

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 140/08
5119658

BETWEEN Mr C
 Applicant

AND D LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Philip James, Counsel for Applicant
 Linda Penno, Counsel for Respondent

Investigation Meeting: 15 and 16 July 2008 at Christchurch

Determination: 22 September 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The nature of the subject matter of this determination is, I hold, sufficiently distressing for the applicant to require the protection of confidentiality and accordingly I direct that, pursuant to Schedule 2 Clause 10(1) of the Employment Relations Act 2000, the names of both parties and the names of all other natural persons mentioned in the determination, may not be published.

[2] The applicant (Mr C) alleges that he has suffered disadvantage as a consequence of a series of unjustified actions by his employer, D Limited (the company), in that the company has failed to appropriately resolve his sexual harassment complaint and in addition has breached express and implied terms of his employment agreement and breached the statutory duty of good faith.

[3] The company denies each and every one of those allegations and says that it has conducted a proper inquiry into the complaint from Mr C and taken all practical steps to deal appropriately with the problem.

[4] Mr C was employed as a builder's labourer for the company which is a property construction business working principally in the housing and wider commercial areas.

[5] Mr C worked for the company on two separate occasions, the first from 7 February 2005 down to 24 June 2005 and the second from 21 November 2005 down to 14 March 2008.

[6] Mr C complains that there was an incident on 19 October 2007 at a building site he was working at for the company at which he says that the company's managing director, Mr E, approached him from behind while he was bending over and rubbed his genital area against Mr C's bottom. In the interests of brevity and in conformity with the expression used during the investigation meeting to describe this kind of activity, I will refer to it in the balance of this determination as *dry humping*.

[7] Mr C's evidence is that having had this happen to him on this occasion, he was shocked and immediately took evasive action. Mr E has no recollection of this incident which Mr C clearly found surprising and indeed suggested that Mr E had *amnesia*.

[8] On 14 December 2007, there was a Christmas function at which Mr C complains that he was subjected to another behaviour which can best be described as *genital flicking*. This was a process where, when a group of workmates were standing together, typically in a social environment, one or other of them would flick at or near the genitals of a colleague standing nearby, allegedly with the purpose of making the recipient spill his drink.

[9] Mr C complains that this genital flicking activity happened to him twice on 14 December 2007 and on each occasion he took evasive action and he protested.

[10] Mr C had his solicitors write to the company by letter dated 21 December 2007 protesting the behaviour just described and seeking a commitment that the complained of behaviour should cease forthwith. The company's response effectively

indicated that the behaviour complained of was endemic in the building industry and that the nature of the complaints made the employment relationship difficult.

[11] The company's Christmas shout took the form of a fishing trip in January of 2008 and Mr C was precluded from participating in that shout on the basis that the company could not guarantee his physical safety.

[12] On 19 February 2008, Mr C saw his general practitioner because he considered his health was suffering as a consequence of the workplace stress that he now felt under. He has not returned to the employ of the company since that time and has registered as a sickness beneficiary with Work and Income New Zealand. Mr C has had very limited other employment since leaving the company.

Issues

[13] It will be helpful to look at each of the principal events complained of, then briefly touch on some associated behaviour which it is claimed is also problematic, and then look at the company's response.

The *dry humping* episode

[14] Clearly for Mr C this episode was a tipping point in terms of his acceptance or otherwise of the prevailing ethos complained of. He seemed, in his evidence, to be genuinely shocked that this sort of behaviour could happen and he was very clear that he took evasive action and protested.

[15] For his part, Mr E has no recollection of the event nor, for that matter, of any protest about it and there is no independent evidence of the event complained of.

[16] I am inclined to believe Mr C that the event he complains of and describes so vividly did in fact occur and that he did in fact protest about it at the time. I reach this conclusion principally because the company never denied that *dry humping* was a reasonably common practice amongst its workforce when one of their number was bending over. It seems to me to follow that it is more rather than less likely that Mr C did experience this event, given his graphic description of it and that he did protest about it at the relevant time.

The two genital flicks

[17] It is common ground that this event happened and there is little in dispute between the parties.

[18] Mr E acknowledges that there were protests from Mr C and that by the second protest, he took Mr C at his word and stopped directing the offending behaviour in Mr C's direction. Mr E's evidence is that he also, from this point on, gave express instructions to the rest of the workforce *not to flick C's balls because he doesn't like it.*

Other associated concerns

[19] Mr C also complains about remarks of a sexual nature made to him by Mr E, including observations about the size of Mr C's penis. Mr C says in his evidence that he protested about this sort of observation and certainly did not participate in it himself.

[20] In the same general connection, Mr C protests about lewd observations allegedly made by Mr E about what he (Mr E) would like to do to Mr C's 25 year old daughter. Mr C said in his evidence that he was upset by these observations and again protested about them to Mr E.

[21] From the company's perspective, the matters complained of are not necessarily accepted as to matters of detail, but the general thrust of the comments are not denied by company witnesses who simply say that it is endemic in the building and construction industry and in effect Mr C needs to *harden up.*

[22] As to the treatment of Mr C's daughter as a sexual object, company witnesses gave ample evidence that all women related to company personnel were *fair game* for that kind of treatment and that the same applied to Mr E's wife for instance and the sisters and girlfriends and wives of other co-workers.

The company's response

[23] In essence, the company's response is that the matters complained about by Mr C are a commonplace in the construction industry. For instance, in the letter dated 10 January 2008 on behalf of the company, the following observations are included:

The nature of the building and construction industry is such that jokes and banter between staff, supervisors, managers and employers is a common occurrence. Your client has remained in the industry and in the employment of Mr E for many years. It is therefore difficult to see how he can now claim this 'joking' behaviour and banter has had 'a detrimental effect on his employment, job performance, or job satisfaction: s.108(1)(b)(iii) of the Employment Relations Act 2000'.

[24] Again, as an illustration of the succession of witnesses who spoke about these matters from the company perspective, I set out a paragraph of the evidence of Mr F, a foreman with the company:

The kind of behaviour that (Mr C) is talking about is the sort of thing that just happens on a regular basis amongst us. If someone's not undoing somebody's else's [sic] tool belt they're sometimes giving a bit of a flick of the genitals or some of the guys (not me) have done it, [sic] will walk past somebody and give them a bit of a dry hump. Although its not my scene to flick the other's genitals or do the dry humping thing, I've had it done to me. It doesn't bother me, its just a bit of a laugh.

[25] Mr G, an apprentice for the company, had this to say about the observations about Mr C's daughter:

The thing is, we all get a hard time about our sisters girlfriends etc. I've had exactly the same sort of stuff said about my sister and its water off a duck's back because its just meaningless fun.

[26] The essence of the company's position is perhaps best expressed in the statement in reply which refers to:

... the respondent's culture based on rituals of Kiwi mateship. Such rituals underpin the culture of the building and construction industry. It is not intended as sexual and is not viewed by those in the industry as sexual.

These rituals, albeit robust in themselves, belie a subtlety and sensitivity about whom to engage with in such behaviour.

The matters complained of are part of the respondent's culture and indicative of the way in which all of the applicant's co-workers behave towards one another.

[27] The company's position then is that whatever this behaviour is, it is not sexual in nature. Clearly, the behaviour is not denied. Its sexual connotation is denied, however.

[28] Furthermore, and for present purposes most significantly, it is common ground that once it became clear to the company that Mr C was offended by the behaviour complained about, the company took immediate steps to ensure that Mr C ceased to

be the recipient of those unwelcome attentions. Mr C himself accepted that was the position in answering a question from me at the investigation meeting.

[29] Essentially, the company's position and the evidence that it has brought before the Authority in support of its position confirms that the behaviour in question is endemic, not just in this company but right across the industry, but that as soon as it became aware that Mr C regarded those attentions as unwelcome, the behaviour directed at him stopped. In those circumstances, the company asks rhetorically what else should it have done? I address this issue shortly.

[30] A final issue to address in this section is the conflict of evidence over whether Mr C was himself involved in the behaviour complained about and/or whether other co-workers perpetrated the conduct complained of on Mr C as well as Mr E. As to the second point, Mr C is adamant that only Mr E was a perpetrator whereas there is evidence before the Authority that other employees were responsible for committing the same acts.

[31] I am not persuaded that anything turns on whether Mr E was the only party committing the acts complained of against Mr C or not. There is ample evidence which I accept that there was a widespread culture in the workplace involving the sort of behaviour which Mr C objects to. While there is some evidence from some witnesses of other people committing the acts complained of against Mr C, he clearly has no recollection of those other persons being involved and it does not assist me to try to decide that point.

[32] However, the question of whether Mr C himself as it were retaliated and participated in the behaviour complained about is directly on point. If Mr C has been found to have himself participated in the behaviour he now complains about, then his complaint cannot be viewed in the same light as would be the case if Mr C were found to have had no involvement whatever by way of participation in the events complained of.

[33] In the end, I reach the conclusion on the balance of probabilities that I prefer Mr C's recollection of events to those of his co-workers. There are only a small number of occasions when it is alleged that Mr C himself participated in the events complained of and on balance I did not find that evidence as compelling as Mr C's own evidence. Even if I am mistaken as to that, the fact that Mr C may have

participated on an occasional basis in the behaviour complained of does not excuse the employer from its obligation to provide a safe and harassment-free workplace in a general sense.

Determination

[34] I have no hesitation in reaching the conclusion that Mr C has suffered disadvantage as a consequence of a number of unjustified actions of the employer. He is entitled to remedies.

[35] I reach this conclusion because I consider it fundamental to the principles of the relevant case law and to the correct application of the test for justification in s.103A of the statute that a good and fair employer, when confronted with evidence that behaviour which is commonplace in the work environment is creating anxiety, concern and distress to a particular employee would take steps to remedy the situation.

[36] I am not satisfied that remedying the situation is achieved simply by protecting the complainant from the offending behaviour because in effect that further ostracises the complainant, causing further distress and anxiety. The rhetorical question I asked above about what more the employer could have done, is answered at this point. It is not enough to ensure the offending behaviour is no longer directed at the complainant if the prevailing ethos in the workplace remains unwholesome and if the consequence of the withdrawal of the behaviour from the complainant has the effect of ostracising him from his workmates, depriving him of social engagement with them and, as it were, singling him out for special treatment.

[37] In my judgment, a good and fair employer, confronted with the situation that Mr E was confronted with when it became clear that Mr C objected to the behaviour complained of, would have progressively taken steps to remove the offending behaviour altogether, not just vis-à-vis Mr C but in relation to any and all of the workforce.

[38] In the end, every employer has an obligation to provide a safe, harassment-free workplace and it is plain from the evidence available to the Authority in this matter that the company's workplace does not provide such an environment. That Mr C has had the courage to stand up and object to that culture and to indicate that he regards it as crude, offensive and sexual in nature does him great credit but has plainly caused

him great suffering as well. It is appropriate that that distress be responded to by appropriate compensation.

[39] The contention that the company advances that the behaviour complained about is not sexual seems to be misconceived. I have already described the behaviour complained about and I do not propose to describe it again. On the face of it, it is difficult to see how such behaviour could be seen as anything other than *prima facie* sexual in nature. What is more, Mr C objected to it and in particular, objected to the way the matter was dealt with by his employer. He found the behaviour crude and offensive. He objected to having to suffer through observations by co-workers about what they wished to do (specifically) to women who they have come in contact with and in particular to Mr C's own daughter.

[40] Mr C, when he filed his statement of problem, did not allege constructive dismissal. When his briefs of evidence were filed in preparation for the investigation meeting, his brief contains a one line contention that he was *laid off work*. When I asked him what he meant by that, he indicated he was referring to his doctor's advice that he could no longer continue work because of the effect on his health, rather than any action taken by the company. In those circumstances then, it is difficult to allow the extension in the closing submissions of Mr C to, as it were, incorporate a constructive dismissal element when the evidence I have heard does not disclose such a situation. Furthermore, I accept the submission of the company to the effect that it has not been asked to respond to a constructive dismissal allegation and yet had to confront one as it were at the eleventh hour.

[41] It follows that I prefer to treat the matter exclusively as an unjustified disadvantage action and for the reasons that I have just expressed, a successful one.

[42] I must consider whether Mr C has in any way, by his behaviour, contributed to the circumstances in which he finds himself. I am satisfied that Mr C has had no part whatever in the circumstances giving rise to his dismissal. There were some side issues raised at the investigation meeting about the quality of Mr C's work; I reject that evidence entirely as being irrelevant to the matters before the Authority. I hold that Mr C has not contributed in any way to the circumstances giving rise to his dismissal.

[43] I am also satisfied that there has been a breach of the statutory obligation of good faith together with a breach of a number of implied and express terms of the employment agreement and of statutory obligations especially the duty to provide a safe working environment. I propose to deal with all of those breaches by an award of compensation, together with a contribution to Mr C's lost wages.

[44] I direct that D Limited pay to Mr C:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$12,500;
- (b) A contribution to the wages lost by Mr C as a consequence of the personal grievance which I am satisfied flow from the unjustified actions of the company, of an amount equivalent to the average gross amount Mr C would be expected to have earned in the period from the date of his resignation down to the date of hearing, less any amount he earned elsewhere.

[45] Given my finding I have given earnest consideration as to whether I may make recommendations to the company pursuant to s.123(1)(d)(ii). However, the claim is not argued as a sexual harassment claim and my finding is that Mr C has suffered a disadvantage by unjustified actions of the employer. The employer needs to develop, with the assistance of outside expertise, a sexual harassment policy and the employer needs to assertively discourage the culture in the workplace which allows the matters complained of by Mr C to continue and develop.

[46] After all, the construction industry has managed to do away with the longstanding enthusiasm its workforce had for physically expressing its admiration for passing women. There seems no good reason why workplaces such as the company's cannot make similar advances in terms of ensuring that all employees are protected from behaviour which they might resent or which they might find crude or offensive.

Costs

[47] Costs are reserved.

James Crichton
Member of the Employment Relations Authority