

Attention is drawn to paragraph 50 prohibiting publication of certain information.

Determination Number: CA 123/02
File Number: CEA 25/02

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN C, Applicant
AND Dr Graeme Fogelberg, Vice Chancellor of University of Otago
Respondent
REPRESENTATIVES Len Andersen and Alistair Paterson for Applicant
Barry Dorking for Respondent
MEMBER OF AUTHORITY Neville Taylor
INVESTIGATION MEETING Dunedin, 19 and 20 November 2002
DATE OF DETERMINATION 3 December 2002

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant (hereinafter referred to as *the applicant* or *C*) was dismissed for serious misconduct. He claims that his dismissal was unjustified and that the claimed *suspension* that preceded it was also unjustified. The applicant seeks reinstatement as his primary remedy. At the investigation Meeting, the applicant also made a claim for lost wages, for compensation,¹ and costs.

Factual Background

[2] The applicant was employed by the respondent in a non-academic position. He was a long-serving employee. His work performance was highly praised and is not in question.

[3] Also working for the respondent is a woman (hereinafter referred to as *D*), who is an administrator in the work area where the applicant was employed. *D* does not work directly alongside the applicant but works in the same establishment and in relatively close proximity to his work area.

[4] There was an initial difficulty in the relationship between the applicant and *D*. Approximately six years ago *D* had complained that the applicant has used inappropriate language of a sexual nature to her. This related to an alleged incident whereby it is claimed that *D* objected to the applicant parking his vehicle too close behind hers. It is alleged that in response to that claim, the applicant uttered words to the effect; *I like being right up your butt*.

¹ For humiliation, loss of dignity, and injury to feelings pursuant to s.123 (c)(i) of the ER Act.

[5] D, during the investigation meeting, mentioned another alleged utterance by the applicant that she also found offensive but as that matter does not appear to have been dealt with by the respondent I take no account of it whatsoever.

[6] There then followed some strange conduct on the part of the applicant, culminating in him *bumping* into D in a corridor. The applicant described the bumping as shoulder to shoulder contact. Although the applicant said that the impact would not have put D off her stride or have caused bruising, I nonetheless gained the impression that there was a degree of moderate force involved.

[7] The applicant could not recall the parking incident of about six years ago but he did remember his car being parked close behind D's car and that he did make a flippant comment in response to one from her.

[8] The applicant's explanation for the unusual behaviour between himself and D was that he never found it easy working with her, though he *always liked her*. The applicant claimed that D was *cold towards [him] and that there was a barrier between* he and her. He claimed that there were incidents that indicated that D wished to have *more than just a friendly* relationship. The applicant described examples of this being D waving at him when leaving on a Friday and maintained that she *bumped hips* with him.

[9] The applicant claimed that as he was receiving *mixed messages* from D, he decided to treat her as if she did not exist. He said that this was in fact a *hurt reaction to her coldness*. He said this led to the incident of him *bumping* into her in the hallway. He said this arose because he *would look right through her and not move away when she was walking down the hallway towards* him. The applicant said that after the *bumping* incident, he apologised to D for being an *arsehole*.

[10] D's recollection of the apology from the applicant was that he did indeed apologise but then he immediately made a comment about how he enjoyed her running her hands through his hair in a bar. It would appear that the applicant was mistaken in his view that D had been the one who had run her hands through his hair. D said that by adding this further comment, the applicant was taking away the apology that he had just given on that occasion.

[11] D said that on many occasions she had told the applicant to stop his behaviour towards her, sometimes in very forthright terms. She claims also that when he had apologised to her she had asked him what his problem was to which the applicant had told her that he really liked her but did not know how to handle it. D had apparently told him to *get over it*.

[12] Matters came to a head in the end of October and early November 2001. There had been a social function. Photographs from the function had been placed on a notice board at the workplace. D noticed some photographs of her on that notice board and from that social occasion had been removed. Within two or three weeks, she noticed that photographic images of her (presumably amongst group photograph scenes) had been cut out of those photographs.

[13] D said that she was *totally floored* and shocked by the removal of her photo and images of her. She confronted the applicant. She told him that she knew that he had removed the photographs and tampered with others.

[14] The applicant accepts that he did remove photographs and cut D's image from others. When D confronted him he told her that the reasons for doing it were that he did not want her pictures on the board and that he *did not want to see her face there*. The applicant says that he was under stress at that time and did not *respond* appropriately.

[15] D went to speak to the manager of the workplace. The manager was not there. The respondent's allegation of the incident that followed is taken from D and is as follows:

[D] went back to her office and you came in and went to shut the door but [D] told you to leave it open. You proceeded to her that she was beautiful. You said that you had been taking her photos to fantasize about them, and that you had been taking them home.

You told her that there had been a death in the family the previous week and that when this happened all you wanted to do was hold [D]. [D] asked you why, what had she done to encourage you and you said she had done nothing, that it was your problem. You told her that if she walks past you, you don't know what to do, you have a thing for her.

[D] thinks you said "I love you", although you speak fast and it could have been "you're lovely". You told her that you couldn't stop thinking about her that she is on your mind all the time. [D] told you that she had nothing to say. That she didn't know how to handle this and that you walked out. You did ask if she wanted the photo's returned and she said she did.

[16] The applicant accepts some of the described detail. He said that he went to D's office because he wanted to *clear the air*. He said that he might have commented that she was a beautiful person and that he said that he was fantasising, meaning that he had a crush on her. He said that there was no *sexual connotation* to this. He said that when he talked about *holding* D he was referring to some incident some years before when they both faced family bereavements and that at the time she seemed upset and at the time he had wanted to hold her then but didn't. He says that he did not say that he loved her because, although he had a bit of a crush on her, he was not in love with her. He concedes that he may have said that she was lovely. He said that when he told her that he thinks about her all of the time he was meaning that he was thinking about the fact that they did not seem to be able to maintain a normal relationship. The applicant also said that he took D's photographs in the hope *that we would talk*.

[17] There was also an allegation that the applicant was *rude* to D but I consider that that relates to allegations of general conduct that had occurred earlier and to the alleged general demeanour from the applicant to D.

[18] Ruth Hamilton, the respondent's Human Resources Manager, put the allegations to the applicant. It was put to him both verbally and in writing. It was at a meeting with his manager. He was told not to comment on it but to seek advice. As he was a member of the Association of University Staff Inc, he was referred to that union's local organiser, Mr Shaun Scott.

[19] At this initial meeting, the applicant was also offered paid special leave for the period of the respondent's investigation into the allegations of the incidents against him. As an alternative, he was told that suspension would be considered and was invited to give his views on that matter.

[20] The applicant did see Mr Scott. According to the respondent, Mr Scott, on the applicant's behalf, accepted the continuation of paid special leave for the period of the investigation. In the meeting, Ms Hamilton says that she cautioned the applicant about the seriousness of the allegations and that there was a potential jeopardy to his employment. The letter that was provided to the applicant at that meeting contains the following paragraph:

Given the serious nature of these concerns, you should be aware subject to your response, consideration may be given as to whether disciplinary, performance management or other action may be appropriate.

[21] Ms Hamilton also wrote to Mr Scott by way of email and including in that email was the following paragraph:

Given the serious nature of the concerns and further report of prior alleged incidents I confirm that in the event any of these matters are confirmed to my satisfactory (sic) disciplinary action could include giving consideration to the applicant was applicant was also offered counselling through the respondent's EAP services.

[22] The applicant and Mr Scott met with Ms Hamilton and Helen Mason for the respondent. This was on 16 November 2001. Mr Scott had, prior to that meeting, prepared a written response from the applicant to the allegations against him. I have mentioned above, the essential response of the applicant to some of the allegations, including the photograph incident.

[23] The applicant, in responding made allegations that conduct to some degree was initiated by D. Examples given included the *bumping of hips* incident referred to above and that D had written names of three work-place men including the applicant's on a picture of three naked men's bottoms. It should be emphasised that D strongly denied this claimed conduct on her part.

[24] The applicant referred to another incident whereby someone had allegedly telephoned his wife. Ms Hamilton was referred to another worker that may have been able to provide information on that. Ms Hamilton said that she spoke to Mr Scott after interviewing D she said that she asked Mr Scott if he wished her to proceed further with additional inquires but that Mr Scott said she should not undertake *further factual inquiries*. Ms Hamilton said that if Mr Scott had not so agreed, she would have continued with her inquiries.

[25] Ms Hamilton formed a preliminary view, which she communicated to the applicant by letter dated 26 November 2001. The letter importantly contained a summary of the applicant's views about the matters. Ms Hamilton's preliminary view was that the applicant had behaved as D had claimed and that such conduct was unacceptable to the respondent. A factor in Ms Hamilton's communicated preliminary view was that the applicant seemed (in her opinion) to have:

...demonstrated no real understanding of the significance of [his] behaviour and the impact on the complainant. Indeed you have attempted to suggest that some responsibility lies with the complainant by way of provocation. This is not corroborated and in my opinion your report is either false or fantasy, despite your earlier stated concern for the distress you have caused the complainant.

[26] Ms Hamilton determined, on a contended preliminary basis, that because she viewed the applicant's found actions to be very serious, the applicant should be dismissed. She asked for his submissions in respect of the proposed remedy. In her letter of 26 November, Ms Hamilton said that she considered that the applicant's *language and behaviour was sexual in nature*. She referred to D being frightened by the conduct and to an employer's obligation in the face of *personal and/or sexual harassment*. Ms Hamilton communicated her reasons in part for her preliminary view, in the following terms:

These matters are very serious. You have been unreliable in your advice, appear to have little real insight into your behaviour and its impact, and have not taken full responsibility for your actions. In view of this, I am not confident that there will not be further occurrences of this nature or that a secure working environment can be obtained for the complainant and possibly other women in the work place. Therefore my preliminary view is that dismissal is necessary given the circumstances.

[27] Additional EAP sessions were made available to the applicant by the respondent and he was advised of the same.

[28] Mr Scott, on behalf of the applicant, made submissions on Ms Hamilton's letter of 26 November 2001. In part, Mr Scott said that the applicant was committed to dealing with his own conduct and that there would be no repeat of the behaviour. The personal and family circumstances of the applicant were pleaded. Materially, Mr Scott submitted:

[C] was confronted with the sudden death of his brother immediately prior to the recent incidents leading to the complaint occurred (sic). This was a time of immense trauma and stress for [C], and any aberrant behaviour at this time must be seen in this context. The prior incidents allegedly occurred a number of years ago, and despite it being stated that these issues were raised with [C's] manager and Human Resources, [C] was never made aware that there was a problem. His ability to respond to those allegations, and for those allegations to be fully investigated, has been compromised by the passage of time, and the lack of any documentation. Clearly the involvement of HR and [C's] immediate manager did not lead them to the conclusion that those alleged issues warranted any discussion with [C] at that time – had this occurred, it is highly possible that the current situation would not have arisen.

[29] The applicant was dismissed. The dismissal was communicated to the applicant by way of letter dated 5 December 2001. The applicant was summarily dismissed but with a payment of one month's salary in consideration of his *family circumstances*. Ms Hamilton, who was the delegated decision-maker and who wrote the letter of 5 December 2001, said that the applicant's dismissal was for serious misconduct. Ms Hamilton rejected the applicant's claim that counselling for him would be an effective alternative to dismissal. She said that the applicant had *displayed a lack of insight, reliability and appear to have no real concern for the complainant*.

[30] Ms Hamilton, in her dismissal letter, also said:

8. *The persistence of what appears to be fantasies about the complainant, gives the Employer no assurance that any kind of direction and general counselling would see a change in your behaviour toward the complainant, or that the safety of the complainant can be maintained in the workplace with you present.*
9. *The kind of restrictions on the workplace to facilitate no contact between yourself and the complainant and to ensure no other women would be at risk, would impose an unreasonable burden on the workplace.*
10. *Your personal circumstances at the time of these recent events were unfortunate, but the conduct you have displayed is consistent with your earlier behaviours of concern.*

[31] The applicant now has a new job although that job is not as well paid or as desirable as his old job with the respondent and accordingly, he seeks reinstatement. In his written brief, the applicant summarised his concerns, as follows:

6.2 *I do not bear any grudge against [D] for the situation that has occurred. On the contrary, I feel upset that my actions have obviously caused her concern. My grievance is with the University and I consider it has acted inappropriately in two respects:*

- (a) *In not alerting me to the fact that [D] had concerns when they were first notified of that fact some years ago; and*
- (b) *Not giving me any opportunity to show that I can react sensitively and*

appropriately to concerns about workplace conduct.

[32] I called D to give evidence. She was emphatic that if the applicant were reinstated, she would resign from her job immediately. D said that initially she did not want to see the applicant dismissed but when she started to compile a list of requirements from her perspective that she would wish to enable the two of them to be reasonably accommodated at work, she gave up because she realised that it was *ridiculous*. She said that she simply realised that she *just couldn't face* the applicant. She said that she thought that she was *coping* up until the photographs incident but that she had been *totally freaked out* about that incident. D said that the applicant has a *problem* and that she feared for her safety.

[33] D emphasised that she was not a *vicious* person and that she was personally unhappy about the effect of the dismissal on the applicant and his family. She did however, describe the effect on her. I am reluctant to detail the described effects on D save to say that it has had a significant, long-term, and detrimental impact on her and her relations with others. She has been required to take medication for some of the effects. Her workplace has been made much more enjoyable with the departure of the applicant.

Determination

[34] I find that Mr Scott, when acting as agent for the applicant, accepted the respondent's proposal to grant the applicant special leave on pay during the investigation. That acceptance in my view prevents the applicant from now asserting that there was an unfair or unreasonable *suspension*.

[35] There were submissions from both parties regarding the question as to whether or not the applicant's conduct amounted to *sexual harassment*. Mr Andersen said that the conduct was not *sexual* in nature. The respondent says that it is difficult to classify the conduct in any other way, when taken as a whole.

[36] The relevant statutory provision reads:

108 Sexual harassment

For the purposes of sections 103(1)(d) and 123(d), an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer—

- (a) *directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains—*
 - (i) *an implied or overt promise of preferential treatment in that employee's employment; or*
 - (ii) *an implied or overt threat of detrimental treatment in that employee's employment; or*
 - (iii) *an implied or overt threat about the present or future employment status of that employee; or*
- (b) *by—*
 - (i) *the use of language (whether written or spoken) of a sexual nature; or*
 - (ii) *the use of visual material of a sexual nature; or*
 - (iii) *physical behaviour of a sexual nature,—*
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.

- (2) *For the purposes of sections 103(1)(d) and 123(d), an employee is also sexually harassed in that employee's employment (whether by a co-employee or by a client or customer of the employer), if the circumstances described in section 117 have occurred.*

[37] I am required to determine whether the complained behaviour by the applicant was unwelcome or offensive conduct of a sexual nature and then, whether the behaviour had a detrimental effect on D's employment, job performance, or job satisfaction.² The first is to be determined in an objective way and the second, by reference to a subjective test. As to the second question, Travis J in *Lenart v Massey University*³, held that:

Unlike some overseas developments which have included the use of concepts such as the 'reasonable woman' in determining whether the actions complained of were unwelcome or offensive, the wording of [the previous statutory equivalent to s.108(1)(b)] makes it clear that when, by the use of words or physical behaviour of a sexual nature, the employee is subjected to behaviour which is unwelcome or offensive to that employee (whether or not that is conveyed to the employer), that will suffice. The harasser must take the consequences of the victim's sensibilities and some commentators have drawn the analogy to the egg shell skull cases in the personal injury field.

[38] The Employment Court in *Lenart* said that a useful guide in determining whether the conduct is of sexual nature is to consider whether the applicant *would have used the same behaviour towards a male*.⁴ Although the removal of the photos and the cutting out of the images of D has a more sinister light to it when coupled with the claim that the applicant took those photos/images home *to fantasize about them*, the admitted conduct of the applicant is objectively quite dysfunctional. The applicant's admitted conduct regarding the photographs and accompanying events is:

- That he removed photographs of D,
- That he cut out images of D from other photographs,
- That he told D that she was lovely,
- That he might have told D that she was a *beautiful* person,
- That he said that he fantasised about D,
- That he wanted to hold D,
- That he had *a crush* on D.

[39] Objectively, the admitted conduct described above is of a sexual nature. I do not consider that the applicant would have conducted himself in that way, but for D's gender. The *physical* conduct in this instance cannot be viewed in isolation from the resulting *spoken* communications. It must be seen as being one transaction. It must be seen in the context of the whole.⁵ There was no innocent explanation for the removal of the photos/images, rather there was a sad explanation for the physical conduct that put the overall transaction in an improper light.

[40] The removal of D's photographs from a public display and the mutilation of other photos to obtain her personal image, when coupled with the utterances from the applicant, must be seen as being of a sexual nature. I do not accept the submission of Mr Andersen that it was somehow intended to be *romantic* rather than sexual. It is not the perception of the perpetrator that is at issue

² *Z v A* [1993]2 ERNZ 469.

³ [1997] ERNZ 253 at 267.

⁴ *Ibid.* at 269.

⁵ *Ibid.*, at 270.

because otherwise the views of what is aberrant as opposed to healthy behaviour will be of those that have a myopic and perhaps perverse view of interactions between themselves and others. One person's view of romance may well be offensive to another.

[41] For conduct to be viewed as *sexual*, according s.108,(b), it is not necessary for reference to be made (directly or indirectly) to sexual acts. What the statute contemplates, is conduct that is *sexual in nature*. By that, I mean that the offending conduct must relate to the attention of the perpetrator to the victim, because of her/his gender or sexual orientation. There may be no logic to the conduct as one person's idea about what is appropriate behaviour may be completely foreign to another. Attraction need not be present as in the case of a person persecuted or belittled because of her/his gender or orientation and in instances of abuse of relative power.

[42] The removal of the photographs/images was a very personal and inappropriately intrusive act. It was bound to have a detrimental impact on D and the evidence shows that it did. D's evidence was clear and emphatic. The effect on her was not surprising as such conduct goes to the root of a person's sense of self. It may have the effect of leaving a sense of violation of the person's sense of self and personal space.

[43] I was not impressed that the applicant fully comprehended the effect that his conduct had had on D. He expressed concern and some surprise at the investigation meeting when he was informed of the evidence of D.⁶ The respondent, I note, had been previously assured of the applicant's comprehension of, and regret for, his actions.

[44] I find that the applicant's conduct towards D did amount to sexual harassment. His actions and words were of a sexual nature. The statutory provision is to be interpreted in a *fair, large and liberal* manner.⁷ I find also that the applicant's conduct had a detrimental effect on D's employment, job performance, or job satisfaction.

[45] Hardie-Boys J in *Hillier v Lyttelton Borough Council*,⁸ said at 95, 653:

If allegations of misconduct are brought against the employee such as to warrant his dismissal if they are well founded, discharge of the duty resting upon the employer demands that he inquire into the allegations in a fair and reasonable manner. This necessarily involves the employee being adequately informed of the allegations, so that he is able to prepare any answer he wishes to make. It involves the employee being given adequate opportunity to present his answer. It means that the employer must not reach a decision adverse to him on the basis of allegations of which he has not been informed and to which he has had no opportunity to respond. It means that the employer must approach the inquiry with an open mind so he is able to give due consideration to what the employee has to say, and to weigh allegations against explanations in a reasonably objective way. Adherence to the outward formalities of fairness mean nothing if a decision has already been made, or if the employer's mind is for other reasons turned against the employee so that the outcome of the inquiry is likely to be effected whatever he may say in his own defence. These requirements may of course overlap.

[46] I am of the view that there was no unfairness to the applicant in the respondent's handling of this matter. It is contested whether the original allegations from D were put to the applicant. I accept however, as the applicant says, that he may not have been informed about them. I do not however accept that this creates a significant unfairness for the applicant. This is because the main

⁶ Heard in the presence of his counsel but in the absence of the applicant and others.

⁷ *H v E* (1985) 5 NZAR 333.

⁸ (1987) 1NZELC 95,647.

focus of the respondent's attention seems to have been correctly focussed on the events associated with the removal of the photographs. In any event, if the applicant was not given an opportunity to respond to the earlier allegations at the time, he was when it came to the respondent's notice after the time of the photograph incident. Counsel for the applicant says that the applicant was disadvantaged in not being able to modify his behaviour earlier because of lack of knowledge of the earlier complaint. I was mindful of that but the applicant impressed me as being quite unable to fully comprehend the effect of his own conduct at the investigation meeting and after all that had happened to him, including his dismissal. More importantly however, and what must not be lost sight of, I find that D herself made it abundantly clear to the applicant that his earlier conduct was unwelcome and that it should stop. Why should it require the employer to bring him to his senses?

[47] This is a sad and unfortunate case with a number of people who have been hurt, including, D and the applicant and his family. I can however, find no fault with the actions of the respondent. A reasonable employer in the respondent's shoes was entitled to form an honest belief on reasonable grounds that the applicant had acted in the manner claimed and that, within a range of reasonable options, dismissal was appropriate. I was impressed by the respondent's approach to what was a very difficult matter. The support offered to the applicant struck me as being particularly appropriate.

[48] For the foregoing reasons, I determine that the applicant's dismissal is justified. The applicant's claimed personal grievances are dismissed.

[49] I should emphasise here that, although I am firmly of the view that the applicant's conduct amounted to sexual harassment, if it did not comfortably fit within the statutory definition, I would still have found that the applicant's conduct was wholly unacceptable and deserving of dismissal by a reasonable employer in the shoes of the respondent. I say this because the respondent did not seem to tie it's hand firmly to the defined term and secondly, because the Authority has the jurisdiction in my view to investigate the whole matter in a broader way.

Suppression of Identity

[50] Pursuant to clause 10(1) of the Second Schedule to the Act, I hereby order that the names and identities of the applicant and the complainant known as D (including any information that reasonably might lead to them being identified), shall not be published in any manner whatsoever.

Costs

[51] I reserve the question of costs. I would invite counsel to attempt to come to an agreement between themselves on the matter of costs and disbursements. If it is not possible to reach agreement between the parties, Mr Dorking may provide a memorandum on the matter within fourteen days from the date of this determination (copied to Mr Andersen). Mr Andersen shall then have a further fourteen days within which to provide a response (copied to Mr Andersen).

Neville Taylor
Member of Employment Relations Authority