



New Zealand Employment Relations Authority Decisions

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K v J (Christchurch) [2012] NZERA 1288; [2012] NZERA Christchurch 288 (21 December 2012)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2012] NZERA Christchurch 288
5356237

BETWEEN K Applicant

A N D J Respondent

Member of Authority: M B Loftus

Representatives: David Beck, Counsel for Applicant

T and U, Representatives of the Respondent

Investigation meeting: 19 July 2012 at Christchurch

Submissions Received 30 July and 14 August 2012 from the Applicant

10 August 2012 from the Respondent

Date of Determination: 21 December 2012

DETERMINATION OF THE AUTHORITY

Suppression

[1] K seeks to have her identity suppressed but asks that the same not apply to other participants. J responds that if suppression is granted it should apply to all.

[2] I support of her application K relies on *Z v A* [1993] 2 ERNZ 469 where the

Court said:

In the majority of cases the interests of justice will require that the name of a grievant in a complaint of sexual harassment should be protected.

[3] I accept that.

[4] J responds that if one should be protected both should. It argues despite the fact it has numerous female employees this was an isolated claim. In any event the alleged harasser has departed and J has since taken steps to ensure there is no repetition. I also accept that but also note anyone with a working knowledge of this employer would be able to identify K if J and other participants were identified.

[5] Pursuant to clause 10(1) of the second schedule of the Employment Relations

Act 2000 I therefore prohibit from publication the names of the parties and witnesses.

Employment relationship problem

[6] The applicant, K, claims she was unjustifiably dismissed (albeit constructively) from her employ with the respondent on 1 August 2011.

[7] In the alternative, and in the event her dismissal claim is unsuccessful, K

claims the actions that caused her to resign constituted an unjustifiable disadvantage. [8] J denies the claims.

Background

[9] K was interviewed for a position at J by the then Manager (U), on 22 February

2011. Soon thereafter she was telephoned and offered a few shifts by way of a trial. That was followed by an offer of permanent employment as a bar manager. A written employment agreement was not, however, completed at the time.

[10] On 1 April 2011 S took the managers role previously occupied by U (who remains a director of the company). Shortly after his appointment S offered K an increased wage of \$16 per hour. She accepted. However the increase was never paid and K continued to receive her original \$13.50 per hour. J claims this is due to the fact she never signed her employment agreement. She says that was because the document (which was in the form of a form agreement provided to all staff) contained clauses that were not applicable, such as a trial period. She was not going to sign the document until she received advice on its contents and, as events turned out, she never signed it.

[11] The next significant event occurred on the evening of 10 June 2011. It would appear S's behaviour in the workplace fell short of exemplary. Using the words of a colleague whose statement was proffered by J he was known for off-colour comments, inappropriate jokes and general silliness though this was not malicious or directed at any particular individual. U accepts S often made offhand comments and crude jokes though she also attributes no maliciousness to it.

[12] The witnesses for the applicant are somewhat stronger in their criticism and even S himself accepts some of his behaviour was inappropriate.

[13] In any event S's behaviour became too much for K. At the end of her shift on the 10th she approached T in the car park. She says:

I was in tears when I explained what was happening and that something needed to be done as it was affecting the business, staff and customers. I also asked to remain anonymous if possible. T said he would look into it. He walked me back inside so I could finish cleaning up, and he slammed the door shut behind him and left.

[14] T accepts K was visibly upset but denies she asked for anonymity. He goes on to say:

I asked her if she had any fears or concerns about continuing to work with S while we looked into the issue and she said that was not a problem. I also stayed with her until she composed herself and ensured that she was okay to close up the bar that evening and that I would meet her further the next day.

[15] T denies closing the door on departure. K denies being asked if she had fears or concerns about continuing to work with S. The following day T and K met. Their recollections differ. K says:

T told me he had spoken with S and that he would not be taking it further. I told T that he needed to speak with other staff to find out what was going on.

This was when T became very defensive and angry about how it was ultimately his decision, saying "what did I expect him to do, punish S? Is this what this is about?". I explained that it was about him seeing what was happening for himself and then deciding on the appropriate action.

I was then presented with the code of conduct and the choice of either accepting it as it was or sitting down with T and S to discuss the problems I had with S. At this stage I felt unsafe and vulnerable. I felt I was getting in over my head. I went back to T with my final ask to sit down and discuss it with my father present.

[16] T's view is that:

... I suggested that the easiest way of dealing with the issue would be for her to take her concerns directly to S and sort it out. K was unwilling to do this alone so I suggested that I organise the meeting in my office. Initially K agreed however the following morning 10

June 2011 K told me that she was not willing to meet with S but would meet with me and her father ... I agreed.

As the new J Code of Conduct was just completed at that time and due to be presented to the entire staff, I presented a draft to K

for her and her father to review in order to give her further assurance that such behaviour as she had allegedly observed by S or anyone else would no longer be tolerated. It was my hope that by seeing a definitive boundary of acceptable behaviour and a formal complaint process K would feel more comfortable even with the investigation process.

[17] The following day 12 June, K and T met. Also present was K's father and T's wife (another director of the company). The parties agreed the discussion was amicable. K presented a letter of complaint. It advises:

I discussed this with you because I felt the business's reputation and the safety of staff, including S's, was of concern. My intention was to inform you of the situations I have seen and have heard so you were aware of the issues and could take the appropriate steps to investigate it. ... I believe this is important for J as it is not an isolated instant but a collection of incidents, some of which appear to have been witnessed by customers.

[18] That is followed by a list of 18 specific occurrences. Eight are under a heading *I observed*. A further eight come under the heading *staff have told me* and the other two under the heading *customers have told me*. It appears T then embarked upon an investigation process which involved interviewing all of the staff identified in K's letter. The final interview occurred on 29 June and was with S. Notes of that meeting say *we explained the verbal and written complaint and process; and that 80% was hearsay 'I observed', 'staff has told me' and 'customers have told me' from K. We worked through the complaint together and S admitted that some of the things were true.*

[19] There then follow a number of notes that precise a discussion Messrs S and T had over S's relationship with other staff. They take the bulk of the meeting. The notes conclude with advice that *in conclusion to the meeting we told S that he needs to respond to the complaint and interviews in writing. Then we will meet with K and her father.*

[20] The second meeting occurred on 11 July 2011. K states she and her father had to instigate it but T denies that and says it was he who called the meeting.

[21] K complains S's behaviour towards her changed in the interim. She accepts the sexualised behaviour decreased but states there were other problems. She says he

initially ignored her and any work related queries but further, and worse, changes eventuated. She says

He was micro-managing me and had basically changed my role from bar manager to cleaner. I felt belittled as I could not do anything my job entailed without S's approval first. I had no say as to what happened in the bar anymore and no matter what I did it was always wrong even when I gave him what he specifically stated he wanted.

[22] There is also an issue about S's ability to monitor bar till transactions on his computer at home. K claims he would ring within minutes to query transactions he considered unusual. J initially denied this was possible but conceded when S stated he was acting as claimed. His justification was that there had been till losses and he was conducting an investigation by monitoring the transactions of all staff. He accepts K was the only one he telephoned but puts this down to the fact the others were present while he was also at work so he could approach directly if he had any queries.

[23] Returning to the meeting of 11 July. K says:

In this meeting I lost complete faith in T. I felt like his investigation was focused on making me out to be a troublemaker. He said I had no right to speak on the other staff's behalf, which was never my intention. I only added their names for T's benefit in his investigation, yet he used it as the means to point the finger back at me. ...

During this meeting T talked about the 14 year old employee that was mentioned in my letter as being harassed by S. He confirmed that it had happened and laughed whilst saying it was considered a joke. This made me feel sick to my stomach. I knew then that I was not dealing with someone who had the values associated with a decent person or employer.

S's behaviour was also raised in the meeting when [T's wife] asked me why I hesitated in asking a question, I explained S's behaviour as a concern and pulled out a copy of the list S had given me regarding the cleaning I had missed. T told me to take the matter directly to S and changed the subject.

I left feeling this whole thing had been a waste of time and that there was nothing else I could do. How can you solve an issue like this when the people you have to solve it with do not have the mindset to do so?

[24] K's father says:

At the second meeting, we were told the staff had not given K any right to speak on their behalf and that they in the main had not supported the statements K had made. During this meeting I got frustrated with T trying to shift the blame from what had occurred on to K, by saying she had no right to raise issues on behalf of other staff. I pointed that K had made it very clear that she was not representing the other staff, as a Bar Manager she was trying to represent him (T) and protect his interest by bringing serious business risks to his attention. ...

In the meeting K was asked if she had any other concerns about S, she was hesitant to raise them, but was encouraged by T's

wife] to do so. K shared a number of concerns like S holding her accountable for staff she did not manage, and for tasks that were not required of her. These behaviours had occurred since she lodged her complaints. T's response was merely to tell K to be firm and stand up to S.

[25] T's recollection differs. He says the meeting was called to outline the results of the investigation. He says the discussion commenced with a talk about the Code of Conduct and K expressed positive views about its introduction. He goes on to say:

The issue of the working relationship between K and S was specifically discussed. I suggested a way forward that K, at least initially, talk to S directly about any issues that she had in order to resolve them. K at that time agreed that she was not afraid of S and did not believe that she would any problem with working with S in the future.

[26] K disagrees vehemently with the last comment. She says the discussion occurred toward the end of the meeting and that is reflected by notes taken by T's wife. She also says that while she accepted she did not fear a physical impropriety from Mr S she had a psychological fear of him.

[27] T accepts K stated S was acting unreasonably toward her but adds he did not accept Mr S's behaviour was unfair, unreasonable or unjustified. He considered the list of cleaning duties as standard for all bar staff and not a punishment. He concluded by saying:

Given the lack of support from other co-workers for the complaints raised by K, and the lack of any other verifying evidence, and having considered the explanation given by S, I decided that no disciplinary action against S was justified. I did however insist that he personal deliver a copy of the Code of Conduct to each staff member, had a staff meeting to go over the content in detail and make every effort to standby its every principle which I believe he carried out very well.

[28] Shortly after the meeting K was struck by a severe bout of food poisoning. She says she initially sent a text to S advising she thought she had a bug and would be back soon. The following day, and having visited a doctor, she sent another text advising her absence would be longer. She says S responded with a text demanding she provide a medical certificate immediately. She says that was the straw that broke the camels back and she started thinking of what she would have to go back to and questioning whether the situation was really going to improve. She says she felt she had done everything she could and no longer had the energy to deal with the situation any more. She prepared and sent a note reading:

I am resigning from the position as bar manager as of today, being

19/7/11 before work. My last day will be two weeks from this date which is the 1/8/11.

[29] K returned to work when she was well enough to do so and worked out the remainder of her notice. Upon returning she had a discussion with one of her colleagues who questioned why she had resigned and suggested it may be possible to revisit the decision. That colleague put K in contact with Mr Beck. There then followed attempts to have the resignation reversed but these proved unsuccessful and K ceased work in accordance with her resignation.

Determination

[30] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel

Cas 95; [\[1983\] ACJ 965](#) the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[31] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[32] The issues to be determined with such a claim were discussed in [Auckland](#)

[Electric Power Board v Auckland Provincial District Local Authorities Officers'](#)

[IUOW \[1994\] NZCA 250; \[1994\] 1 ERNZ 168; \[1994\] 2 NZLR 415 \(CA\)](#). There the Court said:

In such cases as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of

causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[33] Given the events, I find K was constructively dismissed.

[34] If for no other reason there is the failure to pay the agreed increase in the hourly rate. At its most basic, an employment agreement can be considered an exchange of labour for remuneration. To fail to meet ones obligations in respect to one of these components, as the employer had here in respect to pay, is a breach of sufficiently significance for the other party to consider the agreement repudiated. The possibility of resignation must be foreseeable given such a significant breach.

[35] There is then S's behaviour. The evidence is clear – witnesses called by both parties confirm it was inappropriate.

[36] [Section 108](#) of the [Employment Relations Act 2000](#) provides that an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer 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.

[37] There is no doubt the comments were of a sexual nature, they were unwelcome and offensive and they detrimentally affected K's job satisfaction. She was sexually harassed. Employees should not be subjected to such behaviour and

when they raise their concerns those should be acted upon. Here the evidence is that the response was inadequate. Given the evidence, I accept the allegation J did not take it overly seriously. It formed the view it was a combination of indirect observation and hearsay. J acted accordingly (see 18 above) and while S accepts he knew he was being told off, it was not elevated at a level where he was told to get a representative or that disciplinary action was likely. As S acknowledged when answering questions, it was not a big thing. He was *told to lie low and stay away from K*.

[38] There is then the badgering K was subjected to toward the end of her employment. She had S calling her and querying transactions. The evidence is he did not treat others this way and I have to say that if he was truly investigating possible theft he would gather evidence rather than ride an employee in this fashion.

[39] There is the medical certificate. It is not denied its production was demanded though S thinks he waited a couple of days. He was however uncertain about that so I must prefer K's specific evidence. Acceptance of K's assertion means the demand was made before she had been absent for three days. Section 68 of the Holidays Act

2003 precludes such a demand. A breach of statute must also constitute a breach of

the employer's duty to the employee.

[40] There is also the cleaning. T asserts this was simply an ordinary task and not a form of persecution, yet the evidence is she was not required to perform what she considered a demeaning task until then – it had previously been performed by an employed cleaner.

[41] While the sexual harassment ceased the evidence is other forms of harassment then commenced. An employee should not be subjected to such behaviour, especially from her manager. This, I conclude, constitutes another breach.

[42] The breaches continued to multiply and reached, I conclude, a point K could, as she did, say enough is enough.

[43] Finally I must address the fact K sought to rescind her resignation. That would indicate the environment was not so bad as to warrant the tendering of a resignation. K used to be a full time student. She had taken time from her studies and sought work so as to fund further study. She had, by the time she sought to return to J already sought alternate employment and been rejected. She was, as she put it, desperate. She required money – any money to tide her over and J would do as a last

resort. Returning would not preclude her from seeking an alternate from the comfort of paid employment. I accept that, and do not consider this undermines her claim.

[44] She was, I conclude, constructively dismissed.

[45] The conclusion K was dismissed means J must now justify the termination by the employer. That they will be unable to do. There is not, from its perspective any evidence of concerns warranting disciplinary action or possible termination. That, in turn, mean there was no process or procedure and the requirements of s.103A can not possibly have been met.

Remedies

[46] The conclusion there was a dismissal the employer can not justify raises the question of remedies. K seeks wages lost as a

result of the dismissal and \$15,000 as compensation for hurt and humiliation pursuant to [s.123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#).

[47] [Section 128\(2\)](#) of the [Employment Relations Act](#) provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. A greater award is then discretionary and while the Authority often considers such claims, there must be a serious attempt to mitigate the loss to be eligible for an increased award.

[48] K seeks reimbursement of her loss in full. Her evidence is she enrolled with Work and Income who assisted her with the search for a replacement job. She made a number of applications but with the exception of one casual engagement which netted

\$300, she was unsuccessful. In exasperation she chose to abandon her search and return to full time study in February 2012. The period for which she seeks reimbursement is therefore 6 months. Having considered the evidence I consider that appropriate.

[49] The evidence is K was a full time employee who worked an average of just over forty hours per week (40.12). Her loss is therefore in the order of \$16,640 gross and that amount should, I conclude, be awarded.

[50] K seeks \$15,000 as compensation for hurt and humiliation. Her claim was supported with evidence about the hurt she had suffered. Having considered it I conclude an award of \$8,000 to be appropriate.

[51] The conclusion K is entitled to remedies means I must, in accordance with the provisions of [s.124](#), address whether or not K contributed to the situation. The answer must be no. She clearly did not contribute to the harassment she suffered and there is no evidence of other conduct which could be considered contributory.

[52] Finally there is the issue of arrears. K and her employer agreed a rate of \$16 per hour. She was only paid \$13.50. The difference must be due. K did not quantify the amount but T has. The conclusion is that K is owed \$1408.05 gross. This figure includes holiday pay on the unpaid amount. I accept this calculation and order payment of that amount.

Conclusion and Orders

[53] For the above reasons I conclude K has a personal grievance in that she has been sexually harassed and unjustifiably dismissed. As a result the respondent, J Limited, is ordered to pay the applicant, K:

- i. \$16,640 (Sixteen thousand, six hundred and forty dollars) as reimbursement of wages lost as a result of the unjustified dismissal. PAYE is to be deducted before payment; and
- ii. A further \$8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further 1408.05 (one thousand, four hundred and eight dollars and five cents) gross as recompense for unpaid wages.

[54] Costs are reserved.

M B Loftus

Member of the Employment Relations Authority