

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Yaman Kaytaz (Applicant)
AND Body Corporate Administration Limited (Respondent)
REPRESENTATIVES Keshwant Kaur, Advocate for Applicant
Clinton Baker, Counsel for Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 4 November 2005
DATE OF DETERMINATION 9 March 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] Mr Kaytaz claims that he was unjustifiably dismissed on 20 October 2004. He asks the Authority to find that he has a personal grievance and award him the remedies of loss of wages for 7 weeks and compensation of \$15,000.
Body Corporate Administration Limited (“BCA”) refute the claims of Mr Kaytaz and say that he simply failed to return to work during the progress of an investigation into allegations of inappropriate behaviour that had been made against him by another staff member.

Background Facts and Evidence

- [2] Mr Kaytaz was employed by BCA via Student Job Search, as a Receptionist/Filing Clerk, on 13 September 2004. He was responsible to the General Manager of BCA, Mr Glenn Kwok and another manager, Ms Paula Beaton.

The Evidence of Mr Kwok

- [3] The evidence of Mr Kwok is that on 20 October 2004, he was approached by Ms Karen Thorp, the Office Manager for BCA. Ms Thorp conveyed to him that there was a problem with Mr Kaytaz in regard to his behaviour towards a female staff member¹ and that Mr Kwok should speak to Ms A in order to ascertain the details of what Ms Thorp was referring to.
- [4] Mr Kwok then met with Ms A and she related to him an incident that had taken place on 19 October 2004 in the staff room. Ms A conveyed that she had been in the staff room with Mr

¹ Given the sensitive nature of the sexual harassment complaints made by this person, for the purposes of this determination she will be named as Ms A.

Kaytaz and happened to mention that she usually drank coffee but had recently taken to drinking tea. Upon which Mr Kaytaz responded by asking if she was pregnant. Ms A responded by saying: “No are you?” Ms A told Mr Kwok that Mr Kaytaz then said: “No, I have not had sex in the last few months.” Mr Kwok says that Ms A was upset and angry about the nature of the comments made by Mr Kaytaz. In response to a question as to if there had been any other incidents such as this; Ms A indicated that there had been.

- [5] The evidence of Mr Kwok is that albeit he had a meeting to attend that morning, he felt that what Ms A had told him was “so serious” he should speak to Mr Kaytaz immediately. Mr Kwok met with Mr Kaytaz and told him that a serious allegation had been made and conveyed what Ms A had said without revealing her identity. Mr Kwok says that Mr Kaytaz subsequently admitted that there had been a conversation with Ms A.
- [6] The further evidence of Mr Kwok is that he then asked Mr Kaytaz if there was anything of a similar nature that Mr Kaytaz should tell him about. Mr Kaytaz responded that there was nothing else and when Mr Kwok repeated the question, the response of Mr Kaytaz was again “No.”
- [7] Mr Kwok then had to attend a meeting and informed Mr Kaytaz that he would have to meet with him again to discuss matters in more detail. Mr Kwok did not return from his meeting until mid-afternoon that day. Upon his return to the office, he met again with Ms A and questioned her about the other incidents pertaining to Mr Kaytaz.
- [8] The evidence of Mr Kwok is that Ms A spoke about an instance in the lunchroom whereupon there was no milk available and Mr Kaytaz had made a comment about breast feeding. Ms A also recalled an incident where Mr Kaytaz had asked her “on a date” and made a comment about “sticking his tongue down her throat.”
- [9] Mr Kwok says that following his discussion with Ms A, he then met again with Mr Kaytaz and put the “breast feeding” incident to him and that Mr Kaytaz admitted he has said something to do with this subject but it was in the context of something he had seen in a movie. Mr Kwok says that he drew the attention of Mr Kaytaz to his earlier assurance that there had not been any other incidents and that his credibility was becoming suspect. Mr Kaytaz denied that he had said anything about pregnancy.
- [10] Mr Kwok says that he then told Mr Kaytaz that while he was still in the stages of conducting a preliminary investigation, he could look at things two ways. Firstly, it could be that matters had just been taken out of context, or alternatively, Mr Kaytaz’s comments could be tantamount to sexual harassment and that disciplinary action may follow.² The evidence of Mr Kwok is that as he had another meeting to attend, he did not have time to investigate matters further that day but told Mr Kaytaz he would meet with him again the next day. Mr Kwok says that he attended a meeting and did not return to the office again that day.
- [11] Mr Kwok told the Authority that on the following day, Thursday 21 October 2004, while wishing to meet with Mr Kaytaz, he discovered that Mr Kaytaz was not at work. Mr Kwok did not find this unusual as Mr Kaytaz had been employed through Student Job Search and his experience was that students tended to work irregular hours. However, as Mr Kaytaz never came to work on Friday 22 October or Monday 25 October 2004,³ Mr Kwok says that he then contacted Student Job Search but was not able to ascertain where Mr Kaytaz had got to. Mr Kaytaz never returned to work.

2. The Authority understands that Mr Kwok did not raise with Mr Kaytaz the other incident that Ms A had reported.

³ The latter date was a public holiday – Labour Day.

The Evidence of Mr Kaytaz

- [12] Mr Kaytaz says that on 20 October 2004, Mr Kwok met with him and conveyed that there had been some allegations made by staff members. Mr Kaytaz says that Mr Kwok told him that the allegations concerned; ["had some sort of sexual connotation associated with them." Mr Kaytaz says that Mr Kwok spoke about two incidents - breast feeding and not having had sex lately. The evidence of Mr Kaytaz is that he gave an explanation to Mr Kwok and then Mr Kwok informed him that it was a quite serious situation and was sexual harassment. Mr Kaytaz says that Mr Kwok then conveyed that he had to go to a meeting and after that he would speak to Ms Beaton and get back to him with a decision.
- [13] The further evidence of Mr Kaytaz is that at about 5:00pm that day, Mr Kwok met with him again. "He then told me that he has no choice but to ask me to leave on the spot because if I stay there could be more problems of the [sic] sort and people will talk and it could be "bad blood" as he put it." Mr Kaytaz says that Mr Kwok threatened him and told him if he did not leave, then he would take the matter to Student Job Search and that would lead to more trouble. Mr Kaytaz also says that Mr Kwok asked him not to tell anyone "about this" and he would tell others in the company that Mr Kaytaz had decided to leave and look for work elsewhere.
- [14] Mr Kaytaz told the Authority that: "I said; "But this is not fair," and that Mr Kwok responded: "I'm a Christian, I know. This is the way of the prophets, they never had it easy. God closes a door and opens a window." Mr Kaytaz says that he decided that there was no use arguing with Mr Kwok; ["as he had made up his mind to get rid of me and I left."

Determination

- [15] A certain amount of evidence has been produced to the Authority pertaining to the alleged discussions between Mr Kaytaz and Ms A. However, I am not required to weigh that evidence. The matter that has to be determined is: Was Mr Kaytaz dismissed or did he leave of his own free will?
- [16] I have to say that I did not find the substance of the evidence of Mr Kaytaz to be remotely credible. While there was also some fault in the evidence of Mr Kwok in regard to his reference to Monday 25 October 2004 being a working day, overall I found Mr Kwok to be a credible witness and accept his version of events as being largely correct.
- [17] While I cannot be certain, it is highly probable that faced with the allegations that he had been presented with by Mr Kwok, Mr Kaytaz decided that rather than engage further in the investigation being conducted by Mr Kwok, he would simply leave.
- [18] I find that Mr Kaytaz was not dismissed and that he abandoned his employment at BCA by simply failing to return to work after Wednesday 20 October 2004. Mr Kaytaz does not have a personal grievance and hence the remedies that he seeks are not available to him.

Costs

[19] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 28 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority