

**Attention is drawn to the order
prohibiting publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 276
5330573

BETWEEN	B Applicant
A N D	C trading as D First Respondent
AND	D Limited Second Respondent

Member of Authority: M B Loftus

Representatives: David Beck, Counsel for Applicant
Angeline Boniface, Counsel for Respondent

Investigation meeting: 2 November 2011 at Christchurch

Submissions Received: 10 November 2011 from Applicant
2 November and 30 November 2011 from Respondent

Date of Determination: 17 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The allegation, as initially filed, was that B had been sexually harassed by C. As the hearing progressed, that altered and by the time of submission the claim had become one of unjustified dismissal, albeit constructive, and unjustified disadvantage with the sexual harassment both causing the alleged disadvantage and constituting the breach which brought about the termination.

[2] All claims, and the factual allegations which underlie them, are denied by the respondent.

Identity of the respondent

[3] The claim was filed against C trading as D. C responded that was incorrect. D is not a trading name but a company and it was the employer. B expressed a desire to continue to pursue the claim against C but agreed to an offer from the respondent(s) that D be added.

Suppression of the parties identities

[4] The parties jointly requested, and I agreed given the nature of the allegations and the involvement of additional parties who could be identified by their relationships with the parties, to suppress detail of their identity.

Background

[5] B was employed in the company's Christchurch shop. She obtained the job through her ex husband [E] who also worked there but cannot remember exactly when. She goes on to say *officially I worked 10 hours per week but in fact I worked many more hours than this and was paid under the table for those extra hours. I think I was paid \$11.50 per hour.*

[6] As already said, the claim was initially one that B had been sexually harassed in her employment. In particular, the following allegations are made.

- (a) That C hugged B or otherwise brushed against her and touched her inappropriately. It is alleged this occurred on a multiplicity of occasions, though few specifics were discussed in evidence. One involved an incident when C hugged B after she became upset at the behaviour of her husband in the shop. C accepts that occurred and B notes she had no objection at the time. All other allegations of inappropriate touching or behaviour are denied with C contending it was B who was making approaches to him. He says he rejected those and the claim is the revenge of a woman scorned.
- (b) That C had knowledge of B's marital difficulties and it was his sympathy for that situation that drove a decision to pay her under the table for additional hours. C accepts he made under the table payments. He puts it down to stupidly responding to pressure from

both B and her ex-husband to minimise the effect work would have on B's benefit payments.

- (c) That C had been in B's home. His response is "yes, once, she invited me". He adds he refused at least four other invites.
- (d) That C started telling B about dreams he had about her and that some of the content was explicit. This claim is denied.

[7] B goes on to say

It was disgusting for me to hear such talk from a man old enough to be my grandfather. I found it particularly hard that [C] would do or say these things that affected me terribly but I felt unable to say anything to anyone else and just had to get on with my job. In time it got harder and harder for me to pretend that nothing was happening and I found it impossible to keep a smile on my face as I had done before. [C] and my colleagues commented on this which upset me more.

[8] The straw that broke the proverbial camel's back occurred on 12 November 2010. It had nothing to do with the sexual harassment claims. About it B says:

The breaking point for me came on Show Day. [E] had been yelling at me and correcting me in front of customers ... and I became upset. I asked [C] to speak to [E] and he said he would later but in fact it was noticeable that [C] didn't like intervening between [E] and me. I was very upset that day. Within a short time a colleague [Y] asked me to shift some baskets. I refused saying that I'd been at work all day and he'd just started, but really it was because I was struggling with being so upset. [Y] complained to [C] and straight away [C] came to me saying "what's going on?". He then said "you're a hard lady to get on with". This was the last straw for me and I told him I chose not to work for him any longer and I was going to the Police to tell them what he had been doing to me. [C] tried to calm me down and told me to go home and rest. It was unheard for [C] to offer a staff member time off in this way.

I went to the Police immediately but because it was Show Day and my complaint wasn't urgent they told me to go home and write down everything that had happened and there weren't enough officers to take my statement. I found myself unable to even write about it I was so upset. I know a number of Police officers and I would have been so ashamed if any of them had seen my statement or been involved in an investigation that I didn't go ahead with that.

[9] When the incident occurred C was working at the back of the shop. He says he heard B swearing at and abusing her ex husband and she then stormed into the

back of the shop. He says he asked what the problem was and she described the issue and which led to a customer receiving an incorrect order which upset her ex-husband. She stated that she refused to work with him again and called him *an f...ing bastard*.

[10] C says he asked B to take a moment to calm down and return to the shop front. This she did, but C claims a short time later there was more shouting and swearing from B and she once again stormed to the back of the shop. C says B described Y as a “f...ing little shit” and stated she wouldn’t work with him. C took exception with this on the grounds that it was said loudly and could be heard by customers. C says he told B to go home as she was in no state to deal with customers. This she did and C accepts that as she left she did say, amidst a tirade of abuse, that she was going to the Police to report *the things that you’ve done to me*.

[11] B was scheduled to return to work the following Wednesday (17 November) but did not appear. She subsequently came in and delivered a letter raising her initial grievance.

Determination

[12] There are potentially four issues to be determined. They are:

- a. Who was the employer, C or D;
- b. Was B sexually harassed;
- c. Was her treatment such that she could conclude she had been constructively dismissed; and
- d. If so, can the employer justify the dismissal.

[13] As has already been said the claim was filed against C. He advised that was incorrect and the employer was D Limited. While B refused to accept that, she did agree to D being added as a respondent party.

[14] It is clear D is not a trading name. It is a registered company and has one director and shareholder – C. The evidence shows C draws a shareholders salary. It also shows it is the company (D) that pays the staff and deducts PAYE etc. Finally there is the fact the company’s identity is advertised on its premises near the entrance though B claims to have been oblivious to this.

[15] It would, given the evidence, be inconceivable C would enter into an arrangement under which he assumes personal liability given the circumstances. I also note B never introduced any evidence to counter C's position and show why she believed he was her employer. For these reasons I conclude the employer is the second respondent, D Limited.

[16] There is then the issue of whether or not B was sexually harassed. B must establish there is a prima facie case to answer before D can be required to justify its actions. I conclude she has failed to do so. I reach this conclusion for the following reasons.

[17] Whilst B alleged multiple transgressions on C's part she was unable to provide much detail when pushed. The allegations remain general in character with no dates etc, a paucity of detail and considerable uncertainty as to frequency. For example what was initially portrayed as numerous infractions by C became, under questioning, *a few*.

[18] There is also the evidence B did not avail herself of opportunities to remove herself from potential harm by, for example, refusing lifts home from C (which, according to her, is the type of situation he would take advantage of by touching her). Indeed she accepts she continued to accept offers which would place her in close proximity to C with no others around.

[19] There is then the fact B claims to have raised her concerns with others – namely her Doctor and the Police. These claims would be easy to corroborate and while they would not prove the harassment occurred, they would lend support to the claim by showing she was concerned enough to approach others. Despite that, there is no evidence to support these assertions.

[20] There is then the evidence of another ex-employee who worked for D on and off for some seven years. She felt comfortable returning and expressed surprise at the allegations though that in itself is not determinative. She did, however, establish a friendship with B and claims the latter was quite open in expressing dissatisfaction with her marriage and that she had stated, prior to the separation, she would leave her husband for C. This claim was not disturbed under questioning and nor were others which related to alleged comments, uttered more than once, that C would be a good partner as he had money to spend.

[21] When I consider the evidence I am far from convinced B has discharged the onus of establishing a prima facie case and am unable to conclude, on the balance of probabilities, the alleged harassment occurred.

[22] Even if the above conclusion is wrong it would be difficult to find B can claim she was constructively dismissed as the result of a breach occasioned by the alleged harassment. As the Court said in *Z v A* [1993] 2 ERNZ 469:

the correct standard of proof in a sexual harassment case is to the balance of probabilities. What has to be proved to show a constructive dismissal is that there was a breach of duty by the employer, that the employee resigned, and that there was a causal link between the two.

[23] The evidence is clear. B made her decision to depart on the day she left – 12 November. On that day she had two arguments with other staff – her ex-husband and a young employee, Y. The evidence is also clear B expressly stated she would not continue to work with E or Y. The evidence, and B's admissions when answering questions, would suggest this was the catalyst for her decision to depart and the allegation of sexual harassment was not at the forefront of her mind at the time. A causal link between the alleged harassment and the departure is missing.

[24] The evidence is this is not the first time such events occurred and C had traditionally allowed staff to cool down and return in their own time. This time the cooling period was cut short by notice of the resignation and subsequent claim and there was no reason to make inquiries over the intervening period as C was told by E that B was unwell.

[25] The conclusion B can not satisfy me she was either sexually harassed or constructively dismissed means the question posed in 12(d) need not be answered and that her claims are dismissed.

[26] Costs are reserved.