of the moment decision. The meeting did not go well for Ms Williams. I perceive that this was partly caused by Ms Toumadj's own nervousness. She indicated in evidence that this was the first time that she had had to conduct such a meeting. Questions were pre-prepared for her by Ms Harrison and were simply read out by Ms Toumadj at the meeting with her recording the answers of Ms Williams.

[16] The matter did not end there, however. Mrs McLaughlan, one of the proprietors of the business, had arranged for Ms Harrison, the human resources manager, to send a note to Ms Toumadj. She required this be read to Ms Williams. The note was meant to be read a day or two prior to the disciplinary meeting. It did not reach Ms Toumadj in time for her to do this. It appears that she received it on the day of the disciplinary meeting. She said in her evidence:

*When I went to get the questions I noticed the note asking me to raise the issue of Melissa's appearance, it was not suggested that it needed to be raised as part of that meeting but it seemed the best time to mention it.*

[17] The note read as follows:

*On Tues 15.16.04 please let Melissa know that Marilyn wasn't happy with her appearance when up in Akl so they have asked you to send her home if she arrives at work unclean, not wearing makeup or untidy look/dress. Any Qs ring me or Marilyn.*

*Thks – Amy*

[18] It is difficult to imagine what would possess Ms Toumadj to read this note at the end of a disciplinary meeting, when the employee was so upset that she was shaking with stress and fear. It could possibly have been vindictiveness by Ms Toumadj. It could possibly have arisen from her complete lack of experience in such management matters. It certainly betrayed an inability to comprehend basic requirements of considerate human behaviour. Whatever the reason, Ms Toumadj was in the position of employer. Her actions on this occasion were the actions of the

defendant company. That is not unreasonable in the circumstances because, in my view, Mrs McLaughlan was equally culpable in this unfortunate sequence of events. She knew that Ms Williams was to face disciplinary action for absenteeism and lateness. Whether it was read the day before, at or immediately after the meeting, it could only have been foreseen that it would have a detrimental effect on Ms Williams. I did not hear evidence from Mrs McLaughlan so I am unable to decide what her motive was for asking for the matter to be raised.

[19] It is in the context of this note that the company's dissatisfaction with Ms Williams refusing to wear makeup came to a head. It apparently had been brewing previously with senior staff trying to persuade Ms Williams to wear lip gloss. However, the entire context of the note and the dispute as to facial makeup with the disciplinary meeting is unfortunate from the company's point of view. This is because this separate issue has now been raised as a source of grievance when I suspect that the real dispute was the dissatisfaction of the proprietors with Ms Williams's absenteeism and time keeping. There was absolutely no need for the issue of facial makeup and the inference that Ms Williams was unclean being raised at all as part of the disciplinary process.

[20] Following the disciplinary meeting Ms Williams went home in an extremely distressed state. Her state of mind at that time was corroborated by her former partner Mr Alley in his evidence. Mr Alley described his observations of Ms Williams during this period of her employment. When he visited the shop, he observed Ms Toumadj's rudeness towards staff and customers. He described the day of the disciplinary. He said Ms Williams was extremely distressed and upset.

[21] The evidence of Mr Alley on and following the day of the disciplinary meeting is contained in the following paragraphs of his brief of evidence:

14. *Therefore, the night of the 16 June meeting Melissa wrote out a letter very distressed, stating that she was going to resign. We talked about it and it was clear that she simply could not continue to work for Kimberleys in the circumstances that she has been told that she was unclean, untidy and had to wear make-up and so she felt she had no other option but to resign.*
15. *She did not have make-up but felt she had to wear make-up in her last month of employment so borrowed make-up from Jocelyn Yaxley to wear to work in that last month of employment. Often, in the mornings, during that last month of employment I would see her crying as she forced herself to wear make-up. She was wearing full*

*make-up as she had been forced to do. She became very despondent and very depressed.*

16. *I noticed a quick decline in Melissa's confidence and demeanour. She became very self-critical, unenthusiastic about life and self-conscious especially about the way she looks. I attribute this to depression as being a direct result of the way she was treated by Kimberleys in particular being criticised about her appearance and being told she had to wear make-up and thus making her feel ugly/unattractive.*
17. *Our relationship was very up and down during this period because Melissa was so depressed and because I was forced to financially support both of us together with her supplementary sickness benefit.*
18. *Melissa, for the remainder of 2004 would often become hysterical and so upset that she would threaten to kill herself.*

[22] This type of evidence is always significant in a case of this kind. It provides corroboration for allegations of humiliation, distress, injury to feelings and loss of dignity, which support a claim for compensation should I find that the termination of employment was unjustifiable. In this case the evidence is further corroborated by both Ms Yaxley, who was a fellow employee and who remains in employment with the defendant, and Ms Jennifer Green who is a qualified psychotherapist.

[23] Ms Williams gave notice of termination of employment. The written notice contains dates inconsistent with the date of the disciplinary meeting. This gives the impression that the notice was prepared in advance of the meeting. However, it was agreed that the dates inserted were in error. It was agreed that the notice was prepared after the meeting took place. It appears that while she accepted her health and emotional difficulties had led to unacceptable absenteeism and lateness, the overlay of the facial makeup issue and the insinuation that she was unclean and dirty certainly escalated the matter into another tier. As will be seen from Mr Alley's evidence-in-chief, Ms Williams decided that during the month of her notice being worked out, she would wear facial makeup, much against her wishes. However, she did so to avoid further trauma.

[24] After her employment ended Ms Williams commenced proceedings with the Employment Relations Authority substantially based on constructive dismissal.

[25] Before turning from the factual discussion, I mention the evidence which various witnesses raised in the context of Ms Williams's appearance. Mr

McLaughlan described the allegation of uncleanness specifically in relation to Ms Williams's hair. In his evidence-in-chief he simply said that she "*was not up to the presentation standards ... of our other Newmarket staff ...*". Mr Telle, counsel for Ms Williams, during cross-examination, and I during questions from the Bench, endeavoured to get Mr McLaughlan to explain this. At the end of tedious evasiveness Mr McLaughlan eventually conceded that the accusation his company had made of Ms Williams being unclean related to the state of her hair. He also conceded (finally) under cross-examination that he had seen her in the shop on only two occasions. Other witnesses referred to Ms Williams's style of clothes outside working hours. This really had no relevance as it turns out because staff were required to wear the company's clothes or uniform while working in the shop. There is irony in this. An employer accusing one of its staff of being unclean nevertheless required its staff to wear company clothing while working but return it to the racks for sale. Mr McLaughlan said there were "*rules*" but he did not elaborate on what they were. One of the bundled documents, not referred to in evidence, covered this policy. It was to be confidential and not discussed with anyone outside of work. I note that dry-cleaning may be required at the employee's expense. None of the witnesses for the company could actually confirm what Mrs McLaughlan (for they were really her words in the note) actually meant when accusing Ms Williams of being unclean. Certainly the plaintiff did not wear makeup apart from eye liner. She appeared in court in a very presentable, clean and well groomed state. Some of the witnesses confirmed that this was the state of her appearance in the shop. With her meetings with Ms Green, the psychotherapist, she was described as follows:

*She looks great in clothes, she presents herself well with poise and in her ability to wear clothes.*

[26] It appears that as a result of her illnesses she had lost weight and appeared ill and out of condition. Nothing I heard in evidence would provide justification for the terminology used in the note generated by Ms Harrison but clearly composed by Mrs McLaughlan.

### **The evidence of the psychotherapist**

[27] Ms Williams called the psychotherapist, Jennifer Green, to give evidence in support of her case. This evidence was led to enable the Court to make an assessment of the effect of the actions of the defendant. Often in cases such as this,

only limited evidence is led and upon which the Authority or Court is then asked to assess the level of compensation. That is not so in this case. I was considerably assisted by Ms Green's evidence.

[28] Ms Green established her credentials as an expert witness. No attack was made on her qualification as an expert witness. The main basis of the cross-examination was aimed at whether there may have been factors outside the workplace leading to Ms Williams's state at the time of interview. There is some point to that with which I shall deal more fully shortly. Cross-examination also extended into the issue of whether Ms Williams had over-reacted to the note using the word "*unclean*". There was also cross-examination directed to the effect of correspondence from the employer subsequent to her termination of employment. This referred to Ms Williams's reaction as "*absurd*".

[29] Ms Green met Ms Williams in July 2004. This was quite soon after the employment had ended and the notice period worked out. Obviously, in making her diagnosis, Ms Green had to rely upon Ms Williams's account of events. However, Ms Green observed Ms Williams to be "*in an extremely fragile way, extremely depressed and in need of counselling*". She was diagnosed as suffering from severe depression. She stated that this was "*caused substantially from what had happened to her at Kimberleys ...*".

[30] Ms Green criticised the employer's use of the word "*absurd*" in respect of Ms Williams's reactions to what had had happened to her. As I have indicated, this word was used in subsequent correspondence from the employer. Ms Green believed that the management at Kimberleys were not in a position to judge the effect of their actions upon Ms Williams. She went on to say:

*Ms Williams in my sincere diagnosis was seriously effected [sic] and became extremely depressed substantially as a result of Kimberleys' conduct in particular comments about her appearance and the issue concerning make-up which made her believe/feel she was too ugly/unattractive to pursue a career in fashion which was her dream.*

[31] It was her view that Ms Williams was not mentally capable of pursuing employment for the balance of 2004. Ms Williams's pregnancy late in 2004, Ms Green believed, led to her turnaround in self-esteem and was considerably assisted by it.

[32] Ms Green fairly conceded in her evidence that the stress factors, including those outside employment, would have had a cumulative effect. Under cross-examination she referred to the medical conditions of epilepsy and migraine, the biopsy to screen for cervical cancer, the suicide of her friend, and the break-up of the relationship with her partner. However, in her evidence-in-chief, she considered the implication that Ms Williams was unclean and the accusation of the employer subsequently that her reaction was absurd as significant factors. She outlined the manifestations of the depression as:

- (a) low self-esteem and decreased motivation;
- (b) lowering of self-confidence, competence and ability;
- (c) deleterious change in eating and sleeping patterns;
- (d) lessened sense of future goal setting and reduction of strength of purpose;
- (e) sadness and despondency;
- (f) lack of energy and an increase in a sense of worthlessness;
- (g) financial stress; and
- (h) stress exacerbating her pre-existing illness of epilepsy and migraine.

[33] Later in her report Ms Green referred to the risk of suicide in such circumstances. She articulated, in an eloquent way, reactions which this Court often hears as being those of persons losing employment, whether through dismissal, redundancy or the like.

### **Principles applying**

[34] The concept of constructive dismissal was considered at length in *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ACJ 965; ERNZ Sel Cas 95. Williamson J and the members of the Court considered the cause at length. The ratio of the decision is summarised from the following brief statements at 975; 103:

*A constructive dismissal is one in which the employer's actions are equivalent to a dismissal, or the employer's conduct tantamount to a dismissal.*

...

*There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. This is the doctrine of constructive dismissal.*

[35] Issues of causation and foreseeability are part of the consideration as to whether the employee can rely upon a constructive dismissal:

(a) In *Greenwich* at 976; 104 the Court stated:

*In identifying cases of constructive dismissal, and in separating them from cases of employee resignation, we suggest there is a useful insight to be gained from a consideration of the real or true source of the initiative for termination. If the real source of the initiative for termination is the employer, or the basic causation comes from the employer, then the case is one of constructive dismissal. We appreciate that the concept of causation has caused difficulties in some branches of the law. However, we think it has some utility here, particularly since for years the Court has been applying principles of apportionment of loss having regard to the employee's share in the responsibility for the loss. In that respect the Court's policy is broadly similar to that contained in the Contributory Negligence Act 1947 applying to certain liability for tortious damage.*

(b) In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168, 172 the Court of Appeal outlined the correct approach to constructive dismissals as follows:

*In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*

[36] In the first Court of Appeal decision considering constructive dismissal, *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, the Court enunciated three situations where a constructive dismissal may occur at 374, 375:

- where the employee is given a choice of resignation or dismissal;
- where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

- where a breach of duty by the employer leads a worker to resign.

[37] It is the last of these three situations that applies in the present case.

[38] In respect of that last factor, the *Auckland Electric Power Board* decision elaborated upon it as a breach of contract relied on by the employee that the employer had breached the implied duty not to act in a manner calculated to destroy or seriously damage the employment relationship. In other words, to destroy the trust and confidence between employer and employee, which must exist in every employment relationship.

### **How these principles apply in the present case**

[39] The extent to which the employment relationship of trust and confidence between Ms Williams and Kimberleys had broken down by Kimberleys' behaviour is epitomised in the evidence of Ms Green, the psychotherapist. The employer in this case may have attempted to brush off the allegations as absurd but that, in my view, shows the extent to which the proprietors and some of its managers in this company were out of touch with the real need to act with humanity and compassion towards an employee. Ms Williams had worked for the company for some time. She was highly regarded – indeed, Ms Kidd in her evidence confirmed that Ms Williams was used for merchandising in other branches and on marketing occasions on behalf of the company because of her skills in this respect. Her medical conditions were well-known. Her aversion to wearing makeup was known and had been well tolerated until the final weeks of her employment.

[40] In this case there are a number of factors or actions by the employer, which led to the plaintiff resigning her employment. In combination their effect sufficiently meets the standard of causation required. It would be disingenuous to allege that it was not reasonably foreseeable that, when faced with them, the plaintiff would resign.

[41] First, there was the failure to adequately, promptly and proactively deal with the clear personality difficulties between Ms Williams and Ms Toumadj. It was an insufficient response to require them both to try and sort it out between themselves.

[42] Secondly, there was the inadequate communication to other staff at Newmarket that some flexibility in hours was being afforded to Ms Toumadj. Of course there

was Ms Toumadj's own dishonesty in taking more time off than was contemplated and getting staff to lie for her, but the employer would not have known of this at the time.

[43] Thirdly, regarding the disciplinary meeting itself, the fact that a meeting took place to deal with Ms Williams's absenteeism and lateness is not the issue. Clearly the defendant was entitled to raise this with Ms Williams. I do not perceive her to be arguing anything different. However, there were a number of factors surrounding the preparation for this meeting, which should have alerted the employer that difficulties would arise:

- The managers knew of Ms Williams's illness – she had had turns previously when confronted with pressure. Some tact and sensitivity was needed.
- They knew she had personality difficulties with Ms Toumadj and yet deputised the latter to conduct the meeting.
- They knew Ms Toumadj was inexperienced in such matters. This was confirmed by Ms Harrison preparing written questions for her to use at the meeting.
- Ms Harrison, as human resources manager with experience, should have been there.
- The fact that the note was indeed read at the meeting, its contents and the way it was presented by Ms Toumadj. In this respect the actions of Ms Toumadj, even if totally misguided, were the actions of the employer.

[44] Fourthly, the meeting was to deal with absenteeism and lateness and yet serious issues of facial makeup and personal cleanliness were raised without the plaintiff being previously officially notified of these concerns and at a time in the meeting when the plaintiff was showing considerable distress. Even if it was contemplated that these were to be raised the day before the meeting, the fact that the issues would be raised and the meeting held in such close succession should have alerted the employer to potential difficulties.

[45] It was not a condition of Ms Williams's employment contract that she was required to wear facial makeup during working hours. The company witnesses conceded this. The defendant in the pleadings concedes that the plaintiff was not

required to wear makeup. Some attempt appears to have been made later to introduce the wearing of makeup as a condition of employment or house rules. There was no evidence that this was ever properly communicated to Ms Williams or that she agreed to it as a variation of her employment contract. There was no basis to require it and the fact that it was required and introduced as a disciplinary matter, must in itself simply amount to a breach of the contract. Knowing of Ms Williams's aversion to wearing makeup the direction must have been conduct repudiatory of the conditions of the employment contract. Certainly it was a breach of the employer's duty not to act in a manner calculated to destroy or seriously damage the employment relationship, for that is exactly what it did.

### **Conclusion**

[46] When considered together and where this pattern of behaviour occurred within such a short timeframe, I have no hesitation in finding that all the requirements for a constructive dismissal existed here. If Ms Williams had simply resigned in the face of being disciplined by senior management for absenteeism or timekeeping, then that would have been an over-reaction. However, this entire matter was procedurally mishandled and in addition, the employer required a form of appearance for the employee for which it had no contractual entitlement. It insulted her by insinuating she was unclean.

[47] The plaintiff pleaded causes in constructive dismissal, discrimination on the grounds of disability and sex, and unjustified disadvantage. I perceive that in many respects the causes are in the alternative. Certainly the allegations of fact overlap with each other. In addition, one set of remedies is sought for all causes. I consider that there is considerable repetition not only in the causes themselves but the remedies, which are sought. I note that an allegation of suspension apparently raised before the Authority has not been pursued in the Court either in pleadings or submissions.

[48] As I have indicated, the requirement to wear makeup and the allegation of uncleanliness in the overall factual matrix were major factors in the constructive dismissal. The demand that Ms Williams wear facial makeup is also bound up in the argument of discrimination on grounds of sex, disability and victimisation. Mr Telle submitted that the requirements to wear facial makeup give rise to a test case. I do

not agree with that. I prefer to deal with these issues simply on a contractual basis. There was no contractual requirement that Ms Williams wear facial makeup. There was no basis for Kimberleys to demand that she did. The breach of duty constituted by this and the other matters mentioned led to her resignation.

[49] Having said that, there must be an entitlement for an employer to insist on standards of dress, cleanliness and tidiness for employees in a retail clothing shop. The problem for the employer in this case is that there was no evidence that the employee had breached those standards. To deal with the issue more specifically as discrimination or breach of wider rights issues as submitted by Mr Telle is fraught with difficulties. There may well be workplaces where the nature of the work requires facial makeup. One obvious example could be a women's cosmetic retail shop. There may be others. It is not beyond argument that an employer in a women's clothing boutique could require staff to wear facial makeup so long as it was a mutual, contractual requirement. It may be argued that this is no different from a requirement to wear the employer's clothes or uniform during working hours. Such a requirement existed in this case. It was not the subject of dissension from staff, although I note that it was not an original requirement of Ms William's written contract. Whether such a contractual condition would breach wider human rights and discrimination principles is a matter for argument on another occasion. There was no requirement in this particular case. Accordingly, the matter can be dealt with by application of usual contractual principles. So far as the disability argument is concerned, connecting the makeup requirement to the health difficulties and the resulting deterioration in appearance of the plaintiff (for that is the way it is pleaded) is, in my view, a weak argument. In any event it is simply another way of restating the same primary argument.

[50] I decline to deal with these ancillary causes as discrete claims giving rise to separate damages. I am satisfied that the damages claimed overlap. As I propose to give the plaintiff remedies for the constructive dismissal, there is no need to go on to consider these second causes separately. They will not add anything to quantum. The same comments apply to the unjustified disadvantage/victimisation argument. This again appears to be simply a repetition of the same grounds for the remedies sought.

[51] While much has been made in the evidence and submissions as to the requirement to wear make up it is only one factor. I regard the insinuation that Ms Williams was unclean as equally serious conduct of the employer in the context of causation and foreseeability issues.

### **Disposition**

[52] I accept Ms Green's evidence that Ms Williams would not have been capable of resuming work for the remainder of the year from the termination of employment with Kimberleys. Mr Telle submitted that because she was not in employment when she became pregnant in December 2004 she lost the opportunity of parental leave. He therefore argued in addition for loss of parental leave payments in addition to other damages. I agree with Mrs Shaw that contingencies need to be taken into account. However, the claim is far too remote. Ms Williams would not have been entitled to such payments until near confinement, probably a period of at least eight months from the commencement of the pregnancy in December 2004. It is reasonable, however, that Ms Williams should receive reimbursement for the period she was unable to work primarily caused by the actions of the defendant. She herself gave evidence that by the time she became pregnant she was almost ready to return to work. Accordingly, there will be an award of six months reimbursement of salary from 15 July 2004 until 15 January 2005. I have allowed the period to mid-January as she would be highly unlikely to obtain alternative employment commencing right on the Christmas break. This is to be calculated at the rate then being paid to her. There will be an award of interest on that sum at the rate of 7.5 percent from 15 January 2005 until the date of this judgment.

[53] Insofar as compensation is concerned, Mr Telle urged me to make an award in the vicinity of \$30,000. The humiliation, loss of dignity and injury to feelings suffered by Ms Williams in this case were substantial. A certain stigma attaches as a result of the allegations made against her. The matter is entirely discretionary but the Court needs to act with moderation and consistency: *Telecom NZ Ltd v Nutter* [2004] 1 ERNZ 315 CA. I indicated earlier that there was some point arising from Mrs Shaw's cross examination of Ms Green as to factors outside the workplace influencing Ms Williams's state of health. In exercising my discretion in this regard I consider those factors in the overall assessment of compensation. That is not to say there were any actions of Ms Williams contributing towards the situation giving rise

to the personal grievance. I do not reduce the remedy on that ground. Accordingly, I assess compensation under this head at \$12,000.

### **Costs**

[54] Costs are reserved. If the issue of costs cannot be resolved between the parties and if a further order is required then memoranda will need to be filed. Such memoranda are to be filed by 19 January 2007. Submissions on costs should include calculations based on the present High Court Rules and scale.

M E Perkins  
Judge

Judgment signed at 4.15 pm on Tuesday 12 December 2006