

his main duties were general administration and that he relieved for a short time in payroll while another staff member was on leave.

[4] Mr Kifouani was employed on a salary of \$36,000 and says he was told it would increase to \$38,000 after 4 weeks but this did not eventuate. The respondent denies that such a promise was made or that this conversation took place.

[5] On 22 September Mr Kifouani asserts he was told he would be paid on an hourly rate, not on a salaried basis. He continued to be paid a salary. The respondent says he was told that if he continued to take unauthorised time off for private affairs, this would have to be looked at. He said he would stop so the matter was left. While Mr Kifouani asserts that he questioned the legality of the proposal and persuaded the employer to continue paying him a salary, the respondent denies this.

[6] Mr Kifouani says that on 25 September 2009 changes were made to his workload and responsibilities without any consultation. He says that training sought was not provided and he felt hindered in his ability to do his job. The company says he was never urged to seek training for this role as it was not his role

[7] On 25 September Mr Kifouani says he raised the issue of harassment with Mr Peter Fernandez, the Operations Manager. Mr Kifouani says that Mr Fernandez told him that the girls owed him an apology. A letter from Mr George Vergis, a supplier, states that he was present at the time and observed Mr Fernandez talking to Mr Kifouani about how he needed to be careful about how spoke to the girls and that his complaint about them was a serious matter. He did not hear Mr Fernandez say that Mr Kifouani was owed an apology.

[8] Mr Fernandez said that in September Ms Michelle Li and Ms Lee Zhang told him that Mr Kifouani had been discussing sexual matters which made the female staff uncomfortable. He talked to other office staff who confirmed these claims. He told Mr Kifouani to stop discussing sex in the office and that he should take that as a warning.

[9] On 29 September Mr Kifouani received a memorandum asking him to provide copies of his passport and work permit. He felt singled out and uneasy. However, the

memo sent out was a generic one. The evidence was that when he joined he said he had permanent resident status but he only had a work permit which expired on 2 July 2009. He stated he had been born in 1969 but it was actually 1961.

[10] On 4 October he says his access to the internal computer system was blocked without his being told about it. No explanation was provided and he was unable to obtain his payslip without access to this system. The company does not have an internal internet system. For the short time he was in payroll he had access to the payroll system but when the payroll person came back to work the duties were returned to her.

[11] Mr Kifouani says that throughout the course of his employment he was subjected to ongoing sexual harassment from a female colleague. When he rejected her approaches Ms Li retaliated by making allegations about Mr Kifouani.

[12] These included complaints about the amount of time he spent having his laundry done and visiting the bank. It is clear that he did spend a lot of time away from the office on personal business.

[13] On 4 October Mr Kifouani sought legal advice regarding the problems he was experiencing at work. A letter raising a personal grievance was prepared. However, the matter was not pursued.

[14] On 7 October Mr Kifouani says he met with the Regional Manager, Mr Anirudh Krishna, who had become aware that he had sought legal advice. Mr Kifouani believed Mr Krishna would communicate his concerns to Mr Fernandez when he returned in 2 weeks and that matters would then be rectified. Mr Krishna says no such meeting took place.

[15] When Mr Fernandez returned from leave he was told there was still a problem. He called Mr Kifouani to his office and told him he was warning him again and his job was at risk if further complaints were received. Mr Krishna was present. Mr Fernandez asked him whether he was looking for another job and what was bothering him at work. Mr Kifouani said he told Mr Fernandez that he had been exposed to months of a toxic work atmosphere of bullying and harassment instigated by Ms Li

and that he had been humiliated because he had not submitted to her bullying behaviour.

[16] Mr Kifouani said Mr Fernandez acknowledged that Mr Kifouani had been adversely affected by the behaviour of staff, particularly Ms Li. He said Ms Li's title of Office Manager was fictitious to maximise her work permit chances. Mr Fernandez denies this.

[17] On 13 November Mr Fernandez was told by Ms Li that Mr Kifouani had been watching pornographic movies at work that day. Over the next couple of days he spoke to other staff who confirmed this and said that they were being bullied and harassed by him.

16 November

[18] On 16 November Mr Kifouani said he went to see Mr Fernandez about rumours that were circulating about him. Mr Fernandez said that women never talked when things were good and that "*only what the girl says counts*". Mr Kifouani again felt his concerns were not being taken seriously.

[19] However, it was Mr Fernandez who called the meeting as there had been further claims of sexual harassment. Again Mr Kifouani denied any wrongdoing and Mr Fernandez told him he would be getting the HR Manager to deal with the issue and to expect to hear from him the next day. Mr Krishna was present. Mr Fernandez asked if Mr Kifouani had been watching pornographic movies in the office. Mr Kifouani denied it.

[20] Mr Kifouani says that the same day he phoned Mr Krishna and asked why the company never investigated anything but condemned him based on malice. Mr Krishna told him he was sorry and that he was only an employee. Mr Krishna says no such conversation took place.

[21] On 16 November Mr Fernandez contacted Mr Basil Po-Ching, a Human Resources Consultant, and said there were sexual harassment allegations. He asked

Mr Po-Ching to interview the female office staff and Mr Kifouani. He said he had spoken to Mr Kifouani who had denied it.

[22] Mr Po-Ching interviewed some of the staff. He spoke to Ms Sharona Peng and Ms Li. He went to the head office at 5.30 and interviewed them individually. They said they were uncomfortable being alone with him.

17 November

[23] The following day – 17 November - Mr Po-Ching explained the allegations in detail to Mr Kifouani. Mr Krishna was present.

[24] Mr Po-Ching asked Mr Kifouani whether he had ever left the office to attend to his private affairs or to make personal calls on his mobile. Mr Kifouani denied this had occurred. He was asked whether he had visited pornographic sites and shown pornographic pictures to any of the staff. He denied these allegations.

[25] Mr Kifouani told Mr Po-Ching that the women were ganging up on him because they wanted his affections but he did not want them.

[26] Mr Krishna said Mr Po-Ching went through the allegations and Mr Kifouani either refused to reply or denied the allegations. Mr Kifouani became very exited and defensive and said the girls wanted his attention. Mr Po-Ching believed he was delusional. He believed there was substance to the complaints and told Mr Kifouani that he was liable to immediate dismissal for serious misconduct. He gave details of the complaints but at that time did not have dates when the sites had been accessed.

[27] Mr Po-Ching told him he believed he was delusional and he was concerned for the safety of the female staff, who was frightened of him. He was concerned that Mr Kifouani did not accept any responsibility for his actions.

[28] He told him he was dismissed. Mr Kifouani refused to leave the office and Mr Po-Ching said he would call the police.

[29] Mr Kifouani said he did not know what the meeting was about, although Mr Fernandez had told him he was contacting Human Resources regarding the sexual harassment complaints. Mr Po-Ching told him he had only one option: to resign with immediate effect. On the basis of information received that morning he would ask the police to intervene if Mr Kifouani did not resign.

[30] When Mr Kifouani asked why he was being fired Mr Po-Ching said there had been complaints about his behaviour towards a woman at work and that he had accessed pornography from his work computer. He was not provided with the substance of his complaints and given no opportunity to make an explanation. He had no information about the dates and times he accessed the computer.

[31] He denied the allegations and said there had been no investigation and he would not resign and was happy for the police to be contacted. He was told to leave immediately and to return his mobile phone.

[32] Mr Kifouani believed the allegations were a complete fabrication by the female staff because he had made a complaint to Russell McVeagh about being sexually harassed and the way the company had been trying to get him to resign.

[33] He said he did not have a personal password and user id. The respondent says no one had a personal ID and that emails coming to the office were viewed by all staff and dealt with by the appropriate staff member.

Evidence regarding conversations

[34] Ms Peng gave evidence about a conversation Mr Kifouani had with her on 15 November. He claimed that from June onwards Ms Li had rung him several times asking him to go out with her and that she had asked him about the layout of his bedroom and if he liked sex. Once when he was to be out of town Ms Li insisted that she wanted to go as well but he rejected her. Ms Zhang was not happy if he spoke to Ms Li. There were many girls at Denny's that were friendly towards him in a sexual way and some of them had asked him for his contact details and some had provided their contact details. It was fortunate that he was a mature man who could control himself otherwise he would have slept with a lot of women.

[35] When I asked Mr Kifouani about this conversation he said Ms Li had said she wanted to go to Taranaki with him. He had asked what would happen if she got pregnant, what would Mr Fernandez say. She had replied it would not matter. He had then said that in 2010 he might not be in New Zealand and what would happen if he went to Canada and she found herself pregnant. She repeated that it did not matter. He said Ms Li was jealous, irrational and possessive.

[36] Mr Kifouani said that the first time he had to go out in the car with Ms Li, Mr Fernandez had told him to make sure Ms Li did not rape him. Mr Fernandez denies this.

[37] When a South African woman started employment with the company Mr Fernandez introduced her to Mr Kifouani as a fellow countryman. Mr Kifouani said the woman asked him if he wanted a South African girlfriend. Mr Fernandez had no recollection of this comment being made. It seems very unlikely that a total stranger, upon a first meeting, would make this sort of comment.

[38] Mr Kifouani asserted that when Mr Fernandez telephoned Ms Zhang she would get under the table in the office to talk to him so he could not overhear her. Ms Zhang denied this.

[39] Mr Fernandez said he had had a complaint from a woman at Denny's about Mr Kifouani harassing her.

Determination

[40] Procedurally, the dismissal was flawed. Mr Kifouani was not told the purpose of the meeting (although he had been told that Human Resources would be being contacted regarding the complaints), that his employment might be terminated or given an opportunity to obtain representation.

[41] While the respondent did not keep a record of the verbal warnings given, I am satisfied they were given.

[42] Where there are conflicts in the evidence of Mr Kifouani and the respondent's witnesses, I unhesitatingly prefer the respondent's evidence.

[43] I have no doubt that Mr Kifouani consistently, despite being warned, made a number of offensive sexual comments to his female colleagues and that he viewed material with a sexual content at work, that he showed Ms Li a sexual image on his computer and printed off sexual material. These actions constitute sexual harassment.

[44] The dismissal was unjustified but when I consider the matter of contributory behaviour, I conclude that Mr Kifouani did sexually harass his colleagues. His behaviour was blameworthy and was such as to disentitle him from receiving any remedies.

[45] There was no discussion or agreement about an increase in salary after four weeks.

[46] Work changes were made during another employee's absence and there is provision in the job description for the office administrator to perform varying roles. Training was provided by Ms Peng.

[47] Mr Kifouani's complaint about being denied access to the computer system relates to the payroll part, which he had access to only while he was performing payroll duties.

[48] There was no disadvantage to Mr Kifouani in any of those matters.

Costs

[49] If the parties are unable to resolve the issue of costs, the applicant is to file a memorandum within 28 days of the date of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority