Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 107
5455529

BETWEEN	A Applicant
A N D	AARON BENNETTS trading as AARONS FURNITURE TO GO Respondent

Member of Authority:	M B Loftus
Representatives:	Andrea Derbidge, Advocate for Applicant Aaron Bennetts on his own behalf
Investigation Meeting:	17 July 2014 at Oamaru
Submissions Received:	At the investigation
Date of Determination:	22 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, A, claims she was unjustifiably dismissed by the respondent, Aaron Bennetts, on 23 September 2013. A also claims she was sexually harassed and there is a claim for unpaid holiday pay.

[2] Mr Bennetts accepts he told A she was redundant but believes the decision was justified. The other claims are denied.

[3] Initially there was also a claim A was not allowed rest/breaks. This was not pursued and will be considered no further.

Conduct of the investigation

[4] Comment must be made about Mr Bennetts' approach to both the claims and the investigation process. He was extremely uncooperative and refused to address either in good faith.

[5] Examples include a refusal to accept signature-required documents which meant the Authority had to resort to document servers, a failure to provide a Statement in Reply and a refusal to enhance on the brief defence outlined in a letter he sent to Ms Derbridge on 2 November 2013. His approach is best summarised by his own repeated comments about the process being a joke and not worth the time or effort.

[6] There was also his behaviour at the investigation meeting which was inappropriate and offensive. It ranged from the relatively minor such as refusing to answer questions through to the significant with frequent interjections (often embellished with expletives), direct abuse of other participants and serious but unsubstantiated allegations levelled at other participants.

Citation of respondent

[7] Mr Bennetts is personally cited as the respondent. During the investigation it came to my notice that A was paid by a company, Furniture World Limited. Mr Bennetts is its sole director and shareholder.

[8] A advises she only became aware of the company's existence after she commenced employment and due to the fact it was the source of her pay. She believes it to be a totally separate entity from that she actually worked for and remains adamant she was employed by Mr Bennetts personally. It was with him the arrangement was entered into and there had been no mention of a company.

[9] I accept A's assertions and will retain Mr Bennetts as the respondent. I do so for two reasons. The first is, for reasons soon to be outlined, that I prefer A's evidence over Mr Bennetts'. The second is that while Mr Bennetts frequently took issue with A's claim and her evidence, he never once mentioned or challenged the respondent's citation or suggested the employer was anyone other than himself. Indeed, at one point, he accepted it was he who had employed A.

Credibility of witnesses

[10] Mr Bennetts was not a credible witness. I reach this conclusion for a number of reasons.

[11] First there was the manner in which he presented his evidence. As already said, he failed to provide a Statement in Reply despite advising the Authority he was about to do so on 18 June 2014. Notwithstanding that, and at the commencement of the investigation meeting, the process was explained and Mr Bennetts was given an opportunity to outline his position and add to the letter of 2 November 2013. He refused choosing instead to offer what little evidence he had via his often inappropriate interjections.

[12] Second there was the content of his evidence. One example was a statement he never prepared employment agreements instead requiring his employees write their own. That is not credible. Another example revolved around claims he made of inappropriate behaviour by A which, he says, could be evidenced by text messages she had sent to him. The claims were totally undermined by the fact that while he was happy to wave his phone around he did not allow me an opportunity to actually read the messages.

[13] There were other examples, some of which are commented on later in this determination which led me to conclude that what little evidence Mr Bennetts offered lacked credibility and should be disregarded when it was at variance with that offered by A who came across as a credible and honest witness.

Background

[14] A was employed as the manager of Mr Bennetts' furniture retail business. She commenced on 1 June 2013 having been introduced to Mr Bennetts by mutual acquaintances approximately two days earlier. She says she never received an employment agreement despite numerous requests and while her pay was direct credited to her account there were no payslips.

[15] A claims Mr Bennetts made a number of advances in which he proposed an intimate relationship during the employment. She says she rejected those approaches and advised they were unwelcome. Despite that, they continued.

[16] About the dismissal, A says Mr Bennetts approached her at work on the morning of 23 September 2013 and told her she was being made redundant and this (23 September) was her last day.

[17] A is also of the view she did not receive her holiday pay in cessation but the lack of pay records means she cannot give an absolute guarantee that is the case.

Determination

[18] There are three parts to this claim – the dismissal; the sexual harassment and the holiday pay.

Dismissal

[19] A claims she was summarily dismissed and no discussion or consultation preceded advice of Mr Bennett's decision.

[20] Mr Bennetts' response is he did not dismiss A. He made her redundant. He adds, in a statement which reflected the content of the letter dated letter of 2 November 2013, A was aware the business was struggling. The letter added A's awareness came from advice about the situation given at commencement and continuous reminders essential targets were not being met.

[21] Mr Bennetts was advised redundancy is a dismissal and that meant he would have to justify the decision. He was asked if he wished to elaborate but refused. He did, however, respond when asked to give details about the continuous reminders referred to in [20] above. He was unable to refer to any specific discussion and simply said *of course she knew – she was the [expletive] manager wasn't she*.

[22] He added he gave a weeks' notice and insinuated, both orally and in the letter, it was A who brought the employment to an end by leaving immediately. My preference for A's evidence means I accept she was told she was to finish that day. A accepts she left immediately and attributes that to feeling unwell due to the shock of an unheralded loss of employment. That does not, to me, affect my conclusion this was a dismissal.

[23] It is well established that when reviewing a redundancy decision the Authority or Court will look at two factors. They are the genuineness of the redundancy and the

procedure by which it was carried out. The enquiry into each factor is carried out separately (*Coutts Cars Ltd v Baguley* [2001] ERNZ 660 (CA)).

[24] For three reasons I conclude the redundancy was not genuine. First Mr Bennetts' refusal to elaborate on the business's state or provide any supporting evidence such as accounts means there is no evidence upon which I can base a conclusion it was genuine. Secondly, A denies she was aware the business was struggling and referred to a level of turnover which, on the face of it, could have supported her retention. I have already commented on my preference for her evidence over that of Mr Bennetts. Finally Mr Bennetts accepts the business has a new manager though claims the position remained vacant for some six months. He offered no evidence to corroborate the last assertion and replacement undermines the original decision to some extent.

[25] Turning to process. Section 103A of the Employment Relations Act 2000 (the Act) requires an employer must, before dismissing an employee, raise its concerns, allow the employee an opportunity to respond and consider the response with an open mind (ss.103A(3)(b) to (d)).

[26] That these requirements, in the form of a consultation process, remain in a redundancy setting is expressly confirmed by s.4(1A)(c) of the Act. The relationship was confirmed by the Court in *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102.

[27] I find these requirements were not met by Mr Bennetts. I do so for two reasons. First, I accept A's claim the first she knew of a possible redundancy was advice the decision had been made. Second, Mr Bennetts failed to offer any contrary evidence.

[28] For the above reasons I find the dismissal unjustified.

Sexual harrasment

[29] A claims she received numerous requests she enter into an intimate relationship with Mr Bennetts. In the letter of 2 November 2013 Mr Bennetts denies the claim on the grounds he and A had a pre-existing consensual relationship in which A provided sexual services for reward. The letter claimed they entered into the relationship *well* before A commenced employment.

[30] A strenuously denies Mr Bennetts' claims about the alleged relationship. I accept her denial for credibility reasons already enunciated and because of Mr Bennetts answers when questioned about his assertion the relationship had commenced *well* before the employment.

[31] These questions arose as he had earlier made a comment accepting A's evidence the two had first met on 29 May 2013. That was only two days before commencement and does not sit comfortably with the *well* comment. Mr Bennetts initially denied making the *well* statement. When shown the letter his attempts to resile from his earlier acceptance of the original meeting date were far from convincing.

[32] In *Proceedings Commissioner v Sahay* [1996] 2 ERNZ 388 (CRT), the Complaints Review Tribunal held there was a distinction between two categories of sexual harassment: coercion and annoyance. The former involved attempts to coerce a subordinate to grant sexual favours by linking job benefits to those favours. Annoyance was defined as sexually-related conduct that was hostile, intimidating or offensive, but had no direct link to any tangible job benefit or harm.

[33] A similar distinction must exist here with similarities between the two statutory definitions of sexual harassment. Section 108(1)(a) of the Act essentially reflects s.62(1) of the Human Rights Act 1993 and 108(1)(b) reflects s.62(2).

[34] This is a claim of annoyance given A has not suggested there was an overt or implied threat to her on-going employment.

[35] For a claim of annoyance to succeed an applicant must advise the other party of their dissatisfaction and the behaviour has to be repeated and continued.

[36] Again, I accept A's claim she advised Mr Bennetts to desist and he failed to do so. Given her evidence I also accept A found the approaches an annoyance as defined by the Complaints Review Tribunal. It follows I conclude A was sexually harassed.

[37] Finally I have to, again, note Mr Bennetts' inappropriate behaviour during the investigation. He exhibited a willingness to make unsubstantiated and highly derogatory comments about A which were of a sexual nature. His behaviour in what is, to some extent, a controlled environment raised concerns about how he would act when unrestrained.

Holiday Pay

[38] While the lack of pay records means she cannot guarantee it, A is fairly sure she did not receive holiday pay on termination.

[39] The lack of absolute certainty is, however, overcome by s.132 of the Act. It provides where there is a failure to keep or produce time and wage records I may accept the claim.

[40] Ms Derbidge produced an e-mail she sent to Mr Bennetts on 26 September 2013 requesting A's pay records. Mr Bennetts claims he did not receive it adding e-mail is a poor way to communicate. Aside from the fact I do not believe him given his approach to the receipt of the Authority's documents and the fact the only communication we received from him was by e-mail it would not matter. He could have brought the records to the investigation meeting.

[41] When asked where they were, the answer was *not here* as he had not been told to bring them. That simply means he did not read paragraph 5 of the notice of the investigation meeting which I know he got as (a) it was served by a document server and (b) he would not have been present if he had not have received it.

[42] The response is inadequate and leads to a conclusion A is yet to receive her holiday pay. IRD records A received a total of $8,690 from Mr Bennetts. Eight percent is $695.20 and that is to be paid.

Remedies

[43] The conclusion the dismissal was unjustified raises the issue of remedies. A seeks wages lost as a result of the dismissal and compensation for hurt and humiliation.

[44] Often a successful applicant dismissed for redundancy will be unable to recover lost wages. This is due to the redundancy being substantively, if not procedurally, justifiable meaning there would have been no loss. My conclusion the redundancy has not been substantively justified ([24] above) means that is not the case here. Wages remain recoverable.

[45] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or three months ordinary time

remuneration. Additional amounts may be awarded on a discretionary basis but this requires evidence of an attempt to mitigate the loss. A remains unemployed but the evidence of attempts to mitigate is weak and does not warrant an extension of the mandatory three months.

[46] A worked thirty two and a half hours a week at $17 per hour. That means three month loss of $7,182.50. That is payable.

[47] Turning to compensation. The amount sought is unspecified and the supporting evidence in A's brief is weak. It went little past a statement she felt hurt and humiliated by her treatment and the situation was aggravated by the fact a customer witnessed the dismissal.

[48] Normally that would only warrant a nominal award but that has to be balanced against the finding A was sexually harassed. The harassment was ongoing and the only thing keeping A in the job was a desperate need for work. Hurt and humiliation must emanate from such a hostile environment and A's distress was apparent during the meeting.

[49] Aggravating the injury to A's feelings is the unsubstantiated and unsavoury allegations Mr Bennetts later levelled when trying to craft a defence and the inappropriate and threatening texts he sent to A after she initiated her claim. His behaviour during the meeting illustrated perfectly that Mr Bennetts was both capable of, and actually behaved, in a sexually inappropriate manner.

[50] Having considered the evidence and what I observed, I conclude a significant amount is justified and order the payment of $12,000 as compensation.

[51] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not A contributed to her dismissal in any significant way. The nature of the defence, redundancy, automatically infers no fault so the answer is no.

Conclusion and Orders

[52] For the above reasons I conclude A has a personal grievance as she was both unjustifiably dismissed and sexually harassed in her employment.

[53] As a result the respondent, Mr Aaron Bennetts, is ordered to pay the applicant, A, the following:

i. $7,182.50 (seven thousand, one hundred and eighty two dollars and fifty cents) gross as recompense for wages lost as a result of the dismissal; and

ii. A further $12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and

iii. A further $695.20 (six hundred and ninety five dollars and twenty cents) gross in respect to unpaid holiday pay.

[54] Costs are reserved.

Suppression Order

[55] Suppression is granted where the circumstances of a case outweigh the principle of open justice. Those involving sexual harassment are often considered to be such cases and Mr Bennetts inappropriate response to the claim has aggravated the situation.

[56] I therefore order neither A's identity or any information that may lead to her identification be published.

M B Loftus
Member of the Employment Relations Authority