IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 205/09
5148742

	BETWEEN	KATRINA CARMEL DUNLOP Applicant
	AND	KAPITI SPORT LIMITED T/A STIRING SPORTS DUNEDIN Respondent

Member of Authority:	Paul Montgomery
Representatives:	Jon Beck, Counsel for Applicant Richard Smith and Jenny Guthrie, Counsel for Respondent
Investigation Meeting:	5 August 2009 at Dunedin
Submissions received:	31 August and 6 September 2009 from Applicant 31 August 2009 from Respondent
Determination:	1 December 2009

DETERMINATION OF THE AUTHORITY

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[1] The applicant, Katrina Dunlop, says she was constructively dismissed from her position as Retail Assistant with the respondent. Ms Dunlop was a physical education student at Otago University and usually worked 15 hours each week for the employer in spite of being hired originally on an on-call basis. During the Christmas holidays Ms Dunlop generally worked at least 40 hours each week.

[2] Ms Dunlop alleges she was sexually harassed by a fellow employee Mr I, whom she says spied on her when changing in the changing rooms, *grabbing* her buttocks on two occasions and often spoke to her with language with *heavy sexual overtones*. She resigned from her position on 12 December 2008.

[3] Ms Dunlop says she was constructively dismissed and seeks remedies of one weeks full time wages; seven weeks part time wages; compensation in the sum of $6,000; medical costs of $50 and legal costs.

[4] The respondent, through its directors and shareholders Ms Sue Dawson and Mr Russell Fowler rejected the applicant's claims. They say the applicant resigned from the respondent's employment in a letter dated 12 December 2008. The respondent says it addressed each issue raised with them as required under the Employment Relations Act 2000 and its amendments and dealt with each one appropriately. It says every allegation was taken seriously, the applicant was consulted to gain understanding of her feelings, what outcome she saw as appropriate and advised Ms Dunlop of the outcome of every reported incident.

[5] The parties attempted to resolve their differences in mediation. However, were unable to do so.

Essential facts

[6] In September 2008 Ms Dunlop told her employers she had been sexually harassed by Mr I whom she said had watched her while she was trying on clothes in the changing rooms and who had touched her bottom while working in the shop area. The respondent contests the applicant used the term *grabbed* in relation to the second incident when describing the incident at the time.

[7] The respondent investigated the matter with Mr I, having asked Ms Dunlop what her preferred outcome was. The applicant asked for an apology from Mr I and also said she would be prepared to work with Mr I in the future. Mr I strenuously denied both allegations however, he conceded he may have touched Ms Dunlop accidentally while moving around the shop. The respondent says it made plain to Mr I any behaviour involving sexual innuendoes would be treated seriously.

[8] At a meeting between the Directors, Mr I and Ms Dunlop, Mr I apologised for any offence he may have caused and asked the applicant to let him know at the time if anything he did offended her. The respondent says Ms Dunlop accepted the apology and hugged Mr I. The respondent says Ms Dunlop told Mr I he was a friend and she was happy to continue working with him.

[9] The directors, in the light of the incident, undertook a briefing with all staff members individually, but informally, to ensure everyone was aware of the seriousness of sexual harassment. In the light of Ms Dunlop's complaint the company, despite Ms Dunlop's preparedness to work with Mr I, re-arranged the work rosters to avoid the two working together wherever possible.

[10] Between 22 September 2008 and 4 December 2008 the pair worked together only four times. They were rostered together only once in that period but on three occasions absences of other staff required roster changes. Between 6 October 2008 and 4 December 2008 they were not working together at all. Further, the respondent says on every occasion the two were required to work together they were supervised on each occasion apart from 6 December 2008.

[11] On 4 December 2008 Mr I returned from leave. That evening the director's daughter reported to them Ms Dunlop had raised another allegation against Mr I. This allegation was that Mr I had *touched her stomach*. When Ms Dunlop was spoken to by the respondent's directors, the directors say the applicant said the matter was not serious and confirmed she was prepared to continue working with Mr I.

[12] On 6 December 2008 the pair were scheduled to work together and at about 11.30am Ms Dunlop telephoned Ms Dawson to complain Mr I had thrown a ball at her and told Ms Dawson *I can't handle being here*. Ms Dawson advised the applicant she could end her shift and go home.

[13] The respondent decided the incident needed to be investigated but as Mr I was not rostered to work with Ms Dunlop until 14 December 2008, it re-arranged the roster to ensure the pair did not work together until it had dealt with the investigation of the incident.

[14] On 11 December Ms Dawson raised with Ms Dunlop a totally unrelated issue, that of the applicant's use of the respondent's internet and computer for her personal affairs. Shortly after Ms Dunlop left the store, Ms Dawson took a telephone call from Luke, the applicant's boyfriend, advising Ms Dawson that Ms Dunlop was *seriously unhappy and had resigned.* Despite this call, Ms Dunlop arrived at work on 12 December. Ms Dawson closed the store to get to the bottom of Ms Dunlop's complaints and how they should be addressed.

[15] It was agreed the boyfriend's call could not amount to a resignation. However, Ms Dunlop said she was preparing a letter which she would drop off later in the day.

[16] In the meantime Ms Dawson confronted Mr I about the ball throwing incident. It transpired the pair were playing catch in the store with a soft, foam ball when business was quiet on the morning in question. Mr I said he thought Ms Dunlop was ready to catch the ball, apparently she was not and the ball struck her.

[17] The respondent decided to give Mr I a formal written warning. He accepted that warning. It later was discovered by the applicant its perception the ball was large and hard was incorrect.

[18] The applicant tendered her written resignation on 12 December 2008. The body of the letter reads:

> *I am writing this letter to inform you that after a series of events I am still not feeling comfortable in the work place. This series of events started with I talking and touching me in inappropriate manners. I came to you, as employers, to inform you of what happened in the hope of resolving this. I feel like an inadequate response has come from this and I feel it has not been resolved as I still feel uncomfortable, if not worse, than before I had told you. With the harassment continuing over recent weeks it indicates to me that the issue was not adequately resolved in September with the seriousness of the issue being overlooked.*
>
> *As a result I am handing you this, a formal letter of written resignation from Kapiti Sports Limited. As at two weeks from now being Friday 26 of December I will not longer be employed under you.*
>
> *I have enjoyed working for you over the past two years and unfortunately due to this matter not being dealt with professionally I feel I am in a position to cease my employment.*
>
> *It has been most upsetting that:*
>
> - *This matter was not taken seriously;*
> - *My two* [years] *dedication and loyalty to the business has not been recognised especially as the harasser is of a lower period of employment;*
> - *The situation has been directed back on myself to deal with;*
> - *I was spoken to unprofessionally by my employer in front of other staff members;*
> - *With confidence, I expressed there was staff witness to the harassment which I found out at a later date had been told to stay out the matter;*

- *I feel the Confidentiality and Privacy Act was breached on a number of occasions.*

I am more than happy to discuss any other details concerning the harassment beginning September until the present date.

Yours faithfully

Katrina Dunlop

[19] On 14 December the respondent through its directors Mr Fowler and Ms Dawson responded to the applicant's letter"

Further to our discussions over the weekend of 12-14 December 2008 we would like to respond to the issues raised in your letter.

We would like to reiterate that based on our discussions with yourself and your interaction with I that we felt that the situation that arose in September had been resolved to your satisfaction. We had discussed the inappropriate action by I with him and then arranged a meeting with both of you where I apologised for his actions and at the time you accepted this.

Subsequent to this another incident occurred on 4 December whereby Monique has witnessed that I touched you. We have spoken to I about this incident and he has no recollection of the incident, but has accepted that Monique witnessed it and I has been issued with a formal warning about his behaviour. It is relevant to note that although Monique witnessed the incident she did not feel in her opinion that it was a serious enough event and did not report it to ourselves. When Sue met with you to ascertain the details you again did not see it as harassment. Again you indicated that you wanted no further action taken.

We are unsure as to how unprofessional we have been or did not take the matter seriously, as each matter has been discussed with you and we have always sort [sic] your feedback on how seriously you viewed each instance. Each time you have identified that you were unhappy with what had happened, however when we discussed the issue with you, you did not want to take the matter further.

The length of your service is irrelevant in this matter as we need to act professionally and only deal with the issues raised and cannot take into consideration the length of time any party has been with us.

We apologise if you felt that the matter was directed back to you to deal with, the intent and discussion was not to discuss the matter in front of another staff member. It was inappropriate to discuss the issue at the store counter and advised you of this at the time. If you had made it clear that you wanted to discuss the matter in private we would have arranged this.

In regard to advising staff member to stay out of the matter, we assume this relates to Monique and instance in September. Monique was not a witness and had only the information you had given her.

We therefore did not deem it as professional to involve a third party that could not add anything further to our investigation of the situation.

We refute that we have not maintained the confidentiality of this matter and been fully conscious of the Privacy Act. In fact we have never initiated a discussion on this matter in front of another staff member. The only time we can recall discussing the matter in public is when you initiated the conversation and we advised you that it was inappropriate to discuss the matter publicly. We have raised the matter with other staff in private only after you have wanted us to seek their opinion on what had happened.

Everyone in this store has rights and we have and always will ensure that we have acted to maintain these.

We do acknowledge that you have been an invaluable member of our staff and accept your resignation.

We have obtained professional advice regarding our obligations for wages during days not worked by yourself. We are <u>not</u> legally obliged to pay for hours not worked in this situation, as you are now trying to revisit situations after we received confirmation from you that each instance had been resolved to your satisfaction.

As we feel it unfair to penalise you, we are happy to pay the balance of Friday and your rostered Saturday and Sunday hours, when you did not work. We have attached next weeks roster, where you are not required to work on Boxing Day, and again we will pay those hours. In addition, we will also include in your final pay, an estimate of your share of the "December bonus", and obviously holiday and annual leave entitlement.

We request that the remainder of your time with us is conducted professionally, and the expectation for you to work in harmony with the other staff. Please return the shop key, immediately. You are reminded that removal or copying of any documents is a serious breach of your contract.

We do wish you all the best for your summer studies and then whatever the future holds for you.

Signed
Russell Fowler/Sue Dawson Owners

The Issues

[20] To resolve this matter the Authority needs to make findings on the following issues:

- Was the conduct of the respondent, in dealing with the applicant's complaints of sexual harassment, so deficient as to justify Ms Dunlop repudiating the employment agreement; and

- Was the applicant's resignation, given the actions of the respondent, reasonably foreseeable; and

- Was the applicant constructively dismissed; and

- If so, to what remedies is she entitled.

The Test

[21] Section 117 of the Employment Relations Act sets out the obligations of an employer in matters relating to allegations of sexual harassment by a person other than the employer. The section reads:

> *(1) This section applies where –*
>
> *(a) A request of the kind described in s.108(1)(a) is made to an employee by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer of client of the employer; or*
>
> *(b) An employee is subjected to behaviour of the kind described in s.108(1)(b) by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer; or*
>
> *(c) An employee is subjected to behaviour of the kind described in s.109 by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer.*
>
> *(2) If this section applies, the employee may make a complaint about that request of behaviour to the employee's employer or to a representative of the employer.*
>
> *(3) The employer or representative, on receiving a complaint under sub.section (2) must inquire into the facts.*
>
> *(4) If the employer or representative is satisfied that the request was made or that the behaviour took place, the employer or representative must take whatever steps are practicable to prevent any repetition of such a request or of such behaviour.*

[22] Section 108 of the Act reads:

> *(1) 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 that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains –*
>
> *(i) an implied or overt, 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 it 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 s.117 have occurred.*

[23] The obligations of dealing with each other in good faith requiring the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative in dealing with the complaint of sexual harassment, also need to be examined.

The investigation meeting

[24] At the investigation meeting the Authority heard evidence from the applicant in person and from Ms Nikita Chouveaux. For the respondent evidence was presented by Ms Dawson, Mr Fowler and Mr I.

[25] The Authority records its appreciation of the openness of all when answering questions put to them by the Authority or respective counsel. I also record my thanks to counsel for each party in enabling the investigation to proceed without undue delay and also for their submissions.

Discussion and analysis

[26] The primary burden on the applicant in this case is a burden of fact. The question is whether the facts established conduct on the part of the respondent sufficient to amount at law to repudiatory conduct and sufficiently fundamental to allow the applicant to treat the agreement was finished.

[27] On the facts before the Authority, the applicant's allegations of harassment fall at the lower end of the scale if they are made out. That is not to say the allegations are not serious.

[28] A major difficulty facing the applicant is her acceptance of an apology from Mr I, in spite of his credible denials of observing the applicant in the changing rooms and of *grabbing* her bottom.

[29] Ms Dunlop's complaint of Mr I touching her stomach was not conveyed to the directors in person but to their daughter. Nonetheless, they investigated this matter to be told by the applicant that she did not regard the matter as particularly serious.

[30] An issue arose regarding the respondent not taking Ms Chouveaux's evidence regarding the applicant's complaints in the course of its investigation. Ms Chouveaux told the Authority she and another employee, Monique, were told to *butt out* as the matter was between the applicant and Mr I. The respondent's evidence was that it regarded its obligations to maintain the confidential nature of its inquiries as being in the best interests of Ms Dunlop.

[31] Further, the respondent says Ms Dunlop did not disclose in her initial complaint, her letter of resignation or in her Statement of Problem that Ms Chouveaux was a witness to the earlier alleged incidents. The matter first arose in an email from Mr Beck to Mr Smith on 17 February 2009.

[32] Mr Fowler specifically asked Ms Dunlop whether there was a witness to the earlier incidents and was told there was not. The applicant confirmed this in her

evidence before the Authority saying she had already told Ms Dawson there was a witness. Ms Dawson firmly denied she was told this at the time of the investigation meeting.

[33] The involvement of Ms Chouveaux was as a support person for Ms Dunlop at a meeting with Ms Dawson. Ms Chouveaux's evidence was she interjected on behalf of the applicant however, there is no evidence before the Authority Ms Chouveaux told Ms Dawson or Ms Fowler she had witnessed any of the incidents complained of by Ms Dunlop.

[34] If Ms Chouveaux had in fact heard the statements set out in her written statement of evidence, I find it astonishing she did not tell the respondent's directors at the meeting with Ms Dawson. Equally astounding is Ms Dunlop not advising that there was a witness to the earlier incidents alleged and that witness was Nikita.

[35] I accept, on the balance of probabilities, particularly in light of the respondent's prompt response to Ms Dunlop's complaints on each occasion, had the employer had this information at the time, Ms Chouveaux would have been interviewed as a witness.

[36] However, I doubt this would have affected the action taken by the employer. This is because the respondent issued formal warnings to Mr I and re-arranged rosters to ensure supervision of the few occasions Ms Dunlop and Mr I were together in the store. From the evidence put before the Authority Ms Chouveaux's input to the inquiry would likely have supported Ms Dunlop's complaints. Any input she may have had to the employer's inquiry would not have brought to light more serious allegations of sexual harassment which would likely have led the respondent to take more drastic disciplinary action against Mr I.

[37] The incident over the ball throwing and Ms Dunlop's reaction to it is bordering the ridiculous. How such a trivial matter could justify a resignation, even given the precedent complaints which the Authority accepts were fully investigated, and particularly given the supervision put in place for the few occasions the two were rostered together, simply staggers belief. The actions of the applicant following this minor, trivial incident casts serious doubt on the genuineness of her acceptance of Mr I's apology following the first incident. There was some suggestion in the evidence of Ms Dunlop having some health issues around this time. However, these

were not defined in the evidence before the Authority. There is no reference in Ms Dunlop's letter of resignation to such issues.

[38] Ms Dunlop may feel aggrieved, yet her employers, in the Authority's view of the evidence before it fulfilled their obligations under s.117 and their obligations to act in good faith thoroughly.

Determination

[39] Returning to the issues outlined above I find:

- In dealing with the applicant's complaints of sexual harassment the respondent acted in accordance with its obligations under the Act.
- In the circumstances of this case, particularly in the light of the efforts made by the respondent to ensure no repetition occurred, the applicant's resignation was not reasonably foreseeable.
- The applicant was not constructively dismissed and the Authority is unable to assist her further.

Costs

[40] Costs are reserved. Counsel are to attempt to resolve the matter of costs between themselves. Should this not be possible Mr Smith has 28 days to lodge and serve his memorandum. Mr Beck has a further 14 days within which to lodge and serve his submission in reply.

Paul Montgomery
Member of the Employment Relations Authority