

[4] Ms Roskam claims she was sexually harassed by Mr Fallows throughout the course of her employment and, in particular, the victim of *several incidents of physical sexual harassment which were deeply disturbing and distressing...*

[5] Ms Roskam says Mr Fallows often engaged in inappropriate behaviour of a sexual nature but, until July 2011, she tried to treat it as a joke. She also commented that Mr Fallows had a reputation as *a bit of a joker* within the workplace, and numerous approaches to other woman were accepted with those involved often responding to his actions with a laugh. A number of witnesses appeared for ALSCO. They essentially accept Mr Fallows was a joker but assert his behaviour was inoffensive.

[6] In support of her claims about Mr Fallows' behaviour toward others, Ms Roskam cites one specific incident involving her supervisor. Her evidence was supported by another witness who said she saw the same incident. The supervisor, however, denies the claim has any validity and states the alleged event never occurred.

[7] Ms Roskam then cites four events in which she was a direct participant. The first occurred at a Christmas function where Mr Fallows, dressed as Santa Claus, used a bottle opener to form a graphic and prominent phallic symbol which he attached to his garb. Ms Roskam does, however, accept she found it humorous at the time, as did most of those around her.

[8] Ms Roskam also gave an example of a specific, and improper, conversation she says occurred in 2011 when she was acting as the supervisor. She says:

I felt quite shocked and didn't find it funny but laughed it off as a way of dealing with it. In fact it was embarrassing and very awkward.

[9] There are then two allegations of instances where Mr Fallows' actions went beyond inappropriate banter and extended to physical harassment.

[10] What Ms Roskam categorises as the first really serious incident occurred in July 2011. On the day in question she was again acting as supervisor and working at the No. 1 ironer loading sheets onto a conveyor. There were three other workers at the station when Mr Fallows is alleged to have come up behind Ms Roskam, grabbed her and begun thrusting his pelvis repeatedly into her bottom.

[11] Ms Roskam says:

I was shocked, and feeling absolutely sick and violated. I looked around to see if anybody could see what was happening and as I looked to my right [E], the wet floor supervisor was there witnessing what was happening. We both looked at each other and [E] looked shocked at what he was seeing. As I looked towards [E] it appeared that Tony also noticed him and he immediately dropped his hands from my hips and walked off.

...
[E] did not come over to me but walked away. Neither of us said anything about what had happened.

[12] While not originally a witness, E was called. He is adamant he did not see the event or react as Ms Roskam claims. He says the first he knew of the allegation was when he was approached by the Police after Ms Roskam's complained to them.

[13] Ms Roskam says Mr Fallows had significant periods of absences over the next five months and when he was at work his attitude towards her altered. Contact between the two was limited to the odd exchange of greetings and the previous sexual banter ceased.

[14] The second serious incident occurred in early December 2011 at the door to the supervisor's office (known as the fishbowl). Ms Roskam says she was standing there with her head poking around the door frame talking to the supervisor when Mr Fallows came up behind her, lent against her and again began rubbing his pelvis against her inappropriately.

[15] That was the last time Ms Roskam saw Mr Fallows, at least as a co-worker. The day of the alleged event was his last before a period of leave. He was due to return on 19 December. Ms Roskam says she realised she could not face Mr Fallows return when she realised it was imminent. She says she decided the time had come to tell her partner (Bevin) about her predicament and did so on 16 December having called in sick that day.

[16] The previous evening Ms Roskam had been at a colleague's home. This was a colleague in whom she normally confided and while she said then she was leaving the rationale was limited to dissatisfaction about leave. Ms Roskam accepts that and the fact sexual harassment was not mentioned.

[17] That same evening (15 December) a dispute arose over holidays and ALSCO's denial of a request Ms Roskam made for annual leave to cover sickness. The request

had been made at Bevin's suggestion and he took exception at its refusal when a flatmate, who also worked at ALSCO, was granted leave at about the same time. This became the catalyst for a series of increasingly fraught interactions between Bevin and ALSCO staff which, when fuelled by the sexual harassment allegations, led to the issuing of a trespass notice against Bevin.

[18] Ms Roskam goes on to say:

On 19 December 2012 I went to the South Dunedin Police station and told them what happened. I thought it was best to talk to an entirely independent investigator as I did not trust anybody from ALSCO. The Police said that I needed to tell my employer about what had happened and I rang Glenda Delaney, who works at Head Office, from the Police station. I complained to her that I had been sexually harassed by Tony.

[19] Later that day Ms Delaney rang back. She advised she would arrange counselling for Ms Roskam and the complaint would be investigated. Ms Delaney took notes of the discussions which Ms Roskam accepts are accurate.

[20] Ms Roskam was subsequently delivered a counselling referral form which caused further angst as it included an observation from ALSCO's Dunedin branch manager. He said *I believe that the allegation is baseless* and suggested the claim was a reaction to the leave issue orchestrated by Ms Roskam's partner.

[21] Ms Roskam goes on to say:

Any trust I had in the company was completely destroyed by this document and I felt that I was not going to get a fair hearing from the company, which is exactly what I had feared.

[22] Ms Roskam was also concerned that her discussions with the recommended counsellor would not be confidential and she subsequently arranged alternate counselling through her doctor.

[23] Ms Roskam goes on to say:

On 20 December 2011 I was rung by a woman called Karen Bardwell who said she was an investigator employed by the Respondent. She told me that I was to attend an appointment on 21 December 2013 (sic) for me to talk about what had happened. She said that although I could bring a support person, they would not be able to speak at all.

She was unfriendly and cold and sounded impatient. I did not feel that she was someone who I would feel comfortable talking to. She did not explain her role in any detail and I thought she was a Private Investigator.

[24] Ms Roskam then sought legal advice and claims she was advised to attend neither the counselling nor the investigation meeting (at least on the originally scheduled day).

[25] Further angst was caused over Christmas by a dispute over what type of leave Ms Roskam was on (annual or unpaid sick), though this was remedied to some extent by a partial payment which resulted from a phone discussion between Ms Roskam and Ms Delaney on 30 December.

[26] Ms Roskam goes on to say:

I did not hear anything further from the Respondent after my conversation with Glenda and Peter at the end of December 2011. No one asked me for any further information about my complaint. On 24 January 2013 (sic) I resigned from my employment and raised a personal grievance on the basis that I had been disadvantaged in my workplace by the sexual harassment I had been subjected to and constructively dismissed when the company failed to investigate my claims before deciding they were baseless.

[27] In the interim Ms Roskam laid a formal complaint of indecent assault with the Police. That was investigated and the Police concluded it lacked foundation. Indeed the Police went further and having decided the allegations were fabricated, charged Ms Roskam with making a false complaint. The charge went to a defended hearing during which it was withdrawn.

Determination

[28] Ms Roskam claims she was constructively dismissed. In making that claim Ms Roskam accepts she carries an onus of establishing a prima facie case against ALSCO.

[29] 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.

[30] 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.

[31] There must also be a causal link between the employer's conduct and the tendering of the resignation (*Z v A* [1993] 2 ERNZ 469).

[32] Essentially the concept is an employee leaves because of a breach by the employer which is repudiatory in nature. Ms Roskam says she resigned as a result of two things – the sexual harassment and ALSCO's failure to adequately investigate her claim.

[33] When an employer is advised of an allegation of sexual harassment its prime obligation is to act on the information and ascertain its veracity. Any suggestion ALSCO failed to do so in this instance must fail. It engaged an independent investigator who then proceeded to enquire into the situation.

[34] Ms Roskam accepts that but her concern is the investigation was conducted improperly for two reasons. She says the investigator failed to question her and the manager's comments gave the impression ALSCO was simply going through the motions and the investigation was a sham.

[35] I cannot agree with the first complaint. Ms Roskam accepts she told ALSCO she would not participate in the investigatory process. When questioned about that she initially said her non-participation was limited to the initial meeting with Ms Bardwell on 21 December and she was willing to participate later. Unfortunately she then undermined that with subsequent answers which confirmed her withdrawal from the process was portrayed as permanent. As she put it at one point – *I decided to do it my way, as simple as that.*

[36] I also discount the manager's comments. While perhaps unwise, he could explain why he made them. He was convinced it was a fabrication given the holiday pay issue and Bevin's unhelpful involvement. Given both the evidence I heard, and observations of Bevin and his behaviour, I can understand that. In any event, and more importantly, he was not the investigator and not part of the decision making process. Ms Roskam's answers suggest she knew that.

[37] For the above reasons I conclude Ms Roskam has failed to establish ALSCO failed to properly investigate her complaint.

[38] Turning to whether or not she was subjected to sexual harassment. Ms Roskam relies on five specific examples which, if they all occurred, would clearly constitute sexual harassment. They were Mr Fallows' treatment of the supervisor; the Santa suit incident, the conversation referred to in paragraph 8 and the two instances upon which she alleges she was physically assaulted.

[39] On one hand I have the fact Ms Roskam sought professional assistance to help her address the angst and hurt she felt and which remained plainly obvious throughout the investigation. That though is countered to a significant extent by evidence there were other issues in Ms Roskam's life at the time which could have been responsible. There is then the fact she went to the police on 19 December but that is balanced by the fact I do not know exactly what was said. While I have copious notes of other interactions Ms Roskam had with the police over these issues, there are no notes of what was said on 19 December and Ms Roskam's oral evidence contained inconsistencies.

[40] There is then the evidence of another witness tendered in support of her claim concerning Mr Fallows treatment of the supervisor though it is undermined to some extent (as is ALSCO's) by the fact it became apparent there were by two factions within this workplace. The larger one supports Mr Fallows while the other did not. The two were in conflict with the situation being fuelled to no small extent by Bevin's activities and reactions thereto. These attitudes were evidenced by some fraught exchanges between witnesses during the hearing.

[41] Unfortunately for Ms Roskam her claims in respect to three of the events upon which she relies are seriously undermined and some doubt must exist about their veracity. The supervisor is adamant the alleged assault she suffered never occurred

and similarly E clearly states he never saw the incident Ms Roskam says he did. Neither had their assertions undermined when answering questions though the same could not be said of Ms Roskam whose evidence was, at times, uncertain and contradictory.

[42] There is then the final physical incident. Ms Roskam's original description of where the various participants and witnesses were, strongly suggested both the supervisor and another witness could see the incident. Both deny seeing Mr Fallows act in an improper way. They also deny seeing Ms Roskam forced through the doorway as, at one stage, she said occurred.

[43] A site visit during which part of the alleged event was re-enacted would suggest the supervisor may not have been able to see though a debate remains as to the how far Ms Roskam was pushed through the doorway. The same could not be said of the other witness whose evidence remained consistent. She saw nothing untoward.

[44] There is then the alleged conversation referred to in paragraph 8. There were no witnesses to this and Mr Fallows denies it occurred (as he does all allegations except the Santa suit).

[45] Finally there is then the Santa suit incident. It definitely occurred but the evidence is the event was orchestrated by a group of female staff. Mr Fallows tried to resist their approaches he wear the appendage and did not buckle until the fifth or sixth approach. Add to that no-one, including Ms Roskam, took offence at the time.

[46] Having said that, I must express some concern about the evidence of ALSCO managers when they spoke of this event. Those who gave evidence portrayed it as nothing more than inoffensive skylarking. That is a dangerous approach. What constitutes sexual harassment is normally seen through the eyes of the complainant, hence the onus on an employer to address a complaint when it arises. Having seen photos of this it is easy to conclude someone could have been offended. To continue to condone such behaviour is, in my view, risky and may have adverse future consequences.

[47] Finally I must note some answers Ms Roskam gave which, even if she was sexually harassed, raise doubts about the causal link. She accepts she told her colleague she was resigning over the leave issue on 15 December. When answering

another series of questions she stated she resigned to obtain a benefit and repeated that answer soon thereafter.

Conclusion

[48] As already said Ms Roskam claims she was constructively dismissed. She is therefore required to establish a prima facie case that requires answering.

[49] I conclude she has failed to do so.

[50] For reasons already explained she has failed in respect to the allegation ALSCO failed to properly investigate her claims of sexual harassment.

[51] As to the harassment itself, Ms Roskam relies on five key incidents. Three of her claims were substantially undermined by the evidence of a number of witnesses. A fourth was not witnessed but I cannot safely assume it occurred given the evidence tendered in respect to the three already mentioned.

[52] The fifth did occur but one event to which no-one took offence does not constitute sexual harassment warranting the response of resignation.

[53] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority