IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 4
EMPC 194/2016

IN THE MATTER OF	an application for rehearing
BETWEEN	SANDRA MARX Applicant
AND	SOUTHERN CROSS CAMPUS BOARD OF TRUSTEES Respondent

Hearing: 18 November 2016
(Heard at Auckland)

Appearances: S Marx, applicant in person
R J Scott and G Wishart, counsel for respondent

Judgment: 27 January 2017

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mrs Marx was employed as a Resource Teacher, Learning and Behaviour with the Southern Cross Campus in 2012. She was suspended on 29 January 2013 and later dismissed by way of letter dated 7 May 2013. She filed a personal grievance with the Employment Relations Authority (the Authority) claiming unjustified disadvantage and dismissal. She also sought the imposition of a penalty for breach of good faith.

[2] The respondent (the Board) contended that the grievances based on disadvantage and discrimination grounds had been raised outside the 90-day statutory timeframe for doing so, and that the penalty claim was time-barred. It accepted that her claim of unjustified dismissal had been raised within time. The

preliminary issue for the Authority was the extent to which Mrs Marx had raised a personal grievance within time.

[3] The Authority concluded that Mrs Marx had failed to raise a personal grievance in respect of various aspects of her claim but confirmed that she was entitled to pursue a claim of unjustified dismissal, and also concluded that the question of whether she had raised a bullying grievance within time would be deferred for determination following its substantive investigation.[1] Mrs Marx exercised her right to challenge the Authority's preliminary determination. The challenge was heard over two days and was dismissed for reasons set out in a judgment dated 10 June 2016.[2]

[4] Mrs Marx sought to file an application for a rehearing on 8 July 2016. The application was rejected for filing by the Registrar because it did not comply with the applicable statutory requirements. Ultimately an application was filed on 3 August 2016. An application for rehearing must be filed within 28 days of the date of judgment.[3]

[5] Two issues arise. The first is whether the application for a rehearing could have been made sooner, for the purposes of cl 5(2), sch 3 of the Employment Relations Act 2000 (the Act); secondly, if not, whether a rehearing ought to be granted.

Analysis

[6] The Court's power to grant a rehearing is contained in cl 5, sch 3 of the Act. Clause 5 provides that:

> (1) The court has in every proceeding, on the application of an original party to the proceeding, the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay proceedings.

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1 *Marx v Southern Cross Campus Board of Trustees* [2015] NZERA Auckland 308.
2 *Marx v Southern Cross Campus Board of Trustees* [2016] NZEmpC 71.
3 Employment Relations Act 2000, sch 3, cl 5(2). See too Employment Court Regulations 2000, reg 61(4).

> (2) Despite subclause (1), a rehearing may not be granted on an application made more than 28 days after the decision or order, unless the court is satisfied that the application could not reasonably have been made sooner.

[7] Clause 5(2) is couched in mandatory terms. An application may not be granted if made more than 28 days after the judgment or order unless the Court is satisfied that it could not reasonably have been made sooner than it was.[4] This threshold must be navigated before consideration is given to whether the grounds for ordering a rehearing are made out.

The threshold test

[8] Mrs Marx attempted to file an application for a rehearing within 28 days of the date of the judgment, namely on 8 July 2016. The legislation requires that an application must state the grounds on which the application is made and those grounds must be verified by affidavit. The Registrar rejected the application on the basis that the applicable requirements had not been met. There were then further delays and the application was not filed until 3 August 2016, so well outside the statutory timeframe.

[9] Mrs Marx explained the reasons for the delay in filing. She said that there were difficulties with the way in which District Court staff had witnessed her supporting affidavit and that these had been pointed out by registry staff when she attempted to file her application with the Employment Court. Mrs Marx says that she was given guidance by the Registrar as to how to correct the necessary documentation. She then took steps to address the issues that had been identified, explaining that she and her supporters from Cornerstone Christian Information Centre (Cornerstone) (a voluntary organisation set up to assist Mrs Marx with her litigation) spent a considerable amount of time preparing the documentation.

[10] It is not uncommon for unrepresented litigants to experience some challenges in navigating Court processes and procedures. It is clear that Mrs Marx endeavoured to file her rehearing application on time. However, the reality is that the application eventually came nearly four weeks after it had originally been rejected for filing, the

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4 *Empress Abalone Ltd v Langdon* [2001] ERNZ 441 (EmpC) at [55].

reasons for rejection had been explained, and the steps required to address the deficiencies identified.

[11] As a full Court pointed out in *Empress Abalone Ltd v Langdon*, an applicant must move at all times following the 28-day period "with all possible dispatch."[5] Immediate steps to remedy the situation, and prompt filing, would have lent weight to an argument that the application in the present case could not reasonably have been made sooner for the purposes of cl 5(2). While I accept that Mrs Marx was keen to ensure that the documentation was as full as possible I am not satisfied that the ground in cl 5(2) has been made out and would decline the application on this basis. However, in case I am wrong about that, I have considered the matters raised by Mrs Marx in support of her application. I have concluded that even if cl 5(2) did not represent a stumbling block for the application I would not have granted it in any event.

Grounds for application

[12] Mrs Marx raised a number of matters in support of her application for a rehearing, all of which I have considered. During the course of oral argument I understood Mrs Marx to emphasise four broad matters:

a) Witnesses called on behalf of the Board gave false evidence and counsel for the Board misled the Court and committed gross misconduct;

b) A number of relevant documents were not considered, or were inadequately considered, by the Court in reaching its conclusions;

c) The hearing of Mrs Marx's challenge was conducted in an unfair manner, particularly because her cross-examination was unnecessarily curtailed, so that she was deprived of natural justice;

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5 At [55].

d) A number of facts relied upon by the Court in its decision are incorrect and/or were misinterpreted.

Approach to rehearing applications

[13] The Court has a general power to grant a rehearing. That is reflected in the wording of cl 5(1). While the discretion is broad it is to be exercised judicially and in accordance with principle. The usual approach in this Court is for the trial judge to hear and determine any application for rehearing.[6] That is what occurred in this case, with both parties' agreement.

[14] A range of factors will be relevant to a consideration of whether a rehearing is appropriate, including weighing both parties' interests and the broader public interest in the finality of litigation. The overriding consideration is to avoid a miscarriage of justice.[7] The applicable principles were discussed by the Court of Appeal in *Ports of Auckland Ltd v New Zealand Waterfront Workers Union*.[8] As the Court of Appeal confirmed, the mere possibility of a miscarriage of justice is not a sufficient ground for granting a rehearing.[9] What is required is an actual miscarriage of justice or at least a real or substantial possibility or substantial risk of a miscarriage of justice.[10]

[15] Notably, rehearings are not directed at allowing parties free reign to reformulate their claim, revise their arguments or otherwise have a second bite at the litigation cherry. Nor does a litigant have free reign to decide which, of a suite of possible options, they will pursue if dissatisfied with a judgment. It is, for example, unusual for an application for rehearing to be granted on the grounds that the impugned judgment contained an error of law (which may give rise to an appeal)[11]

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6 See, for example, *Yong (t/a Yong and Co Chartered Accountants) v Chin* [2008] ERNZ 1 at [3].

7 *Cavalier Carpets of New Zealand Ltd v New Zealand (except Taranaki etc) Woollen Mills, etc IUOW* [1989] 2 NZILR 378 at 381.

8 *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* [1995] 2 ERNZ 85 (CA).

9 At 88.

10 At 88. Compare the discussion of the Court of Appeal's *Ports of Auckland* judgment in *New Zealand Nurses Organisation v Waikato District Health Board* [2016] NZEmpC 89. This latter case is currently awaiting appeal, leave having been granted in *Waikato District Health Board v New Zealand Nurses Organisation* [2016] NZCA 488.

11 *Yong v Chin*, above n 6, at [19]-[25].

or where judicial review is available.[12] Both are relevant to an assessment of whether a rehearing would be appropriate in the present case, given the nature of the concerns Mrs Marx has raised in support of her application.

[16] I respectfully agree with Judge Ford's observation in *Davis v Commissioner of Police* that:[13]

> [12] The authorities show that some special circumstance must be found to exist to warrant the ordering of a rehearing. It would be an impossible burden on this Court if a rehearing under cl 5 could be obtained merely by request and there is a strong countervailing public interest consideration in having finality to litigation.

[17] While the kinds of circumstances in which a rehearing will be granted are not closed, the sort of cases in which an application has generally succeeded were usefully set out by Judge Ford as follows:

> [13] Traditionally, rehearings have been ordered when the integrity of a judgment has been placed in issue by some special and unusual circumstance. Examples include the discovery of fresh or new evidence, that could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive: *Hardie v Round*. A similar situation, albeit less common, may arise where a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended: *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* and *Yong t/a Yong and Co Chartered Accountants v Chin*. Other special and unusual circumstances will no doubt arise and each will fall to be considered on a case-by-case basis.

Discussion

Alleged lies and misconduct

[18] Mrs Marx has made a number of allegations against the three witnesses who gave evidence on behalf of the respondent at hearing, and counsel. Amongst other things she variously describes them as having lied, acted fraudulently and as having deliberately misled the Court. Her submission is essentially that a rehearing is necessary in order to challenge the witnesses on what they said in Court, and to

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12 See, for example, *Katz v Mana Coach Services Ltd* [2011] NZEmpC 92 at [6].

13 *Davis v Commissioner of Police* [2015] NZEmpC 38. Citations omitted.

summons additional witnesses (other Board members) to ensure that the truth is revealed.

[19] The first point is that the primary purpose of cross-examination is to test evidence. Mrs Marx had the opportunity to cross-examine the Board's witnesses and did so at some length.

[20] The second point is that while a rehearing may be appropriate in circumstances where there is a concern that a witness has lied, the usual conditions for the introduction of fresh evidence apply[14] and no satisfactory basis has been laid for the allegations advanced against the witnesses in this case. A particular focus was placed on evidence that Mr Parussini gave as to the existence or otherwise of a letter dated 9 May 2013 which Mrs Marx said she had forwarded to the Board. Mr Parussini could not recall receiving the letter, although accepted in evidence that he may have.

[21] It is evident that following the hearing and receipt of documentation (including an email annexed to Mrs Marx's affidavit) filed in support of the application for a rehearing, further searches for the 9 May 2013 letter were undertaken. Affidavits were filed by Mr Parussini and Mr Staples confirming that the letter had now been located and explaining why it had not previously come to light. I agree with Ms Scott's submission that this sequence of events falls well short of laying a foundation for the contention that witnesses for the Board lied under oath and that a rehearing is appropriate on this basis. And while a document which comes to light subsequent to a hearing, and which might have led to a different result, may be grounds for a rehearing, the letter of 9 May 2013 related to the dismissal and came too late in terms of the 90-day timeframe for raising a disadvantage grievance. Accordingly it would not have made a material difference to the outcome.[15]

[22] Finally, no basis has been laid for the claim that a rehearing is required because counsel lied to the Court and committed gross misconduct. There is nothing to suggest that counsel has discharged her obligations in anything other than a

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[14] *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 per Denning LJ; *Lewis v Greene* [2005] ERNZ 142 (EmpC).

[15] *Marx v Southern Cross Campus Board of Trustees*, above n 2, at [28].

professional and appropriate manner. As the cases make clear, evidence, rather than mere suspicion or speculation, is required.

New evidence?

[23] The emergence of new evidence is a well-established ground for granting a rehearing. Generally three qualifying criteria will apply.[16] First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Second, the evidence must be such that if given it would likely have an important influence on the result of the case. It need not be decisive. Third, the evidence must be apparently credible. It need not be incontrovertible. Delay tells against the grant of a rehearing.

[24] Mrs Marx's application for a rehearing states that she wishes to submit "new" evidence and that a rehearing is necessary to enable her to do so, and that:

> My email address being used by Cornerstone at this time of the [90 day window] collapsed and seemingly all my emails were lost. With a degree of extreme earnestness we have been able to retrieve some emails. Therefore I have made a selection of emails/letters Exhibits A to Z as a very earnest attempt to reveal to the court that there is a need to investigat [sic] more, if the truth is to be uncovered.

[25] Exhibit A to the affidavit filed in support of the application is an email dated 29 January 2013. That email is referred to in the judgment.[17] Its contents were held to be insufficient to raise a grievance.

[26] Exhibit B is an email chain of November 2012, so pre-dates Mrs Marx's suspension and is not otherwise relevant. Exhibit C is an email from Mr Staples dated 1 February 2013 which refers to a delegation from the Board of Trustees. It is not material to the matters at issue on the challenge. Exhibit E is a cover email to a letter to Mrs Marx dated 7 March 2013 from Mr Parussini advising of the date for the disciplinary meeting. Exhibits Q, R, S, T, U, V, W, X, Y and Z all post-date the expiration of the 90-day timeframe for raising a personal grievance and are not otherwise relevant to the matters at issue on the challenge.

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16 *Ladd v Marshall*, above n 14; *Dragicevich v Martinovich* [1969] NZLR 306 (CA); *Lewis v Greene*, above n 14.

17 *Marx v Southern Cross Campus Board of Trustees*, above n 2, at [21].

[27] Exhibits D, F, G, H, I, J, K, L, N, O and P are emails or letters noted in a 93 page document referred to as "the Silent Witness Log", which was incorporated in the bundle of documents for hearing at Mrs Marx's request. As Ms Scott points out, the fact that Mrs Marx was able to compile a "log" which (when compared with the documents annexed to her affidavit filed in support of the application for a rehearing) reveals a virtual word-for-word recitation of the originals, undermines any suggestion that the emails and letters are "new" and justify the grant of a rehearing.

[28] As I understood it, Mrs Marx was concerned that she had not been aware that she should have included copies of the emails she wished to refer to in the bundle and that she believed that the Silent Witnesses Log would suffice, despite directions having been given and discussed during telephone conferences as to the requirements for the bundles of documents for hearing. I further understood her to be saying that her ability to present her case was compromised by an absence of the emails because she had been unable to determine the extent of the lies that the Board's witnesses would give under oath and that a rehearing was necessary on this basis. There are several points that can be made in relation to this submission.

[29] Timetabling orders were made well in advance of the hearing, including in respect of the bundle of documents and briefs of evidence. The parties were reminded of the need to include documents that they wished to refer to in evidence and submissions. Mrs Marx liaised with Ms Scott in the preparation of the bundle and provided numerous documents for inclusion (over 600 pages). The original bundles of documents were filed in accordance with the timetable for doing so, namely four weeks before the hearing. Two further bundles (one by each party) followed.

[30] Mrs Marx was aware of the evidence-in-chief which the Board's witnesses would be giving because their briefs of evidence were filed four weeks prior to the hearing. This was underscored by a direction that the Board file and serve a summary of its case prior to the hearing to enable Mrs Marx to fully understand its position. The Board's summary was filed and served accordingly.

[31] The primary purpose of cross-examination is to explore the basis for the evidence that is given under oath. It may be that Mrs Marx did not anticipate some of the responses that came out of cross-examination, but that is not an uncommon occurrence in litigation. It would create an intolerable burden on the courts and the successful litigant if a party could seek a rehearing simply because they wish that, with the benefit of hindsight, they had asked further questions, put additional documents to a witness or pursued a different line of inquiry.

[32] Issues relating to the Silent Witnesses Log arose during Mrs Marx's cross-examination of Mr Parussini. As the following exchange reflects, copies of at least some of the documentation referred to in the Log were contained elsewhere in the bundle:

> Mrs Marx: So, in the documents, if I have to do, two letters, which Mr Parussini says he doesn't know if, if I have produced my documents, the presentation that Mrs Marx presented and it has quite specifically, personal grievance, I'm just wondering then why I can't, why Mrs Marx cannot put that forward as having raised a question about the way she was being treated.
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> Court: Right, so you're referring to documents 32 and 33?
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> Mrs Marx: 32, 33, and 41 and also one other one, if I could just take a second to look at it. So, Your Honour, the problem I have with this, is I've actually basically typed these [emails] out and as, in that email thing so if that's not accepted, then…
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> Court: Well, these documents are here in the bundle, tab 32, 33 and 41.
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> Mrs Marx: Yes.

[33] It became apparent that some of the emails referred to in the Silent Witnesses Log had not been incorporated in the bundle. Mrs Marx was given the opportunity during the course of the first day of hearing and overnight to locate and provide hard copies of documents she wished to refer to in support of her claim that her grievances had been raised within time. Mrs Marx took up this opportunity and put various additional documents before the Court on the second day of hearing. She was then given an opportunity to explain the relevance of this documentation. Again she took up this opportunity.

[34] During the course of argument Mrs Marx drew particular attention to two emails which she said supported her application for a rehearing. The first is an email

dated 24 February 2013, from Mrs Marx to the chair of the investigative committee, Mr Murphy. Mrs Marx said that this email was significant because it reflected the fact that she had always been professional in her dealings with the Board and that this had not been reciprocated. The second is an email dated 11 March 2013. Mrs Marx said that this email is important because it reflects that the Board was not corresponding with her as it should have been. Neither communication bears on the issue of whether a personal grievance was raised within the statutory timeframe. A review of the other correspondence annexed to the affidavit filed in support of the application leads to the same conclusion.

Procedural fairness

[35] A lack of procedural fairness effectively amounting to a miscarriage of justice may justify a rehearing. However, where a full opportunity has been given to the parties to present their case at trial, a rehearing is unlikely.

[36] In the present case timetabling orders were made well in advance of the hearing. As I have said, these orders required the parties to prepare a bundle of documents and file and serve written briefs of evidence. The issues which were perceived to be relevant to the challenge were set out in a minute to the parties. It was emphasised that the evidence and submissions should be focussed on the particular issues the Court would need to decide, and that the Court would not be considering broader issues as to whether Mrs Marx's dismissal was justified or the extent to which she had suffered unjustified disadvantage. The parties were reminded of the need to include documentation that they wished to refer to in the bundle.

[37] Mrs Marx wished to place a considerable amount of information before the Court and four bundles of documents were filed before the hearing. I have already referred to the issues which arose during the course of the hearing about a number of emails which Mrs Marx wished to refer to. She was given leave to put additional documentation before the Court, and was provided with an opportunity to explain the importance of them from her perspective during evidence.

[38] In advance of the hearing directions were made that the Board was to present its evidence first. The Board was also invited to file a summary of its case prior to hearing. As the minute of 10 February 2016 records, these directions were designed to ensure that Mrs Marx was aware of the points that the Board would be making and had a full opportunity to reflect on them and respond. Counsel for the Board filed a 16-page summary on 6 May 2016.

[39] Three days were allocated for the hearing but, as observed in the 10 February minute following a telephone conference, the Court's expectation was that if the parties focussed on the key matters at issue the evidence and submissions should consume much less time. As it transpired the hearing occupied two days.

[40] Court minutes reflect that in advance of the hearing Mrs Marx was advised of the potential benefits of seeking professional representation and/or legal advice and assistance. Her attention was drawn to useful material on the Employment Court's webpage for litigants in person. Mrs Marx was also advised of the availability of a pro bono legal scheme run through the Auckland Employment Court by the Auckland District Law Society.

[41] Mrs Marx referred to various parts of the transcript of hearing which she submitted reflected unnecessary cutting off of her questions in cross-examination. Ms Scott refutes this concern, noting that the transcript reveals that Mrs Marx spent a total of nearly four hours cross-examining the defendant's three witnesses.

[42] It is not, of course, the length of time allowed for cross-examination or the sheer number of interventions, which are pivotal. Nature and context are important. I have considered each of the parts of the transcript referred to. There were occasions where concerns were raised about lines of inquiry Mrs Marx was wishing to pursue with witnesses (generally about relevance) and Mrs Marx was encouraged to move on to her next question, or refocus what she was asking. The transcript also reflects occasions where lengthy questions were brought to a close and Mrs Marx was asked to reformulate or break down her questions. However, I do not consider that the transcript discloses that Mrs Marx was unnecessarily cut off from relevant lines of questioning.

Factual mistakes, inadequate consideration of documents, bias

[43] The key point in respect of this aspect of Mrs Marx's application was one made by Judge Couch in *Yong v Chin*, where it was emphasised that where a complaint is susceptible to appeal and/or judicial review, the Court will be slow to exercise its general power to order a rehearing.[18]

[44] Mrs Marx set out numerous concerns about the factual findings in the judgment, many of which were said to be based on the alleged lies which witnesses had told under oath and a failure to closely scrutinise the documents or to view them in context. I also understood Mrs Marx to be particularly concerned that Mr Parussini's evidence about the letter of 9 May 2013 (which I have already referred to) was preferred and that this reflected a bias in approach. As the judgment notes, Mr Parussini's evidence was supported at the time by the evidence given by Mr Staples. In the circumstances a fair-minded lay observer would not reasonably apprehend that the findings reached or the subsequent sequence of events (including the contents of the most recent affidavits filed on behalf of the respondent) reflected actual or apparent bias.[19] In any event, I have already dealt with the potential impact of the letter on the substantive matters at issue on the challenge.

Other concerns

[45] Mrs Marx further submitted that a rehearing is necessary to address a gross miscarriage of justice arising out of an alleged absence of proper authority for the respondent's lawyers to act, and on the basis that the respondent never suspended or dismissed her. These matters were traversed during the hearing. The first was dealt with in the judgment and dismissed on a factual basis.[20] The second is not relevant to the particular matters arising at this stage of the litigation and does not support an application for rehearing.

[46] Nor do I accept Mrs Marx's overarching submission that a rehearing is necessary in the broader public interest. As I understood it, the submission hinged

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18 *Yong v Chin*, above n 6 at [25].
19 *Davis v Commissioner of Police*, above n 13, at [17].
20 *Marx v Southern Cross Campus Board of Trustees*, above n 2, at [32].

on a perceived need to reveal the truth, the desirability of public scrutiny of the matters at issue in the litigation, and the ability to rebut evidence given by witnesses for the Board. I have already dealt with the difficulties of this line of argument.

[47] Finally, Mrs Marx's written submissions seek leave to raise a grievance out of time on the basis of exceptional circumstances. An application for leave is contemplated by s 114(3) of the Act but is advanced, at least initially, in the Authority. As the Authority's determination records, no such application has been pursued in that forum. It cannot be dealt with for the first time by the Court on a rehearing application.[21]

[48] During the course of hearing Mrs Marx made it clear that she was upset that it had been more than three years since her dismissal and her main claim has yet to be substantively investigated. I agree that it would be desirable for matters to be progressed and brought to a final conclusion. The respondent also has an obvious interest in bringing the litigation process to an end.

Conclusion

[49] It follows from the foregoing that even if I had concluded that the application did not fall foul of cl 5(2), I would not have been satisfied that there has been an actual miscarriage of justice, or that a real or substantial possibility or risk of a miscarriage of justice has been made out. Nor do I consider that granting the application would be consistent with the interests of justice.

[50] The application for a rehearing is accordingly declined.

Costs

[51] Mrs Marx sought, and the Board did not oppose, a stay of any determination as to costs following her unsuccessful challenge pending the outcome of the current application. Submissions have already been filed by the parties in respect of costs on

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[21] *Snowdon v Radio New Zealand* [2014] NZEmpC 45, [2014] ERNZ 180 at [83].

the challenge. The Board's application for costs now needs to be determined, and I will do so together with any application for costs on the application for a rehearing.

[52] In the absence of agreement the Board is to file and serve any memorandum and supporting material in respect of the application for a rehearing within 20 working days of the date of this judgment; Mrs Marx within a further 20 working days and anything strictly in reply within a further five working days.

Christina Inglis
Judge

Judgment signed at 4.15 pm on 27 January 2017