

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2011] NZEmpC 171
WRC 32/10**

IN THE MATTER OF an application for rehearing

AND IN THE MATTER OF an application for costs

BETWEEN ADVKIT PARA LEGAL SERVICES
 LIMITED
 Plaintiff

AND JACQUELINE WENDY WESTON
 Defendant

Hearing: By memoranda of submissions filed on 27 October and 7 December
 2011

Appearances: No appearance for plaintiff
 John Gwilliam, counsel for defendant

Judgment: 15 December 2011

INTERLOCUTORY JUDGMENT OF JUDGE BS TRAVIS

[1] In my judgment¹ dated 26 October 2010 I upheld Mrs Weston's challenge, found that her resignation was inevitable and that her resignation therefore amounted to a constructive dismissal. I stated that as her challenge had been successful, she was entitled to costs. I gave the parties a timetable for making submissions as to costs if they could not agree. Advkit Para Legal Services Ltd (Advkit) subsequently applied for rehearing of the matter and I ordered that costs for the substantive hearing be put on hold while that application was heard and decided.

¹ [2010] NZEmpC 140.

[2] In a second judgment,² dated 26 September 2011, I dismissed the application for rehearing of my earlier decision. I again decided that Mrs Weston was entitled to costs and set out a timetable for submissions.

[3] On 26 October 2011, counsel for Mrs Weston, Mr Gwilliam, made his submissions with regard to costs. Mr Gwilliam noted that costs had not yet been fixed for the substantive hearing and that indemnity costs were sought in relation to that hearing. He also claimed further costs in relation to defending the application for rehearing and other matters. In addition, Mr Gwilliam presented a document showing that Advkit was struck off the Companies Register on 24 August 2011. This document shows that Mr Douglas Dixon-McIvor was the sole director of Advkit.

[4] Mr Gwilliam also made a number of other assertions which were not substantiated by any affidavit evidence. He stated that his client had informed him that Mr Dixon-McIvor was continuing to run his business through a new entity, Wellington Advkit Services Limited. This company was registered on 21 January 2011 with Mark Basford as its director. Mr Gwilliam asserted that Messrs Basford and Dixon-McIvor are close associates and friends.

[5] In these circumstances, Mr Gwilliam submitted that a “cost order now be personally made against Mr Dixon-McIvor”. Mr Gwilliam envisioned that the Court would offer Mr Dixon-McIvor an opportunity to respond before issuing a costs award and, if so, counsel requested a final opportunity to respond.

[6] No response to Mr Gwilliam’s memorandum has been received by the Court. Mr Gwilliam therefore made additional costs submissions, dated 6 December 2011, inviting the Court to issue directions as to why Mr Dixon-McIvor should not be joined as a party to the proceedings for the purposes of a costs award being made against him.

[7] In his submission, Mr Gwilliam appropriately referred to cl 19 of sch 3 of the Employment Relations Act 2000 which permits the Court to award costs, but only to a party to the proceedings. It would therefore be necessary to join Mr Dixon-McIvor

² [2011] NZEmpC 117.

as a party before awarding costs against him. The Court of Appeal has recently made clear in *Kidd v Equity Realty (1995) Ltd*,³ that in order for a party to be joined for the purposes of a costs award, the Court must be satisfied that a costs award against a third party is appropriate. The Court of Appeal went on to canvas the circumstances in which such an award may be appropriate and discussed, in particular, the situation where a closely held company is the litigant and those who controlled the company necessarily controlled its conduct of the litigation. The Court noted that in some cases of insolvency, a court may conclude that the real parties were the directors, not the company, especially where the litigation is without merit.

[8] Mr Gwilliam also referred to *Pacific Palms International Resort & Golf Club Ltd v Smith*.⁴ That case was an application by the sole director of the plaintiff company for leave to appear and be represented. That application was subsequently withdrawn but the defendant sought an order that the director pay costs personally. In that case I ordered the plaintiff company to make submissions, supported by affidavit evidence, as to why the director should not be joined for the purposes of a costs award.

[9] In order for a costs award to be made against Mr Dixon-McIvor, the Court will need sufficient evidence on which to decide that Mr Dixon-McIvor has acted in a way which the Court of Appeal indicated would make a third party liable. In *Pacific Palms*, I had before me considerable information as to the financial state of the company and the director and I indicated there was a strong argument that third party costs should be awarded. I therefore had an evidentiary basis to potentially act on my own motion and I gave directions for the plaintiff to show cause why the director should not be joined.

[10] In this case, however, I have limited documentation filed with submissions and a number of assertions made as to Mr Dixon-McIvor's conduct. In these circumstances, rather than directing Mr Dixon-McIvor to respond, the correct procedure is for Mrs Weston to file an application for joinder, supported by affidavit

³ [2010] NZCA 452.

⁴ [2010] NZEmpC 135.

evidence. That application would make clear the purpose of the application for joinder and specify the grounds relied upon. Mr Dixon-McIvor could then respond in the normal way.

[11] I am aware that such an approach would delay resolution of this issue further. However, Mr Dixon-McIvor must have a proper opportunity to resist joinder and liability for substantial costs, if he so chooses. In anticipation that Mrs Weston will wish to file such an application, a decision on costs will be delayed pending the joinder application. That application will need to address the quantum of the costs that are sought and any other matters relevant to the granting of appropriate costs orders. If Mrs Weston does not wish to file such an application, she should inform the Court.

BS Travis
Judge

Judgment signed at 3 pm on Thursday 15 December 2011