

publication of the evidence. I have found it unnecessary to publically name people who have not participated in the Authority's investigation and who have not needed to give evidence. There have been claims made about a co-worker who did not attend the Authority's investigation meeting and I have referred to that person as "A". I have only reported on the information that is necessary to cover the relevant facts.

Employment Relationship Problem

[4] Robyn Burns is employed by Housing New Zealand Corporation (HNZC). She has been employed by HNZC since 19 June 2006. She is employed under an individual employment agreement. Her employment relationship problem relates to an interpersonal relationship between her and "A" involving the boundaries of appropriate behaviour and where inter-personal issues have arisen; for example

- A conversation between Ms Burns and another employee (A) about a fishing trip involving Ms Burns and her son.
- "A" invited Ms Burns to talk and to have coffee. She alleged "A" made a comment about wanting to take her to bed. She is adamant "A" said this. "A" at the time denied saying that and said that something else was said.
- Ms Burns has claimed that she was followed by "A" and "A" entered a fish and chip shop where she was waiting for an order and was the only customer. She claimed that "A" kissed her on the cheek. "A" accepted approaching her in the fish and chip shop, but denied following her there. A claimed at the time the kiss was an air kiss.
- "A" telephoned Ms Burns at home enquiring about seeing her car at the Police Station, which incidentally involved Ms Burns in an entirely separate and personal family matter.
- Ms Burns says "A" welcomed her and another employee on one occasion (22 October 2008) when "A" asked them: "How are my two beautiful birds". She says "A" attempted to engage her in unwelcome conversation later. Later that day she says "A" said "Are you not talking to me baby?"
- On 23 October "A" tried to engage her in personal conversation at her desk.

- On 24 October 2008 again “A” tried to engage her in personal conversation and she had to say to “A” to “f### off” and she walked away.
- Ms Burns says she received a telephone call from “A” on 25 October 2008, which was a Saturday. She tried to record the call but it did not work. Later, “A” called back and another recording device was set up that recorded that conversation. The phone call occurred.
- There was another telephone call on 27 October and “A” turned up at Ms Burns’ house unannounced. This phone call also occurred.

[5] The combination of these matters caused Ms Burns to complain of being harassed. Ms Burns met with HNZN officers and she handed over the tape and phone recordings. She wrote a statement. HNZN started an enquiry involving an internal investigator and the complaint was put to “A”. In the meantime Ms Burns stayed at home. A range of options was provided to her to enable her to work. Arrangements were made for Ms Burns to work from home and to involve her in the enquiry and to comment on the statement from “A” in reply to her allegations. Ms Burns had an issue about her access to the office laptop while she was at home. The laptop was retrieved and returned to work during the time Ms Burns was at home. Ms Burns has complained that HNZN’s investigation was incomplete because the investigator never met with her in regard to hearing any reply.

[6] Ms Burns has complained that the investigation was neither fair nor balanced on the basis of the information she now has. In addition she says HNZN’s findings were made without any reasoning and the investigator was biased. She also claims HNZN failed to prevent any repetition of the behaviour, failed to interview some staff, failed to provide a report, failed to resolve inconsistencies between statements, failed to meet with her to hear her response in reply and removed her right to work.

[7] Arrangements around Ms Burns return to work involved an agreement for a facilitation meeting where an agreement was reached on a return to work.

[8] Ms Burns has claimed that she was unjustifiably disadvantaged in her employment. She is seeking the reimbursement of leave taken during the period under s 123 (1) (b) of the Employment Relations Act (the Act) of \$1,267.77,

reimbursement of separate legal costs in damages caused by the employer of \$10,992.53 (submissions 27 November 2009), and a payment for humiliation and hurt and loss of dignity and injury to feelings under s 123 (1) (c) (i) of the Act. Both parties have claimed costs.

[9] In a supplementary statement of problem filed on 25 November further claims were made that claims that the applicant's right to work was removed and that there was a failure to facilitate a return to a safe work environment.

[10] The respondent denied all the claims and contended that it acted fairly and did take appropriate action involving disciplining the manager.

Issues

[11] The issues can be summarised as follows:

- (i) Did the respondent follow adequate and proper procedures to investigate Ms Burns' complaint?
- (ii) Would a fair and reasonable employer have reached the findings made by HNZC?
- (iii) Were any arrangements agreed between Ms Burns and HNZC in regard to what Ms Burns was to do during the investigation process, and her return to work breached by HNZC?
- (iv) What remedies, if any should be applied to resolve the employment relationship problem?

[12] There are some factual matters and I will deal with these as they arise and as it is necessary to do so.

The facts

[13] Ms Burns made a complaint about "A's" behaviour towards her at and outside work. HNZC commenced an investigation and gave Ms Burns the opportunity to reply to the statement received from "A" in reply to the allegations. In the meantime

Ms Burns remained at home until an arrangement was agreed and an outcome through facilitation was reached to enable her to return to work.

[14] Ms Burns and “A” at the time gave different accounts about the “*wanting to take you to bed*” comment. Ms Burns says that is what “A” said to her. “A” told HNZN that what was said was that another person in “A’s” personal life thought that “A” and Ms Burns were too familiar, and that it was that other person who referred to “A” wanting to take Ms Burns to bed.

[15] “A” acknowledged, to HNZN, going into the fish and chip shop when Ms Burns was there and stopped to speak to her.

[16] There were different accounts about the kiss. Ms Burns claimed that she considered the kiss was sexual. “A” told HNZN it was an air kiss and their lips did not make any contact.

[17] There is no dispute that the phone calls occurred. There were different accounts of what was said. One of the calls was taped and a transcript obtained.

[18] On 27 October “A” visited Ms Burns’ at home unannounced. “A” told HNZN that the visit was made to go and try and explain the situation.

[19] The above information is what HNZN obtained and relied upon at the time through the investigation process. HNZN found that “A’s” conduct was unprofessional and fell below the standard expected by HNZN, but did not amount to sexual harassment.

[20] Ms Burns was written to by HNZN on 25 November 2008 and on 4 December 2008 about her complaint. There was a facilitated agreement to return to work but not before Ms Burns refused to return unless HNZN’s investigation was reopened and she had refused to work with “A”, who was still located at the workplace. She had been on sick leave and once the sick leave ran out HNZN was not willing to extend to Ms Burns any special leave.

Determination

[21] It is my determination that Ms Burns had grounds to complain about “A’s” behaviour. It was a matter that was investigated by HNZN. During the investigation Ms Burns acquiesced to stay and work from home. She was provided with a range of options on the arrangements to enable her to work by HNZN. Her complaint was that she was being harassed. HNZN found “A’s” behaviour fell below the standards required and was unprofessional, but did not involve sexual harassment. “A” was disciplined and was requested to apologise to Ms Burns.

[22] I further determine that:

- HNZN did respond and set about to investigate the complaint from Ms Burns.
- It was open to HNZN to investigate the allegation of harassment including any sexual harassment.
- HNZN’s investigation involving “A” is open to criticism about the process: especially (a) the decision by the investigator not to interview some of the witnesses identified by Ms Burns; (b) the investigator not providing any reasoning for the decision; and (c) the investigator failed to interview Ms Burns for a reply.

[23] On (c) first, I find that this was not fatal, as Ms Burns was represented and had every opportunity to reply, and that HNZN relied upon Ms Burns’ written reply, which it was entitled to rely upon.

[24] On (b) I accept that the investigator responsible for reaching some conclusions on the matter decided that she could not determine the truth between the applicant and “A” because they each had a different context in recalling the matters. It was not fatal that the decision maker did not make a finding on the inconsistencies between Ms Burns’ and “A’s” accounts, I hold. What in fact happened was that the investigator knew that there were two different versions and she could not decide which one was the truth, and the investigator determined that both the applicant and “A” had their own views and opinions about what happened. The reasoning is acceptable but its communication at first to Ms Burns was inadequate, I find. This is not enough to be

unjustified when further details were provided to Ms Burns' representative a short time later.

[25] On (a) HNZN decided that the witnesses named by Ms Burns would not add anything more to the information obtained, first hand experiences related to matters not in contention, and evidence from two witnesses about events in their written statements occurred significantly before the issues being investigated by HNZN. I agree. Thus, HNZN's action was not unjustified and did not cause any disadvantage, I hold.

[26] In general an employer is not required to follow a legalistic process and meet the same standards as Court of law. Also, any scrutiny of the process is not required to be pedantic. I am satisfied that overall HNZN endeavoured to be fair and make a decision free of bias. It was acting on a complaint and gave the people involved an opportunity to comment and there was nothing that required it to set terms of reference for the investigation and consult Ms Burns on that when it had her complaint. I am satisfied that the decision makers were managers acting in accordance with their responsibilities and when there was a change that Ms Burns was informed (letter dated 6 November 2008).

[27] HNZN's decision to discipline "A" for his behaviour was a decision open to a fair and reasonable employer given that no actual finding on sexual harassment was made. It was open to Ms Burns to conclude she was sexually harassed given the information and conclusions she was able to draw from her own experience in the matter. HNZN was also entitled to reach its own decision, and it did take action, albeit Ms Burns did not agree with the outcome. That is not enough to give rise to an unjustified action, I hold.

[28] I hold that HNZN informed Ms Burn's of the outcome and that it was not required to provide a report. Ms Burns was given the outcome (25 November 2008 letter) and reasons for the decision on 4 December 2008 (letter).

[29] Ms Burns agreed to participate in a facilitation to enable her to return to work. Agreement was reached, and Ms Burns returned to work. Thus, Ms Burns can have no complaint about any difficulties before the decision. This is because she was

involved in deciding her strategy and approach to the relationship in her employment and gave instructions to her representative to make demands in regard to her return to work. HNZN was not required to accept her demands. Ms Burns' demands required HNZN to respond with care, because of its duty to both Ms Burns and "A". Indeed Ms Burns decided to leave work initially, albeit that was understandable given that "A" remained in the workplace until agreement was reached on managing the relationship for Ms Burns to return to work. HNZN gave Ms Burns options about her work. HNZN's responses were reasonable, I find. It faced demands from Ms Burns before she would return to work. She also took time off work sick. Her demands for returning to work later became associated with the delays in resolving the relationship, I hold.

[30] The laptop was an office laptop. It was open to HNZN to decide to retrieve the laptop because there was no requirement on HNZN to provide Ms Burns with a laptop for her own use and at home. The decision to retrieve the laptop would not have changed anything because by that time Ms Burns was represented anyway to engage with HNZN.

[31] It is my decision that whilst HNZN can be criticised about the investigator not making findings on Ms Burns' issues about "A", and the circumstances are that Ms Burns did not like the outcome, they do not make HNZN's action unjustified. In all other respects HNZN was acting properly to investigate the complaint from Ms Burns and engaged in a facilitated agreement for Ms Burns to return to work.

[32] I conclude that the claims that the applicant's right to work was removed and that there was a failure to facilitate a return to a safe work environment, have not been established.

[33] Ms Burns has not established that she has a personal grievance.

[34] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority