

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 158/09  
5139613

BETWEEN                      JACQUELINE WESTON  
   Applicant

AND                              MICHAEL DIXON MCIVOR  
   First Respondent

AND

   ADVKIT PARA LEGAL  
   SERVICES LIMITED  
   Second Respondent

Member of Authority:      P R Stapp

Representatives:            John Gwilliam for Applicant  
   Graeme Ogilvie for Respondent

Investigation Meeting:      25 August 2009 at Wellington

Submissions by:            18 September 2009

Determination:              14 October 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      Mrs Weston started work on 12 June 2006 for Mr Michael Dixon McIvor trading as ADVKIT Para Legal Service. Her employer became ADVKIT Para Legal Service Limited when the company was registered. She claimed that she was employed as the administrative manager. Mr Dixon McIvor says he employed her as a filing clerk. There was no written employment agreement. They worked from a residential property where Mr Dixon McIvor resided with his wife, Jolene Dixon McIvor, and their two sons.

[2] On 2 September 2008 Mrs Weston was assaulted by Mr Dixon McIvor's eldest son. The assault occurred when Mr Dixon McIvor's son became upset and agitated by Mrs Weston putting a fax number into the fax machine at the same time he was conducting a job interview on the telephone and the interview was interrupted. Because of the noise Mrs Dixon McIvor went to help Mrs Weston. Then her son assaulted Mrs Weston a second time. Mrs Dixon McIvor instructed her son to go outside the house and she locked the door. A short time later she let him in to enable him to get a cigarette lighter, thinking that this would defuse the situation. He assaulted her too. There was more verbal abuse from the son. Mrs Dixon McIvor rang Mr Dixon McIvor, who without hesitation told her to ring the Police, and she did that. The Police intervened. Also, Mr Dixon McIvor decided, without any hesitation that his son was in the wrong, and he "trespassed" him immediately from the house as he considered he had to protect Mrs Weston's rights as an employee. Underlying this was an issue as to whether or not Mrs Dixon McIvor had informed Mrs Weston that her son had been given permission to use the phone to help him get a job because they had requested him to leave home, but wanted him to have a job before he left. Mr Dixon McIvor says that he was aware of the tension between Mrs Weston and their son, and he had banned his son from the work area. After the Police had been Mrs Weston had a short discussion with the Dixon McIvors, and then she left the premises to go to the Police station to make her statement. After that she went to a doctor for a medical examination that cost her \$28. She then went home.

[3] Mrs Weston claimed that her employer made no effort to raise the matter with her during the next day (3 September). The Dixon McIvors say Mrs Weston returned to work despite her having the opportunity to have time out.

[4] Mrs Weston claimed that while she was at work on 3 September there was a visitor who frightened her when that person started to play with a toy cap pistol, and she thought that that person might have been the Dixon McIvors' son returning home. She completed her hours, finished work and went home.

[5] On 4 September Mrs Weston went to work. She claims that while she was there Mr Dixon McIvor assaulted and abused her. She says that the Dixon McIvors attempted to minimise the matter and blame her for what had occurred. Mr Dixon McIvor says that he witnessed from his office that Mrs Weston looked uncomfortable

during a discussion she was having with his wife. That discussion had involved Mrs Dixon McIvor asking Mrs Weston how the situation could have happened. Mr Dixon McIvor intervened and told Mrs Dixon McIvor that that was not the time to “*dot the i’s and cross the t’s*”. He did not know that Mrs Weston had raised that it had cost her \$28 to go to the doctor and that she had been asking to meet. He was not aware of anything due to the stress he was suffering because of the shock of the incident and other matters in his life. Mr Dixon McIvor accepted he got upset, thumped the table with his fist and did remonstrate with Mrs Weston in response to her behaviour that involved her thumping the table with her fist, swearing and becoming very emotional. She accepted that she swore and was upset too. However, Mr Dixon McIvor also denied that he swore at Mrs Weston and denied that he said that “*if his son had not hit Mrs Weston he would have*”, as Mrs Weston claimed. Mrs Weston left the premises, but returned to retrieve her keys, and never returned to work again.

[6] The next contact involved a telephone call between Mrs Weston, who was trying to find out what was happening with her employment, and Mrs Dixon McIvor. After pleasantries Mrs Dixon McIvor thought that she could advance the matter by getting Mr Dixon McIvor involved as he was passing by, and she passed the phone to him, whereupon, Mrs Weston slammed the phone down on him. Mr Dixon McIvor says that he barely remembers that call due to his state of mind and health, but has been reminded of it by his wife and her evidence.

[7] In the meantime Mrs Weston consulted her lawyer and her lawyer raised a personal grievance (9 October 2008) for constructive dismissal and approached the Department of Labour on the same date to organise mediation. In the meantime Mrs Weston continued to get paid until 4 November 2008. Her pay then ceased.

[8] The matter now rests with the Authority to determine whether or not Mrs Weston has a personal grievance. Since the investigation meeting the parties have commendably settled the holiday pay claim. That is no longer a claim. Mrs Weston has also claimed costs.

**Issues**

[9] Under the law I am required to determine whether or not there has been an actual or constructive dismissal.

[10] There are a number of factual issues:

- What was Mrs Weston's job title and role?
- Did Mrs Dixon McIvor have anything to do with the running of the business?
- Did Mrs Dixon McIvor inform Mrs Weston on or about 2 September that her son needed to use the telephone?
- What happened between Mrs Weston and Mr Dixon McIvor, and who said what on 4 September? Did Mr Dixon McIvor swear when he remonstrated with Mrs Weston on 4 September? Was Mrs Dixon McIvor aware of her son using the phone? What was the purpose of Mrs Dixon McIvor's discussion with Mrs Weston?
- Did Mrs Weston deliberately go out of her way to tell anybody else about what had happened?
- Was Mr Dixon McIvor's instruction to his son not to go in the work area enough to meet the employer's health and safety responsibilities in the work place?
- What was the cause for Mrs Weston deciding to leave her employment and resign?

**Findings**

[11] Mrs Weston called herself the administration manager, and in that role she had a range of clerical duties. It was Mr Dixon McIvor's responsibility to ensure that there was an employment agreement including providing a description of the role. There was none. It was open to both parties to put their own label on the role, but there was common ground that Mrs Weston's role included a range of clerical duties, whatever they called the job.

[12] A number of facts turn on credibility. I have made the following assessment of the three witnesses.

[13] Mrs Weston-

- Acknowledged there was an error in her written evidence and that her written evidence did not cover the context and did not reflect the full detail of the events she described.
- Reasonably put a title on her job in the absence of any employment agreement and absence of a job description. She accepted her role included the range of clerical duties.
- Produced contemporaneous notes that were written 10 days after the incidents when she had cleared her mind. The notes were handed to her lawyer, who used them to summarise the events to raise a personal grievance in the letter dated 9 October 2008.
- Produced invoices from ADVKIT for costs that Mr Dixon McIvor had claimed from ACC, but was not able to establish that there was anything wrong with the claims to make an impact on Mr Dixon McIvor's honesty, integrity and credibility.

[14] Mrs Dixon McIvor-

- Was not shaken during questioning on her involvement in the incidents and spontaneously repeated orally her written details and information.
- Was able to provide plausible explanations on her role in the business. This was supported by the fact that she was not a director and or a shareholder and that the business was run from the family home that would have explained her helping out from time to time. She was also a mother and wife in the household. She built up a relationship with Mrs Weston, but that does not prove that she had some role in running the business as Mrs Weston claimed.
- She was able to refute Mrs Weston's claim that she used the business car by producing details of the ownership, although the vehicle did have a business sign on it.
- Was clear about her evidence, did not waiver on any major matter and was able to explain most matters.
- Produced contemporaneous diary notes that she wrote daily. It was not challenged that she was a regular note taker. Her diary notes recorded that

- Corroborated Mr Dixon McIvor's evidence.
- She acknowledged she asked Mrs Weston how the situation on 2 September eventuated.

[15] Mr Dixon McIvor-

- Was consistent.
- Could recall accurately the events he was involved in and the thread of his evidence remained in tact when he was questioned.
- He acknowledged the incident involving his son and accepted it was disgraceful and inappropriate.
- He accepted he called Mrs Weston "...a stupid cow...".
- He accepted that there was never an employment agreement produced. Also he accepted that there was no proper wages time and holiday record.
- He maintained his composure during questioning by me and the applicant's representative. He never appeared likely to swear. He accepted that the discussion with Mrs Weston became heated.

[16] It is my assessment that the parties have recalled what they believed happened. The evidence does not establish that any one of them has deliberately not told the truth and lied, but they genuinely believe that what they have said is the truth. I hold that Mrs Weston has not established her allegation of being assaulted a second time. It is more than likely that Mrs Dixon McIver informed Mrs Weston that her son would be using the phone, but somehow Mrs Weston has misunderstood, not heard or interpreted the situation inaccurately. It is more than likely that Mr Dixon McIvor did not swear at Mrs Weston because there were no other incidents recalled by anyone to support the allegation that he swore at Mrs Weston. Moreover during his evidence he emphatically denied Mrs Weston's allegation and his composure never slipped and it never seemed likely that he would swear. Just because there was a heated discussion and both Mrs Weston and Mr Dixon McIvor got upset does not lead to a conclusion that he verbally assaulted her when he was responding to her upset and emotional state. Whether or not Mr Dixon McIvor said "*if his son had not hit Mrs Weston he would have*", as Mrs Weston claimed, is inconclusive given the parties' differences in recalling what was actually said.

[17] I have decided that Mrs Dixon McIvor had no involvement in the running of the business, but from time to time she did do some duties to help out. That was not sufficient for Mrs Weston to claim that Mrs Dixon McIvor had a role running the business and therefore could be held responsible for anything. Their relationship therefore needs to be considered in context. First Mrs Dixon McIvor developed a friendly informal relationship with Mrs Weston. Secondly the business was located in the family home. Thirdly Mrs Weston and Mrs Dixon McIvor had regular contact with each other including coffee in the mornings. Therefore Mrs Dixon McIvor's query about what happened over the telephone was understandable in the context of their relationship, the business, the premises and the familiarity they enjoyed in each other's company over coffee and discussions.

[18] Mr Dixon McIvor properly headed off any discomfort he noticed Mrs Weston experiencing in the office when she was talking with Mrs Dixon McIvor. The discussion, although it involved Mrs Weston and Mr Dixon McIvor becoming upset, was not enough for Mrs Weston to decide to resign, I hold. In the absence of any finding that Mr Dixon McIvor assaulted Mrs Weston there cannot be a finding that she was forced to resign due to a breach of trust and confidence and that her resignation would have been foreseeable. This conclusion is supported by ADVIKIT continuing to pay Mrs Weston until it became apparent that the employment relationship problem was not going to be resolved and that Mr Dixon McIvor had 'trespassed' his son, and Mr Dixon McIvor agreed to go to mediation when it was requested. Also Mr Dixon McIvor acted immediately on hearing about the assault involving his son and accepted without hesitation how bad and how wrong that was. With that knowledge it is unlikely that he would have escalated the matter even more deeply by assaulting Mrs Weston as she claimed. Furthermore, Mrs Weston could have used the first step in the dispute resolution process and go to mediation instead of resigning. The latter was an option raised by Mrs Weston's representative at the time and in the absence of an employment agreement. I conclude that mediation was an alternative option available instead of resigning, especially when it was offered at the same time as Mrs Weston's lawyer tendered the information that she had decided to resign.

[19] I find that the employer had a responsibility to meet the minimum health and safety requirement in regard to protecting Mrs Weston in her employment. This is

because Mr Dixon McIvor knew about the tension between Mrs Weston and his son. Mr Dixon McIvor has acknowledged in hindsight that he could have confronted the issue differently earlier instead of banishing his son from the work area. I conclude that he could have done more to try and avoid the risk of the tension escalating. In my view that was a foreseeable risk, but was not fatal in the employment relationship because the place of work was the family home and Mrs Weston accepted that and accepted that the Dixon-McIvors' son would be around. Mr Dixon McIvor had banished his son from the work area. Also, he immediately acted against his son and removed him from the home when his son assaulted Mrs Weston. Mr Dixon-McIvor's decision to allow his son to use one of the phones for a telephone job interview proved unfortunate given the communication breakdown involving Mrs Weston. Mrs Weston did not resign because of that incident.

[20] It is arguable that Mr Dixon McIvor did not provide Mrs Weston with a sufficient amount of support after the first assault. However that has to be considered in the context that Mrs Weston returned to work and did not take an opportunity to take time off work. She certainly was not inhibited to take time off and she has not established that her employer actively prevented her from taking time off. Mr and Mrs Dixon McIvor were surprised that Mrs Weston returned to work. Perhaps they should have insisted on her taking time off, however that omission cannot be held against them given Mrs Dixon returned to work of her own volition.

[21] Mrs Weston's resignation followed what she claimed was the assault by Mr Dixon McIvor and the Dixon McIvors' failure to support her after the first assault. These have not been established sufficiently for Mrs Weston to rely on them to establish a constructive dismissal by resigning and that her resignation was foreseeable. Her claim that Mr and Mrs Dixon McIvor displayed no interest has to be considered in the situation that developed and the context of the parties' mutual upset and emotional state given the place of work was the family home, Mrs Weston chose to return to work when she could have stayed away and the son had been banished. It is not necessary for me to make any findings on whether or not Mrs Weston deliberately went out of her way to tell anybody else about what had happened.

**Determination**

[22] Mrs Weston does not have a personal grievance. Her claim of constructive dismissal is dismissed.

[23] Costs are reserved.

P R Stapp  
Member of the Authority