

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 98  
5435882

BETWEEN RACHEL GRACE HIGGS  
Applicant  
A N D CHIEF OF DEFENCE FORCE  
Respondent

Member of Authority: Helen Doyle  
Representatives: Philip James, Counsel for Applicant  
Craig McCall, Counsel for Respondent  
Investigation Meeting: 27 May 2014 at Christchurch  
Submissions Received: On the day of the investigation meeting  
Date of Determination: 4 July 2014

---

**DETERMINATION OF THE AUTHORITY**

---

- A The applicant raised a personal grievance that she has been sexually harassed in her employment with the respondent within the statutory timeframe.**
- B Costs are reserved until after the substantive determination.**

**Prohibition from publication**

[1] I prohibit from publication the name of the person the applicant says sexually harassed her in her employment with the respondent. I shall refer to him in this determination as Z.

**Identity of the respondent**

[2] In the statement of problem, both original and amended, the respondent was referred to as New Zealand Defence Force. I agree with Mr McCall that the respondent should be the Chief of the Defence Force. This is in accordance with s 71 of the Defence Act 1990 which provides the Chief of the Defence Force is the employer in relation to a personal grievance.

[3] I shall refer to the respondent in this determination as NZDF or Chief of Defence Force.

**Employment relationship problem**

[4] Rachel Higgs was employed as a civilian employee by NZDF from 30 March 2006. On 15 December 2010 Ms Higgs was reassigned to the role of Service Point Manager in the New Zealand Army Band. She started working closely in that position with Z. Z did not have managerial responsibilities for Ms Higgs. Ms Higgs says that soon after she moved to her new position Z sexually harassed her and was sexually provocative towards her.

[5] Ms Higgs said that she raised a personal grievance about the behaviour of Z commencing on 21 February 2012 with a verbal complaint to her report in the chain of command Captain Graham Hickman.

[6] The Chief of the Defence Force says that Ms Higgs did not raise a personal grievance within the statutory timeframe prescribed by s 114 (1) of the Employment Relations Act 2000 (the Act) about sexual harassment or any other grievance. NZDF does not accept that the delay was occasioned by exceptional circumstances or that time to raise a grievance should be extended.

[7] A date was set for an investigation meeting to deal with this preliminary issue and there was a timetable for exchange of statements of evidence relevant to determination of the preliminary issue. Statements of evidence were received from Ms Higgs and her mother Barbara Fitzgibbon. The Authority also received statements of evidence from Captain Hickman, Warrant Officer (Class 2) Paul Hawkins and Senior Human Resources Advisor Tania Lutton.

[8] On the morning of the investigation meeting Ms Higgs advised that she was too unwell to answer any questions as she was on morphine to cope with pain whilst she waited for an operation.

[9] After discussion with counsel, it was agreed that the matter would be dealt with on the basis of the statements of evidence, the documentation and submissions. The sequence of events was not seriously in dispute.

[10] I thank counsel for their cooperative approach in these difficult and unexpected circumstances. I am satisfied that, notwithstanding no evidence was given, there was no undue prejudice because the occasions Ms Higgs says she raised a personal grievance were also the subject of written file notes, emails or letters.

[11] One matter that I required Mr James to clarify was whether in addition to Ms Higgs claim that she raised a personal grievance of sexual harassment she relied on other grievances being raised. That is because in the original statement of problem as well as the amended statement of problem there is reference to an unjustified disadvantage in relation to the covering up of the conduct complained of by Ms Higgs. There is also reference to the conduct preventing Ms Higgs applying for civil positions resulting in her being made redundant which is expressed in the statement of problem to be a constructive dismissal. Mr James said that a grievance of unjustified disadvantage had been raised in addition to the grievance of sexual harassment.

### **The Issues**

[12] There are two issues for determination.

- (a) Whether Ms Higgs personal grievance or grievances were raised within the statutory 90 day period provided for in s 114(1) of the Act from the date on which the action alleged to amount to a personal grievance occurred or came to the notice of Ms Higgs. A grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance which the employee wants to be addressed – s 114(2).

- (b) If the personal grievance or grievances were not raised within the statutory time period the second issue is whether Ms Higgs should be granted leave to raise her personal grievance subsequently. Subsections (3) and (4) of s 114 of the Act enable an employee to apply for leave to raise a personal grievance after the expiration of the statutory period. The Authority must be satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and it is just to grant leave. Section 115 provides examples of exceptional circumstances although these are not intended to be exhaustive.

### **Background against which the issues are to be determined**

[13] I shall refer to various documents. Many are annexed to a report of Professor Phillip Green who subsequently carried out an investigation into the allegations. I shall use the same annexure numbers as he did in his report.

*February 2012*

[14] On 21 February 2012 Ms Higgs spoke verbally to Captain Hickman about bullying issues and how Z treated her in the workplace. She referred to experiencing sexual harassment by Z. Captain Hickman made a file note of the discussion on that same day - annexure I 9. In that file note Captain Hickman describes the accusations about bullying as quite minor but the sexual allegations as of a serious nature. He writes that he has some doubts about their authenticity but asked Ms Higgs to put her complaints in writing and that he reiterated the military position on sexual harassment. He records that Ms Higgs asked him not to discuss the sexual allegations with Z but he did not agree or disagree to this.

[15] From the statements of evidence of Ms Higgs and Captain Hickman there is a dispute about what Ms Higgs was asked to put in writing on that day. I cannot resolve it in the absence of evidence so I will simply set out the different accounts. Ms Higgs says in her statement of evidence that Captain Hickman asked her not to put the sexual harassment issue in writing but Captain Hickman in his statement consistent with the file note says that he asked that Ms Higgs put all her complaints in writing.

[16] Ms Higgs put the complaints about the bullying/controlling behaviour in writing. Captain Hickman records in a file note dated 23 February 2012 that he received the written complaint which he records was about minor issues and notes

there is no mention of any sexual allegations - annexure I 9A. He then sets out that he spoke to Z about both the written complaint and the sexual allegations. He wrote that Z agreed to do everything he can to improve communication and to otherwise keep a healthy distance from Ms Higgs.

[17] There is another file note - annexure I 10 that records that Captain Hickman spoke to Ms Higgs on 29 February 2012 and asked her how things with Z had been and told her he had talked to him. The file note records Ms Higgs said she and Z were getting on much better. It also records that Captain Hickman asked Ms Higgs why she had not put any of the sexual allegations in writing and that it was important to do so.

[18] Ms Higgs did not rely on any further interaction with Captain Hickman to raise her personal grievance. Captain Hickman received an email from Sergeant Hewson on 23 July 2012 that set out Ms Higgs' concerns regarding Z were raised with him.

#### *July 2012*

[19] On 23 July 2012 Ms Higgs complained to Sergeant Callum Hewson who was the senior staff member of the unit at the time about Z. Captain Hickman was overseas with the NZ Army Band. Sergeant Hewson provided Ms Higgs with a copy of an email that he had sent to Captain Hickman in which amongst other matters he noted that Ms Higgs had mentioned a few disturbing incidents which have happened concerning Z. He noted the nature of the complaints and that Ms Higgs mentioned it had happened in the past and that Captain Hickman had had words with Z.

[20] On that same day Ms Higgs and a support person went to see Ms Lutton. Ms Lutton in her statement of evidence says that Ms Higgs complained that she had been bullied, intimidated and harassed by Z and that he *creeped* her out and had given her back rubs and massages. She asked to be removed away from her role in the Band and employed elsewhere. Ms Lutton in her statement of evidence says that she relocated Ms Higgs to the Defence Shared Services (DSS) clothing store.

[21] On 24 July 2012 Ms Higgs also sent Ms Lutton a copy of an email she had sent to Z advising him his behaviour impacted on her life and to stop it. She mentioned in the email that she understood Captain Hickman had spoken to him.

[22] Ms Lutton said in her statement she made it clear that a written complaint was required and she made contact with the anti-harassment advisor at NZDF and arranged for her to provide assistance to Ms Higgs to prepare a written complaint. Warrant Officer (Class 2) Paul Hawkins, Human Resources Advisor for Defence Force also talked to Ms Higgs about the written complaint.

*29 August complaint*

[23] By letter dated 29 August 2012 Ms Higgs wrote a formal complaint about Z. Ms Higgs set out in some detail the examples of inappropriate behaviour she experienced. She also set out the steps that she had taken including confronting Z and speaking with Captain Hickman. She noted in her complaint that it took a lot of courage to speak with Captain Hickman. She wrote that the complaint needs to be taken seriously and she would like to see a thorough investigation into it. She said that Z needs to understand his behaviour is wrong and that he has caused her stress and she has required counselling and had used personal sick leave. She also expressed that she was extremely offended by some comments made in Sergeant Hewson's email sent to Captain Hickman on 23 July and concluded by writing; *I do not wish to see Z ever again.*

*Professor Green*

[24] Professor Green was formally appointed by letter dated 24 September 2012 by NZDF as the investigating officer to report on allegations made by Ms Higgs against Z. The letter also contained the terms of reference for the investigation. The allegations from Ms Higgs were set out in paragraph one of the letter.

[25] An investigation was then carried out by Professor Green from September/October 2012 to February 2013. The final report was provided to Mr James on or about 17 September 2013 – letter to Mr James from Nigel Lucie-Smith Manager Resources Law NZDF dated 17 September 2013 to Mr James advising that the report had been sent by courier that day.

[26] Ms Higgs was made redundant in or about 17 February 2013 from NZDF.

*After employment ended*

[27] Mr James wrote a letter dated 22 April 2013 to NZDF. At that time he recorded that Ms Higgs has been made redundant as from 17 February 2013. In the letter he stated that Ms Higgs wished to raise a personal grievance at the way she was treated in that NZDF failed to protect her adequately from the actions of Z. He noted that prior to Ms Higgs complaining about the actions of Z other personnel had made complaints as well. He stated that in due course further details of the personal grievance will be raised but that most of the complaints will be fully detailed in the report prepared by Professor Green and submissions made by Ms Higgs to Professor Green for the purpose of the enquiry. Mr James also wrote that in due course details of remedies would be raised.

[28] There was no reply to that letter.

[29] On 24 June 2013 Mr James sent an email on to follow up.

[30] On 28 June 2013 Mr Lucie-Smith wrote to Mr James. He set out the personal grievance raised by Ms Higgs on 22 April 2013 alleged; NZDF failed to protect Ms Higgs from the actions of Z, failed to appropriately investigate or take action, had received complaints about Z prior to Ms Higgs' complaint and therefore exposed Ms Higgs to Z's actions. Ms Lucie-Smith wrote that in anticipation of further particulars in relation to Ms Higgs' allegations and finalisation of the report by Professor Green NZDF reserves its position but that Mr Lucie-Smith would contact Mr James once he has possession of the final report with a view to progressing the matter.

[31] On 8 July 2013 Mr James responded to Mr Lucie-Smith with additional details of the grievance. These relate to allegations that there were inadequate steps taken from February 2012 when the matter was first raised with Captain Hickman and that she was exposed therefore to continued harassment.

[32] There was no response to that letter and on 6 September 2013 Mr James asked for a reply and advice as to when the report is to be available.

[33] On 17 September 2013 Mr Lucie-Smith responded to Mr James and amongst other matters advised that the personal grievance is raised after the expiry of the 90 day period and that NZDF does not consent to it now being raised.

[34] On 1 October 2013 NZDF stated that although maintaining the personal grievance is out of time it was prepared to have the matter dealt with by mediation.

[35] On 20 December 2013 a statement of problem was lodged with the Authority.

**Were Ms Higgs personal grievance or grievances raised within the statutory 90 day period provided for in s 114(1) of the Act**

*Sexual Harassment*

[36] Mr McCall submits that 23 July 2012 is the date that the 90 day period runs from because after that date Ms Higgs was employed in another area in NZDF and no allegation has been made about sexual harassment after this date. If calculated from that date the 90 day period elapsed on 21 October 2012.

[37] Mr McCall submits that a personal grievance was not raised by the verbal complaints by Ms Higgs in July 2012 and then the written complaint in August 2012 because Ms Higgs did not say that NZDF failed to take practicable steps or discharge a duty to prevent repetition of sexual harassment in her. Therefore Mr McCall submits NZDF could not respond as required in s 114(2) of the Act to a grievance. He submits that Ms Higgs never identified the facts necessary to raise a personal grievance

[38] In *Creedy v Commissioner of Police* (2006) 3 NZELR 293, [2006] 1 ERNZ 517 the Court considered the issue of raising a grievance. The Court stated in para.[36]:

*It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of a grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... For an employer to be able to address a grievance as the legislation clearly states an employer must know what to address ... That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[39] I agree with Mr McCall's submission that as Z was not Ms Higgs employer or a representative of NZDF the focus should properly be on s 118 of the Act. Section

118 provides for circumstances where there has been sexual harassment and the employer or a representative of the employer has not taken whatever steps are practicable to prevent the repetition of such behaviour. In those circumstances the employee is deemed for the purpose of the Act and employment agreement to have a personal grievance by virtue of having been sexually harassed.

[40] I find that the initial complaint made on 21 February 2012 to Captain Hickman was a complaint under s 117 of the Act about Z's behaviour. If satisfied that the behaviour took place then s 117 requires the employer or representative to take whatever steps are practicable to prevent any repetition of such behaviour.

[41] Captain Hickman from his statement and file notes doubted the truth and seriousness of Ms Higgs complaints of sexual harassment by Z for a number of reasons although he did take some steps to speak to Z and these are contained in his file notes.

[42] Ms Higgs verbal and written complaints in July and August 2012 to Ms Lutton and Sergeant Hewson make it clear that the behaviour continued. There is a detailed description in the written letter of 29 August 2012 of the types of behaviour Ms Higgs said occurred with specific examples given. There is reference to the difficulty Ms Higgs felt and why in approaching Captain Hickman because of the well-established working relationship he had with Z.

[43] Sexual harassment is defined in s 108 of the Act. Section 108 should be read with s 117 as Z was an employee. In her letter of 29 August 2012 Ms Higgs states that she was subject to behaviour of a sexual nature by Z that she found unwelcome. Ms Higgs sets out in her letter of 29 August 2012 how the behaviour made her feel; helpless, inferior, stupid, angry, bullied, and embarrassed and that she has lost confidence. She set out that she has required counselling and taken sick leave. There is reference to the February 2012 complaint to Captain Hickman and specific reference to dates after that complaint and matters of a sexual nature by Z including some physical touching that Ms Higgs says was offensive/unwelcome.

[44] NZDF says that there was no specific reference to the fact that it had failed to take steps to prevent the harassment and/or that Ms Higgs was blaming NZDF for the harassment. NZDF concluded that Ms Higgs wanted an investigation and to take action against Z.

[45] In *Clark v Nelson Marlborough Institute of Technology* (2008) 8 NZELC 99,483, (2008) 5 NZELR 628 Judge Couch stated at [37] that it did not matter what the employee intended her complaint to be, her preferred process for dealing with it in the first instance or whether the employer recognised the complaint as a personal grievance. The only issues are whether the complaint was a personal grievance within the meaning of s 103 of the Act and if so, whether the letter complied with s 114(2) of the Act by conveying the substance of the complaint sufficiently to the employer.

[46] I am satisfied that the nature of Ms Higgs complaint was a personal grievance that she was sexually harassed in her employment by a person other than the employer or a representative of the employer under s 103(d) of the Act. I do not find that Ms Higgs needed to specifically state NZDF was responsible for the harassment because it was clear in the verbal complaints in July and then the written letter of 29 August 2012 that Ms Higgs alleged the behaviour had been complained of earlier to a representative of NZDF and had continued. Ms Higgs wanted the matter dealt with in the first instance by way of a thorough investigation and that she not see Z again.

[47] I am strengthened in my view that there was some understanding on the part of NZDF about the relevance of the earlier complaint because Professor Green was asked within the scope of the investigation to comment on two relevant matters. The first was about Ms Higgs bringing this behaviour to the attention of her superiors but they had failed to exert sufficient influence on Z to make him desist from such behaviour and the second whether the behaviour had been reported to the Unit Command Team other than the letter of complaint dated 29 August 2012.

[48] I find that a personal grievance of sexual harassment was raised within 90 days of the grievance by virtue of the verbal complaints on 23 July 2012 and the written complaint of 29 August 2012. The bullying/control matters I find rather than forming a separate grievance are intertwined with the sexual harassment grievance as is any previous knowledge of concerns about Z's behaviour.

#### *Unjustified disadvantage*

[49] I do not find that a separate grievance of unjustified disadvantage as alleged for the first time in the statement of problem was raised that Ms Higgs was prevented from applying for civil positions. Evidence of that can be given though in respect of

the sexual harassment grievance. There could be no grounds to extend time to raise that personal grievance in circumstances where Mr James had been instructed since April 2013.

*Unjustifiable constructive dismissal*

[50] I do not find that a personal grievance was raised that Ms Higgs was unjustifiably constructively dismissed from her employment which was raised only in the statement of problem. There could be no grounds to extend time to raise that personal grievance in circumstances where Mr James had been instructed since April 2013.

**Determination**

[51] Ms Higgs raised a personal grievance with NZDF that she was sexually harassed in July and August 2012 within the statutory timeframe.

**Mediation**

[52] I am of the view that this matter would benefit from further mediation. I would be grateful if Counsel could advise the Authority if there is agreement with this.

[53] If the parties do not share this view then Mr James is to contact the Authority and the matter will be set down for a telephone conference.

**Costs**

[54] I reserve the issue of costs until after the substantive determination.

Helen Doyle  
Member of the Employment Relations Authority