IN THE EMPLOYMENT COURT
AUCKLAND

AC 45/06
ARC 93/05

IN THE MATTER OF	a de novo challenge to a determination of the Employment Relations Authority
BETWEEN	IHC NEW ZEALAND INCO Plaintiff
AND	TREVOR SCOTT Defendant

Hearing: 8 August 2006

Appearances: Mr P McBride, counsel for plaintiff
Ms S Moran and Mr T Oldfield, counsel for defendant

Judgment: 8 August 2006

ORAL INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

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[1] Unfortunately I do not have the luxury in this case of being able to reserve this decision. This is because there are two witnesses who are ready to give evidence and this hearing today has been especially set up to accommodate the special requirements of both of those witnesses. Just for the record I indicate that prior to hearing the evidence, which was to be heard today, and I will come back to why we are sitting in this particular Court, counsel indicated that there was an argument as to admissibility of evidence. It has, therefore, been necessary for me to consider that application in advance of hearing the witnesses because the admissibility issue goes squarely to the evidence, which we know one of those witnesses is intending to give. That is the evidence of Mrs Wheldale.

[2] We are sitting today in the North Shore District Court, rather than the premises of the Employment Court in Auckland City. The reason for that is twofold. First, the defendant has given notice that he intends to call the evidence of Mrs Prictor who

is the mother of one of the intellectually disabled persons involved in the inquiry, which took place leading to the dismissal of Mr Scott the defendant. She is next week to undertake surgery and that may result in her thereafter being unavailable to give evidence for a lengthy period of time. Accordingly, the defendant properly applied to have her evidence taken in advance. She lives north of Auckland and the Albany Court, which we have chosen for other reasons, as it turns out is convenient for her. Secondly, Ms Wheldale who is one of the witnesses for the plaintiff and an employee of the plaintiff suffers from a phobia, which would not enable her to travel by lift to the 11th floor of the Employment Court premises in Auckland City. Accordingly, it was found that a convenient ground floor location was the North Shore District Court at Albany and that is why this venue has been chosen.

[3] Both Ms Wheldale, who has provided an affidavit, and Ms Prictor, who has provided a brief of evidence, are now available to give evidence. Accordingly, because the admissibility arguments go partly to Ms Wheldale's evidence it is convenient to deal with the argument on admissibility in advance. I indicated earlier that regardless of what I decide now, very much in an urgent situation, it is still going to be subject to any issues, which may arise during trial. This is to take place next week. In any event, in giving my decision on the substantive issues, which will arise at the trial, I will also of necessity need to deal with admissibility issues and more likely weight issues as a result of what I have decided to do today.

[4] The objection that has been taken by the defendant is not only to Ms Wheldale's evidence as I have indicated, but also to the evidence, which has been provided in advance in a brief of a clinical psychologist, Olive Webb. Nearly or at least two years from the events, which gave rise to the dismissal of Mr Scott the defendant, she has been brought in to interview and assess the evidence of the intellectually disabled persons who were interviewed by the decision maker in the dismissal; Mrs Vanderkolk.

[5] In dealing with Ms Wheldale's evidence the objection, which is taken, is that in her affidavit she refers to a conversation, which she alleged she had with Mr Scott. This was some time during the course of his employment. It related to his experience in the army and using army discipline and perhaps rough stuff in dealing with these intellectually disabled people who would be in his care. I understand that

evidence was not in any way presented before the Authority at the enquiry, which took place and from which this challenge de novo has been made.

[6] In addition to that, Ms Wheldale, at the end of her affidavit, has made statements relating to a conversation, which she had with one of the complainants. This was after the dismissal took place. Some of it is direct evidence but quite a lot of it is what could only be regarded as hearsay in the sense that the intellectually disabled complainant is relating to Ms Wheldale what another person had said to him.

[7] Insofar as Ms Wheldale's evidence is concerned, Ms Moran on behalf of the defendant Mr Scott, submits that that evidence and in particular, what is alleged to have followed dismissal is extremely prejudicial in nature. She submits it would be unfair to admit it because it then means that the defendant is put into the position of having to deal with it, probably by way of some attempt at rebuttal and also during the trial by way of cross-examination of Ms Wheldale and possibly other witnesses I might add. To admit it, particularly having regard to the nature of the evidence, which Ms Moran says is totally put in for the purposes of prejudice, would be completely unfair to the defendant.

[8] Insofar as the clinical psychologist's evidence is concerned, Ms Moran stated that the objection to it is really that it is opinion, which has been formed a long time after the events. It arises from interview with some of the players in the matter a long time after the events. It is opinion, which is formed without actually hearing both sides of the matter. That again it puts the defendant in a prejudicial and unfair position.

[9] Mr McBride in his submissions in reply to these arguments presented by the defendant has reverted to principle and section 189(2) of the Employment Relations Act 2000 where the Court is given wide jurisdiction to admit evidence even if it might be otherwise inadmissible by virtue of the normally applying statutory provisions and common law principles. He has referred me to a number of authorities. Obviously in giving this decision on the urgent basis that I have, I have not had time to fully consider all of those. However, he has highlighted relevant parts from the decisions and incorporated them into his summary of submissions. He effectively relies upon this Court's broad powers as to admissibility of evidence. He says that Dr Webb's evidence, that is the clinical psychologist, is relevant and

admissible. That the evidence not only of Ms Webb, but also Ms Wheldale, which is also the source of the objection from the defendant, may go to remedies. This is as opposed to the substantive issue of the justifiability of the dismissal. That finally it is a matter of weight rather than admissibility insofar as the Court is concerned. He refers to decisions, which distinguish a Judge alone position from a jury trial, where a Judge is able to discriminate evidence, which might be regarded as prejudicial or otherwise inadmissible, from the main body of the evidence.

[10] There is another point, particularly relating to the evidence of Ms Webb, the clinical psychologist, which I have raised with counsel. Mrs Prictor's evidence had been adverted to in documents even before her brief was filed. It was known the type of evidence that she would be intending to give. That once that evidence is in and is not objected to then the plaintiff is placed in the position of somehow trying to answer it. One of the ways it has chosen obviously is to have the clinical psychologist interview the complainants including Mrs Prictor's son and then give expert evidence on the believability or credibility I suppose of what those people said to the decision maker in the dismissal.

[11] In dealing with this matter I particularly rely upon the statement of Judge Colgan in an unreported decision of the Employment Court, *X v Auckland District Health Board,* unreported, AC52A/05, 31 October 2005. That is a decision, which involved a tortious action. That may involve different considerations from the present. However, Ms Moran did make the point, which I think has considerable merit, that where allegations are being made of a sexual abuse nature a fairly high standard needs to be adopted, as with an action in tort where the Court decided to deal by reasonably rigid standards with admissibility of evidence. In that decision Judge Colgan stated that even though the Court does have wide power to admit evidence under section 189(2) of the Act, the power does not and should not be interpreted and indeed has not been interpreted by the Court or its predecessors to permit evidential open slather. That is what Ms Moran submits in this particular case some of the evidence to which objection is taken, to amounts to.

[12] Perhaps if I could deal with Ms Webb's evidence first. I agree that this evidence has been put in rather late in the stage of this proceeding. As I said I think it has been put in in an effort by the plaintiff to answer what it perceives will be some evidence from Mrs Prictor. But it is also obviously produced to try and justify

the view that was taken by the decision maker Mrs Vanderkolk, when she interviewed the complainants in the matter and then made the decision to terminate Mr Scott's employment. Having said that I do have some concern about excluding Ms Webb's evidence. First, for the reason that section 189(2), despite what Judge Colgan said in the *X* decision, does allow quite wide ranging evidence. Secondly, in any event I think the Court in dealing with this matter would be assisted by expert evidence because of the special nature of this particular case involving young persons who are intellectually disabled. The employer is relying upon what those people said in assessing whether to terminate the employment of Mr Scott or not.

[13] From that point of view or reason rather I exercise my discretion in this particular case and allow Ms Webb's evidence to be admitted. I am of the view that some of the paragraphs, in particular paragraphs 57, 58 and 62.3 of her evidence, come perilously close to usurping the function of the Court. But as Mr McBride has submitted they fall short of that. Perhaps in a more vehement fashion than might have been warranted, they confirm the earlier views in the brief as to the credibility and reliability of the intellectually disabled persons she has interviewed. My decision is that I am going to allow that evidence to be given at trial. It is not going to be produced today. However, it would be of assistance to the Court. It is going to be subject of course to the decision, which the Court will ultimately have to make in the overall assessment of the substantive issues in this case.

[14] As I have also indicated it represents somewhat of a two edged sword for the plaintiff in any event because it raises the question, probably a rhetorical question, as to why this person was not available to the decision maker at the time that she made the decision. But that is an issue for later. Even though I do find some of the paragraphs in the brief, bordering on the objectionable, I am nevertheless going to allow that evidence to be given in its entirety. That does raise a problem though for the defendant, which I think is properly raised by Ms Moran. It was obviously a proper option for the defendant to take on the basis of cost, not to brief an expert of his own. Now that the Webb evidence has been ruled as admissible, as a matter of fairness the defendant should be given the option of considering whether he will employ an expert of his own in an effort to rebut what Ms Webb has said. The way I propose to deal with that is that the trial will still take place next week for the two days that have been allocated. Depending upon the outcome at the end of the

evidence next week the defendant will then be allowed the opportunity of marshalling that rebuttal evidence. Obviously the matter in that case would need to be adjourned part heard for that to be done. In my view Mrs Prictor's evidence would go a long way in combination with Mr Scott's evidence in any event, to rebuttal of what Ms Webb has said. But nevertheless that opportunity should as a matter of fairness be made available to the defendant.

[15] I now come to the evidence of Ms Wheldale. Insofar as the statements contained in paragraphs 15 and 16 of her affidavit are concerned I must say that I have concerns about them. Nevertheless, I have had the opportunity since reading Ms Wheldale's affidavit of also reading the brief of evidence of Mr Scott, which was filed in Court this morning. It is a lengthy brief but I read it as best I could this morning, and it seems to me that he has dealt with the matters, which are contained in Ms Wheldale's affidavit in paragraphs 15 and 16. Indeed Ms Moran has indicated in her submissions that she now probably does not take as strong an objection to those paragraphs as she had formerly taken. In my view rather than deleting those paragraphs from the affidavit or ruling them as being inadmissible as evidence, those paragraphs can remain. But obviously they will need to be dealt with in cross-examination and it may be of considerable assistance to the Court in assessing credibility and reliability of Ms Wheldale to hear that cross-examination.

[16] Insofar as the matters contained in paragraphs 36 to 42 of Ms Wheldale's affidavit are concerned, they relate, as I said earlier, to allegations coming to light after the dismissal. The allegations in themselves do not actually relate to any post-dismissal behaviour. They actually relate to pre-dismissal behaviour but are matters, which have come to light apparently and according to Ms Wheldale from a conversation, which she had with David Prictor. David Prictor, obviously is entitled to state what his views about the defendant are directly to Ms Wheldale. Under normal circumstances with the wide powers the Court has that might be admissible. I have weighed the submissions which have been made. On the one hand Ms Moran's submission is that the evidence is just so prejudicial that it should be excluded. It would create, if admitted, considerable prejudicial difficulties for the defendant to face at trial. On the other hand, Mr McBride's submission is that while the statements are not relevant to the justifiability issue because they were not known to the employer at the time of termination of employment, they necessarily go to

remedies. I prefer the submission, which is made on behalf of the defendant in respect of this portion of Ms Wheldale's affidavit. In my view it has all the hallmarks of an attempt to admit prejudicial evidence simply to sway the Court. I agree that it is going to create possibly insurmountable problems for the defendant. If it is put in as going to remedies, then even if it were admitted for that purpose it is of such a nature, having regard to a majority of it being hearsay, that in my view it would have little value as to relevance to remedies in any event. My own view is, standing back and just considering that evidence in the overall context of Ms Wheldale's evidence, it is more likely to have been put into the affidavit for prejudicial rather than genuine purposes going to remedy. It is so objectionable that it is appropriate for me, in my view, to rule that Ms Wheldale is simply not permitted at trial or in her evidence today to give that evidence. Accordingly, paragraphs 36 to 42 are struck from her affidavit and will not be considered as part of her evidence, given before this Court.

[17] She has put the evidence in by way of affidavit and that was in accordance with a minute giving directions. I understand she is to be cross-examined on that affidavit. In view of my decision that those paragraphs will be deleted obviously there will be no purpose in those being canvassed in cross-examination. There are also other parts of Ms Wheldale's evidence, which in normal circumstances might be regarded as being objectionable, but for the purposes of this hearing and having regard to the wide powers to admit evidence I am not going to strike out any of the other paragraphs of her affidavit. They were not specifically addressed in submissions. But in my view, they come close again to usurping the function of the Court in the ultimate decision that it has to make in this matter.

M E Perkins
Judge

Oral interlocutory judgment given at 12.22pm on Tuesday, 8 August 2006

Representatives: McBride Davenport James, Barristers & Solicitors, P O Box 19001, Wellington
Oakley Moran, Barristers & Solicitors, P O Box 241, Wellington