

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 402/08
5076502

BETWEEN

LINDA WYNNE
Applicant

AND

THE ORDER OF ST JOHN
MIDLAND REGIONAL
TRUST BOARD
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Mark Ryan for Applicant
Prue Dawson for Respondent

Investigation Meeting: 13 and 14 March, 2008

Submissions received: 23 June 2008 from Applicant
27 June 2008 from Respondent

Determination: 25 November 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem has arisen out of circumstances where a husband and wife worked for the same employer. From September 2003 the applicant, Mrs Wynne, was employed by the order of St John Midland Regional Trust Board (St John) as an ambulance officer. In October 2005 she married her immediate manager but by mid 2006 the marriage was falling apart. Mrs Wynne says that at this time her husband's conduct towards her at work affected her employment to her disadvantage and that aspects of this conduct amounted to sexual harassment.

[2] On her doctor's advice, Mrs Wynne went on sick leave for two weeks from 24 June 2006. She also sought help from the respondent's peer support service. However she continued to find her situation an impossible strain and on 24 July she went off on sick leave again. She stayed on sick leave until February 2007 when she resigned.

Issues

[3] Mrs Wynne's employment relationship problem is in two main parts. The first concerns disadvantage and sexual harassment grievances which she says arise out of her husband's conduct towards her in the six to eight weeks leading up to 24 July 2006.

[4] The respondent's position in relation to this first part of the matter is that Mrs Wynne told no one (except her husband) about these concerns until well after she went on sick leave. When she did raise them (as a formal grievance) they were discussed with her. Vanessa Woodcock, the respondent's Human Resources Manager, told me that although she did not disbelieve what Mrs Wynne told her, and acknowledged how difficult her situation had been, she did not consider the nature of the allegations was such that they could be described as being of sexual harassment or any other sort of serious misconduct. For that reason, the respondent took no further steps to address the particular concerns arising out of the period leading up to Mrs Wynne's sick leave.

[5] If the respondent is found to have erred in coming to this conclusion, it will follow that Mrs Wynne will have made out a grievance based on the respondent's failure to treat her concerns as serious enough to warrant further action. The issue for determination in relation to that part of the employment relationship problem is therefore whether the allegations made by Mrs Wynne amounted to allegations of sexual harassment or otherwise subjected her to a disadvantage.

[6] The second part of the employment relationship problem, a claim of alleged constructive dismissal arises out of the period from 24 July 2006 until February 2007, during which time Mrs Wynne brought her concerns to the attention of senior managers within St John. She says the organisation failed to address those concerns in a way that made it safe for her to return to work and that she was therefore left with no option but to resign. The issue for determination is therefore whether the respondent constructively dismissed her by failing to ensure that her workplace was safe for her return.

[7] I note that neither party called Mr Wynne to give evidence, and nor did the Authority. Mr Wynne has not, therefore, had any opportunity to refute evidence other witnesses have given about him and his conduct. I have therefore reported such statements only where absolutely necessary and emphasise that I make no findings about behaviour attributed to him. For the same reason, as well as for reasons of economy, I record here only such of the background in this case as is required to make my reasons clear.

(i) Disadvantage grievance

[8] Mrs Wynne (who had begun her involvement with the respondent as a volunteer) was employed at the Whakatane station on a fixed term basis from September 2003. Then, on 29 May 2006, she was confirmed in a permanent role there. Unfortunately her problems about her husband's conduct began at almost the same time. She felt that Mr Wynne gave her an unnecessary and inappropriate workload (including work she was not skilled to complete) and made inappropriate comments which undermined her confidence. Mrs Wynne also alleged that she had witnessed her husband engaging in inappropriate behaviour in the workplace with another female colleague. She says that in this way Mr Wynne subjected her to a form of sexual harassment.

[9] In her evidence, by way of example, Mrs Wynne says she saw her husband giggling with this person and on occasion, entering his office with her and shutting the door. She told the Authority that she had seen them involved in "*inappropriate touching which was sexual in nature.*" She confirmed that this was a reference to something she later reported to Ms Woodcock: she once saw her husband put his hands on the colleague's hips. Otherwise, as she also told Ms Woodcock, she had not seen any "*intimate behaviour.*"

[10] Mrs Wynne told me that while all this was going on she confided in another colleague that she thought her husband was having an affair but the colleague dismissed her concerns as unfounded suspicion. She also sought help from the respondent's peer support service (which like other similar Employee Assistance Programmes operated independently of management and maintained strict confidentiality.)

[11] Finally she confronted Mr Wynne about his behaviour and told him that she could not continue to work with him. She reports that he replied that it would not be possible to transfer her.

[12] There was no evidence that Mr Wynne passed on Mrs Wynne's concerns to his own manager, Brent Nielsen, or anyone else in the organisation, at any time, or told anyone else that she had requested a transfer. Mrs Wynne told me that subsequently she decided that a transfer was not in fact what she wanted as she did not see why she should have to be inconvenienced.

[13] By early August 2006 Mrs Wynne and her husband were living apart. On or about 3 August 2006 Mrs Wynne told Mr Nielsen that she and Mr Wynne were separating but she did not raise the matter of his conduct in that conversation. The first Mr Nielsen heard of a work related problem was about a week later when for the first time she presented a medical certificate recording that she was unfit due to stress related problems in the workplace. Mr Nielson told me that he responded by telling her that he understood the stress related problems that were keeping her from working were "*personal in origin.*"

[14] On 29 August Mr Ryan wrote to the respondent on Mrs Wynne's behalf raising a disadvantage grievance. The letter covered the concerns relating to workload and support but did not mention sexual harassment or other conduct of a sexual nature.

[15] This issue was however raised on 18 October when Mr Nielsen and Ms Woodcock met with Mrs Wynne and discussed the other concerns Mr Ryan had raised in his letter. In relation to workload Mrs Wynne conceded that she was not given excessive amounts of work or duties outside her job description. She explained that the problem was that she received less help from her husband than previously.

[16] The principal issue soon emerged as being the conduct Mrs Wynne alleged to have observed between her husband and a colleague. All the witnesses agree that discussing this made the meeting difficult and distressing for Mrs Wynne. Mrs Wynne explained in her evidence that her own relationship with Mr Wynne had begun as an

extramarital workplace affair. She said she came to believe that she was seeing “*history repeating itself.*” She said she found this particularly painful especially as co-workers, such as the colleague in whom she had confided, believed she was imagining things.

[17] Ms Woodcock and Mr Nielson told me that after hearing from Mrs Wynne on 18 October they concluded that, even if accepted, the behaviour alleged of Mr Wynne did not amount to serious misconduct. By Mrs Wynne’s own account, any workload issues were minor (in that both the level and type of work required of Mrs Wynne were, overall, reasonable.) As for the conduct she alleged to have observed between Mr Wynne and the colleague (the principal cause of her distress) this too seemed to have remained within the bounds of what was acceptable in the workplace. In Ms Woodcock’s view, the problems “*were marriage difficulties that St John couldn’t prevent even if it had known about them before Linda went off work on sick leave.*”

Determination

[18] I have concluded that Ms Woodcock’s assessment was justified.

[19] Dealing first with the allegation of sexual harassment, I note that in order for Mr Wynne’s conduct with the colleague to amount to sexual harassment of Mrs Wynne, it would need to fall within the ambit of Section 108 (1) (b) of the Employment Relations Act, that is, Mrs Wynne would need to have been subjected to unwelcome or offensive language, visual material or physical behaviour of a sexual nature.

[20] Mr Ryan has pointed out, in submissions, that where the alleged actions are not unequivocally sexual in nature it may be helpful to take into account the context of the behaviour (here, the fact that Mr Wynne was the complainant’s husband.) Even taking this into account however I am unable to conclude that what has been described (two colleagues talking, laughing and spending time together in front of a third) was of a sexual nature at all. The report that Mr Wynne had once been observed to place his hands on the colleague’s hips was not (by itself) enough to suggest that those two individuals were conducting themselves in ways that were unacceptable in the workplace. This conclusion has been further supported by Mrs Wynne’s evidence

that the colleague in whom she confided seemed unaware of any inappropriate behaviour.

[21] As for the general claim of disadvantage, there has been no evidence to suggest that Mr Wynne gave his wife any less assistance, in his capacity as a manager, than he gave to staff generally. I accept that the workload issues were minor. In relation to the request for transfer, I note that Mrs Wynne did not take this any further after he declined it, and eventually decided that she did not want to move to a different station. It has not been established therefore that there was any breach of duty arising out of a failure to consider her request for a transfer.

[22] In summary, Mrs Wynne was entitled to expect the same conduct from Mr Wynne during the working day as she would be entitled to expect of any other manager; no more and no less. The personal issues between them should not have impacted on his conduct towards her at work. However nothing she complained of to Ms Woodcock (or has subsequently told me) indicated that his conduct towards her went beyond what might reasonably be expected of a manager.

(ii) Constructive dismissal

[23] By February 2007 Mrs Wynne had been on stress leave for many months, much of it on a sickness benefit because she had exhausted all her paid leave. By this time, also, her husband had been suspended from his duties pending a disciplinary inquiry unrelated to Mrs Wynne's complaints.

[24] After receiving a medical clearance and after the parties had engaged in mediation, Mrs Wynne agreed to return to work on 26 February. By this time, she had told the respondent that she did not want a transfer to another station, even if that was possible. A return to work plan was arranged including refresher training at another station (away from her station, Whakatane) with all costs (including accommodation at a motel for Mrs Wynne) to be met by the respondent in full.

[25] Unfortunately, this did not eventuate. Mrs Wynne asked for her return to work to be deferred and then, at the last minute, decided that she could not face returning to work at St John at all. Her reason was not primarily that her husband was still on the

payroll. Although his fate was yet to be decided at that time, Mrs Wynne knew that he was not likely to return to the Whakatane station in the immediate future. Rather, as she told me, she found the idea of going back into her former environment, amongst colleagues who she felt had witnessed her humiliation, too distressing. In particular, she told me, she believed that her husband was by then living with the colleague with whom she had suspected he was having an affair, and that person did still work at the Whakatane station.

[26] Mrs Wynne's doctor also advised against her resuming work in her former workplace. On 6 March 2007, she resigned. St John urged her to reconsider however her mind was made up and she immediately took up employment elsewhere.

[27] As outlined already, by the time a return to work was being discussed Mrs Wynne was clear that she no longer wanted a transfer. I asked her what she felt the respondent should have done to make the workplace safe for her return. Her answer was simple. She felt that St John should have sacked both Mr Wynne and the colleague who she believed had by then become his new partner.

Determination

[28] I am satisfied that Mrs Wynne was a valued employee whom the respondent wished to retain as an ambulance officer. On several occasions from August 2006 onwards (after she had first raised a grievance) Ms Woodcock and others reassured her of this. Indeed I have concluded after hearing from Ms Woodcock that she offered good support to Mrs Wynne.

[29] Unfortunately, however, there were limits to what the respondent could do to assist in making Mrs Wynne feel comfortable going back to work. At the end of the day, Mrs Wynne resigned because she could not bear to work with the woman she believed to be her former husband's new partner. Remedying that was outside the respondent's capabilities.

[30] Mrs Wynne has failed to show that her resignation arose as a result of any breach of duty on the part of St John. Her claim of constructive dismissal fails.

Costs

[31] The issue of costs is reserved. In the event the parties are unable to agree on costs any request for a determination of the issue must be lodged with the Authority within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority