

Attention is drawn to paragraph [1] of this determination prohibiting publication of certain information.

Determination Number: CA 131/05
File Number: CEA 207/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN B (Applicant)
AND C (Respondent)
REPRESENTATIVES Janet Norman-Oke, Counsel for Applicant
Christine French, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 8 September 2005
DATE OF DETERMINATION 28 September 2005

DETERMINATION OF THE AUTHORITY

Prohibition of publication

[1] In light of the nature of the behaviour complained of there was agreement that there should be, at this preliminary stage, prohibition of publication of the names of the applicant, the respondent and the employee who is the subject of the complaint. I also prohibit from publication any information that may lead to their identification. I shall refer to the applicant as B and the respondent as C. I shall refer to the employee who it is alleged sexually harassed B as X.

The Employment Relationship Problem

[2] The applicant, B applies to the Authority for leave to raise her personal grievance after the expiration of the 90 day period under section 114 (3) of the Employment Relations Act 2000. B relies on the ground set out in section 115 (a) of the Act for exceptional circumstances which provides:

115 (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114 (1);

[3] B says that she was sexually harassed shortly after she commenced employment with the respondent by another employee of the respondent X. B says that the harassment took place on

20 January 2003 and that it was a *one off incident*. B said that because X was at the other end of the building she could go for days or weeks without seeing him so her ongoing contact with X was limited.

[4] B raised her personal grievance by way of letter from her lawyer on 22 December 2004. This was 23 months after the alleged incident of sexual harassment. At the time of the raising of the grievance the applicant was no longer working for the respondent having left her employment with C in early October 2004. Prior to 22 December 2004 the applicant says that she did not feel able to raise the matter because of her emotional and physical state. The applicant accepts that she did not make a clear complaint of the behaviour to C or a representative of C whilst she was employed.

[5] B says that she did attempt to raise the incident with another employee on 21 January 2003 but felt that she was ignored. B fairly accepted that there was at least a possibility that she was not heard. B did talk about some staff conflict to a representative of C a few months after the incident and felt that she was inappropriately referred to her supervisor in the first instance. B said that she was told *don't bring behavioural issues to me*. B said that it *became harder to speak out and that there was a sense of futility and hostility*.

[6] The respondent, C does not consent to the grievance being raised out of time although it did on receipt of the letter of 22 December 2004 carry out an investigation of the matter. It says that the evidence falls short of satisfying the high threshold required to meet the exceptional circumstances test which was recognised in the Employment Court judgment in *Telecom New Zealand Limited v Morgan* (2004) 7 NZELC 97,544.

[7] The Authority is required in this case, in considering whether leave should be granted, to be satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and must consider it just to grant leave.

Determination

[8] It became apparent to me on receipt of the employment relationship problem and statement in reply that there was a difficulty for B in this case. I spoke to counsel about this during a telephone conference before the investigation meeting.

[9] Liability for C does not arise until after B has made a complaint about the behaviour of X. C is then required to inquire into the facts of the complaint. If C is satisfied that the behaviour took place then C must take practicable steps to prevent repetition of the behaviour. It is only if such practicable steps are not taken to prevent the repetition of the behaviour that under section 118 of the Employment Relations Act 2000 B has a personal grievance against C by virtue of having been sexually harassed.

[10] There is no specific time limit for an employee to make a complaint to the employer or representative of the employer that they have been subjected to behaviour of the kind described in section 108 (1) (b) of the Employment Relations Act 2000 under section 117 of the Employment Relations Act 2000. It would seem sensible though for an employee to complain to his or her employer as soon as possible and to benefit from the protections afforded by section 117 and 118 the complaint would need to be made to the employer during employment.

[11] B did not take the first step of making a complaint to her employer until after her employment with C had ended. I accept that there was some staff conflict at the time that would not have helped and B was also a new employee. B explained that she found it difficult to articulate the nature of her complaint about X which is understandable and she also spoke about the emotional and physical

symptoms that she suffered. B got on well with her supervisor but did not raise the matter with her because *she needed a lot of support herself*. I do note that there was a workplace chaplain with whom B said she had spoken to on at least one occasion about a different matter, a human resource co-ordinator and B was a member of the PSA. It did not seem to me to have been a workplace where there was no support at all. It may not have appeared to B for a variety of reasons that these people could be spoken to or written to about the alleged behaviour but I am not persuaded that C can be responsible for that.

[12] I am of the view that because no complaint was made under section 117 until after B left her employment, there was no action that occurred that amounted to a personal grievance for B to raise against C. Section 118 ceased to have any practical effect when B was no longer employed by C. C was wise though to carry out its own investigation after it received a letter from Ms Norman-Oke on 22 December 2004.

[13] Even if I am incorrect in that, I am of the view that the action relied on by B must be the alleged incident on 20 January 2003. The time for raising a grievance in these circumstances after employment has ended must fairly run from that date. I accept Miss French's submission that B's evidence falls short of establishing, as required, that for a period of 23 months B was unable to properly consider raising the grievance. Neither the doctor who B visited some 18 months after the alleged incident nor the counsellor B went to 22 months after the alleged incident went so far in their respective certificate and report to suggest that was the case. B in my view had been able to consider some matters during her employment, that demonstrated some insight such as her supervisor's well being in deciding not to talk to her about her own situation. Whilst B said that she could not put anything in writing she did think that a lawyer would be required to put the complaint in writing. There was no significant sick leave during the period of employment and B stayed at work where she undertook a job which required her to concentrate and take care. I also place some weight on the fact that B left her employment in early October 2004 and commenced new employment but did not raise a personal grievance until 22 December 2004.

[14] I am not satisfied that B was so affected or traumatised by the incident on 20 January 2003 that she was unable to properly consider raising her grievance for the whole 23 month period. I am not satisfied that the delay in raising the personal grievance was occasioned by the ground relied on by the applicant as exceptional circumstances.

[15] For completeness I would not, had I been required to consider whether it was just to have granted leave, have granted leave for the reasons I have set out earlier in this determination about the substantive merits of the grievance.

[16] Leave therefore to raise the personal grievance after the expiration of the 90-day period is not granted.

Costs

[17] I reserve the issue of costs.