

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Stephanie Henry (Applicant)
AND Patrick Distribution Limited (Respondent)
REPRESENTATIVES Michael O'Brien for applicant
Sheila McCabe for respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 6 and 7 September, 8 October 2004.
SUBMISSIONS 29 October 2004, 22 December 2004.
DATE OF DETERMINATION 17 June 2005

DETERMINATION OF THE AUTHORITY

- [1] This case concerns allegations of sexual harassment, disadvantage and constructive dismissal. All three personal grievance claims arose out of events at a social function hosted by the respondent one Saturday night in late 2003. Abusive text messages were sent from this party (using a mobile phone belonging to the respondent) to Ms Henry, who was at home at the time.
- [2] Ms Henry was very distressed by these messages and spoke of them to senior managers of the respondent the following Tuesday. She says that she did not receive a satisfactory response from them, further compounding her distress and making it impossible for her to come in to work the next day. She went to see her doctor and obtained a succession of medical certificates which ran through until 9 February 2004. During her leave she heard nothing more from the respondent about her complaint. She says that she felt that her concerns had not been addressed and she considered it impossible to continue her employment. She raised a personal grievance on 18 February 2004.

Issues for Determination

- [3] In relation to the first claim (sexual harassment) Ms Henry's case relies primarily on s.108 (1) (b) of the Employment Relations Act 2000 which provides;

"...an employee is sexually harassed in that employee's employment if that employee's employer or a representative of the employer-

...

(b) by-

(i) *the use of language (whether written or spoken) 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 that employee's employment, job performance or job satisfaction."

[4] The issue for determination is therefore whether the sending of the text messages amounted to sexual harassment within the terms of section 108 (1) (b). I must determine:

- i. Whether the text messages consisted of language of a sexual nature;
- ii. Whether they were sent by a representative of the employer;
- iii. Whether by its nature the language had a detrimental effect on Ms Henry.

[5] As an alternative (in the event that it were to be determined that the sender of the text messages was not a representative of the employer) Mr O'Brien also argued that the respondent breached its obligations under s.117 of the Employment Relations Act which provides:

"(1) This section applies where-

...

(b) an employee is subjected to behaviour of the kind described in section 108 (b) 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 employee's employer or to a representative of the employer.

(3) The employer or representative, on receiving a complaint under subsection (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 whatever steps are practicable to prevent any repetition of such a request or of such behaviour."

[6] The issues for determination here are therefore whether the respondent received a complaint and if so whether it met its obligations to investigate that complaint and to take whatever steps were practical to prevent repetition of such conduct.

[7] The claims of disadvantage and constructive dismissal also arise out of the contention that more should have been done to follow up on the complaint. The additional issues for determination here are:

- i. what general obligations the respondent had to follow up on the complaint;
- ii. whether it met any such obligations;
- iii. if not, whether this amounted to a serious breach of the employment agreement, giving rise to a constructive dismissal or alternatively a disadvantage grievance.

Was Ms Henry sexually harassed in terms of s.108 (1) (b)?

- [8] In mid 2002 Ms Henry began a relationship with Christopher Head and, soon after, went to work in his parents' freight business, Liberty Distribution Ltd. There she worked in Dispatch reporting to Christopher on operational issues. If she had any issues regarding her own employment (such as, on one occasion, a query over her holiday pay entitlements) she went to his parents, Royden or Raewyn Head. Ms Henry told me Royden Head in particular was very approachable. All concerned were aware of the potential for problems where personal and business relationships were combined but everything went smoothly enough until August 2003.
- [9] In mid August 2003 Mr Head's sister Abigail returned home from overseas to work at Liberty Distribution along with the other family members. Soon after her arrival, she confronted her brother about his recreational drug use. At this time, both Ms Henry and Mr Head were heavy users of methamphetamine. Encouraged by his sister, Mr Head decided to tell his parents about his problem and seek their help in attempting to break his habit. He decided to leave the flat he shared with Ms Henry and go home to live for a while. However he and Ms Henry continued to have strong feelings for each other and this was not, to use Mr Head's words "a clean break" in their relationship.
- [10] At work, Mr Head's mother decided it would be awkward for Ms Henry and her son to continue in a direct reporting relationship. Ms Henry was therefore moved from Dispatch to Customer Services. Ms Henry was not consulted about the move and would have preferred to remain where she was. In Customer Services Ms Henry worked alongside Abigail Head. Ms Henry told me that during their time working together she formed a clear impression that Ms Abigail Head was senior to her in the organisation. However I have since seen pay records and organisational charts which demonstrated without doubt that Ms Head was on the same rate of pay and at the same level within the business as Ms Henry.
- [11] As it turned out, Ms Henry's move to Customer Services was short lived. In the latter part of 2003 the family business which Raewyn and Royden Head had owned and operated for 12 years was having serious problems. These led ultimately to receivership, and in late September 2003 the company's assets were sold to an Australian freight company, Patrick International Ltd ("Patrick's"). It set up a New Zealand company, Patrick Distribution Ltd, to operate the business. Raewyn and Royden Head, their children and the other staff were reappointed to the new venture although a new National Manager, Mark Corner, was appointed to run it. Upon the takeover it was decided that Dispatch needed Ms Henry more than Customer Services and she was moved back.
- [12] All of which brings me to the events of 29 November 2003. On this evening the respondent hosted a large function for clients, designed in part to mark the takeover by "Patrick's." Mr Christopher Head and Ms Henry had been having an on again/off again relationship in the period since he had moved back home. On this evening he had chosen to attend the function with someone else, but Ms Henry had texted him several times on his work mobile. Mr Head did not want to respond to these calls in the middle of the party but could not turn his phone off as he was the "on call" contact person for any Dispatch problems. His sister had brought a friend ("Letitia") to the party and now Letitia volunteered to look after his phone for him. He handed it over and moved away to chat to others. He did not see his phone again until the next morning.
- [13] By this time, Letitia and Abigail Head were already very drunk. They decided that they would put a stop to what they saw as Ms Henry "pestering" Christopher Head. Using Mr Head's

phone and encouraged by Ms Head, Letitia sent first, a light-hearted text and then, shortly after, one which read:

“Fuck off you sycotic bitch, getting on with my life! Suggest u get on with yours! The end!”

- [14] A few moments later the two women were joined by Operations Manager, Carl Grainger, who was apparently equally drunk. After this two more things happened. The group telephoned Ms Henry at home and Mr Grainger left a silly message on her answer phone. He did not give his name but Ms Henry recognised his voice. The message was not offensive in itself but coming after the text which had already been sent, it added to her upset.
- [15] Had this been all that had happened I might have been sceptical of Ms Henry’s claims of deep distress. She was quite capable of abusive and offensive language herself and had on one occasion used a work phone to send a similar text to someone she suspected of making advances to Christopher. She had also breached policy by viewing and sending pornography on work computers.
- [16] However, a further text message was sent shortly after the voicemail message had been left. This contained references to sodomy and was highly offensive. Scared and distressed, Ms Henry now left her flat and went to stay overnight with a woman friend.
- [17] At no stage did Ms Henry (or anyone else) think that Christopher Head could have or would have sent any of these messages. She had already concluded that someone else had possession of his phone. However, no one admits to sending the final text. Abigail Head says she left Letitia and Mr Grainger for a few moments for a drink or a cigarette and thinks they must have sent it while she was away. Mr Grainger says that he was not involved in sending any text but says that he knew the two women were sending rude material to Ms Henry. He said that Ms Head and Ms Henry *“had never liked each other.”*
- [18] The following Monday, when she arrived at work, Ms Henry confronted Mr Grainger about the events of Saturday night. He had no clear recollection of the evening. Ms Henry told him about the voicemail message and showed him the text messages she had received. He told me that for his part he could still remember nothing, but Ms Henry was clearly very upset, and he apologised to her for any part he had had in the episode.
- [19] I asked Ms Henry who she thought was most likely to have composed and sent the text messages. She said that she did not think Mr Grainger was the type to do something like this. She also said she barely knew Letitia. She believed Abigail Head was the instigator of the whole thing as she was the one with malice towards her.

Determination

- [20] It is argued for Ms Henry that both the text messages contained language of a sexual nature and by their very nature had a detrimental effect on Ms Henry. If the abuse had been limited to the first text, I would have rejected this submission. It was abusive but not sexual in nature and Ms Henry was known to direct this sort of language to others. However, I accept that the second text was in a completely different category. It was sexual in nature and I accept that it caused Ms Henry great distress.
- [21] The crucial question for determination is whether the message was sent by a representative of the employer. Mr O’Brien argued on behalf of Ms Henry that the message must have been sent by Mr Grainger (as indicated by Abigail Head in her evidence) because only a man would have

expressed himself in the terms used. It was also argued that as Operations Manager, Mr Grainger was senior to Ms Henry in the organisation and so a “representative of the employer.” Mr O’Brien therefore submits that through the actions of Mr Grainger there has been a breach of s.108 (1) (b).

[22] However, set against this is Ms Henry’s own view, as expressed to me, that she did not consider Mr Grainger the type to do something like this. I am not prepared to accept a submission for the applicant that flies in the face of her own evidence. She has the benefit of knowing Mr Grainger, I do not, and in the face of this evidence I do not believe I can safely infer that Mr Grainger was the sender of the final text.

[23] In the alternative, it was argued that Ms Head was the instigator of the text and that she too was senior to Ms Henry and a representative of the employer. I reject this submission as the evidence showed that she was at the same level in the organisation as Ms Henry.

[24] In summary, although the final text message was of a sexual nature and had a detrimental effect on Ms Henry’s employment, there was insufficient evidence to establish that it came from a representative of the employer. I cannot conclude that Ms Henry was sexually harassed in terms of s.108 (1) (b).

Was there a breach of s. 117?

[25] After speaking with Mr Grainger on Monday 2 December Ms Henry went to talk to Christopher Head. She told him what had happened and how upset she was but did not show him the messages. (They had been deleted from his phone.) She told him she considered Abigail Head (not Carl Grainger) to be responsible and wanted an apology from her. She also told him that she wanted him to sort this out as she did not trust herself to approach Abigail about the matter.

[26] Mr Head told her he would. However, he told me that he just said this to please her and had no intentions of doing anything. He saw this as a personal matter between the two women and knew that Ms Henry herself sometimes sent offensive text messages to others. Mr Head did not approach his sister or anyone else about the incident that day or the next.

[27] On Tuesday 2 December 2003, independently from the events of the previous few days, Mr Corner called Ms Henry to a meeting with him and Raewyn Head. He wished to talk to her about developments being implemented since the change of ownership. Specifically, he wanted her feedback on the operation of Dispatch (which was being reviewed) and a new job description which had been drafted for her role.

[28] In addition, about two weeks beforehand, she had been advised that she owed a very large sum for personal calls made from her mobile phone over the preceding couple of months. He wished to remind her of the need to pay for these calls and was also concerned that her use had not declined since she had been spoken to about it the first time. He told me that this was not a disciplinary issue but he was concerned about the amount of work time that was being wasted on lengthy personal calls and texts. Ms Henry told me that she understood that she had to pay for her personal use (which was very high) but found Mr Corner’s manner aggressive.

[29] Suddenly at the end of the meeting, just as she was about to leave, Ms Henry raised the issue of the text messages. Her own evidence is that she told Mr Corner:

“that members of management had sent me abusive texts and asked him why I deserved to be harassed and abused by others in the company. Mark stopped me and said “look I don’t want to know about it, just go away.” I did my best to hold back my tears; I did not want to cry in front of them. I got up and walked out of the boardroom back to my office. I finished the jobs I needed to get done that day and left at 6.00pm.”

[30] Both Mr Corner and Ms Head deny that he said the words alleged. They say that Ms Henry added: *“You’d better watch because I will use these if I have to...”* and started to walk out. Ms Head told me she recognised that Ms Henry was upset and *“I knew if Steph said [the messages] were bad they would be bad.”* She asked Ms Henry to wait, but Ms Henry left.

[31] Knowing that there was ill feeling between the two young women Raewyn Head suspected that her daughter might be involved, and told Mr Corner so. After leaving the meeting Mr Corner saw Abigail Head talking to Carl Grainger in his office and took the opportunity to ask what they knew of the allegations. They acknowledged that inappropriate messages had been sent during the function. Mr Corner told them that it was not acceptable conduct and would not be tolerated. Mr Corner also caught up with Christopher Head before leaving the premises that same evening. Mr Head confirmed that he had had a part to play by handing over his phone and accepted responsibility for this.

[32] Mr Corner still did not know the content of the messages and made no further inquiries to find out. He said all parties had freely admitted their involvement and the inappropriateness of their actions. They were all young and relatively junior staff. Now sober, they were all contrite. He therefore felt that there was no need to conduct any further inquiries. In February the grievance was raised and for the first time Mr Corner learnt the content of the messages. At this point those involved were sent warning letters.

Determination

[33] Mr O’Brien says that Ms Henry lodged a complaint of sexual harassment at the 2 December meeting but her concerns were dismissed and afterwards she received no follow up. Mr O’Brien says therefore that the employer’s response was inadequate. He cited authority for the principle that those who make complaints pursuant to s.117 are entitled to receive a report on the resulting investigation and any steps taken to prevent a repetition of the conduct. (*Sloggett v Taranaki Health Care Limited* [1995] 1 ERNZ 553.) He argues therefore that there has been a breach of s.117 which has caused Ms Henry further emotional distress.

[34] I do not accept Mr O’Brien’s argument. Ms Henry made a complaint of sorts on 2 December but did not give details of the language used or indicate that the abuse was sexual in nature. Raewyn Head formed what turned out to be a well founded suspicion that her daughter was behind the alleged abuse. Neither she nor Mr Corner had any reason to infer that abuse from one young woman to another might constitute sexual harassment in terms of either s.108 or s.118 of the Employment Relations Act 2000.

[35] Thus the complaint on 2 December was not expressly one of sexual harassment nor could a complaint of sexual harassment be inferred from what Ms Henry said. It did not therefore constitute a complaint pursuant to s.117 and so there can be no issue about whether the requirements of that section have been met.

Should more have been done to follow up on the complaint?

[36] Regarding Ms Henry’s departure from the organisation Raewyn Head told me:

“Stephanie left Patrick’s premises at the end of the day on 2 December 2003. She left in a normal way and I did not perceive that there was any issue in respect of her ongoing employment with Patrick.

It is important to note that my son Christopher was still in a relationship with Stephanie at that time. I therefore heard through him subsequent to that day that Stephanie was on “stress leave” and was not coming to work. Patrick did receive medical certificates for a period of time from Stephanie... Christopher brought them in to us...

At the time Christopher had been involved with methamphetamine and so had Stephanie. Christopher eventually accepted that he needed help (about two weeks before Christmas) and he went to Tauranga. I thought that Stephanie’s “stress” was due to dealing with drug problems and problems in her relationship with Christopher.

I accept that I made no attempt to contact Stephanie ...I really did want to know... whether or not she was coming back. However because the message I got was that she was under stress, I did not feel it appropriate to add to her stress by pestering her with either questions about her return to work or with information about the steps which Patrick had taken in relation to the inappropriate texts. I appreciate that I and/or Patrick are now being criticised for this but at the time I thought that the best thing to do was to leave her in the hands of her medical advisors and family until she considered she was fit to either come back to work or discuss matters with me or Mark.

Christopher was in constant contact with her, on a personal basis. At no time did he suggest to us that Stephanie was still stressed by the texts and there were much bigger issues in her life”

[37] Ms Henry’s paid leave ran out on 8 December. After that (despite medical certificates stating that she was unfit for work) she undertook casual work to support herself. She did not consider going on a sickness benefit as she found it inadequate to meet her expenses. Christopher Head moved back in with her for at least a couple of months from the end of January. He said that Ms Henry had told him that she was stressed and needed a rest from work. He passed this information on to his mother along with a series of medical certificates covering the period to 9 February.

[38] Ms Henry never formally resigned. On 30 January 2004 she went overseas on holiday but both parties are prepared to treat the date the medical certificates ran out (9 February) as the end of the employment. (There had been no moves to fill her position prior to this.) A personal grievance was lodged on 18 February.

Determination

[39] Ms Henry’s complaint on 2 December was not one of sexual harassment, but it was a complaint nonetheless. Mr O’Brien has argued that the duty to maintain trust and confidence in the employment relationship required the respondent to follow up this complaint with some sort of action. I accept this submission, which leads me to the need to make a factual finding regarding Ms Henry’s evidence that Mr Corner told her to go away when she raised the matter.

[40] I have of course had the opportunity of meeting Mark Corner (who no longer works for the respondent) as well as Raewyn Head and Stephanie Henry. I feel I can fairly say that Mr Corner does have a very blunt manner and was not someone who appeared comfortable or skilled at dealing with a matter of this sort. Ms Head on the other hand impressed me as a very

patient and approachable person with a sensitive manner. I saw no sign of the ill will that Ms Henry suspected of her indeed she continued to demonstrate an apparently genuine concern for Ms Henry's welfare. For her part, Ms Henry did not seem in good health even at the investigation meeting and I had doubts about how precise her recall was.

[41] Taking all this into consideration I have decided on balance that Mr Corner probably did say something that sounded dismissive to Ms Henry (albeit not the specific words used, which I accept were probably not likely.) I conclude that Ms Head saw (correctly) that there was a problem here that needed to be addressed, and intervened to ask Ms Henry to stay. I accept that Ms Henry was distressed by Mr Corner's response but I consider it to have been rectified by Ms Head's action. Ms Henry should have stayed and provided more detail of her complaint.

[42] Instead, Mr Corner was left with no idea of the seriousness of the text message which had been sent. He conducted some brief inquiries on the basis of the limited information he had, eliciting admissions of misconduct and an undertaking that it would not be repeated. In all the circumstances I am satisfied that it was reasonable for him to conclude that he had done enough. After this I would normally have expected some feedback to Ms Henry. However I have accepted Raewyn Head's explanation (quoted above) as to why she did not contact Ms Henry to tell her what had happened.

[43] I conclude that there was no breach of the employer's obligations to maintain trust and confidence. It follows that there is no personal grievance of either disadvantage or unjustified constructive dismissal.

Costs

[44] I leave the issue of costs to the parties to resolve. If they are unable to do so they must ensure that I receive any application to determine costs within 28 days of this determination.

Y S Oldfield
Member of Employment Relations Authority