

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 581  
3093692

BETWEEN                      GHT  
   Applicant  
  
AND                                AWN  
   Respondent

Member of Authority:        Peter van Keulen  
  
Representatives:              Josh Lucas, counsel for the Applicant  
   Amy Keir, counsel for the Respondent  
  
Investigation Meeting:        30 June and 1 July 2021  
  
Submissions Received:        1 July 2021 with further information received up to  
   22 December 2021 from both parties  
  
Date of Determination:        23 December 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     GHT was employed as a security guard by AWN. In the course of her work GHT was sexually harassed by a colleague. GHT complained about this to AWN and it took immediate steps to protect GHT by ensuring she did not work with that colleague again.

[2] Then over a period of time GHT and AWN discussed her sexual harassment complaint and the steps AWN would take to deal with it. However, after the communication stopped GHT felt not enough had been done by AWN.

[3] Shortly after this GHT was working at a student function and was offended by the behaviour of some students. GHT complained about the behaviour to the University of Canterbury. The owner of the venue where the function was held then complained to AWN suggesting that through GHT's complaint AWN had breached its obligations as the security guard provider, particularly privacy and confidentiality obligations.

[4] AWN took immediate steps to remedy the situation, advising GHT of the concerns, requiring her to send a letter of apology to the venue owner and then requesting she attend a meeting to discuss the complaint further. GHT sent an explanation to AWN, wrote the letter of apology and then provided her availability for a meeting. AWN did not follow up on this with GHT, the meeting was never held and then GHT was not rostered on to any further shifts.

[5] In the end GHT treated herself as having been dismissed and sought legal advice. GHT then raised personal grievances for the manner in which her sexual harassment complaint was dealt with and the way in which the incident over her complaint about the student behaviour was dealt with.

### **The Authority's investigation**

[6] The parties were unable to resolve GHT's personal grievances and she subsequently lodged a statement of problem in the Authority. The statement of problem advanced two claims:

- (a) A personal grievance for unjustifiable action causing disadvantage relating to the alleged failure by AWN to deal with her sexual harassment complaint appropriately.
- (b) A personal grievance for unjustified dismissal for AWN not rostering her on for further work after she complained about the student behaviour.

[7] AWN's response to these two claims was:

- (a) GHT was a casual employee and any failure to roster her on to further shifts was not a dismissal. AWN was in fact waiting on GHT to advise of her availability and she removed herself from the Facebook groups on which shifts were made available.
- (b) The personal grievance for unjustifiable action causing disadvantage was not raised within the requisite 90 day period and therefore the Authority does not have jurisdiction to investigate the claim.<sup>1</sup> Alternatively, the steps AWN took in dealing with GHT's complaint were responsive to her needs and their obligations to her were justifiable in so far as the steps they took with her colleague (whom she complained about).

[8] I investigated GHT's claims by firstly considering two preliminary issues:

- (a) What was GHT's employment status i.e. was she a permanent part-time employee or casual?
- (b) Was GHT's personal grievance for unjustifiable action raised within the 90 day time frame?

[9] Then the outcome for each preliminary issue has informed the corresponding claim and my investigation and determination of them.

[10] I investigated these preliminary issues and claims by receiving written evidence and documents, holding an investigation meeting on 30 June and 1 July 2021 and assessing the oral and written submissions of the parties' representatives.

[11] I received witness statements from GHT and the directors of AWN. In my investigation meeting, under oath or affirmation, these witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[12] As permitted by 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my

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<sup>1</sup> Section 114 of the Employment Relations Act 2000.

findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

### **Non-publication**

[13] Given the nature of this claim, particularly the harassment GHT experienced and the effect that had on her, and the potential for publication of GHT's identity to cause her embarrassment and anxiety it is appropriate that I prohibit from publication her identity and any information that may identify her.

[14] Therefore, pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication the name and identity of GHT, the applicant - she is referred to as GHT in this determination.

[15] I also prohibit from publication any information which may lead to GHT's identification. To this end the following references have been used:

- (a) The respondent employer is referred to as AWN.
- (b) One of the directors of AWN with whom GHT dealt directly about various issues, is referred to as HKO.
- (c) The employee of AWN who sexually harassed GHT is referred to as IJB.

### **What was GHT's employment status?**

#### *Issues*

[16] In deciding whether GHT was a casual employee or a permanent part-time employee I must assess the real nature of the relationship, with the description of their relationship not being determinative.<sup>2</sup> A number of characteristics have been identified as assisting with that assessment but the key factor is seen as being whether there is an obligation on the employer to provide work to the employee and an obligation on the employee to accept it.<sup>3</sup>

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<sup>2</sup> *Baker v St John Central Regional Trust Board* [2013] NZEmpC 34 at [20]; and *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

<sup>3</sup> *Baker v St John Central Regional Trust Board*, above n 2 at [23]; and *Jinkinson v Oceana Gold (NZ) Ltd*, above n 2 at [41].

[17] In my view the characteristics of the relationship often referred to are merely elements that inform this key factor – so for example if the employer requires notice before an employee takes leave that is a factor that indicates the employee has an obligation to accept work or if the employee works a regular shift pattern then that is a factor that indicates the employer has an obligation to offer work, because there is an expectation created by the regularity of the work.

[18] So what I must do in establishing whether GHT was employed on a casual or permanent basis is assess how the relationship operated. How the relationship operated will reveal a number of factors that inform whether there was an obligation on the employer to offer work and an obligation on the employee to accept work.

*What were the arrangements for GHT's employment?*

[19] AWN operates a security guard business. It has contracts with various venues in Christchurch to provide security guards.

[20] At the time GHT was employed AWN provided security guard services covering around 16 venues.

[21] And at that time, AWN operated its business by:

- (a) Employing only casual security guards and offering them part time work on a weekly basis; most employees were either studying full time or had unrelated full time employment elsewhere.
- (b) Generally offering employees two shifts per week with additional shifts depending on demand; the number of security guards required each week varied depending on client demand, which fluctuated depending on what functions were occurring and/or how busy bar and restaurant venues expected to be.
- (c) Having a pool of security guards for each venue it provided services to, the rationale being that those guards were inducted for the venues and regular work at a venue brought experience and familiarity with requirements.

(d) Advising employees of the shifts offered to them each week by putting rosters on to a Facebook page; AWN having a different page with a roster for each venue. AWN required employees to confirm availability for shifts once the roster was posted on the Facebook page.

[22] The employment agreement AWN used at the time had the following features:

- (a) It identified the employment arrangement as being casual.
- (b) Holiday pay was “rolled up” rather than accrued so that an additional 8% was paid as part of the hourly wage rate.
- (c) It had a 90 day trial period.
- (d) The provision dealing with statutory holidays stated that employees shall be required to be available to work public holidays if requested.
- (e) A notice period of two weeks.
- (f) It had non-solicitation and restraint of trade provisions.

[23] GHT applied for a security guard position with AWN, through Facebook. GHT was then interviewed in early January 2019 by the directors of AWN. It appears that at the time GHT was interviewed and when she commenced work both directors were involved in running AWN’s security guard business, with HKO leading the management and effectively filling the role he now holds formally as General Manager.

[24] In the interview GHT was advised that the security guard roles were based on casual employment, with AWN offering shifts to employees on a weekly basis. HKO advised GHT that AWN tried to give its employed security guards two shifts a week with additional work offered depending on demand.

[25] GHT was offered employment, which she accepted, signing the casual employment agreement. She commenced work at a bar in Christchurch central, on 11 January 2019.

[26] For the first five weeks of her employment, GHT worked the same shifts at the bar, Friday and Saturday evenings commencing at 10:00 pm. In her third week she worked additional shifts – there was no evidence of where or what shifts but the wage and time records indicate additional hours of work for that third week.

[27] Then from the sixth week of employment GHT's working pattern varied. She continued to work at the bar on Friday and Saturday evenings but her start times varied. The work at the bar continued in terms of GHT working Friday and Saturday evenings up until the end of March 2019, such that GHT regularly worked the Friday and Saturday evenings at the bar for eleven weeks (albeit with varied times).

[28] And from the sixth week of her employment, GHT worked an additional shift on Thursday evenings at another venue, and this continued for some time albeit with varied start times.

[29] This pattern of working Thursday at one venue and Friday and Saturday at the other bar continued for six weeks.

[30] The relevant Facebook pages show that during the first twelve weeks of her employment GHT was offered shifts at both venues through rosters being posted weekly. Each roster recorded the hours to be worked for that week and had a reminder at the bottom for employees to confirm availability, which in practice worked by employees advising AWN if they were unable to work the shift offered.

[31] During her employment GHT was also offered shifts separately from the rosters on the Facebook pages, with HKO messaging her directly to see if she could work. GHT's wage and time records show additional hours worked and the evidence from GHT and HKO was that she worked shifts at other venues throughout Christchurch.

[32] GHT did not accept all shifts offered to her but her evidence is she worked all of the shifts offered to her for Friday and Saturday evenings and she considered this work to be regular part-time work.

[33] From the twelfth week of her employment GHT only worked two more Friday evening shifts at the bar – this was because her complaint of sexual harassment was raised on 30 March 2019 and in response she was removed from working the Saturday evening shifts at

the bar. And then from the week of 8 April 2019 she was not offered any shifts at the bar. However, GHT continued to be offered shifts at other venues and the wage and time records show that for the majority of the time she worked more than two shifts per week and each week she worked a different number of hours.

[34] There was no evidence to show where and when this ongoing work from the twelfth week of GHT's employment was, other than GHT often working Thursday evenings at the same venue, and then the times varied.

[35] And the other relevant feature from the wage and time records is that there was a period of four weeks in April to June 2019 and one week in July 2019, when GHT did not work at all.

### *Analysis*

[36] Whilst there was some regularity in GHT's work for the first twelve weeks of her employment this was not sufficiently regular to create a pattern of work that was permanent:

- (a) For the first six weeks GHT worked at the bar on Friday and Saturday evenings but the hours she worked varied.
- (b) For the next six weeks of her employment GHT worked at the bar on Friday and Saturday evening and Thursday evenings at the other venue but again the start times varied.
- (c) During the first twelve weeks of her employment GHT also did other shifts at other venues and this varied significantly week by week.

[37] GHT's work was set by a weekly roster which she had to confirm she was available for and she could refuse to accept any rostered shift without notice. GHT was not expected to work – and she did refuse shifts offered; she had four weeks and one week off in the time she was employed.

[38] GHT also received and accepted work on short notice outside of the roster system, to cover other employees who were not available or where additional guards were required at short notice.

[39] All of the security guard work offered each week varied depending on demand, that is the number of guards working and the hours required changed depending on how busy a venue expected to be and functions being held at venues.

[40] GHT (and all security guards) could work elsewhere, which GHT did. And she could prioritise study or other commitments such as sport over work, which she also did.

[41] Whilst GHT's employment agreement had clauses in it that were more consistent with permanent employment there was no evidence that those permanent provisions were in fact applied. And the reality is GHT's employment did not operate as a permanent arrangement, so for example she received her holiday pay rolled up into the hourly wage. I believe the employment agreement was just a poorly drafted casual employment agreement based on a permanent employment agreement and it was not meant to reflect a permanent employment arrangement.

[42] Reflecting on these various factors and assessing overall how the employment relationship between AWN and GHT operated, I conclude there was no obligation on AWN to offer work to GHT and there was no requirement imposed on GHT to accept work that AWN did offer to her. And therefore I conclude that the employment relationship was a casual one.

### **Was GHT's personal grievance for unjustifiable action raised in time?**

#### *Issues*

[43] Section 114(1) of the Act requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee. Section 114(2) sets out what constitutes the raising of a personal grievance.

[44] The first thing I need to determine is when was the personal grievance raised. Then I can decide if the events complained of occurred or came to the attention of GHT within the 90 days preceding the personal grievance being raised?

*What happened?*

[45] In February 2019 when GHT was working at the bar one of her colleagues, IJB, started sexually harassing her. The harassment was verbal, consisting of unwanted and unacceptable sexual comments directed at GHT. Through the course of February and March 2019, GHT tried various means to stop the harassment including ignoring IJB, avoiding him, and telling him to stop but this had no effect and the harassment continued and got worse. In the end the escalation of the harassment got to the point where GHT was anxious around IJB, was having panic attacks, and was increasingly concerned about what IJB might do.

[46] After hiding in her car one evening to avoid IJB, GHT decided to speak to another employee to get some support. That employee encouraged GHT to raise the issues with her team leader, which she did. The team leader immediately changed the work roster so GHT was no longer working with IJB and reported the complaint to HKO.

[47] HKO was away from Christchurch on holiday at the time but he sent a message to GHT asking to meet with her when he returned so he could find out what was going on. GHT replied, stating:

... I was scared to say anything at first because I didn't know how anything would be handled or if I'd be treated differently but I went and saw [manager]. Basically [IJB's] been sexually harassing me verbally at this stage and it's just gotten to the point where I'm scared and uncomfortable to be around him. He just turned up to [the bar] and I got the worse (sic) anxiety and had to go in my car until he had left

[48] HKO responded to the message, stating:

... I heard in confidence there was an issue but had no idea of the extent of what's going on. I think it's really important we meet and discuss and make sure your (sic) safe at work ... You will never be ignored over something so serious ....

It's important that your (sic) safe and free of an environment of any harassment at work ....

[49] GHT responded advising of a time she would be free to meet and stating "I'm fine now, Im (sic) just really scared to be around him."

[50] GHT and HKO met on 3 April 2019. GHT explained what had been happening and HKO advised that he was going to meet with AWN's lawyer to discuss what steps to take. In

the interim the colleague was told he was not to go to the bar when GHT was working on Friday evenings and GHT was not rostered to work Saturday evenings at the bar as the colleague continued to work there on Saturday evenings.

[51] On 17 April 2019, GHT had not been contacted any further about her complaint so she sent a message to HKO asking for an update. HKO responded offering to meet GHT to discuss but then never finalised a time, so the meeting did not happen.

[52] On 23 April 2019, GHT sent a message to HKO advising him that IJB had been provoking her by trawling her Facebook. GHT was worried by this and told HKO “I really don’t understand what’s going through his head, it’s like he’s trying to either intimidate me or something ... I really don’t know what to do anymore.”

[53] HKO replied to the message stating:

I have told him to leave you alone and not to contact you. ...

He is not to attend or work at any venue you are working at and I have told him this type of behaviour can be considered serious misconduct so he is to refrain

I will speak with [other director] and my employment lawyer in relation to the next steps. Can I ask what your expectation is in terms of how you would like me to manage the situation from your perspective?

[54] GHT then responded, stating:

... It just seems like he is trying to intimidate me or something. I get so anxious now and I’ve never been anxious. ... I don’t think he should be working in this industry in the type of workplace he is because of the harassment. It’s not something that should be taken lightly because of the extent of it and how confident he was doing it. ...

[55] HKO then asked GHT if she had “messages or something” or a time line that he could use to “progress it to the next level”. GHT responded providing a document that set out various examples of the harassment she had experienced at work and her reaction to the harassment, including feeling uncomfortable, anxious, intimidated and scared.

[56] On 29 April 2019, HKO advised GHT that he was putting together an “investigation report into the sexual harassment situation”. He also said he would send GHT a draft of the report so she could have input into it before it was finalised.

[57] By 6 May 2019, GHT had not heard anything further from HKO, so she decided to go to the Police to record with them the events that had happened. GHT told HKO that she was going to do this and he asked for any documents, presumably any report from the Police, so he could add it to his investigation.

[58] Then on 7 May 2019 GHT received a message from another manager at AWN, in which that manager referred to IJB and her complaint and stated:

... It's under investigation and hasn't been closed yet, you need to let us deal with it. ...

Personal issues don't come to work and affect a professional environment because then it gets ugly ...

Just don't let whatever kind of issue this is interfere with our business operations please, we've worked too hard to build a professional reputation I get on edge when it's being damaged ....

[59] On 10 May 2019, a Police officer called GHT and told her that her complaint was a work issue and she needed to raise it with AWN. The Police officer said he would call HKO to discuss it.

[60] After this call GHT had a panic attack and she called her father. GHT's father then called HKO to complain about the lack of action and support for GHT. This prompted HKO to message GHT, apologising that she was still being affected by the situation. In the message exchange that followed HKO stated "he's not doing it at work so it's a police issue now". He then offered to go to the Police station with her. HKO and GHT then exchanged messages about going to the Police station but in the end HKO never confirmed a time to go.

[61] On 9 June 2019 GHT had another panic attack in relation to IJB. She called her father again and he calmed her down. GHT's father then sent a message to HKO complaining about the lack of action, stating:

This is a follow up message in regards to [GHT's] sexual harassment case against [IJB]. Seems as though nothing has been done about it and you never went to the Police station with [GHT] like you said you were, and [IJB] is saying to other people that [GHT] made it up. ... What are your steps to getting this solved or have you lied to me and swept it under the carpet. ....

[62] HKO then contacted GHT telling her he did not want to get into a back and forth with her father. He then said:

If you want to go to the police station with me today I will take you and support you, please just tell me how I can help out as I have already had a formal meeting with [IJB] and disciplinary action has taken place and to my knowledge it has worked he hasent (sic) spoken to you? Contacted you? Or attempted to use social media against you? If he has please tell me so I can address and take the next steps with HR.

[63] In the message exchange GHT stated in relation to the sexual harassment IJB “it just doesn’t sit right with me and makes me so uncomfortable and is still giving me anxiety but there’s nothing I can do to help that” and “I just don’t want [IJB] to think he can get away with it and be so confident and comfortable to potentially do it to others but only time will tell with that I guess.”

[64] HKO responded to GHT by telling her again that he was prepared to go to the Police station with her, that he would get IJB to sign a non-disclosure agreement to stop him talking about the sexual harassment complaint and that as IJB was staying away and not making contact with her, he was confident GHT was safe in the interim.

[65] GHT’s response was “yeah I hope the message has processed with him then haha”.

[66] GHT then received a message from IJB’s girlfriend on 8 July 2019, which appeared to be supportive of GHT’s complaint suggesting the girlfriend was not aware of what was going on at the time. GHT forwarded that message on to HKO who advised he would call to discuss but he did not.

[67] GHT stopped following up on the sexual harassment complaint with HKO in July 2019 as she had become embarrassed about it and what was happening. However GHT still believed something was being done as HKO had responded in such a way to her messages that she felt he cared and things would happen; GHT trusted HKO was investigating and would resolve the complaint. From GHT’s perspective she had not received anything to suggest the complaint had been finalised and there was never an outcome reported to her. So, GHT continued to think a formal investigation was being undertaken, which she would contribute to, and a report would be produced with an outcome concluding everything.

[68] GHT did nothing further on this until she obtained some legal advice and her counsel raised a personal grievance on 10 October 2019.

## *Analysis*

[69] GHT's personal grievance for unjustifiable action causing disadvantage is not based on AWN failing to protect her from the harassment but rather it is based on an allegation AWN failed to respond to her sexual harassment complaint and deal with it appropriately.

[70] Counsel for AWN submits that by 9 June 2019 it was clear that AWN had resolved GHT's sexual harassment complaint. By this time AWN had held a meeting with IJB and given him a warning, it had responded to GHT throughout reassuring her and ensuring she was safe by having her work separately from IJB and keeping him away from her and it was continuing to monitor IJB at work. AWN also checked with GHT about whether IJB was harassing her again and whether she wanted it to do more.

[71] In short, the message exchange that HKO had with GHT on 9 June 2019 made it clear that AWN felt it had done enough on GHT's sexual harassment complaint and would not do anymore unless something else happened or GHT wanted more to be done. Counsel says the 90 day period runs from this date, being the date when it is clear AWN had concluded its work on GHT's complaint and if she believed not enough had been done then she knew this then. And therefore counsel submits that the personal grievance was raised outside of 90 days from 9 June 2019.

[72] This personal grievance was raised in a letter of 10 October 2019, which therefore covers events occurring or coming to GHT's attention in the period up to 90 days prior, being up to 9 July 2019. So, on the face of it counsel for AWN has advanced a credible argument.

[73] However, I do not accept that 9 June 2019 is the date GHT knew or had brought to her attention that AWN had completed its work on her sexual harassment complaint:

- (a) There was no investigation report produced by then, which HKO had said he was producing; and AWN did not advise GHT it was no longer going to produce a report.
- (b) AWN did not provide GHT with an outcome; HKO did say he had met with the colleague and given him a warning but there was no indication that this was the final and only outcome from GHT's complaint.

(c) During July 2019 GHT believed AWN was still working on her complaint and that the report would be produced.

[74] I am satisfied that GHT was only aware that AWN was not doing any more work on her sexual harassment complaint after 9 July 2019 and therefore her personal grievance was raised within the 90 day time frame.

[75] I therefore have jurisdiction to investigate and determine GHT's claim based on the unjustifiable action causing disadvantage personal grievance.

### **Unjustified action causing disadvantage**

#### *Issues*

[76] Section 103(1)(b) of the Act sets out that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[77] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If so, did the employer's actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable?

#### *What action does GHT complain about?*

[78] GHT's claim is based on the allegation that AWN did not do enough in response to her sexual harassment complaint.

[79] AWN's immediate response to GHT's complaint included:

- (a) It removed GHT from working with IJB by altering the shifts for both of them at the bar.

- (b) HKO contacted GHT expressing concern and ensuring she was okay. HKO then met with GHT on 5 April 2019, although this was not an in depth investigatory meeting more of a discussion about the behaviour complained of and how AWN would deal with IJB in the short term. HKO says that all he knew at this stage was there had been some crass comments, he also says he told GHT he would meet with IJB and tell him about the complaint and warn him to not contact GHT.
- (c) HKO met IJB on 6 April 2019; he says he gave IJB a warning but the evidence does not support this in terms of it being a disciplinary sanction. The meeting involved HKO telling IJB there was a complaint and there was some discussion about IJB's behaviour toward GHT and then HKO told IJB to stay away from GHT.
- (d) AWN then took legal advice on what it needed to do in response to GHT's complaint, on 8 April 2019.
- (e) AWN did not then report back to GHT about its discussion with IJB or what it proposed to do based on its legal advice.

[80] For the remainder of April 2019 and the start of May 2019 GHT followed up on her complaint with AWN and received various reassurances but ultimately AWN took no significant steps to investigate and resolve the complaint. The message exchanges between HKO and GHT show that GHT followed up on a number of occasions and when she did she did so because she continued to be anxious, scared and concerned about IJB and his behaviour.

[81] Significantly, during this period of time and in response to GHT's concerns HKO told GHT that he was putting together an investigation report. GHT provided written information for this report and was then told she would have the opportunity to review a draft, a step she welcomed.

[82] HKO says he discussed GHT's written complaint with IJB and some of it was disputed so he was unsure if completing the investigation report would be beneficial or not.

[83] HKO says by 10 May 2019 he considered the matter was no longer a work matter, IJB had stopped contacting GHT and he considered GHT was safe at work so from his perspective he thought why “drag up” the allegations through an investigation. In short he thought AWN had “nipped it in the bud” and nothing further was required.

[84] HKO accepts he did not tell GHT this. And then during May 2019 GHT received confusing and conflicting messages about what was happening and the status of her sexual harassment complaint:

- (a) On 7 May 2019, GHT was told off for telling others about her complaint as it was still under investigation but in the same message exchange she was told it was a personal issue that should not be brought to work.
- (b) On 9 May 2019 HKO states “[IJB’s] not doing it at work so it’s a police issue now”.
- (c) When GHT spoke to the Police she was told it was a work issue and she should follow up with her employer.

[85] The only other steps AWN took in respect of GHT’s complaint was when GHT’s father contacted HKO on 9 June 2019 complaining that nothing had been done about GHT’s complaint and this just amounted to a deflection and an appeasement of GHT.

*Did AWN’s actions cause a disadvantage to GHT’s employment or a condition of her employment?*

[86] The extent of AWN’s actions, or lack of action, in response to GHT’s complaint did cause a disadvantage to GHT’s employment; the evidence clearly shows GHT felt unsafe in her work and unsupported.

*Was AWN’s failure to do more with GHT’s sexual harassment complaint justified?*

[87] AWN says its actions in response to GHT’s complaint were justified and it was not required to do more. It says GHT’s complaint was never a formal complaint and it did enough to ensure she was protected and that IJB did not harass her again. It also says GHT did not want them to do any more.

[88] I do not accept this.

[89] First, it is clear that GHT's complaint was formal - she expected something to be done to protect her and discipline IJB:

- (a) In her very first communication with HKO on 30 March 2019 GHT refers to IJT's behaviour as sexual harassment.
- (b) GHT followed up her complaint several times – this being the clearest evidence that she expected more to be done.
- (c) GHT supported HKO's formal investigation and report as she provided a written document for the investigation and when she was told she would have a draft that she could provide input on she responded with “thank you so much”.
- (d) GHT's father refers to GHT's complaint as being sexual harassment and he asks to know what has been done.
- (e) GHT continued to feel anxious and have concerns and told HKO this on many occasions. GHT was effectively asking for help but apart from reassurances from HKO nothing substantive was done.
- (f) GHT felt so unsafe at work that in the end she went to the Police; rather than just accepting this and supporting it by saying the complaint was a Police matter AWN should have considered why GHT felt she needed to go to the Police and what it could do to make her feel safe at work.
- (g) GHT's concerns about IJB's behaviour were not just about her own safety but others; she told HKO “I don't think he should be working in the industry in the type of workplace he is because of the harassment.” And she also said “I just don't want [IJB] to think he can get away with it and be so confident and comfortable to potentially do it to others ....”

[90] Second, in the circumstances AWN did not do enough:

- (a) Sexual harassment is listed as serious misconduct in AWN's employment agreement – this alone suggests a formal approach was required.
- (b) By not investigating and undertaking disciplinary action – noting here that AWN accepted GHT's complaint and has progressed this matter on the basis that sexual harassment occurred – AWN condoned IJB's behaviour and it minimised what occurred and the impact on GHT and it ignored the risk of further harassment.
- (c) If it had investigated GHT's complaint then several concerning features about IJB's behaviour would have been clear – these were immediately obvious from GHT's evidence in my investigation. IJB was brazen in his behaviour and unrepentant, he did not stop the behaviour when asked to by GHT, he was stalking GHT on social media and letting her know this, he was intimidating and GHT was scared and anxious around him, he had said he would follow GHT home and watch her sleep and there had been one incident at work where IJB had physically restrained GHT against her will.
- (d) If it had reflected on what GHT was actually saying, that she was scared, had anxiety and suffered panic attacks, and was concerned for others then it should have realised the seriousness of the complaint and that more was required.

[91] Third, that IJB may not have harassed GHT again does not mean AWN did enough.

[92] Fourth, it was not clear that GHT did not want AWN to do any more. Throughout April 2019 she wanted more to be done and expressed this to AWN. In May 2019 she took steps herself to do more by going to the Police. GHT's father effectively told AWN that they expected more to be done in June 2019. And GHT's communications with HKO in June 2019 were inconclusive insofar as she was not aware at that stage that the investigation was not happening and she was embarrassed at that stage about continuing to have concerns and ask for help. Her last communication in response to HKO was "Yeah I hope the message has processed with him haha." This is not GHT accepting that AWN had done enough.

[93] In any event, notwithstanding there was no further harassment by IJB and even if GHT did not want further steps to be taken in respect of her complaint this does not mean Awn had done enough – essentially, even if right, the third and fourth points do not outweigh my conclusions on the first and second.

[94] My conclusion is that Awn's actions in response to GHT's complaint were insufficient and not justified; it did not do enough to make GHT feel safe and it minimised what happened and the impact it had on her.

[95] As a result GHT has a personal grievance for unjustifiable action causing disadvantage and is successful with her claim in this regard.

### **Unjustified dismissal**

#### *What happened?*

[96] In August 2019 GHT was working at a student function and was offended by the behaviour of some students. After checking with her supervisor at the time about what she could do, GHT sent a complaint in writing to the University of Canterbury, which identified some of the students and their behaviour. This complaint was passed on to the owner of the venue where the function was held and the owner complained to Awn suggesting that through GHT's complaint Awn had breached its privacy and confidentiality obligations it owed as the security guard provider.

[97] Awn took immediate steps; it told GHT of the complaint, told her to send a letter of apology to the venue owner and then told her she had to attend a meeting to discuss the complaint further. GHT sent an explanation to Awn, wrote the letter of apology and then provided her availability for a meeting. Awn did not follow up on this with GHT, the meeting was never held and then GHT was not rostered on to any further shifts.

[98] About one month later GHT followed up with Awn asking if she had been dismissed. Awn responded by advising she was still to have a meeting with management and the directors would discuss her future. Following this Awn did not arrange the meeting and it did not roster GHT on to any shifts.

[99] In the end GHT treated AWN's failure to offer her more shifts as a dismissal and she raised her personal grievance for unjustified dismissal.

### *Analysis*

[100] As GHT's employment with AWN was casual the circumstances in which her employment stopped cannot give rise to an unjustified dismissal grievance. The hallmark of a casual employment relationship is that the employee is effectively only employed for the shifts offered and accepted and in between, where there is no ongoing work obligations, the employee is not employed. This means if an employee is not offered further shifts then they are not dismissed because their employment has already come to an end at the completion of the last shift worked.

### **Remedies**

[101] As GHT has been successful with her personal grievance claims for unjustifiable disadvantage I must turn to consider what remedies she may be entitled to. In this regard, I may award any of the remedies provided for under s 123 of the Act.

### *Compensation*

[102] Turning to compensation, this is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act. GHT seeks \$24,000.00 in compensation.

[103] My task is to quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings arising out of the dismissal and recent decisions of the Employment Court provide guidance on this exercise of quantification.<sup>4</sup>

[104] What these decisions show is that I must consider the effects of the dismissal and the unjustified behaviour on GHT; identifying the harm caused to her and the loss she suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum

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<sup>4</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

of harm and loss suffered by those that have been unjustifiably dismissed. Then I must consider where that corresponds to the spectrum of quantum awarded as compensation.<sup>5</sup>

[105] Applying this guidance and based on GHT's evidence, both in the investigation meeting and what is set out in her messages to HKO during the time that AWN was dealing with her sexual harassment complaint, I am satisfied that the \$24,000.00 she seeks is an appropriate amount of compensation.

#### *Reimbursement*

[106] As GHT has a personal grievance if she has lost remuneration as a result of that grievance then pursuant to sections 123 and 128 of the Act, GHT may be entitled to her lost remuneration or three months ordinary time remuneration.

[107] I am not satisfied that GHT lost any remuneration as a result of the unjustifiable actions of AWN and will not award any reimbursement to her.

#### *Contribution*

[108] As I have awarded compensation to GHT, I must now consider whether she contributed to the situation that gave rise to her grievance.<sup>6</sup> This assessment requires me to determine if GHT behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievance.<sup>7</sup>

[109] I have reflected on what occurred and I am satisfied that GHT did not act in a blameworthy or culpable manner; there was no contributory behaviour from GHT that warrants a reduction in the compensation awarded.

#### **Conclusion**

[110] AWN acted unjustifiably and caused disadvantage to GHT's employment. In settlement of this grievance AWN must pay GHT \$24,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

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<sup>5</sup> *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

<sup>6</sup> Section 124 of the Act.

<sup>7</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

## **Costs**

[111] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[112] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority