

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Maree Hand (Applicant)
AND McCrostie Builders (Respondent)
REPRESENTATIVES Mary-Jane Thomas, Counsel for Applicant
Kirsten Knights, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 1 December 2005
SUBMISSIONS RECEIVED 26 January 2006
12 April 2006
DATE OF DETERMINATION 25 July 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant began working for the respondent in March 2004 as a painter. Her partner, Mr Bruce Taylor, was also employed by the respondent at the time but left in November that same year.

[2] Ms Hand alleges she was sexually harassed by a fellow employee who was a leading hand. Ms Hand resigned from her employment on 18 February 2005 as she believed the respondent was not acting to deal with her complaints. The applicant alleges she was constructively dismissed.

[3] She seeks compensation for hurt and humiliation, reimbursement of lost remuneration and costs.

[4] The respondent, through its director, Mr Noel McCrostie, denies that the applicant needed to resign as the company was dealing with the offending employee. He says the company investigated the incidents complained of, found most to be "some onsite fun which got a bit out of hand" and the company ensured that the applicant would, in the future, not be in the same gang or on the same site as the offender.

[5] The parties attended mediation but were unable to resolve their differences.

A brief history

[6] While working on a site in Roxburgh on 8 November 2004 Ms Hand was approached by Steve Hill who said the applicant looked good for her age and looked “tight”. At lunchtime Mr Hill laid a blanket on the ground, lay on it and then patted the blanket telling the applicant to come over and join him. On two occasions that day he approached the applicant holding his genitals and tugging them in an upward movement. Mr Hill was playing sexually suggestive tapes on his tape recorder. Later, he pulled his trousers down, bent down and exposed his buttocks to the applicant. He laughed and asked Ms Hand what her partner would think of his action.

[7] The applicant asked her employer for a meeting the following day. At the meeting the applicant told Mr McCrostie of the incidents and told him she was frightened by Hill and his behaviour. Mr McCrostie told her she would not be asked to work with Hill again and undertook to speak to Hill.

[8] The respondent made inquiries of those on the Roxburgh site and concluded that the only independent evidence related to the buttock baring incident. The company found that on-site banter had got out of hand. In a letter to Hill Mr McCrostie wrote:

But Maree has taken things differently and if the allegations she is making, which cannot be substantiated, are correct we would be dismissing you at once ... As a company we have to make this a warning and if any of this sort of behaviour goes on with any staff in the future you will be instantly dismissed.

[9] The letter also told Hill he was to keep his distance from the applicant at all times.

[10] On 10 November 2004 the respondent’s construction manager Mr Warren Whelan, arrived at the work site. Mr Hill was in the van off-site and was to apologise to the applicant for the incidents. Mr Whelan approached the applicant and said Hill wanted to apologise to her. Ms Hand said that she would not accept a verbal apology and Mr Whelan told her that in that case Hill would write her a letter of apology.

[11] A further meeting took place between the applicant and the company on 12 November 2004. Mr McCrostie told Ms Hand that Hill had been given a letter of warning, that the whole business was costing the company money, that Hill was a good tradesman and he would not be working on any site with her. Ms Hand was given a letter apologising on behalf of the company, advising that Hill was prepared to write a letter of apology to the applicant and had given the company an undertaking that he would not repeat the behaviour. The letter of apology never arrived.

[12] Some two weeks later, a further incident occurred when Hill arrived at the site where the applicant was working. Later that day around knock-off time Hill again arrived on the site and Ms Hand says he stood and stared at her. The applicant complained to Mr Whelan who inquired into the incident. After questioning other staff on the site he found the action complained of did take place. Mr Whelan issued Hill with a verbal warning.

[13] It appears that Mr Whelan took this approach because Hill had a legitimate reason to call at the site that day and because he felt any other approach would necessarily involve Mr McCrostie. It also appears clear that the respondent did not consider the incident to be linked with the 8 November incidents. The applicant was not advised of the company’s action in respect of this incident, nor did anyone from the respondent speak to her about it.

[14] On Christmas Eve Hill walked past the applicant, spat at her feet and later sat opposite the applicant at a tea break. Following Christmas Hill again arrived at another job site where Ms Hand was working. She complained to her supervisor and related the spitting incident to him.

[15] On 25 January 2005 the applicant and her daughter were driving to a video store in Alexandra when Ms Hand saw that Mr Hill was following her. On returning home Ms Hand told Mr Taylor of the incident. He rang Mr McCrostie and told him he (Mr McCrostie) had to *sort it out*.

[16] Mr Taylor says Mr McCrostie told him that the applicant did not have to work for the company and could leave it if she wished. He made it clear to Mr Taylor that the company did not want to dismiss Maree and that it was difficult for him to do anything about uncorroborated allegations.

[17] A further meeting took place on 26 January 2005. The applicant was told that Hill had complained about Ms Hand staring at him. The respondent decided to suspend both the applicant and Hill without pay while he investigated the incident.

[18] On 31 January the applicant met with a person from Workplace Support, a work place chaplaincy service. Mr McCrostie says that it was only when he was contacted by the counsellor that he realised that the incidents could constitute sexual harassment. The Workplace Support person told Ms Hand the applicant needed counselling and the company sent her a letter saying she was to go to counselling as part of her continuing employment. Ms Hand advised Mrs McCrostie that she did not want to go to counselling and when he was advised of this Mr McCrostie became annoyed.

[19] On 17 February the applicant was working in the respondent's yard and office. Unbeknown to her, Hill was working next door. He walked across the yard and in view of Ms Hand.

[20] Ms Hand left her employment on 18 February 2005.

The issues

[21] In this case the Authority needs to resolve the following issues:

- Was the behaviour of Mr Hill capable of amounting to sexual harassment; and
- Did the employer conduct a full and fair inquiry into the behaviours complained of; and
- Were the steps taken by the employer sufficient to prevent any repetition of the behaviour; and
- Was the suspension of the applicant for one day without pay lawful; and
- Was the applicant unjustifiably constructively dismissed; and
- What, if any, remedies are appropriate in the event the applicant succeeds in her claim.

[22] In the investigation meeting the Authority was assisted by the applicant and her partner. On her behalf evidence was also heard from Mr Nigel McLeod, a fellow worker, Mr Wayne Love, a plastering subcontractor, Ms Margaret Carden and Mr Matthew Elliott, fellow workers. For the respondent evidence was given by Mr McCrostie and Mr Warren Whelan. An affidavit from Mr Tom Lamb from Workplace Support and who was on leave in the United States was received by

the Authority on 12 April 2006. The Authority records its appreciation of the assistance by witnesses and by counsel for the parties.

The legal principles

[23] The sections of the Employment Relations Act 2000 relevant to this case are set out below.

117 Sexual or Racial Harassment by person other than employer - (1) This section applies where –

- (a) *a request of the kind described in section 1081A is made to an employee by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer; or*
 - (b) *an employee is subjected to behaviour of the kind described in section 1081B by a person not being a representative of the employer who is in the employ of the employee's employer or who is a customer or client of the employer; or*
 - (c) *an employee is subjected to behaviour of the kind described in section 109 by a person not being a representative of the employer who is in the employ of the employee's employer or who is a customer or client of the employer.*
- (2) *If this section applies, the employee may make a complaint about that request or behaviour to the employer or to a representative of the employer.*
 - (3) *The employer or representative, on receiving a complaint under section (2) must inquire into the facts.*
 - (4) *If the employer or representative is satisfied that the request was made or that the behaviour took place, the employer or representative must take what ever steps are practicable to prevent any repetition of such a request or such behaviour.*

118 Sexual or Racial Harassment after steps not taken to prevent repetition – (1) This section applies if –

- (a) *A person in relation to whom an employee has made a complaint under section 117(2) either –*
 - (i) *makes to that employee after the complaint a request of the kind described in section 108(1)(a); or*
 - (ii) *subjects that employee after the complaint to behaviour of the kind described in section 108(1)(b) or section 109; and*
 - (b) *The employer of that employee, or a representative of that employer has not taken whatever steps are practicable to prevent the repetition of such a request or such behaviour.*
- (2) *If this section applies, the employee is deemed for the purposes of this Act and for the purposes of any employment agreement to have a personal grievance by virtue of having been sexually harassed or racially harassed as the case may be, in the course of the employee's employment as if the request or behaviour were that of the employer's employer.*

The relevant clauses of Section 108 are also set out here for the sake of completeness.

108 Sexual Harassment

- (1) *For the purposes of section 103(1)(d) and 123(d), an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer –*
- (a) *Not applicable;*
 - (b) *By –*
 - (i) *the use of language (whether written or spoken) of a sexual nature; or*
 - (ii) *the use of visual material of a sexual nature; or*
 - (iii) *physical behaviour of a sexual nature, - 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 the employee's employment, job performance, or job satisfaction.*
- (2) *For the purposes of section 103(1)(d) and 123(d), an employee is also sexually harassed in that employee's employment (whether by a co-employee or by a client or customer of the employer), if the circumstances described in section 117 have occurred.*

Discussion and analysis

[24] The test for sexual harassment is a subjective test in the sense that it is the perception of the complainant and the observable effects on him or her that an employer is required to seriously consider in investigating complaints. It is not for the employer to substitute his or her judgment of what constitutes sexual harassment in the work place for that of the affected employee.

[25] In this case the evidence of Margaret Cardin, the applicant's support person, was that *it was evident that Maree was fearful and upset* at the 9 November 2004 meeting. The evidence of Mr Love a subcontractor working on the site at the time, was that he considered Hill had been stalking the applicant and *was pretty much her shadow*. Mr Love also confirmed that when asked by Mr McCrostie whether he had seen anything untoward on the site, he replied that he had. It appears that he was not pressed to provide further information of other matters he had observed.

[26] It was clear to me at the investigation meeting that Ms Hand was upset as she related the incidents and the reactions she had to them at the time.

[27] I have a concern with the lack of depth in the employer's investigation and the disregarding of the applicant's own evidence. The failure of the employer to perceive that the actions complained of were of a sexual nature is simply extraordinary, and to write off incidents solely on the basis that they were not witnessed by a third party is quite frankly, foolhardy.

[28] I have difficulty in accepting the logic of the employer when it issued Hill with a verbal warning only, after the staring incident some two weeks after the primary complaint was laid. To view this incident as discrete from the primary incidents was a serious error of judgment on the part of the company. The letter to Hill after the first complaint was very clear; *if any of this sort of behaviour goes on with any staff in future you will be instantly dismissed*. It appears to me that the

incident involving Hill staring at the applicant, even at a considerable distance, falls squarely under s.118 of the Act. Clearly the warning issued by the company to Hill proved meaningless and ineffectual.

[29] The referral of the applicant to counselling by Workplace Support was a sound initiative by the respondent and the Authority was advised that Hill also was offered assistance. What is exceptionally peculiar is the clear inference that it was the harassed applicant who had a problem, and she needed to *move towards recovery*. Put bluntly, the applicant was the innocent and aggrieved party. The behaviours of Hill were what needed, under statute, to be attended to. The Authority however, commends the respondent's supporting counselling for the perpetrator.

[30] While critical of the respondent, the Authority accepts the evident goodwill of the company to all its employees in what seems to be a family business despite its growth over time. The directors are good, genuine people. However, the failure to correctly diagnose the problem of sexual harassment at the outset and the ineffectual remedy applied led to a worsening condition for the applicant. In short, a specialist was called for to deal with the legal issues.

[31] I have carefully considered the submissions of counsel for each party and have studied precedents they have provided. I thank them in particular for their patience in awaiting the belated evidence of Mr Tom Lamb, which has occasioned considerable delay.

The determination

[32] Returning to the issues set out earlier in this determination:

- I find the behaviour of Mr Hill in respect of the applicant did amount to sexual harassment and that the incident involving his staring at the applicant constituted repetition.
- I find that the respondent's investigation process was not full and sufficiently robust to uncover the relevant facts and its reliance solely on *corroborated* observations and its refusal to accord any credence to the applicant's account of events, falls well short of its obligations.
- I find the steps taken to prevent further offensive behaviour by Mr Hill were poorly conceived and executed.
- I find the suspension of the applicant, when no contractual right to suspend existed, was unlawful. I am aware that this error on the part of the respondent was remedied prior to the applicant's resignation.
- I find the applicant was constructively dismissed.

[33] Having made these findings I turn now to the remedies.

Remedies

[34] The applicant's evidence was that she started work more or less straight after handing her resignation to the respondent. However, she says that her weekly earnings dropped by \$150 in the new position. This evidence was not contested. The respondent is to pay the applicant the sum of \$1,950.00 (gross) being thirteen weeks shortfall in her wages on taking up other employment.

[35] In respect to the unjustified constructive dismissal, the respondent is to pay the compensatory sum of \$10,000 without deduction under s.123(1)(c)(i).

Costs

[36] Costs are reserved. I leave this matter to the parties to resolve between themselves. If that cannot be achieved, the parties have 30 days from the issue of this determination to lodge their respective costs claim with the Authority.

Paul Montgomery
Member of Employment Relations Authority