

[3] The respondent vehemently denies any sexual harassment and any breach of its obligations as an employer to the applicant. Further, it says following Mr Heeney raising his complaints in a letter, Mr Patching apologised and undertook to address the close proximity of the work stations to prevent accidental contact between employees going about their tasks. It says Mr Heeney accepted the apology and the respondent believed its assurances had also been accepted by the applicant.

[4] Further, the respondent says it was entitled, on safety grounds, to ban the use of MP3 players and other like devices while employees were undertaking tasks in the workshop. It says Mr Patching was within his rights to ask the applicant to cease using his MP3, a request which led to an outburst by Mr Heeney followed by his walking off the premises. It also says it was open to it to accept Mr Heeney's written resignation of 30 May 2009.

[5] Accordingly, it says it has no case to answer and declines to provide the remedies Mr Heeney wants.

Essential facts

[6] Mr Heeney was employed as a Framer and says that apart from a few minor matters, his first three months were *mainly without issues* and that his relationship with Mr Patching *was cordial and he was pleasant*. The applicant felt at times Mr Patching was *over solicitous when giving him instructions on simple tasks*. He says this changed dramatically following the Christmas party when, the following day, Mr Patching became *aggressive and badgering* towards him.

[7] Mr Heeney says, after the Christmas break, his employer's attitude improved for a time but then deteriorated in that the behaviour would go on for longer. Mr Heeney said Mr Patching *would be constantly badgering me, criticising my work and how I was organising the work. He would stand by me and speak to me in a hectoring tone and give me continuous and contradictory instructions. He would interrupt me while I was doing something, get me to do something else, and then criticise me for not having finished the job I was originally working on*. Mr Patching denies that this was the case.

[8] On the basis of the evidence of Mr Heeney, it appears that the relationship between the two men oscillated between the cordial and the hyper-critical. Mr Heeney said he found this oscillation quite exhausting because he did not know

from week to week how Mr Patching would behave and the tension generated in the workshop was significant.

[9] Mr Heeney consulted his doctor as he was having difficulty sleeping. His general practitioner prescribed some sleeping tablets and voiced the view that the communication difficulties the applicant was having with his employer was likely based on differing personality types.

[10] On 26 March 2009, the applicant had a discussion with Martin Surynt, a co-worker, about their not having employment agreements. The two also spoke about the possibility of making complaint about the bullying behaviour to the employment institutions.

[11] On Monday, 30 March 2009, Mr Patching walked behind the applicant and brushed past him touching his buttocks. The applicant says *when Mr Patching gets to the door he turned around and said "that was an accident by the way. I wouldn't want to be getting a letter in the post"*. Around this time, there was also some discussion about the applicant's haircut. However, on 7 April, a second touching incident occurred.

[12] Mr Heeney says Mr Patching had asked him and Mr Surynt to hold some large mirrors and boards which were leaning against the wall. While both men were taking the weight of the items, the applicant says Mr Patching asked whether he had his measuring tape on him and put his hand inside the applicant's tool pouch. Mr Heeney said that when Mr Patching's hand was inside his tool pouch, he felt Mr Patching's hand brush his penis. He says he made no comment nor reacted to it at that time but was somewhat concerned at Mr Patching saying something to the effect of *I'd better be careful about doing that. I wouldn't want it to go into your report*.

[13] In his diary note, Mr Heeney says *on reflection I feel extremely uncomfortable that what may or may not have been accidental has been given a sexual meaning because of his comments. I feel ... he is using a position of power to make me feel uncomfortable by making jokes in poor taste or making sexual advance*.

[14] The following day, the applicant says he ceased wearing his tool pouch so that Mr Patching would not have a chance to put his hand near him. He says *I am feeling upset and angry*.

[15] On 14 April 2009, the applicant took a day off on sick leave and rang the Department of Labour to get advice regarding dispute resolution procedures. Upon his return to work the following day, the workshop supervisor called a staff meeting and advised that the use of MP3 players was no longer allowed in the workshop.

[16] The following day, Thursday, 16 April, Mr Heeney decided the best way to deal with his situation was to make it known to everyone. He spoke to those who were at work, including Anita who, having heard Mr Heeney's story, said she was not surprised and told him of another staff member who was upset by Mr Patching's behaviour.

[17] Later that day, Mr Sutherland, the supervisor, approached Mr Heeney in the workshop and asked him to leave his MP3 at home. Mr Heeney says he replied that he would rather keep it on and said that if Mr Patching wanted him to stop using it, then it was up to Mr Patching to convey that message himself.

[18] On Monday, 20 April 2009, the applicant went to get legal advice from the Canterbury Law Centre. He advises that he was told to put his concerns in writing to his employer and to come back to them if there were further difficulties.

[19] That same day, while the applicant and Mr Patching were hanging mirrors at a retail outlet, the applicant was trying to put in a wall plug but was having some difficulty. He says Mr Patching showed him how to do it without breaking the plug and while instructing him made a comment which Mr Heeney took to be a reference to sodomy. He says he made no comment nor did he react in any way however, the next day when he was talking to Anita, he says he told her what was said to him. He says Anita told him that Mr Patching often made quite disgusting comments to her.

[20] Late in the day on Monday, 27 April, and having equipped himself with a recording device, Mr Heeney approached Mr Patching in his office towards the close of the day. Mr Patching says he was about to go out on a job and was very surprised at being handed the letter and its contents. It is common ground that the matter was discussed and that Mr Patching then apologised.

[21] The following day, shortly after morning tea while working at his bench with his headphone around his neck, Mr Heeney says he was approached by Mr Patching who said *I want to talk to you about listening to an MP3 player at work. Dan told everybody not to use MP3 players at work and I don't want them being used.*

Mr Heeney says he inquired what the problem was in using the device and when Mr Patching continued to insist on the issue Mr Heeney said *so its okay to touch up your employees at work but its not okay to use an MP3 player – is that how it is?*.

[22] The diary notes continue:

After that I started shouting at him and it went on for a minute or two. First we were in the workshop and then I followed him to the van but my hands were at my time all the time and I didn't touch him. I told Graeme I was going to make a complaint to the Police and I'd see him in Court. I walked away from the van and Martin was there watching. Then Martin said to Graeme, why didn't you just let him use his MP3 player? Graeme tried to say something to me and made as if to approach me but I told him to keep away from me and he went away. Martin then said to me "you might as well leave now". I said yes I'm out of here. I'll see you round (or something similar). I then got my hearing protectors and breathing mask from the tool area and walked out to the lunchroom where I grabbed my bag. I left straightaway.

[23] The respondent says that, following the receipt of the letter from Mr Heeney and the discussion which ensued, it explained that, given the close proximity of the work stations to each other, accidental contact was possible. It says the applicant accepted this application and the company had assumed the complaint had been dealt with, given its undertaking to realign the work station siting.

[24] Further, Mr Patching says the business had a policy that the wearing of audio listening equipment is prohibited in the workshop. He says the applicant, with another employee, had been advised earlier of this policy on three separate occasions by Mr Dan Sutherland. On 28 April 2009, the applicant was asked to remove his audio listening equipment but responded in a very aggressive and abusive manner. Mr Patching says he was shocked, scared for his safety and called out for assistance. he says the applicant continued to scream at and tried to approach him, yelling repeatedly *so its okay to touch up your workers but its not okay to wear your earphones*. The applicant repeated this statement several times according to Mr Patching's evidence.

[25] Mr Patching said he felt intimidated and conscious the matter could matter and so he edged his way out of the workshop. Mr Patching says Mr Heeney continued to stand over and move towards him while yelling menacingly *don't look at my eyes*. Once outside the workshop, Mr Patching says he noticed that people at least 50 metres away had stopped to see what the screaming was about. Eventually, the applicant said

I'm fucking out of here and went into the workshop to collect his belongings and then left the premises.

[26] Mr Patching accepts he received a letter of resignation dated 30 April 2009 in which the applicant said *I consider that my employment ... is no longer tenable*. He says the letter also asked for mediation and the opportunity to negotiate an exit package.

[27] Because of the behaviour and conduct of Mr Heeney, Mr Patching says he was reluctant to have the applicant anywhere near the premises and so took out a non-trespass order for his own safety and that of others.

[28] In terms of the tape measure incident, Mr Patching says that any contact with the applicant's genital area was completely accidental and acknowledges that, given his work history in the building industry, he may at times make comments which others see as inappropriate. However, he says this falls well short of sexual harassment.

The issues

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

- Did the buttock brushing and the tape measure incident and the verbal insinuations amount to sexual harassment of the applicant; and
- Did the applicant accept the respondent's apology and undertaking to resolve the issues brought to him; and
- Was the resignation following the altercation over the MP3 player use based on a breach on the part of the employer; and
- Was that breach sufficiently serious to justify the applicant's departure; and
- Was the applicant unjustifiably dismissed and, if so, to what remedies is he entitled?

The onus of proof

[30] Where a claim of constructive dismissal is made following a resignation, the initial burden to establish the resignation was caused by the employer's failure(s) rests with the applicant. Only when that hurdle has been negotiated does the burden of proof move to the employer.

[31] In this case, the allegation is one of a breach of the employer's duty to provide a safe working environment, namely, that the respondent's principal sexually harassed the applicant physically and verbally.

Statutory framework

[32] Section 108 of the Act reads as follows:

Sexual harassment

(1) *For the purposes of ss.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 employee 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) *The physical behaviour of a sexual nature, - directly or indirectly subjects the employee 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.*

The investigation meeting

[33] The applicant represented himself at the investigation meeting and gave evidence in support of his claim. For the respondent, Mr Patching, Mr Surynt and Mr Sutherland gave evidence.

[34] A significant issue to emerge in the course of the meeting was that of the effect on the applicant of the insecurity of his terms of employment. I will return to this matter later.

[35] Another was Mr Patching's evidence that after he made his apology to Mr Heeney and gave an undertaking to make changes to the workshop to minimise the risk of accidental physical contact, the applicant took his letter of complaint back. Mr Patching said he took that as an indication that his apology had been accepted and his undertaking also.

[36] The Authority records its appreciation of those who gave evidence in the investigation and their genuine efforts to clarify the circumstances surrounding this whole matter.

Analysis and discussion

[37] A significant difficulty facing Mr Heeney is his initial acceptance of the apology of Mr Patching and the latter's undertaking to realign the work stations to minimise the chances of accidental physical contact between people in the workplace. There is no evidence that Mr Patching's apology or undertaking was other than genuine.

[38] Another difficulty is that the incident which gave rise to Mr Heeney's walkout was in relation to his disregard for Mr Sutherland's relayed instruction (later reinforced by Mr Patching at Mr Heeney's request) that he and other staff were to stop wearing MP3 players.

[39] I think it fair to say that Mr Heeney's attitude actually prompted the confrontation over the MP3 player. He told Mr Sutherland he would continue to use it and Mr Patching would need to convey the message to Mr Heeney himself. Mr Patching did that and a verbally violent exchange occurred. Mr Patching says he felt very threatened physically, although Mr Heeney said he kept his hands by his side and never threatened violence. It is clear, however, from the evidence, including that

of the applicant, that there was considerable volume and anger in Mr Heeney's contribution to the exchange.

[40] Mr Patching's evidence was that he found Mr Heeney *quiet and withdrawn*. He told the Authority he saw the tape in the applicant's pouch and retrieved it easily with his fingers forward. I think it likely, given Mr Heeney wore his apron as a builder would his nail and tool pouch, contact with Mr Heeney's groin area was most probably accidental. However, I see no reason why Mr Patching, given his view of the applicant's reserved temperament, could not have asked the applicant's permission to retrieve the tape prior to doing so.

[41] It also appears from the evidence that, but for the raising of the MP3 use, Mr Patching would have stood by his undertaking to rearrange the layout of the workshop. I am of the view that the physical contact issue had largely been resolved and would likely have ceased to be a problem except for Mr Heeney taking umbrage at Mr Patching reinforcing Mr Sutherland's instruction that he was not to use his MP3.

[42] That said, it is fair to say in this particular case that Mr Patching's behaviour in respect of the applicant and of Mr Surynt falls short of a requirement of the parties to an employment relationship to be active and constructive in establishing and maintaining employment relationship in which the parties are, among other things, responsive and communicative.

[43] It was clear from the evidence of Mr Heeney, which was not challenged by the respondent, that the applicant was hired on the basis of one month's work with the possibility that the respondent would then consider an ongoing employment relationship. Contrary to Mr Heeney's submission that *there is no compulsion on the employer to provide an employment agreement when an employee commences work*, the Act specifically requires a written agreement to be entered into between the parties. The respondent says the reason no employment agreement had been issued nor discussed was due to *constant changes in his [Mr Heeney] hours of work to suit his child custody issues*. That appears unlikely as the evidence from Mr Heeney, which I accept, did not require significant variation in hours. That which may have been required could adequately have been covered in any written agreement regardless of the length of the employment.

[44] Again, it is clear from Mr Heeney's evidence that he became anxious at the instability in respect of his ongoing employment with the respondent. He told the Authority he suffered from sleeplessness following discussions with Mr Surynt regarding the stability of each of their employment situations and because of the fluctuations in Mr Patching's treatment of him. The applicant's GP, in the light of the situation Mr Heeney had reported to him, prescribed sleeping tablets to assist. This evidence was not challenged by the respondent.

[45] I found Mr Patching's evidence defensive when explaining his verbal insinuations which he says arose from his employment as a carpenter and the *banter in different groups I have worked in*. He was also defensive when challenged regarding the absence of an employment agreement, laying the blame for that at the feet of Mr Heeney and his childcare arrangements.

[46] It is not unfair to say, in all the circumstances surrounding this matter, that the anxiety suffered by the applicant during his period of employment was largely occasioned by the behaviour of Mr Patching in his regard.

The determination

[47] Returning to the issues as set out above in this determination, I find:

- The buttock brushing and the tape measure incident and the verbal insinuations amount to sexual harassment of the employee because the behaviour was unwelcome or offensive to Mr Heeney and which, by its nature, had a detrimental effect on the applicant's employment. The offending, objectively viewed, sits towards the bottom end of the scale.
- I find the applicant did accept the respondent's apology and undertaking to resolve the issues with it at that time. The acceptance of that apology modifies the applicant's claim for remedies linked to sexual harassment.
- The resignation which followed the altercation over the MP3 player was not based on a breach by the employer. The matter arose as a result of the applicant's refusal to obey a reasonable and lawful instruction issued by his employer.

- The applicant was not unjustifiably dismissed, either actually or constructively. He resigned.
- The failure of the employer to provide Mr Heeney with a written employment agreement setting out the terms and duration of the employment gave rise, I find, to a high level of anxiety which a written agreement between the parties would have obviated. This anxiety was exacerbated by Mr Patching's style of dealing with the applicant. Mr Heeney has a personal grievance of disadvantage arising from that unjustifiable action by the respondent. (See s.122 Employment Relations Act 2000.)

Remedies

[48] Given the findings above, and in particular that Mr Heeney's departure was as a result of a resignation, the Authority is unable to consider his claim for lost wages or any other attendant loss.

[49] The Authority is limited to awarding compensation under s.123(1)(c)(i) for the hurt and humiliation arising from the successful aspect of his case.

[50] I order the respondent to pay the applicant the compensatory sum of \$2,000 without deduction.

Costs

[51] As a self-represented party, Mr Heeney sought expenses he expended in bringing this matter before the Authority. The amount he sought was \$1,000. The Authority is unsure how this sum is arrived at as no invoices have been presented.

[52] I think this is a case in which costs should follow the event but given the respondent's success in repelling the primary head of the applicant's claims, any expenses need to be modest.

[53] In this case, I think it fair to make an award to the applicant in the sum of \$200 as a contribution to his expenses. I also order the respondent to refund the applicant's \$70 filing fee.

Paul Montgomery
Member of the Employment Relations Authority