

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 139/08
5105938

BETWEEN A
 Applicant

AND B AND C
 First Respondent

 D LIMITED
 Second Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, In person
 First and Second Respondents, B and C

Investigation Meeting: 6 March 2008

Further information and 14, 17 March, 4 and 9 April 2008
submissions received:

Determination: 14 April 2008

DETERMINATION OF THE AUTHORITY AS TO A PRELIMINARY ISSUE

Non-publication order

[1] The publication of the names of the parties, and any evidence which could lead to their identification, is prohibited. This order is made pursuant to clause 10 Schedule 2 of the Employment Relations Act 2008.

Employment Relationship Problem

[2] The applicant was employed as a bakery assistant in B and C's bakery until 15 July 2007. In her statement of problem dated 7 November 2007 she says she was

unjustifiably constructively dismissed as a consequence of sexual harassment in the workplace.

[3] The 20 November 2007 statement in reply raised a challenge to jurisdiction; that the applicant had raised her personal grievance outside the 90-day statutory timeframe and the respondent did not consent to the late filing.

[4] Subsequent to the challenge to jurisdiction the applicant sought leave to raise her personal grievance out of time on the grounds that exceptional circumstances exist under section 115(b) Employment Relations Act 2000.

[5] B and C oppose this application. They have also raised an issue as to the identity of the respondent. They say the applicant was employed by the second respondent and not them personally.

[6] This determination deals with two preliminary issues; the identity of the respondent and whether the applicant's application for leave to raise a personal grievance out of time ought to be granted.

Identity of respondent

[7] In the statement of problem B and C are personally named as the respondent. B and C say the applicant was employed by their company D Limited. The written employment agreement identifies the employer as "[] Bakery".

[8] B and C say the applicant was employed by D Limited as are all bakery staff. B and C have provided a letter from IRD directing D Limited, as the applicant's employer, to make deductions from the applicant's pay.

[9] "[] Bakery" does not have legal personality. There is no evidence that B and C represented themselves to the applicant as personally employing her. I am satisfied that D Limited was the employer. The intituling should be amended accordingly. The respondent should ensure that the identity of the employer is clear to all D Limited staff.

Exceptional circumstances

[10] The applicant did not raise her personal grievance with the respondent until after the expiration of the statutory 90-day period¹. She says the delay in raising her personal grievance was occasioned by exceptional circumstances and she seeks leave, pursuant to section 114(3) to raise her personal grievance after the expiration of that period.

[11] The applicant says she was sexually harassed during her employment by B and this so affected or traumatised² her that she was unable to properly consider raising her personal grievance within the 90-day statutory time frame. The applicant says she was upset and depressed as a consequence of the alleged harassment and unable to consider raising a personal grievance within the 90-day timeframe.

[12] The applicant has provided her 2007 medical records. They show she was unwell from March 2007, that she first raised her concerns about work after her employment had ended and that she had a number of stressors in her life.

[13] The Authority received the applicant's 27 July 2007 sickness benefit application. She listed *stress and illness* as the reason for leaving her employment at [] Bakery. The accompanying medical certificate lists depression as the primary reason for the applicant's incapacity and digestive system disorder as a further cause of incapacity.

[14] The Authority also received a letter from Linda Downey, the mental health nurse the applicant's GP had referred her to in July 2007. Ms Downey conducted a home visit with the applicant on 9 August 2007 who reported a range of causes for the stress and depression she was experiencing. With regard to work Ms Downey wrote *she [the applicant] stated she had left her last job at a bakery in [], citing her boss as the reason, stating he had harassed her, was too stressed to deal with it at the time.*" Through Ms Downey the applicant accessed counselling services and attending counselling sessions until December 2007.

¹ Section 114(1) Employment Relations Act 2000

² Section 115(a) Employment Relations Act 2000

[15] The applicant got married in September 2007. In October 2007 the applicant applied for a position at the Opuia Store. Four weeks later she applied for a position at the Kawakawa Woolworths.

[16] The applicant sent B the following txt message in October 2007 "*I think you guys are disgusting*". She sent this message because she believed B and C were responsible for her not securing the Opuia Store position. The applicant said she believed this because when she visited a friend at [] Bakery she (the friend) told her she had overheard C speaking negatively to the Opuia Store about the applicant. C denied any discussion with the Opuia Store about the applicant. On her application for the position the applicant had listed [] Bakery as her last employer.

[17] In submissions B and C have referred me to the judgment of Colgan CJ in *Telecom NZ v Morgan* [2004] ERNZ 9 which sets out the test to apply to a consideration of s 115(a). The essential elements of the test are:

- the consequences of the dismissal or other matter giving rise to the grievance must be severe;
- the effects of the dismissal or other matter giving rise to the grievance caused the employee to not be able to properly consider raising the grievance;
- the incapacity must last for the whole 90-day period; and
- a high standard of proof is required.

[18] I accept that the applicant was incapacitated when her employment with Krumz ended. However, the evidence does not establish that the cause of that incapacity was the events which she says gave rise to her personal grievance. I make this finding because the applicant was prescribed antidepressant medication from 21 March 2007, some months before any record of the alleged sexual harassment, and the GP and nurse notes record the work issue was one of multiple causes of the applicant's stress and depression during the period after her employment ended.

[19] Further, I am not satisfied that the extent of the applicant's incapacity prevented her from giving proper consideration to raising a personal grievance. The applicant was able to get married during the 90-day statutory time period and apply

for new positions. I accept B and C's submission that if the applicant was able to undertake these matters then she could reasonably consider raising a personal grievance.

[20] For the reasons set out above the exceptional circumstance test is not met. The applicant's application is declined.

Costs

[21] I do not understand that there is any issue as to costs (ie, legal fees). If I am wrong then D Limited may file a memorandum within 14 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority