

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 499
5314345

BETWEEN PHILLIPA KEMP
 Applicant

AND UNIFORM GROUP
 (AUCKLAND) LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Michael Smyth, Counsel for the Respondent

Investigation Meeting: 10, 11 and 24 August 2011

Determination: 21 November 2011

DETERMINATION OF THE AUTHORITY

- A. Phillipa Kemp’s personal grievance application is declined.**
- B. Costs are reserved.**

Employment relationship problem

[1] Phillipa Kemp worked as a sales administrator for Uniform Group (Auckland) Limited (UGL) from 25 March 2008 until she resigned on 3 February 2009.

[2] In April 2009 Ms Kemp raised a personal grievance alleging her resignation was really a constructive dismissal resulting from sexual harassment, harsh treatment and unnecessary consultation about restructuring.

[3] The matter was referred to mediation when a statement of problem and a statement in reply were lodged in August 2010. Mediation, held in January 2011, did not resolve the grievance. In May 2011 Ms Kemp requested the Authority proceed

with an investigation of her application.

Investigation

[4] For the purposes of the Authority's investigation written witness statements were lodged from Ms Kemp; UGL directors and owners Ross Gordon and Adele Gordon (who are husband and wife); former UGL employees Olivia Tapper, Bevon Jacobs and Jan Bickerton; Mrs Gordon's daughter Gina van Berlo; and Andrea Chapman, a friend of Ms Kemp. Each of these witnesses, under oath or affirmation, confirmed their written evidence and provided further oral evidence in answer to questions from the Authority member and representatives.

[5] Ms Kemp's medical records were among relevant documents provided in evidence for the investigation. To assist with understanding those records and Ms Kemp's claim that she was suffering work-induced stress at the time of her resignation, the Authority heard from her GP Dr Ivan Connell and Dr Steve Culpan, a general practitioner specialising in occupational medicine. Both doctors gave oral affirmed evidence by telephone conference at the same time so they could hear and comment on one another's evidence. At UGL's request Dr Culpan had provided a written opinion after reviewing Ms Kemp's medical records and other documents about her personal grievance claim. Dr Culpan did not interview or examine Ms Kemp or speak with her GP before giving his opinion.

[6] In preparing this determination I reviewed all the written and oral evidence, relevant documents provided by the parties, and their closing submissions. As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination does not record all evidence and submissions received but states the Authority's findings of fact and law and its conclusions on the matters for determination.

Issues

[7] In investigating the alleged constructive dismissal the Authority had to consider whether Ms Kemp's employment with UGL ended by her voluntary resignation or as the result of sufficiently serious breaches of her terms of employment by UGL that it was reasonably foreseeable she would resign rather than

continue working under those conditions. Having made the allegation of constructive dismissal Ms Kemp bore the onus to prove – on the balance of probabilities – that UGL, through the actions of Mr and Mrs Gordon, breached her terms of employment. Those terms included an implied duty of fair treatment to her.

[8] UGL is in the business of supplying corporate and sports uniforms. It denied Ms Kemp was treated unfairly or harassed in her employment. It believed the reason for her resignation was the one given verbally by Ms Kemp to Mrs Gordon on 3 February 2008 – that she wanted to spend more time with her children – and not the allegations made months later.

Assessing the evidence

[9] In deciding the matter on the balance of probabilities the Authority is not able to say with absolute certainty what happened in various incidents during the employment relationship, some of which occurred more than three years before the investigation meeting was held. Rather it must assess the evidence to determine what is more likely than not to have been said and done.

[10] In this case Ms Kemp relied on the evidence of her former colleagues Mrs Bickerton and Mr Jacobs and her friend Ms Chapman to corroborate her evidence about the acts of sexual harassment said to have occurred 19 and 20 June 2008. That evidence however does nothing more than establish that Ms Kemp talked to them in June 2008 about her concerns and belief or perception about what happened. It is evidence of what she told them, not necessarily of what happened.

[11] Evidence from Mrs Gordon and Ms van Berlo about their view of Mr Gordon's character, and whether he was likely to have acted as Ms Kemp alleged he did, was inevitably coloured by their family relationship and of little help.

[12] In the end, on several key points, the Authority simply had to make an assessment between what Ms Kemp said and what Mr Gordon said about various events. I have not made a general finding of credibility between them and their two accounts. There is just not enough to go on to do so. I have however generally found that Ms Kemp's evidence fell short of establishing, to the necessary standard, many of

the key points on which she relied. The particular points and reasons are explained in the remainder of this determination.

The issues

- [13] The issues of fact and law are addressed below in response to four questions:
- (i) was Ms Kemp sexually harassed during a dinner with Mr Gordon on 19 June 2008 and at UGL's premises on 20 June 2008?
 - (ii) was Ms Kemp's unfairly treated during her work by Mr and Mrs Gordon?
 - (iii) was Ms Kemp unfairly treated during consultation about a restructuring proposal in October and November 2008?
 - (iv) was Ms Kemp's resignation on 3 February 2009 caused by work-induced stress in turn resulting from breaches of duty by UGL and particularly by Mr Gordon?

Alleged sexual harassment

[14] Ms Kemp identified two occasions on which conduct by Mr Gordon amounted to sexual harassment of her.

[15] The first was at dinner in a restaurant with Mr Gordon on 19 June 2009. Ms Kemp said she was invited to dinner under misleading circumstances and at dinner (as described in her representative's letter of 8 June 2009) Mr Gordon "engaged in inappropriate gestures and conversation of a sexual nature" with her.

[16] The second was said to have occurred on the following afternoon. Ms Kemp said Mr Gordon invited her into the boardroom for a glass of wine and, at one point, asked her to sit on his knee. She said that she replied he was acting inappropriately to which he responded she "was a tease" but not to change as he enjoyed her being a tease. Ms Kemp said she reiterated that Mr Gordon was acting inappropriately and then left the premises.

The dinner

[17] I found Ms Kemp's evidence that Mr Gordon's conduct at the dinner

amounted to sexual harassment unconvincing. He had invited her to dinner after a successful business meeting with UGL clients and, contrary to her evidence, I find it was more likely than not Ms Kemp knew beforehand that Mrs Gordon would not be at the dinner because she knew Mrs Gordon had left the office that afternoon for a weekend out of town with friends.

[18] Ms Kemp's evidence in the Authority was that Mr Gordon made her feel "increasingly uncomfortable with his conversation" and "touched my hair and put his hand on my hand" during the dinner. She said Mr Gordon also insisted on driving her home in his car rather than letting her take a taxi and she felt uncomfortable in his car because he played loud music.

[19] Ms Kemp said the dinner conversation, over the course of about one hour, was uncomfortable and "too personal" because Mr Gordon talked about how he had met and came to marry Mrs Gordon, the death of his brother, providing financial assistance to his mother, and how he regretted having little contact with the children from his first marriage. She said Mr Gordon asked some questions about her personal life. She accepted that in answering his questions she did not disclose any information she did not wish to reveal and he did not press her for details. Mr Gordon could not remember what he said during the dinner as clearly as Ms Kemp but accepted he probably talked about the topics she recalled.

[20] Mr Gordon's actions in talking about his wife, brother, mother, and children and playing loud music in his car, despite Ms Kemp's declared discomfort, do not amount to sexual harassment. However the alleged physical touching could constitute sexual harassment if it was, in the context in which it occurred, physical behaviour of a sexual nature. Mr Gordon emphatically denied he touched Ms Kemp at all.

[21] I was not convinced Ms Kemp's evidence established to the necessary standard that those physical acts occurred or, if they did, that they were of a sexual nature.¹ There are three reasons for that doubt.

[22] Firstly, Ms Kemp could recall no detail about what was happening or being said at either of the two times that she said Mr Gordon touched her during dinner.

¹ *Managh v Wallington* [1998] 2 ERNZ 337, 341 (CA).

That is inconsistent with her other evidence giving a detailed account of the conversation during the dinner.

[23] Secondly, the letter of 9 April 2009 in which her personal grievance was raised made no reference to the alleged touching on 19 June 2008. A second letter, sent two months later, referred to inappropriate gestures of a sexual nature but gave no particulars about what Mr Gordon was said to have done. It was not until her witness statement was lodged in July 2011 that Ms Kemp specified his actions as touching her hair and putting his hand on her hand. In her evidence to the Authority Ms Kemp said she had told the lawyer who wrote the first letter about the touching but the lawyer had not included it in the letter. I consider it unlikely a legal representative raising a personal grievance claiming sexual harassment would not refer to and specify the alleged physical touching if her client had told her about it.

[24] Thirdly, even if Ms Kemp's evidence about touching her hand and her hair was correct, it was insufficient to establish that those actions were sexual in nature. She said when Mr Gordon touched her hand, she moved it. He did not touch it again. She could give no details about how he touched her hair. Mr Gordon's actions, if they were as described by Ms Kemp, may have been inadvertent or an overly familiar gesture, but not a request for sexual contact or physical behaviour of a sexual nature within the statutory definition.² There is simply insufficient evidence to make Ms Kemp's account of events more likely than Mr Gordon's denial of it. Both are possible but there is not enough to say one is more probable than the other.

The boardroom

[25] Mr Gordon also denied Ms Kemp's account of his actions or comments on the afternoon of 20 June 2008, which she said occurred after other employees had left the office. He agreed he was working in the boardroom with papers spread out on the table. He said he suggested a glass of wine because Ms Kemp had said she was filling in time before going to have dinner with friends. Mr Gordon agreed he probably talked about a photograph on the boardroom wall showing him in London in the 1970s. Mr Gordon does not agree with Ms Kemp evidence that, knowing she had previously worked as a nurse, he referred to enjoying the company of nurses in those

² Section 108 of the Act.

years.

[26] Ms Kemp said that after Mr Gordon asked her to have a drink in the boardroom she arranged for her friend, Ms Chapman, to send her a text in around half an hour so she could use that message as an excuse to leave. Ms Kemp said it was during that time Mr Gordon asked her to sit on his knee and called her a tease. Mr Gordon described Ms Kemp's evidence as "fantasising".

[27] I have not made a finding as to whose version of events is correct because I concluded that even if Ms Kemp's evidence was accepted, the alleged conduct did not meet all the necessary elements of the statutory definition of sexual harassment. If Mr Gordon did make the 'knee' request or the 'tease' comment, Ms Kemp's own evidence was that she immediately told him it was inappropriate and from that time until she resigned from the job more than seven months later he did not do anything she would describe as sexual harassment. There was no repetition.

[28] Ms Kemp did identify two other aspects of Mr Gordon's behaviour which she found uncomfortable during her employment – that he sometimes knelt beside her desk while talking to her in the open plan office and that, on at least one occasion, he had picked loose hair from her clothes. I do not accept either amounted to sexual harassment. Ms Tapper's evidence was that both Mr and Mrs Gordon sometimes sat with staff members at their desks looking at papers and other information. While Mr Gordon denied he had ever touched Ms Kemp's clothes, I consider the evidence from him and Ms Tapper about his attention to detail, concern about appearances and frequent comments to male and female staff members about their clothing, made it likely he would pluck a loose hair from an employee's clothing. Such an action, alone, would not amount to sexual harassment.

Alleged unfair treatment

[29] Ms Kemp identified a number of actions by Mr and Mrs Gordon she considered were harsh or unfair treatment that reduced her enjoyment and satisfaction in the job.

[30] These included:

- (i) Mr Gordon shouting at her;
- (ii) Mr Gordon criticising staff members in their absence or in front of other staff members;
- (ii) Mr Gordon and Mrs Gordon giving contradictory instructions;
- (iii) Mrs Gordon telling her not to waste time at work talking to colleagues;
- (iv) Mrs Gordon checking her break time;
- (v) moving her desk without telling her
- (vi) making an insulting comment about a deceased family friend when she asked for time off to attend his funeral;
- (vi) calling her to check her whereabouts when out on business calls; and
- (vii) after June 2008, not taking her out for coffee during the working day.

[31] The evidence from Mrs Gordon, Ms Tapper, Mrs Bickerton and Mr Jacobs established Mr Gordon's manner or style of work could be abrasive and demanding. Mrs Gordon accepted Mr Gordon could be "intense" and this could be "misconstrued as overbearing". Ms Tapper said he could also be "animated", describing an incident where he shouted at her because he thought she was dressing a mannequin incorrectly, with her shouting back, throwing an item on the floor and walking out of the work area. Mrs Bickerton and Mr Jacob said they were concerned at how Mr Gordon spoke to other staff while Ms Tapper considered demanding managers, who were particular about details, was part of the "rag trade" work environment.

[32] The evidence confirmed one instance where Mrs Gordon had written on her calendar what time Ms Kemp left the office for lunch. Mrs Bickerton saw Mrs Gordon make the note and told Ms Kemp about it. Neither checking break times nor asking an employee not to waste work time talking amounted to a breach of Ms Kemp's terms of employment.

[33] What witnesses described as "micromanaging" by Mr and Mrs Gordon appeared to be a feature of how they ran their business. Mrs Bickerton's evidence described Mr Gordon as yelling at staff members when orders were not sent out on time, items were missed from orders, and when he was frustrated with how things were done or not done. Both Mrs Bickerton and Mr Jacobs confirmed Mr Gordon did not single out Ms Kemp for such attention. Ms Kemp accepted that was so, although she had asked Mr Gordon not to yell at her. Mr Gordon accepted he spoke loudly to

employees about getting details correct and readily told them when they did not do so “because mistakes cost money”. That approach may not suit all employees but was not – to the extent it was directed at her – a breach of Ms Kemp’s terms of employment. Calling her while she was out of the office on work visits was also within the normal range of activity for managers of sales staff.

[34] Matters such as moving the desks in the office were within UGL’s management prerogative. Ms Kemp believed it was done so computer monitors faced outwards where Mrs Gordon could see them and to stop Ms Kemp spending time browsing on the internet. Mrs Gordon’s evidence was that the changes were made to improve the communication and efficiency of sales office. I find no breach there.

[35] Mr Gordon denied referring to a deceased friend of Ms Kemp’s as a “hori”. If that language was used it would be indicative of ignorance or bigotry which Ms Kemp and others would find offensive but, not being a racial epithet directed at her, was not a breach of her terms of employment. She was granted the leave she sought to attend her friend’s funeral.

[36] Ms Kemp said that after June 2008 Mr Gordon did not take her on business visits to suppliers or customers as he had in previous months. Those errands sometimes included stopping for coffee at cafes. Ms Kemp’s evidence did not identify any aspect of her work that was hindered by not going on those visits or not going to cafes. There was no breach of duty to her.

Restructuring

[37] In raising her personal grievance Ms Kemp complained she was told three months prior to her resignation that she may be made redundant and had been called to meetings about possible restructuring and redundancy.

[38] In October 2008 UGL consulted eight staff about restructuring their roles because of the effect of the recession on its business sales. Ms Kemp took part in three meetings. During one of those meetings she confirmed she was happy with her work. Ms Kemp requested a change in hours so she could get home earlier to her school age children. This was agreed to but did include a reduction in her hours.

Apart from that change, her position was confirmed on 19 November although UGL indicated it would again review the position in the first week of February 2009.

[39] There was no breach of Ms Kemp's terms of employment by consulting her about possible restructuring of the business. Her employer acted lawfully by doing so. Her position was confirmed, unlike some other positions that were disestablished or changed, including that of Mrs Bickerton.

The cause of Ms Kemp's resignation

[40] In the letter raising her personal grievance Ms Kemp was said to have felt overwhelmed, exhausted and extremely distressed by UGL actions by February 2009. The letter stated her doctor had confirmed she had elevated blood pressure and the beginnings of an ulcer caused by stress directly related to her employment. In her witness statement she said both Mr and Mrs Gordon were aware the reason for her resignation was that she "could no longer endure their bullying and intimidating behaviour" and that Mr Gordon's "sexual advances were causing me immense distress".

[41] After a doctor's visit on 2 February 2008 Dr Connell issued Ms Kemp with a medical certificate stating she was "suffering from several conditions including systolic hypertension, gastritis with possible stomach ulcer, and work induced stress". Ms Kemp gave the certificate and a letter of resignation to Mrs Gordon the next day and then took her required one month's notice as sick leave.

[42] In his evidence to the Authority Dr Connell agreed Ms Kemp's symptoms, as observed by him on 2 February 2008, did not meet clinical criteria for a diagnosis of psychological harm arising from workplace stress. He recalled Ms Kemp as being unusually anxious and despondent but not clinically depressed. He accepted his conclusion regarding the effect of her work on her was based solely on her reporting of the circumstances to him. It was him that suggested she resign. Ms Kemp's evidence was that, although she had thought about resigning before she saw her doctor, she made the decision after getting his advice.

[43] Dr Connell said he had intended to imply in the medical certificate that work

stress was contributing to Ms Kemp's gastritis and hypertension. However I accept Dr Culpan's opinion that Ms Kemp's medical records showed no clinical evidence to support the reference to a possible stomach ulcer and that the blood pressure and gastritis issues were relatively mild, easily treated and should not have prevented Ms Kemp doing her usual work. The period of sick leave given was longer than usual for treatment review and follow-up. It did not match the medical needs for treating such symptoms but did correspond exactly with the period of notice Ms Kemp had to give.

[44] While the Authority must accept Dr Connell's assessment and description of Ms Kemp's health at the time was suitable for medical purposes, it does not meet the requirements of legal evidence necessary to establish her ill health was caused by UGL breaching its duties to her and resulting in her resignation really being a constructive dismissal. That is largely because his conclusion was based on Ms Kemp's subjective report of events rather than any objective analysis of the situation in her workplace.

[45] As a result I do not accept Ms Kemp established the necessary chain of causation for a constructive dismissal or displaced the following factors as the real motivation for her decision to resign (which were all raised to some degree or other through the course of the evidence heard):

- (i) there were other stressors in her life, including her concern about needing to spend more time with her children (as she told Mrs Gordon at the time of resignation) and a recent burglary at her house; and
- (ii) the job was not as enjoyable as she had hoped as she had less autonomy and more direction than her previous job from which UGL had recruited her; and
- (iii) there was some ongoing uncertainty about the security of her position because, while the role was confirmed in November, a further review was planned for February.

[46] There must also be, as submitted by UGL, some doubt that the alleged harassment of June 2008 remained a motivating factor in Ms Kemp's resignation decision as she had continued to work for more than six months after the harassment was said to have occurred and, during the October restructuring review, told Mrs Gordon she was happy in her work.

Determination

[47] For the reasons given I find the circumstances of Ms Kemp's employment, and her experience of it, did not reach the threshold necessary for a finding of constructive dismissal. That threshold has been defined in this way:³

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness and resentment to the employee from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.

[48] Her personal grievance application is declined.

Costs

[49] Costs are reserved. The parties are encouraged to resolve any questions of costs between themselves. If they are not able to do so and an Authority determination of costs is required, UGL may lodge and serve a costs memorandum within 28 days of the date of this determination. Ms Kemp would then have 14 days from the date of service to lodge any reply memorandum. No application for costs will be considered outside this timetable unless a prior application for leave had been made and granted.

Robin Arthur
Member of the Employment Relations Authority

³ *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cas 95, 104.