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Weston v Advkit Para Legal Services Ltd [2010] NZEmpC 140 (26 October 2010)

Last Updated: 1 November 2010

IN THE EMPLOYMENT COURT WELLINGTON

[\[2010\] NZEMPC 140](#)

WRC 42/09

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JACQUELINE WENDY WESTON Plaintiff

AND ADVKIT PARA LEGAL SERVICES LTD Defendant

Hearing: 3 May 2010

(Heard at Wellington)

Submissions received from the plaintiff on 12 May 2010

Submissions received from the defendant on 19 May 2010

Submissions received from the plaintiff in reply on 21 May 2010

Appearances: John Gwilliam, counsel for plaintiff

Graeme Ogilvie, advocate for defendant

Judgment: 26 October 2010

JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff, Mrs Weston, has challenged a determination of the Employment Relations Authority which found that her resignation from her employment with the defendant was not a constructive dismissal and she did not have a personal grievance.

Factual findings

[2] In April 2006 Mrs Weston began working for Mr Dixon-McIver, the managing director of the defendant, on a voluntary basis, as he had been assisting her

with her ACC claim. From about June 2006 she began to be paid for the work she

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was doing. There was an issue as to precisely the duties performed by Mrs Weston, but Mr Dixon-McIver accepted that her duties included clerical work, responsibility for telephone calls, and the supervision, compilation and filing of lump sum or independence allowance accident compensation claims for clients. She also assisted in meeting clients' needs and ensuring cases were progressed. At some point Mr Dixon-McIver incorporated the defendant and it appears to be common ground that her employment was transferred to the defendant. There was no written employment agreement. The defendant's business of providing advocacy and other services for ACC claimants was operated from the family home of Mr and Mrs Dixon-McIver

in Upper Hutt. Mrs Weston was paid about \$97 nett per week for 10 hours of work. Mr Dixon-McIver also succeeded in finalising her ACC claim and did not charge for his services.

[3] Two sons lived at the house, the eldest, Kirk, was 32 years of age at the time, had a mental condition and was being treated for depression. Difficulties arose about Kirk's behaviour which Mrs Weston found to be threatening and intimidating.

[4] Mr and Mrs Dixon-McIver were aware of the difficulties between Mrs Weston and Kirk and Mr Dixon-McIver imposed a limit on his son accessing the office environment in the house during the time Mrs Weston worked there. Mr Dixon-McIver claimed that the physical boundary imposed by him on his son and Mrs Weston separated them and, although this arrangement was inconvenient, it ensured there were no direct confrontations. He said he had put these in place because he valued Mrs Weston as an employee. His evidence was that despite this boundary there were occasions when Mrs Weston expressed her displeasure to him about Kirk "and vice versa", by which I take it that Kirk also expressed his displeasure about Mrs Weston to Mr Dixon-McIver.

[5] On the morning of 2 September 2008 Mrs Weston arrived at work at her normal time of about 9.15am. She spoke to Mrs Dixon-McIver and was aware that Mr Dixon-McIver was out of the office for a medical appointment. She went into her office to begin working and saw Kirk standing by the computer near the photocopier. She was surprised that Kirk was in the office given that she understood he had been told not to come into that office while she was there. She claimed she

felt uncomfortable because of Kirk's odd behaviour and felt fearful as a result. She waited a few minutes and started up the office computer, hoping that this would encourage Kirk to leave the office. She claimed she needed to insert the backup tape into the hard drive and could not get to those items because they were blocked by Kirk. She claims that she tried to be civil and said "excuse me" to Kirk but he ignored her and walked out of the office in an agitated state and did not say anything. She claimed that he went back into the office and went to the computer again and when she needed to do some photocopying she asked him how long he would be, at which point he stormed out of the room without a word but she thought he was very unhappy and angry with her. She told Mrs Dixon-McIver what had been happening because she felt discomfited by Kirk's behaviour and feared that things could escalate.

[6] At about 10am Mrs Weston offered to send a facsimile transmission on behalf of a client in the office. She went to the facsimile machine and attempted to send a facsimile but the transmission failed. She tried a second time. At this point Kirk burst into the room shouting that he was doing a job interview over the telephone and that it was being ruined because of her interference. She responded that it was a business line and she had a right to send a facsimile and that was all she was doing. She claimed that she had no idea that Kirk was on the phone or what he had been doing. She claimed that she rarely used the facsimile machine and did not check to see if anyone was on the business line at the time.

[7] Mrs Weston, who is nearly twice Kirk's age, was then physically attacked by him. He lunged across the desk at her with the fingers of his right hand extended, pushing them hard into her face, wrenched her head and twisted her glasses. He then slammed her head against the wall behind her while subjecting her to a torrent of verbal abuse and then stormed out of the office. She ran out of the office yelling to Mrs Dixon-McIver to call the Police. She was then attacked for a second time by Kirk who grabbed her, pushed her and then flung her into the corner of the hall where she fell over a telephone stand and chair and hit her head against the wall. This was accompanied by further abuse. Mrs Dixon-McIver, who saw that attack, ordered Kirk out of the house but let him back in on his request. Kirk then assaulted Mrs Weston for a third time. He was then ordered to leave the house a second time

by Mrs Dixon-McIver who tried to help Mrs Weston to her feet. When Kirk was allowed back into the house again he attacked Mrs Weston for a fourth time, and also pushed Mrs Dixon-McIver against a piece of furniture. Kirk was screaming and shouting abuse. At this point Mrs Dixon-McIver rang her husband and, as a result of his advice, the Police were called. Kirk approached Mrs Weston for a fifth time and started verbally abusing her again. The Police subsequently arrived, arrested Kirk and removed him from the premises. Mr and Mrs Dixon-McIver apologised to Mrs Weston and she then left by herself to go to the Upper Hutt Police Station. The Police arranged for her injuries to be examined by a doctor. She went home straight after that.

[8] I find that these events occurred substantially as Mrs Weston described them. I reach that conclusion because her evidence was largely uncontroverted on the issues of the assault and supported materially by that of Mrs Dixon-McIver and the contemporary statements made to the Police. The only matter with which issue was taken was Mrs Weston's familiarity with the facsimile machine and whether she intentionally interrupted Kirk's telephone conversation and thus provoked his reaction. This is a matter to which I will return.

[9] Mr Dixon-McIver issued a trespass notice to Kirk to prevent him returning to the house. The non-return was also a condition of Kirk's bail bond. I find Mrs Weston was reassured by Mrs Dixon-McIver that Kirk would not be back at the house and that Mrs Weston was safe to return to work.

[10] The following day, 3 September 2008, Mrs Weston returned to work at about

9am. She claims that Mr Dixon-McIver did not ask her if she was alright or make any enquiries about her health or whether

she had had to pay for the doctor. Instead he spoke in some detail about the blood tests he had taken the previous day. Mrs Weston then showed Mr Dixon-McIver the bruising she had sustained from the assault.

[11] At some time between 9.30am and noon, unexpectedly another man appeared in the doorway as Mrs Weston was in Mr Dixon-McIver's office. This person was a computer technician, Christopher Curtis, who gave evidence to the Court. Mr Curtis walked into Mr Dixon-McIver's office and as a "bit of fun" he produced a small child's cap pistol from his pocket and set it off in Mr Dixon-McIver's direction. Mr Curtis gave evidence that Ms Weston reacted so dramatically that he was shocked at by her intensity. Mrs Weston said that she panicked at Mr Curtis's action and was distressed. There is some dispute as to whether she immediately left the premises as a result of this incident or whether she met with Mr Curtis outside, when he apologised after seeing Mrs Weston's reaction at the time. I prefer the account of Mr Curtis that Mrs Weston seemed to have got over her shock before she left work. However, Mr Curtis's account of Mrs Weston's reaction to the incident supports her own evidence and dramatically demonstrates the state she was in as a result of what she had been subjected to by Kirk the previous day. It also suggests that she had returned to work too soon.

[12] Mrs Weston had gone to work on the following morning of 4 September at about 9am. The events that then followed are in considerable dispute. I find that the relationship between Mrs Weston and Mrs Dixon-McIver became strained during the morning. Mrs Weston told Mrs Dixon-McIver that she was concerned that Mr Dixon-McIver was making light of the fact that she had been assaulted by Kirk and appeared to be ignoring her and was rude and uncaring. Mrs Dixon-McIver spoke to Mrs Weston about Kirk. I find Mrs Dixon-McIver said the assault was Mrs Weston's fault because Mrs Weston's actions with the facsimile had prevented Kirk from getting a job. Mrs Weston's evidence was that she was devastated by this accusation.

[13] When Mr Dixon-McIver came down to the office, she claimed she tried to say that he had a duty to keep her safe in the workplace and he was responsible for the assault that had taken place. She claimed in her affidavit that he repeatedly interrupted her and would not listen to her concerns, and she became so exasperated that she began slapping her hand against the desk. She claimed that Mr Dixon-McIver reacted by yelling at her and came up and over her desk screaming that he would show her. She backed off in her chair but he towered over her, spat in her face and screamed at her: "You fucking stupid cow, if you had been adult enough to sort out your problem with Kirk none of this would have happened". She claimed he then screamed: "if he had not hit you I would assault you myself".

[14] This was all allegedly said while he was in close proximity to her and she claimed to be terrified for her personal safety. She claimed she ran out of the office screaming for Mr Dixon-McIver to get away from her and that she was in absolute terror. She had to go back into the house to get her car keys and then immediately drove to the Upper Hutt Police Station and spoke to a police officer about what had happened. No charge against Mr Dixon-McIver was laid by the Police.

[15] In cross-examination Mrs Weston resiled from her statement to the effect that Mr Dixon-McIver had intentionally spat in her face but said he was so close that she was sprayed by his spittle as he yelled at her.

[16] Mr Dixon-McIver's evidence was that Mrs Weston and Mrs Dixon-McIver were discussing the assault and Mrs Weston was becoming uncomfortable with the conversation. I find that this was because Mrs Dixon-McIver was telling Mrs Weston she was at fault because she had interrupted Kirk's telephone job interview. Mr Dixon-McIver claimed that he then came down to the office where both women were sitting and his reason for his intervention was what his wife was saying to Mrs Weston about what had led up to the assault and Mrs Weston's reaction to what was being said to her and that he did not want to see "any blame games commence". That statement supports the finding I have made that Mrs Dixon-McIver blamed Mrs Weston for provoking the situation that led to the assault. Mr Dixon-McIver's evidence was that he said to his wife: "Please do not pursue your desire to dot the "I's" and cross the "T's" at this time as it is not necessary".

[17] Mr Dixon-McIver claimed that to his utmost astonishment Mrs Weston stood up, stepped towards her work desk and bellowed at him: "Your fucking son assaulted me ... I am the victim. You haven't fucking worried about me or my bruises or the cost of me going to the doctor". Mr Dixon-McIver in evidence said that in hindsight he now believed that Mrs Weston was reacting to the conversation that she had been having with Mrs Dixon-McIver and that he had not done anything to provoke the outburst. He claimed to have been shocked by the verbal assault and that his reaction was to lean over and thump the desk back and said: "You stupid cow, can't you see that what you are doing now is the equivalent of assaulting me when there is no need".

[18] Both Mr and Mrs Dixon-McIver deny that Mr Dixon-McIver has ever sworn or that he had said to Mrs Weston, "if he had not hit you I would assault you myself".

[19] The resolution of this acute conflict has not been easy. The submissions dealt in detail with the incident and other material which was said to be of assistance in making credibility findings. I did not find that ancillary material to be of assistance either way.

[20] What did support the gravaman of Mrs Weston's complaint about Mr Dixon-McIver's actions that morning was Mrs Dixon-McIver's contemporary diary entry that night, which supports Mrs Weston's account of the incident. The relevant part of her diary entry for 4 September reads as follows:

Jackie [Mrs Weston] and M [Mr Dixon-McIver] had a show down this morning and abused M – yelling at him because she is the victim and he has not shown her enough attention. M threatened her for another assault if she carried on. Like father like son it would seem.

[21] Mr Dixon-McIver's actions are perhaps explained because he was very distressed at having to have a trespass notice issued to his son. It is also clear that at the time he was suffering from a heart condition which was causing him stress and he was also defending a fraud prosecution that had been brought against him by the Accident Compensation Commission which could have cost him his career as an advocate. I find that what Mr Dixon-McIver admitted to having said to Mrs Weston was substantially the same as her evidence of the exchange. Mrs Weston thought Mr Dixon-McIver was threatening to assault her and that is supported by Mrs Dixon-McIver's diary entry.

[22] I accept Mr Gwilliam's proper concession that from Mrs Weston's evidence there was no actual physical assault. I also accept Mr Ogilvie's submission that in Mrs Weston's oral evidence she resiled from her written claim that Mr Dixon-McIver spat at her. However, I find as a fact that Mr Dixon-McIver did lean over the desk and punched it. He called Mrs Weston a stupid cow. He threatened her about another assault and made references to Kirk's assault which may reasonably have led Mrs Weston to believe that she was going to be subjected to an assault by Mr Dixon

McIver. It is common ground that she left the premises that day in some distress and never returned to work for the defendant.

[23] On Friday 5 September 2008 she advised Mrs Dixon-McIver that she would not be working that day due to the assault. She heard Mr Dixon-McIver connect to the call and say good morning and she claimed she panicked and hung up because she was terrified of hearing his voice.

[24] On Monday 8 September, she rang Mrs Dixon-McIver and asked what was happening and was told she would have to speak to Mr Dixon-McIver. She was also accused of having created the situation which led to Mr Dixon-McIver's "assault" on her and that her husband was suffering from chest pain and she was concerned about his health. She said Mrs Weston would have to give him more time to come to terms with what had happened. Mrs Weston claimed that given the comments from the Dixon-McIvers, they thought she was to blame for what had happened. She felt she could not go back to work and that any good faith between them had been irretrievably undermined. That was her last direct contact although she continued to be paid. She did not return to work as she claimed she did not feel safe.

[25] On 9 October 2008 Mrs Weston's solicitor wrote to the defendant stating Mrs Weston claimed to have been assaulted not only by Kirk but by Mr Dixon-McIver. The letter states, in part:

Our client is unable to return to work because she will be exposed to undue risk if she does. She is fearful of an assault by you of a verbal or physical nature. You have created a situation whereby our client has lost her career, her employment, her mental health and wellbeing and is fearful of assault and violation in the future. On this basis our client raises a Personal Grievance against you on the basis of Constructive Dismissal as you have left her no option but to resign from her employment for her own physical and mental wellbeing. Our client has been subjected to abuse contrary to the criminal law, the [Employment Relations Act 2000](#) and the Health & Safety Act 1992. Your failure to contact her in the interim period is directly contrary to the underlying principle of good faith pursuant to the [Employment Relations Act 2000](#). (pp 3-4)

[26] The defendant did not reply to this letter. Considerable evidence was given about the subsequent events including allegations and counter-allegations concerning the obtaining and use of private documentation and an unsolicited visit by Mike

Ingrey, a friend of Mr Dixon-McIver, to Mrs Weston's house at which threats were allegedly made to her and which resulted in Mrs Weston dialling 111 in a state of great distress. This last matter will be referred to again.

Discussion

[27] The written submissions dealt in some detail with the factual findings I should make and I have taken these into account in the conclusions I have already expressed.

[28] This is a claim that Mrs Weston's resignation amounted to an unjustified constructive dismissal. It is common ground that what was being alleged was a breach of duty by the defendant which led Mrs Weston to resign. As Mr Gwilliam submitted the leading case dealing with this category of constructive dismissal is *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers*

IUOW.^[1] 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 have to be examined, including the communication in which the resignation was tendered. If it is found that the breach of duty has caused the resignation, the next question is whether the breach 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, that is whether a substantial risk of

resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[29] The plaintiff has the burden of satisfying the Court that her resignation did amount to a constructive dismissal. If she discharges that onus, on balance, then it will be for the defendant to establish that the constructive dismissal was justifiable, applying the test in [s 103A](#).

[30] I do not consider that the assault by Kirk of itself gave rise to circumstances which could be said to amount to a serious breach of the employment agreement by the defendant. Mr Dixon-McIver had laid down a demarcation which should have prevented any confrontation between Mrs Weston and Kirk. I accept the evidence of Mr and Mrs Dixon-McIver that Kirk had not shown any previous propensity for violence and his attack on Mrs Weston and on Mrs Dixon-McIver was unexpected. Mr Dixon-McIver reacted promptly by telling his wife to call the Police and then by issuing a trespass notice to keep Kirk out of the house thereby making it safe for Mrs Weston to return to work.

[31] It is possible that Mr Dixon-McIver because of his own distress over having to send his son away and his health difficulties may not have expressed adequate sympathy to Mrs Weston when she returned to work and the incident with Mr Curtis was unfortunate in causing her additional distress. I accept the evidence of Mr Curtis that he was not aware of the time that he played with the cap gun that Mrs Weston had been subjected to an assault by Kirk the previous day.

[32] Again I find that none of these events amounted to breaches on the part of the defendant of the employment agreement which would have made it reasonably foreseeable that Mrs Weston would resign.

[33] However, the actions of Mr and Mrs Dixon-McIver in attempting to hold Mrs Weston responsible for the circumstances that gave rise to the assault by Kirk were actions which a fair and reasonable employer would not have taken in dealing with an employee who had suffered such a stressful assault. Those actions of themselves constituted a breach of duty on the part of the employer but would not have been sufficient to make her resignation reasonably foreseeable.

[34] The actions of Mr Dixon-McIver, even if provoked by Mrs Weston's outburst did, however, constitute a serious breach of the duty to provide a safe place of work and not to be abusive to an employee. The actions and words used by Mr Dixon-McIver therefore constituted a serious breach of the terms of the employment agreement which would have made Mrs Weston's resignation reasonably foreseeable. When combined with the blame that was being laid on her for the circumstances that gave rise to Kirk's assault, it was far more likely than not that she would be compelled to resign as a result of those breaches. They are the reasons given for her resignation in the letter written on her behalf by her solicitors.

[35] Mrs Weston did not make any further attempt to discuss the matter with Mr Dixon-McIver in view of his actions and statements. That is understandable in the circumstances. What is significant is that Mr Dixon-McIver took no steps to apologise for what he had said and done and to mitigate the damage he had caused. It is to his credit that he continued to pay Mrs Weston's normal wages, but should have made an attempt to discuss the situation with her, or at least to have replied to her solicitor's letter.

[36] I find in the circumstances her resignation was inevitable and that her resignation amounted to a constructive dismissal.

[37] I did not understand Mr Ogilvie's submissions to attempt to justify the constructive dismissal if I was to make the factual findings which I have made. It will suffice to say that the defendant did not discharge the burden of showing that its actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the constructive dismissal occurred. I therefore find that the plaintiff was unjustifiably constructively dismissed.

Remedies

[38] Mrs Weston sought an award of three months as lost remuneration. She had been unable to find alternative part-time employment although accepts that she received pay at least up to the date of resignation.

[39] Although I have some reservations about the strict proof of loss and the steps she may have taken to obtain alternative employment I am satisfied that she has proven the entitlement to three months ordinary time remuneration and, subject to the finding of contribution, I award her that amount.

[40] If there are any difficulties in calculating the amount I reserve leave to the parties to refer the matter back to the Court.

[41] The plaintiff also sought compensation for humiliation, loss of dignity and injury to feelings. She claimed the initial attack on her by Kirk and then Mr Dixon-

McIver's own actions in what she has described as subsequent intimidation had subjected to her to physical and mental harm. In this regard I refer also to her evidence of the totally unexpected visit to her house by Mr Ingrey on or about 9 June

2009. A recording of her emergency 111 call to the Police was played to the Court and I have no doubt that her reaction to that visit demonstrated that she found that it was extremely threatening and intimidating. It is not clear however, that the call was made on her house at the instigation of the defendant or that the defendant ought to bear any responsibility for the

distress that it caused her.

[42] I am also concerned that her claims of distress were not supported by any independent medical evidence. In her statement of claim the plaintiff sought

\$10,000 for humiliation, loss of dignity and injury to feelings. Having seen and heard her give evidence, I am satisfied that the actions of the defendant subsequent to the unexpected assault by Kirk, did cause her considerable stress and, as I have found, led to her resignation. I consider that an award of \$7,500 under this head would be adequate in the absence of supporting medical evidence and subject to the issue of contribution.

[43] Mr Ogilvie submitted that in the event that the Court determined that there was an unjustified constructive dismissal there should be a substantial reduction of remedies for contribution because it was the plaintiff's tirade that started the incident that led to her departure. Mr Ogilvie submitted that her screaming, foul language and thumping of the table created the incident and that Mr Dixon-McIver simply mimicked part of that behaviour to show her how inappropriate it was. He claimed that any contribution against remedies should be at the highest level.

[44] Mr Gwilliam accepted that on 4 September, Mrs Weston was extremely upset and was screaming, swearing and thumping the table at Mr Dixon-McIver because of his inability to address her concerns regarding the earlier assault by Kirk. He submitted that there ought to have been a cooling off period imposed by Mr Dixon-McIver but instead his actions amounted to threatening her in the same way that his son had recently done. He also placed reliance on Mr Dixon-McIver's knowledge in having acting for Mrs Weston in respect of her ACC claim that she was in emotional labile and that therefore there should be no reductions.

[45] [Section 124](#) of the [Employment Relations Act 2000](#) requires the Court, when it is determined there is a personal grievance, in deciding the nature and extent of the remedies, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Court must reduce the remedies that would otherwise have been awarded accordingly. The previous authorities established that the actions must be blameworthy conduct.

[46] Although I accept Mrs Weston's evidence that she was stressed as a result of Kirk's assault, I do find there was an element of blameworthiness in her conduct which directly led to Mr Dixon-McIver's inappropriate response that induced her resignation. I therefore find that there is an element of contribution which should reduce the remedies that I would otherwise have awarded, but, in view of the distress that had been induced by Kirk's assault, I set it at a modest level of 10 percent.

Summary of remedies

[47] The defendant is to pay Mrs Weston the equivalent of three months ordinary time remuneration less 10 percent.

[48] Mrs Weston is also awarded \$6,750 being the \$7,500 for distress, humiliation and injury to feelings award, less the 10 percent contribution.

Costs

[49] Mrs Weston's challenge having been successful, she is entitled to costs. If these cannot be agreed a memorandum should be filed and served within 30 days of the date of this judgment and any memorandum in response within a further 30 days.

BS Travis

Judge

Judgment signed at 3.20 pm on Tuesday 26 October 2010

[\[1\] \[1994\] NZCA 250; \[1994\] 2 NZLR 415; \[1994\] 1 ERNZ 168 \(CA\).](#)