IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 70
3024432

	BETWEEN	KIM RANDLE Applicant
	AND	THE WAREHOUSE LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Gregory Bennett, Advocate for Applicant Penny Swarbrick, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	11 May 2018 for Applicant 28 May 2018 for Respondent
Determination:	10 August 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Ms Kim Randle has filed an application to reopen an investigation into a claim that she was unjustifiably dismissed by The Warehouse Ltd ("The Warehouse"). A determination on that matter was issued on 30 October 2017.[1] Ms Randle's claim was unsuccessful.

[2] The grounds for re-opening are said to be because new evidence has come to light that was unknown at the time of the investigation meeting and could not have been known with due diligence.[2]

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1 *Randle v The Warehouse Ltd* [2017] NZERA Wellington 108
2 Ms Randle's Amended Application to Reopen a Determination, dated 20 April 2018

[3] The Warehouse submits there is no basis for the Authority to grant the application. It says Ms Randle has failed to pursue a challenge in the Court despite advice to it (and the Authority) on 2 November 2017 that she would do so. The Warehouse views the application as an attempt to overcome the expiration of time by which a challenge must be lodged with the Court, and submits it should be dismissed.

The Law

[4] The Authority has jurisdiction to order an investigation to be reopened upon such terms as it sees fit.[3]

[5] The threshold for determining if a matter ought to be reopened is whether a failure to do so would constitute a miscarriage of justice. A mere possibility of a miscarriage of justice is not sufficient. What is required is an actual miscarriage of justice or at least a real or substantial risk of a miscarriage of justice.[4]

[6] Judge Perkins recently summarised additional principles the Court applies when determining an application for rehearing, as follows:[5]

- The interests of justice require finality in court proceedings.
- While it appears that the Court has a broad unqualified discretion in relation to rehearing applications, it must be exercised judicially according to principle.
- The most likely ground is that new evidence has been discovered which is material to the outcome of the case and could not have been given at trial.
- Rehearings are not to be granted lightly; they are not to provide a backdoor method by which unsuccessful litigants can re-argue their cases.

[7] Where a rehearing is sought on grounds there is fresh evidence, the law requires three criteria to be met.[6]

> (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial,

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3 Clause 4 of Schedule 2 of the Employment Relations Act.
4 *Ports of Auckland Limited v New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 (CA) at p 88 – 89.
5 P v A [2018] NZEmpC 42 at [8]
6 *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 per Denning LJ; *Lewis v Greene* [2005] ERNZ 142 (EmpC)

(ii) the evidence must be such that it would likely have an important influence on the result of the case. It need not be decisive,

(iii) the evidence must be apparently credible, it need not be incontrovertible,

Background

[8] The Warehouse received a complaint alleging Ms Randle had sexually harassed another employee. It investigated the matter.

[9] The complainant, Ms Randle, and three witnesses, (referred to as witness A, B and C in the Authority's determination), each of whom the complainant said had seen the incident, were interviewed. Ms Randle conceded she had touched the complainant's breasts in one instance, and possibly another. She said the touching was accidental. Based on information obtained during its inquiry The Warehouse considered Ms Randle's actions were intentional, and she was dismissed.

[10] Ms Randle was represented by Mr Gregory Bennett throughout The Warehouse's investigation, and subsequently in the Authority. The Warehouse's investigators, Ms Lisa Bell and Ms Connie Semenoff, and Ms Randle and her husband gave evidence at the Authority's investigation.

What is the "new evidence"?

[11] Ms Randle's application for reopening was lodged with the Authority on 7 February 2018. It intimated there were witnesses who had evidence to support a conclusion that Ms Randle did not engage in the conduct for which she was dismissed. Little by way of particulars were provided in the application. The Authority advised it required sworn affidavits from the unnamed individuals referenced in the application if Ms Randle wished to pursue the application. These were supplied on 20 April 2018.

[12] Three affidavits were provided by individuals who say they were present when the events leading to the complaint occurred.

[13] In various ways each affidavit records that publication of Ms Randle's case by the New Zealand Herald on 9 November 2017 prompted the author to come forward.

[14] The first affidavit is sworn by Ms Arlia Shaw. No detail is given about what she witnessed other than her recollection of the event was different to that reported by the Herald. She states "*I don't remember witness A or B being in the room when I was there*."

[15] The next affidavit is from Ms Misty Taupa'u who was interviewed by The Warehouse during its investigation and referred to as witness C in the substantive determination. She says she read the notes (taken by The Warehouse) during her interview but says the material provided to the Authority contained statements she did not make and her statement has been changed. She denies reporting Ms Randle said a particular set of words, or that she confirmed by phone to an investigator, that Ms Randle touched the complainant's breast more than twice. I note there was no allegation that the touching occurred more than twice. She says she told the investigators that Ms Randle's actions weren't intentional. She says she is "*certain*" that she told the investigators that her husband was present. She says she did not see witness A in the room.

[16] The third affidavit is sworn by Mr Filiki Taupa'u, the husband of Ms Taupa'u. He says he was not approached by anyone from The Warehouse. By inference he accepts he saw an instance of touching but says "[Ms Randle] *did not consciously do this*". He further says witness A was not present at the time of the incident.

Was the evidence not able to be obtained with reasonable diligence for use at the Authority's investigation meeting?

[17] The reasons why the evidence was not presented at the Authority's investigation were set out in a sworn affidavit from Ms Randle and in submissions.

Was Ms Randle prevented from producing evidence as a consequence of The Warehouse's actions?

[18] The thrust of Ms Randle's affidavit is that she was unable to obtain information from the witnesses to support her case prior to her dismissal because "*team members had been instructed not to speak of the incident*". She says after she was dismissed staff "*were instructed never to speak my name again*".

[19] Mr Bennett submits:

> 18. Approaches were made to staff at [The Warehouse] however staff were unwilling to speak to [Mr Bennett's office] regarding the applicant or what they knew as they feared what would happen to their employment. It was very apparent that the staff spoken to, did not want any information across that would have indicated that [The Warehouse] was misleading the applicant or ourselves.

[20] The issue as to whether staff were instructed not to assist Ms Randle with her substantive claim was touched on in the lead up to, and during, the Authority's investigation.

[21] Ms Randle's brief of evidence dated 24 March 2017 stated:

> Because I have been told that Lisa Bell has told staff that they are not able to talk with me I have found it difficult to progress my case with witnesses."[7]

[22] Ms Bell responded to that statement in her written evidence, as follows:

> I am not sure what this is about but it is not correct. What she may be referring to is that on 18 March 2017, I was advised that [the complainant] had been approached by Greg Bennett. Greg had phoned [the complainant] and asked her a number of questions about the case including "*do you think Kim is a lesbian*", "*do you think Kim was on drugs*" and "*why didn't you smash her*?" The complainant was very upset by the questions and the approach from Greg and reported it to Connie and then me.
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> As a result, I spoke to the others involved in the investigation and advised them they were under no obligation to speak to Kim or her representative if approached, but if they wished to do so, they could.[8]

[23] Ms Bell's evidence was not challenged at the Authority's investigation. It was unclear from testimony given by Ms Randle during the Authority's investigation meeting whether her concern stemmed from the above event or some other circumstance.

[24] No additional evidence was provided at the Authority's investigation to support Ms Randle's allegation regarding The Warehouse's communication with witnesses, and this matter was not pursued any further.

[25] I note also that in a case management conference call held 1 March 2017 - almost 3 months before the investigation meeting - the Authority advised Mr Bennett that Ms Randle was free to apply to have relevant witnesses summonsed to the Authority's investigation as she saw fit. No application for summonses was made.

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7 Brief of Evidence, – Kim Randle, dated 24 March 2017, at [28]

8 Brief of Evidence of Lisa Bell, dated 13 April 2017, at [13] and [14]

[26] Turning to the affidavits which are said to advise of "new" evidence, there is no mention by the deponents that s/he had been approached by Mr Bennett's office prior to the investigation meeting and/or were fearful of reprisals if they discussed Ms Randle's claims with Mr Bennett's office. If The Warehouse had impeded any one of these witnesses from providing evidence or speaking to Ms Randle I consider it likely that information would have been reported within individual affidavits.

[27] There is no evidence that The Warehouse instructed witnesses not to assist Ms Randle or provide evidence in support of her claim.

When was the new evidence available?

[28] In submissions written on behalf of Mr Randle, Mr Bennett says:

> 19. The applicant could have called all the witnesses spoken to by [The Warehouse] however there were three main considerations given why this should not occur. Firstly the cost of the applicant could not be sustained, secondly the applicant trusted [The Warehouse] to vigorously investigate the allegation and act as a fair and reasonable employer and not do anything that would mislead or breach the good faith principles, and lastly because the applicant could not remember what had occurred, but was certain she had not done what was alleged, the calling of witnesses without knowing what they were going to say was a substantial risk, especially as we were unable to get anyone to speak to us.

[29] No information was furnished to the Authority regarding costs as a reason for not providing evidence to the Authority and I can take that matter no further.

[30] All notes taken by The Warehouse during its interviews with the complainant and the three witnesses were provided to Ms Randle prior to her interviews with The Warehouse. In the notes recording witness B's first interview, she advises Ms Shaw was present during the incident.[9] It was open to Ms Randle to require Ms Shaw's inclusion in The Warehouse's investigation.

[31] It is clear also that The Warehouse conducted additional interviews with breakfast attendees during its inquiry following Mr Bennett's request. I accept the submission on behalf of The Warehouse that, if Ms Randle wished to raise concerns about who was present (or not) during the incident, she could have, similarly, requested The Warehouse make relevant inquiries and interview any individual's identified.

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[9] Notes taken by The Warehouse, p 85, p 86.

[32] Nor do I accept Ms Randle's evidence that she had no reason to question Ms Taupa'u's statements to The Warehouse as the cause for the failure to have Ms Taupa'u provide evidence in the Authority. Ms Randle alleged there were multiple inconsistencies in various witness statements and between witnesses. Those matters, amongst others, were investigated by the Authority.

[33] It follows from the reasons set out above that I do not accept that the witnesses were prevented from providing evidence at the Authority's meeting. Nor do I accept the information contained in the affidavits of Ms Shaw, Mr Taupa'u or Ms Taupa'u was not available at the time of the investigation meeting. The decision not to call for evidence from the witnesses due to uncertainty as to what might be said, as opposed to the evidence not being available at that time, does not provide a satisfactory basis to reopen an investigation. Ms Randle has not met the first threshold requirement to warrant a reopening of her claim.

Comment

[34] Even if the evidence had not been available for the Authority's investigation I am not persuaded it would have satisfied the remaining tests.

[35] Firstly, much of the information contained in the affidavits is not new. Ms Randle does not dispute the touching occurred.

[36] What could be regarded as new evidence is that each affidavit advises s/he did not see witness A (and/or witness B) in the room at the time the incident occurred. But a failure to observe someone does not mean they were not present. I note Ms Taupa'u's comment to the investigators in her first interview (which is not retracted in her affidavit) that "*As I came back to the room I saw [the complainant] in bed and didn't focus on who was actually there*".[10] The assertion that witness A was not in the room at the time of the incident also goes against Ms Randle's own statement to The Warehouse that witness A was present during the incident.[11] Overall I do not find this new evidence to be apparently credible. I am conscious that 18 months have passed between the time of the incident and the date on which affidavits were, which raises the possibility that memories have altered or faded.

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[10] Respondents Bundle of Documents, p 88
[11] Respondents Bundle of Documents, p 98

[37] Ms Taupa'u was interviewed twice by The Warehouse. The first interview was held 6 days after the incident. The second interview (by phone) was 11 days after the first. Each set of notes was consistent with the other. As previously noted, Ms Taupa'u states the notes have been altered although it is not clear from her affidavit whether she challenges the notes of one or both interviews. The notes record that Ms Taupa'u considered the first touching was accidental but not the second time.[12] The essence of Ms Taupa'u's new evidence is that that she considers Ms Randle's actions were not intentional and that she advised The Warehouse of that view.

[38] I have reservations about Ms Taupa'u's allegations that interview notes have been altered. But in any event, even if the information recorded in Ms Taupa'u's interview notes cannot be relied on, I am not persuaded her new evidence would have an important influence on the case. The view advanced by Ms Taupa'u (and Mr Taupa'u) that the touching was accidental was not supported by evidence or reasons as why that view is held. It remains that The Warehouse received information from three witnesses (the complainant and two others) that was consistent on critical aspects of the factual matrix which led The Warehouse to conclude the touching was intentional. As noted in the substantive determination, The Warehouse [was] not required to prove that the alleged actions occurred, but rather, that after having conducted a full and fair inquiry into the allegations, it could have reasonably concluded the event occurred.[13] I am satisfied that it was reasonable of the Warehouse to form the view that it did, based on the evidence it had in front of it as a whole at the time, including the complaint and the admission of Ms Randle of the conduct.

[39] There is nothing in the "new" evidence which leads me to conclude a substantial risk of a miscarriage of justice has occurred such that a reopening of the Authority's investigation is justified. Ms Randle's application is dismissed.

[40] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

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12 Respondents Bundle of Documents, p 107
13 At [28]