Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 270
5324703

BETWEEN	C Applicant
A N D	D LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	T J McKenzie, Counsel for Applicant Peter Zwart, Advocate for Respondent
Investigation meeting:	14 June 2011 at Christchurch
Submissions Received:	20 June and 6 July 2011 from Applicant 29 June 2011 from Respondent
Date of Determination:	13 December 2012

DETERMINATION OF THE AUTHORITY

Suppression

[1] Suppression of the identity of those involved was sought by C. D supported the application. Having considered the issue I agreed to the application. Pursuant to clause 10 (1) of the second schedule of the Employment Relations Act 2000 I prohibit from publication the names of the parties and witnesses.

Employment relationship problem

[2] The applicant, C, claims she was unjustifiably dismissed by the respondent, D Limited, on 4 October 2010.

[3] She also claims she has further grievances in that she was sexually harassed and D has breached both her employment agreement and provisions of the Health and

Safety in Employment Act 1992 by failing to provide a safe workplace. The last claim concerns both the response to her sexual harassment complaint and the state of the company's premises following Christchurch's September 2010 earthquake. Finally there is a claim both wages and holiday pay remained owing.

[4] D accepts it dismissed C but contends the dismissal justified by reason of redundancy. It denies it failed to provide a safe workplace. It says it acted promptly when C raised concerns she was being harassed and appropriately in respect to the building. D also denies there are any payments outstanding.

Background

[5] C was employed by D to fulfil a variety of functions including stock management, financial management and administrative/customer support. She shared her work space with G, an owner and director of D, and H, the Operations Manager.

[6] C says she quickly became concerned about G's behaviour and he frequently made comments of a sexual nature or engaged in inappropriate behaviour.

[7] In addition to this general observation, she raises eight particular incidents where she says she was subjected to inappropriate comments or behaviour of a sexual nature.

[8] G has no recollection of one of the alleged incidents and denies two. He accepts three of the alleged incidents occurred but with the proviso no sexual innuendo was intended. G also accepts the occurrence of a seventh incident which involved a cake but contends C was a willing participant and encouraged him. She responds that it's a pity he does not understand when a response is sarcastic and indicative of displeasure. The eighth event involved G's cat. G accepts it occurred but does not remember telling C about it.

[9] The last of these events occurred on or about 20 August 2010. C says she had had enough and finally confronted G. She told him his comments made her feel stressed and self-conscious. She told him *that if it was something he wouldn't say in the presence of our partners, then he shouldn't say it at all*.

[10] C says G became embarrassed and defensive. He appeared unable to discuss the issue. C says she tried to change the topic but G angrily refused to engage and left the office.

[11] C goes on to say she had hoped she would at least receive an apology but the issue was not discussed leaving her feeling uncertain and leading to one of the claims regarding a failure to provide a safe workplace.

[12] The other alleged breach in respect to the provision of a safe workplace stems from events following Christchurch's first major earthquake on the morning of 4 September 2010. C says she sent a text to G to find out what was going on. His response was everything is fine and its business as usual. C says she was concerned about that and called both the Department of Labour and the Government Earthquake Helpline. She says she was advised all public buildings must be checked by someone approved by the Council. A failure to do so could result in action if injuries were sustained by an employee and caused by a safety deficiency in an unchecked building.

[13] C raised her concerns with G by phone. His response was his personal building check showed it was safe – indeed he felt it was probably safer being at work than at home. C says G became agitated when she told him she had spoken to the Department of Labour and the Earthquake line. He asked whether she had identified the company but calmed when told no. C then offered to contact the Council and arrange a structural check but G maintained it was unnecessary.

[14] Shortly after the conversation G sent C a text reading:

> *C. If you want you can take the day off. I completely understand your worries as your side of town has had way more damage. Be safe. I'll stay in touch. G*

[15] C goes on to say:

> *The next morning he called me at 9am, telling me to come into work because it was safe. I thought he must have had it checked to be calling me and telling me to come in, but he hadn't and maintained it was unnecessary.*

[16] C's response was as the building was still unchecked she would be staying at home that day. She says G then said that if she wasn't coming into work then it would be either as sick or annual leave if she wished to be paid but that she couldn't

use health and safety as an excuse to miss work. C goes on to say the comment hurt her and she advised that she would come in when the building was checked or the state of emergency was lifted, whichever was first.

[17] C was not paid for that day.

[18] C returned to work on the Wednesday once the state of emergency was lifted. In the interim she had a telephone discussion with H who had advised he did not think G would have the building checked. They discussed the situation and whilst their views differed C agreed to return the following day. Once again she was not paid for the day off.

[19] C arrived at approximately 7.40am. She was engaged in a conversation with H when a large aftershock struck. She says the building groaned and rocked sharply and this reinforced her uncertainty about its safety. She chose to leave and G says he was happy with that decision but again chose not to pay for the time off.

[20] C returned on Friday 10 September. She says:

> *Upon arriving at work on Friday morning, I was summoned to an impromptu meeting with G and H. G wanted to know how I felt about him as a person. I wasn't sure what he was getting at and said as much. He then changed tack and asked how much I wanted to work for D, on a scale out of ten. There had been no notice for the meeting and I said I wasn't comfortable answering his questions because I wasn't sure what he was getting at. He then asked what they could do to support me. I said all I wanted was to simply have the building checked and the shelving properly secured so I could work safely. I said that since it seemed there was nothing more I could do convince him, maybe it was best if we just got on with our work, hoped for the best and put the week behind us. G however would not let up. He then asked me to rate my opinion of the company from one to ten, ten being I love work and zero not wanting to come in. I refused to answer and said I would prefer to catch up on my work. G said if I couldn't answer a simple question with a number for an answer then I wasn't fit to work and he was sending me home for the day. I pointed out that I had already done an hour's work and it had been fine. He insisted I leave and I started to cry.*

[21] Once again C was not paid for the time she was absent.

[22] G says he used the rating question as a tool to stimulate a general discussion but C's refusal to answer negated his attempt to discuss her concerns. He therefore suggested she go home.

[23] C goes on to say that having returned to work on the Monday she was again called to another meeting with Messrs G and H. She says she was asked the same question as Friday. Her response was *Are you treating me differently because I raised a sexual harassment issue with you two weeks ago?*

[24] She says:

> *At this, his whole demeanour changed and he said the meeting was now over and I should pack all my things and go home. I asked if he was firing me. He told me that I would be back at 9am on Wednesday morning with a support person to discuss my future with the company, and left the room.*

[25] G says that when he asked the rating question C was initially unable to answer then *glibly replied '5'.* He felt her attitude negative and therefore *postponed* the meeting. He told her she need not work in the interim.

[26] C left as instructed. She also sought legal advice but chose not to retain it.

[27] As events transpired the meeting did not occur until Thursday 16 September. She did not work on the intervening days but was paid for this absence.

[28] C says G again asked her to rate D. She goes on to say:

> *I said I felt he had not been supportive and that in light of the last two weeks, I did not trust him, nor had he addressed my harassment complaint. He said* "We are not always going to do things right but we will try. We were just concerned and wanted to give you a couple of days to think". *I said that all I wanted was to work in a professional workplace with clear boundaries. He said* "No place is really professional. I've worked for corporations and small companies. That isn't possible but we try. We want to move forward, hear your concerns and make this a better workplace".

[29] C says G went on to ask whether she would put more effort into doing things the company's way before the two discussed an engineering check on the building. She says when she pushed for a check to be performed he replied that the Council had told them not to bother if he was satisfied the building was okay. He claims he was so satisfied, as staff had advised him they felt safe. C says G responded to harassment issues by advising *they were nothing* but he would avoid such behaviour and comments in the future. C was not paid for the day.

[30] C goes on to say that she returned to work on the Friday. She says

> *I emailed G and said some of the issues were unresolved. I stated that the harassment was still an issue. There had been no apology, action taken or reassurance and I was left feeling uncertain and probably even more vulnerable since I had raised it. Also there was the issue of my wages from the last few days.*

[31] C says G promised to make various payments but she saw that had not happened when she checked her pay slips the following week (which she worked). That led to a further e-mail and, as events transpired, some of the payments have only recently been made.

[32] C was away sick the following Monday and returned on the Tuesday (28 September). She says H asked to meet with her and gave her a notice advising, amidst other things, that:

> *This letter is not a redundancy notice, but forms part of our procedures for informing staff who are 'at risk' of redundancy at the earliest opportunity and to explain the options open to you.*

[33] The letter advises the situation had arisen as the company, notwithstanding a 20% increase in sales, turned a half million profit for the previous year into a loss. It goes on to advise the company would welcome any views the recipient may have about avoiding redundancy and that the letter would be followed by a couple of consultation meetings. C says presentation of the letter was accompanied by oral advice the company felt it needed a full time accountant and therefore G's brother would step in as he was so qualified. The work he would perform was a large part of that then performed by C. She says she asked if anyone else had received such a letter and was told no.

[34] On 1 October C provided a written response. It opens with the comment:

> *Regarding my redundancy selection, I believe that the main duties I perform in my job will still need to be done to keep the business operating smoothly, so I do not understand why my position is the only one selected for redundancy.*

[35] That is followed by a description of the duties performed.

[36] D responded by acknowledging receipt of C's response and advising a meeting on 5 October. The meeting was later brought forward to the 4th.

[37] The meeting, which was with H, was brief with C being advised of her dismissal. She was told she would not be required to work out her notice period and would be paid in lieu.

Determination

Sexual Harassment

[38] C claims she has a personal grievance in that she was sexually harassed. She supports her claim by referring to eight specific acts of her employer, G.

[39] Section 108 of the Employment Relations Act 2000 provides that an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.

[40] D accepts four of the alleged incidents occurred. G adds no sexual innuendo was intended though that is irrelevant. Intent is not the issue – it is how the recipient perceives the behaviour and I note that when answering questions during the investigation, and with the benefit of hindsight, G accepted the behaviour was inappropriate. G claims C was a willing participant in the fourth. He has no recollection of two more and denies the other two.

[41] I conclude the two G does not recollect occurred. I reach that conclusion for two reasons:-

a. One relates to the description of an event G accepts occurred. Its just that he can not remember telling C about it but I conclude he did – there is no other explanation for her knowledge of it; and

b. G accepts he suffers various illnesses and takes a lot of drugs as a result. He therefore has *out of body experiences at work* and in not in full control. In such circumstances I accept C's evidence on specifics as preferable to G's, particularly as G does not deny the claims.

[42] I need not decide the veracity of the three disputed events (the two denials and the one it is claimed C willingly participated in, though I note her denial). Five events are enough though having heard the evidence I have little doubt all eight occurred.

[43] It is clear C was subjected to behaviour she found unwelcome and offensive. It is clear the behaviour was repeated and it had a detrimental effect on C's job satisfaction. I therefore conclude, given the definition in s.108, C was sexually harassed.

Safe workplace

[44] C claims both her employment contract and the Health and Safety in Employment Act have been breached as a result of the employer's failure to provide a safe workplace. The complaint has two factual bases. The first is C's safety was compromised by G's failure to apologise for the harassment once she brought her dissatisfaction to his notice. The second is the result of his failure to have the building's integrity professionally assessed after the 5 September earthquake.

[45] The response is the claim can not succeed and even if it could the remedies sought can not be granted.

[46] I agree the claim can not succeed in respect to the first alleged breach – namely the failure to apologise. While C says she felt uncertain as a result of the failure (and I accept she did) she did not go so far as to say how or why it meant she was unsafe. There is simply no evidence upon which I can base a conclusion this action led to an unsafe workplace, especially as it is conceded that once C raised her dissatisfaction with the sexual innuendo and behaviour it ceased.

[47] With respect to the building I make the following observations. I accept C was told by both the Department of Labour and the Earthquake hotline all public buildings had to be professionally inspected; that she considered her workplace to be such a building and acted on the information. That said, the evidence as presented at the investigation does not convince me her well meaning approach was warranted. There is no evidence this workplace, as a privately owned factory is what was being referred to as a public building and no evidence G was actually required to have it professionally inspected other than C's understanding of what she had been told. There is therefore no evidence G had not taken reasonable steps and therefore no evidence he has breached the Act.

[48] There is then the remedy – a penalty. Even if the above conclusion is wrong I would not impose a penalty even if G had breached his obligations. A penalty is imposed for deliberate and wilful failures. There is definitely no evidence G acted in a way that he knew to be improper. He acted as he thought appropriate given no apparent damage to either the building or stock and, as was submitted on his behalf, he gave credible explanations as to why he believed the building to be safe.

[49] For these reasons I take this claim no further.

Redundancy

[50] As has already been said, D accepts it dismissed C. In doing so, it accepts it is required to justify the dismissal. The justification relied upon is redundancy.

[51] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is justifiable

> *... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.*

[52] That test is used as C was dismissed before the now current test came into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[53] It is well established that:

> *When reviewing an employer's decision to make employees redundant, the Authority or Court will generally look at two initial factors: the genuineness of the redundancy; and whether the dismissal was carried out in a procedurally fair manner.*
> *In Coutts Cars Ltd v Baguley [2001] 1 ERNZ 660; [2002] 2 NZLR 533 (CA), the Court of Appeal in reviewing the approach of the Employment Court decision (Baguley v Coutts Cars Ltd [2000] 2 ERNZ 409) emphasised the need to consider the two factors (genuineness and process) separately ...*
> Kevin Leary (ed) *Employment Law* (looseleaf ed, Brookers) at ER103.17

[54] It is C's contention her dismissal can not be justified either substantively or procedurally. It is her belief she was targeted for redundancy because of the other two

issues – her complaints about sexual harassment and her stance over the buildings safety.

[55] G says he visited his accountant on 23 September 2010 to receive the preliminary accounts. He was advised that notwithstanding an increase in turnover, profit had dropped by some $470,000 from the previous years $400,000. He says the accountant advised he obtain professional accounting input on a part time basis.

[56] G goes on to say he was *freaked out* by the change in the company's circumstances and felt he had to reduce costs. He could not do so by laying off manufacturing staff as he had to maintain sales levels. He felt the only option was to obtain the savings by looking at the administrative side of the business.

[57] The financial data was not seriously challenged and, I conclude, G had sufficient reason to look at his staffing levels, especially the overhead elements thereof. That this would include C's position goes without saying as she performed some accounting functions yet did not hold the level of qualification the accountant was recommending. That said others performed accounting functions for D, including G's mother.

[58] Turning to the procedural issues, it is well established that a procedural key in a redundancy setting is adequate consultation. This requirement is confirmed by Section 4(1A) of the Employment Relations Act 2000 (the Act). It demands that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment give the employee access to relevant information and an opportunity to comment to the employer before the decision is made.

[59] It is also well established that where an employee is facing dismissal he must be allowed to address the decision maker. A failure to allow this will render any subsequent dismissal unjust.

[60] D has failed to comply with this most basic of requirements. It was H who advised her of her potential predicament. It was to him she gave her initial response which outlined the breadth of roles she performed and which, in her view, the company had to continue performing. The next discussion was again with H and by that time the decision had been made. The evidence is G was the decision maker yet C never had the opportunity of addressing him on the issue.

[61] I need not go into C's claim of an ulterior motive and given the evidence others were laid off at this time it may be the timing was an unfortunate coincidence. The reason I need not go into this is the failure to consult adequately is so profound it must render the dismissal unjustified. This is especially so as the evidence shows C was correct when she said the duties she performed remained. The accounting function went to a new engagement, G's brother on a part time basis and other tasks were redistributed amidst other staff.

[62] There must, in such circumstances, have been a chance C may have been able to suggest scenarios in which she could be retained, albeit with some alterations to either tasking or remuneration. She never had the chance despite advice in the letter notifying her of the potential redundancy that she would. Indeed the letter said there would be three meetings. That did not occur and a company's failure to adhere to a process it set will also render a dismissal unjustified. The dismissal must, if only for these failures, be unjustified.

The wage claim

[63] Finally there is the claim for arrears. Information provided at the investigation would indicate that while various payments were originally withheld, a number have now been made. C made no submission on the issue and I therefore accept D's submission it appears the claim has been abandoned.

Remedies

[64] The conclusion the dismissal was unjustified raises the question of remedies. C seeks wages lost as a result of the dismissal and compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[65] It may be in a redundancy setting the substantive rationale is so compelling that notwithstanding procedural deficiencies the dismissal was inevitable and there is not, therefore, a wage loss. This, for reasons outlined in 61 above, is not such a case.

[66] Section 128(2) of the Employment Relations Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. For C, three months wages was $11,596. A greater award is then discretionary and while the Authority often considers such claims, there must be a serious attempt to mitigate the loss to be eligible for an increased award.

[67] C's evidence in respect to mitigation was relatively weak. She says she sought other roles with a dozen or so interviews and was unsuccessful until obtaining part-time employment with a previous employer which did not start until after the expiry of the three months period mandated by s.128(2). There is no evidence of enrolling with Work and Income or other measures by which she sought external assistance. In such circumstances I limit the award to the three months stipulated in the Act.

[68] The claim for compensation was not quantified. That said C was both sexually harassed and unjustifiably dismissed. It is clear from her evidence that she felt a significant level of hurt and humiliation. Indeed the injury was such she sought counselling and had to be referred to an emergency psychiatric service. Having considered the evidence I conclude a relatively high amount is appropriate and award $10,000.

[69] A claim for an order G be required to undertake training in respect to his sexualised behaviour was not pursued with vigour. It will not be considered further.

[70] The conclusion remedies accrue means I must, in accordance with the provisions of s.124, address whether or not C contributed to her demise in any significant way. The answer must be no. She clearly did not contribute to the harassment she suffered and the defence proffered in respect to the dismissal (redundancy) implies no fault on the employees behalf.

Conclusion and Orders

[71] For the above reasons I conclude C has a personal grievance in that she has been sexually harassed and unjustifiably dismissed.

[72] As a result the respondent, D Limited, is ordered to pay the applicant, C, the following:

i. $11,596 (Eleven thousand, five hundred and ninety six dollars) as reimbursement of wages lost as a result of the unjustified dismissal. PAYE is to be deducted before payment; and

ii. A further $10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[73] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority