

Attention is drawn to the non-publication order at paragraph 5 on page 2.

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 248/08  
5074991

BETWEEN                      A  
                                         Applicant  
  
AND                                B and C  
                                         Respondent

Member of Authority:        Marija Urlich  
  
Representatives:              Damien Chesterman, for Applicant  
                                         Kim Stretton, for Respondent  
  
Investigation Meeting:        10, 11 July and 21 August 2007  
  
Submissions and further      18 September, 18 October, 8 November 2007 and 18, 24  
information received:        April 2008  
  
Determination:                14 July 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms A was employed by Mr B and Mrs C as an apprentice from June 2006 until December 2006. She says her employment ended when she was unjustifiably constructively dismissed following her employer's failure to fully and fairly investigate a complaint of sexual harassment by a co-worker. She seeks findings from the Authority that she was sexually harassed, unjustifiably constructively dismissed and that her employer failed to maintain the good faith obligations owed to her.

[2] Mr B and Mrs C say they fully and fairly investigated Ms A's complaint of sexual harassment. They say Ms A conducted herself in the workplace in a sexually provocative manner and that they acted fairly and reasonably in their dealings with her.

[3] I wish to comment on the striking similarity of passages of the filed evidence of the respondent witnesses. It has undermined the credibility of their evidence and has not assisted the Authority's investigation of this matter.

[4] In April 2008 an application was made to the Authority to re-interview one the witnesses, Mr E, on the basis of comments he is alleged to have made to the applicant's mother regarding his evidence to the Authority. This further information was served on Mr E and a timetable set for him to provide a reply. He has not replied. I have not considered it necessary to investigate further and put no weight on the further information provided.

### **Prohibition of publication**

[5] I prohibit from publication the names and other evidence that may lead to the identification of the applicant, the respondent and employees of the respondent. This order is made pursuant to schedule 2, clause 10(1) of the Employment Relations Act 2000.

### **Background**

[6] Ms A was 18 years old at the time of the events in question. Ms A said she enjoyed her work with Mr B and Mrs C very much. Mr B said Ms A showed a natural aptitude for the trade in which she was undertaking her apprenticeship. Ms A had a written employment agreement. The agreement does not have a sexual harassment complaint procedure. At the time in question the respondent did not have a sexual harassment prevention policy. The work rules provide guidelines for appropriate conduct but do not deal with sexual harassment.

[7] Mr B and Mrs C operate their business in partnership. Mr B is a master tradesman. Mrs C looks after the administration and accounts. They have been in business for over 35 years and over this time have employed many people. They told me they have never had an employment relationship problem and never conducted an investigation.

[8] Ms A was one of four staff employed by Mr B and Mrs C in this business. The others were Mr D, the factory foreman, Mr E, a tradesman and another apprentice, Ms F. In the main Ms A worked with Mr B.

[9] Mr B and Mrs C's staff work at benches located on the factory floor or travel to and from jobs in work vehicles. An office and lunch room are located on the mezzanine level of the factory.

[10] Early on Monday, 4 December 2006 Ms A raised a complaint with Mr B about the conduct of Mr D during the work Christmas party, held the previous Friday evening. Ms A told Mr B she wished to meet with her mother, Ms G, and Mr B and Mrs C to discuss her complaint further. No details of the complaint were provided. Due to Ms G's work commitments the meeting could not be arranged until Friday, 8 December 2006.

[11] Mr B, in general terms, then admonished staff about their inappropriate conduct during the Christmas function towards a guest of Mr B and Mrs C's and inappropriate workshop behaviour and suggested they apologise to those they had offended.

[12] Mr D approached Mr C and Mrs B and made a general apology that he "*might have said something which might have upset somebody*". Mrs B's running record of her investigation records that she understood the apology to relate to either Ms A or her guest. She records that Mr D appeared visibly upset. She also records that she told Mr D she would have to speak to others and would let him know the outcome.

[13] Mr B and Mrs C also spoke with Mr E and Ms F. They said Ms A had complained to them about Mr D's conduct during the Christmas function and that they had not seen any inappropriate conduct between Ms D and Ms A. During the course of the week Ms F continued to speak with Ms A about her complain against Mr D and this information was relayed to Mrs C. Ms F did not tell Ms A she was discussing her complaint with Mrs C.

[14] When Ms A and Ms G meet with Mr B and Mrs C on 8 December 2006 Mr B and Mrs C did not tell them they had commenced their investigation or that they had

formed tentative conclusions, based on their investigations, that the complaint was not genuine.

[15] Ms A provided a written complaint at the meeting. The complaint was:

- (i) Mr D had approached Ms A during work, on the day of the Christmas function, made a sexually explicit proposal and grabbed her breast;
- (ii) Ms A asked Ms F, in front of Mr D, if she had seen Mr D grab her breast but Ms F had not;
- (iii) During the course of the Christmas function Mr D approached Ms A and made a sexually explicit request;
- (iv) Other unspecified incidents had occurred;
- (v) Ms A had told Mr D she would tell Mrs C and he replied Mrs C would not believe Ms A;
- (vi) Ms A wanted the conduct to stop because of the effect on her work

[16] There is no dispute that this meeting was the first time the detail of Ms A's complaint was put to Mr B and Mrs C.

[17] Mr B and Mrs C meet with Mr D on 11 December 2006. Ms A's complaint was put to Mr D. He denied the alleged conduct had occurred. He told Mr B and Mrs C that Ms A had acted in a sexually provocative manner in the workplace.

[18] Following this meeting Mrs C observed conduct of Ms A's which she interpreted as sexually provocative. A staff meeting was immediately called. All staff attended including Ms A and Mr D.

[19] Mr B and Mrs C advised the staff that sexual harassment was unacceptable and would have serious consequences and that provocative sexual conduct and false complaints of sexual harassment were also unacceptable and would have serious consequences. Staff were advised of a process for raising complaints of sexual harassment and that a dress code was to be implemented forthwith. Mediation between Ms A and Mr D was proposed to resolve the issue.

[20] On 12 December 2006 Mrs C sought to secure Ms A's agreement to attend mediation with Mr G. Ms A refused. Mrs C raised concerns with Ms A about conduct which she saw as sexually provocative. A heated discussion ensued. Ms A left the work place. The following day Ms A did not attend work and telephoned in sick. A medical certificate was provided the following day advising Ms A was not fit for work for at least one month.

[21] Ms G attended the workplace to drop off the medical certificate, pick up Ms A's wages and some information about the proposed mediation. She met with Mr B and Mrs C for this purpose. Mr B and Mrs C handed Ms G a final written warning for Ms A titled *Final Warning (Unauthorised Leave, Stress, False Accusations, etc)*. Mrs C then raised her concerns that Ms A was behaving in a sexually provocative manner and told Ms G she had received an opinion from her doctor that Ms A suffered from Borderline Personality Disorder<sup>1</sup>. A heated discussion followed.

[22] On 13 December 2006 Mrs C made a request for mediation assistance to the Mediation Service of the Department of Labour. The purpose of the mediation was to find a way for Ms A, Mr D and the rest of the staff to work together. The Mediation Service wrote to Mr B and Mrs C the following day advising a date for mediation could not be confirmed because Ms A had advised *at this time she is not ready to mediate next week*.

[23] On 18 December 2006 Mr Chesterman wrote to Mr B and Mrs C raising a personal grievance on Ms A's behalf relating to:

- a. *Sexual harassment in the work place and failure to provide a safe workplace;*
- b. *Public humiliation;*
- c. *Failure to investigate properly complaint of sexual harassment;*
- d. *Issuing a final warning without a fair and reasonable disciplinary process;*
- e. *Constructive dismissal through failure to provide a safe work place and public humiliation*

[24] On 19 December 2006 Mr B, Mrs C and Mr D filed, as applicant parties, an application in the Employment Relations Authority seeking a direction to urgent

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<sup>1</sup> Borderline Personality Disorder is a mental illness. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR) defines Borderline Personality Disorder as: "a pervasive pattern of instability of interpersonal relationships, self-image and affects, as well as marked impulsivity, beginning by early adulthood and present in a variety of contexts."

mediation and a determination of the Authority terminating Ms A's employment. The Authority declined to direct the parties to urgent mediation.

[25] On 3 January 2007 an amended statement of problem was filed by Mr B, Mrs C and Mr D. A strike-out application to the statement of problem and amended statement of problem was filed on behalf of Ms A. Notice of opposition to the strike out application was then filed.

[26] On 8 January 2007 Mr B and Mrs C wrote to Ms A, at her home address:

- (i) issuing her with a final warning for *gross misbehaviour and gross disobedience* for failing to advise Mr B and Mrs C earlier of Mr D's alleged sexual harassment;
- (ii) Ms A had continued to make false accusations, including correspondence Mr Chesterman's letter of 20 December 2006, despite being verbally warned and receiving a written final warning to desist from such behaviour;
- (iii) Mr B and Mrs C's doctor had provided them with a medical opinion, enables under the employment agreement, *that he firmly believed from my description of your behaviour...that you suffered from a medical condition known as Borderline Personality Disorder.*";
- (iv) unless Ms A returned to work on 15 January 2007 her employment would be terminated; and
- (v) if Ms A returned to work she would be under a final written warning for which any misbehaviour, disobedience or non-compliance with any aspect of the employment agreement would result in instant dismissal.

[27] On 30 January 2007 Ms A lodged a statement of problem in the Authority. A statement of reply was lodged on 14 February 2007. This is the employment relationship problem this determination deals with.

[28] On 19 February 2007 an application was filed by Mr B, Mrs C, Mr D, Mr E and Ms F. The problem was outlined as *sexual harassment, false allegations, etc, against 1<sup>st</sup> and 2<sup>nd</sup> applicants [ie, all the applicant parties] by respondent [Ms A] as outlined in 1 above and documents.* The resolution sought was *mediation and ERA to*

*determine if steps taken by 1<sup>st</sup> and 2<sup>nd</sup> applicants were correct in procedures outlined. Reimbursement.*

[29] On 2 March 2007 the parties were directed to undertake mediation by 21 March 2007 into the application this determination deals with.

[30] On 28 March 2007 Ms Stretton advised the Authority all claims against Ms A filed by Mr B and Mrs C were withdrawn.

## **Principles and issues**

[31] Ms A has two principle claims. The first is that Mr B and Mrs C failed to provide a safe workplace free from sexual harassment. The second claim is that she was unjustifiably constructively dismissed.

[32] The sections of the Employment Relations Act 2000 which are relevant to the first arm of Ms A's claim are:

### ***108 Sexual harassment***

*(1) For the purposes of section 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 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 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.*

*(2) For the purposes of section 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 section 117 have occurred.*

### ***117 Sexual ...harassment by a person other than the employer***

(1) *This section applies where –*

- (a) *a request of the kind described in section 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 or client of the employer; or*
- (b) *an employee is subjected to behaviour of the kind described in section 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 section 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 or behaviour to the employee’s employer or to a representative of the employer.*

(3) *The employer or representative, on receiving a complaint under subsection (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.*

[33] The test for justification to apply to an assessment of a claim of unjustified constructive dismissal is set out at section 103A Employment Relations Act 2000:

**103A Test of justification**

*For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[34] In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168, at page 17, the Court of Appeal said:

*... in our view it can now safely be said in New Zealand law that one relevant implied term is that stated in the judgment of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in Woods v WM Car Services (Peterborough) Ltd quoted in the Auckland Shop Employees case. As the judge put it:*

*“In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Courtaulds Northern Textiles Ltd v Andrew [1970] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see British Aircraft Corporation Ltd v Austin [1978] IRLR 322 and Post Office v Roberts [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: Post Office v Roberts.*

*“We regard this implied term as one of great importance in good industrial relations...”*

[35] Applying those principles to this case the issues are:

- a) was Mr D’s behaviour capable of amounting to sexual harassment?

- b) Did the employer conduct a full and fair inquiry into the behaviours complained of?
- c) Did Mr B and Mrs C breach any duty owed to Ms A?
- d) if so, was that breach sufficiently serious to make it reasonably foreseeable that Ms A would resign as a result?
- e) If so, did Ms A actually resign as a result of that breach?
- f) If Ms A was constructively dismissed, were the actions of Mr B and Mrs C those a fair and reasonable employer would have taken in the circumstances?

## Issues

### (a) Does the complained of conduct amount to sexual harassment?

[36] Ms A says Mr D repeatedly sexually harassed her during her employment and Mr B and Mrs C failed to provide a safe workplace free from sexual harassment.

[37] The test for sexual harassment is a subjective test in the sense that it is the perception of the complainant and the observable effects on him or her that an employer is required to seriously consider in investigating complaints. It is not for the employer to substitute his or her judgement of what constitutes sexual harassment in the work place for that of the affected employee.

[38] During the evening of the work Christmas function Mr D got up from the dinner table, went over to where Ms A was sitting and whispered something into her ear. This was observed by Ms F and Mr E and confirmed by Ms A and Mr D.

[39] Mr D said he said stopped by Ms A on the way to the bathroom and said *watch out for the feeding frenzy*, which was a reference to Mr E who had just been served his

meal. Mr B and Mrs C say Ms D provided this explanation from the start and it has not changed.

[40] Ms A accepts Mr D made the *feeding frenzy* comment. She says Mr D also made a sexually explicit request of her, that she immediately turned to the person sitting next to her, Ms F's partner, and asked if he had heard the comment.

[41] In her investigation Mrs C telephoned Ms F's partner. He said he heard Ms A and Mr D laugh and asked them to share the joke. Mrs C did not ask what their reply was.

[42] Ms F and Mr E told me Ms A approached them separately during the Christmas function and told them Mr D had made a sexually explicit request of her during that evening. They both said she was upset and told her the matter was serious and she needed to tell Mrs C about it.

[43] Ms A said she had thought she could manage the situation herself but the offensive conduct had escalated. She discussed the situation with her mother, Ms G, over the weekend and they decided she would tell Mr B the following Monday, which occurred.

[44] I am satisfied after hearing from Ms A that she was subjected to some behaviour of a sexual nature from Mr D during the evening of the Christmas function and that behaviour was unwelcome and offensive to her. I am not able to reach a conclusion on the other alleged instances of sexual harassment. The allegations are not sufficiently specified.

[45] I have reached the finding that Ms A was subjected to unwelcome behaviour of a sexual nature for the following reasons.

[46] These facts are not disputed. Mr D said something to Ms A which could not be overheard. Ms A told Mr E and Ms F about this comment during the course of the evening and that it was offensive to her. She raised a complaint with Mr B the next working day. These actions are consistent with the nature of the allegations made and intention to complain.

[47] Mr D's recollection of events to the Authority was very poor. This casts doubt on what he was able to recall. Mr D accepted he was intoxicated during the Christmas function. I do not accept Mr D's apology was proffered to Mrs C for the "*fat ankles*" comment he made to Mrs C's friend at the Christmas function when she ordered dessert. This was an inappropriate comment but not one warranting the response Mrs C records. Mrs C records Mr D was visibly upset when he apologised to Mrs C for upsetting *somebody* during the course of the evening and that she told him he would be advised of the outcome when she had spoken to others. I find it is most likely the apology was proffered for offending Ms A.

[48] The 4 December 2006 complaint was the first complaint of sexual harassment Ms A had raised with Mr B and Mrs C. They were therefore not alerted to the need to inquire into the facts prior to this date and, if satisfied the behaviour took place, take steps to prevent the recurrence of the sexual harassment. There is no claim that Mr D continued to Ms A after her complaint was raised.

[49] Prior to the events at issue Ms A had two occasions to meet with her employers about concerns in the workplace. The first occasion concerned a bullying complaint Ms A made about her co-worker Mr E. The second concerned a discussion initiated by her employers about Ms A's attitude to her work and in particular attendance and time keeping.

[50] Both issues were dealt with to the parties' satisfaction. In relation to the bullying incident Ms A raised her concern about her co-worker's behaviour, Mr B and Mrs C listened, spoke to the co-worker concerned (making it clear the conduct was not acceptable), relayed the outcome of this discussion to Ms A and emphasised to her that any similar concerns should immediately be brought to their attention. In relation to the attitude issue, Mr B and Mrs C meet with Ms A and her mother, Ms G, put their concerns to her, Ms A accepted the legitimacy of those concerns and the parties appear to have continued their working relationship.

[51] Though Mr B and Mrs C did not have a sexual harassment prevention policy in place they had taken reasonable steps to make clear to Ms A what she should do if she had any concerns about her work or co-workers.

[52] I record that Mr B and Mrs C have implemented a sexual harassment prevention policy.

**(b) Did the employer conduct a full and fair inquiry?**

[53] Mr B and Mrs C did not fairly investigate Ms A's complaint.

[54] There is no dispute Mr B and Mrs C commenced an investigation before the complaint was formally made and without Ms A's knowledge or consent. This has tainted the investigation with hearsay and unnecessarily complicated the issues under investigation.

[55] Mr B and Mrs C formed the conclusion that Ms A's complaint *kept changing* before any detail of the complaint had been received. This caused them concern. They had no reasonable basis for concern for two reasons. Firstly, their concerns were never put to Ms A to comment on (this was a relevant issue and should have been squarely put before Ms A). Secondly, that the story appeared to change is an inevitable consequence of commencing an investigation before the details of a complaint have been received.

[56] Mr B and Mrs C did not tell Ms A Mr D had made an apology and they suspected the apology related to his conduct towards Ms A. This was clearly relevant to their inquiry and relevant to the concerns Ms A expressed in her complaint. This information should have been disclosed to Ms A.

[57] Mr B and Mrs C say the purpose of the staff meeting on 11 December 2006 was not to advise of the outcome of the investigation and that this did not occur. On Mrs C's running record of events alone it is clear the meeting announced the end of the inquiry, a line was to be drawn under the complaint, and Mr B and Mrs C expressed their wished that the process move into the next phase to reconcile Ms A and Mr D:

Monday 11 December 2006 [ ] Staff Meeting held at 4.30pm

*(All staff had been told by [Ms A] at the restaurant about [Mr D's] alleged behaviour, apart from Mr B and Mrs Cs, so matters discussed were (sic) not be a breach of the Privacy Act. At the meeting with Ms A and her mother on Friday 08 December 2006, we advised them we would be meeting with staff early next week to discuss the situation and make it very clear*

*what behaviour was and was not acceptable and outline steps 1010 of our meeting with them. They were both happy with that arrangement).*

*Due to the atmosphere in the workshop and Mrs C's observations of what Mrs C considered to be Ms A's sexual, provocative "posing" on the worksite and workshop, it was decided by Mr B and Mrs C to hold the staff meeting to outline company behaviour to be held that afternoon and all were present, to make very definite line in the sand over company policy concerning acceptable work behaviour.*

*Mr B and Mrs C outlined steps 1-10 on page 4 [reference to Mrs C's diary] to staff as being steps taken should any be involved in sexual harassment/harassment complaints. (By now it had become apparent to Mr B and Mrs C that from Mrs C's observations, that it was possible that the complaints laid by Ms A may have been false). Why else was Ms A behaving as she had, after laying complaints of sexual harassment?*

*It was pointed out that if anyone indulged in flirting, provocative behaviour and then ran to Mr B and Mrs C to get them to sort out a matter which had literally blown up in their face when they themselves had created it, [Mr B and Mrs C] would be very, very annoyed.*

*We hoped Ms A and Mr D would agree to a meeting to resolve the matter, to enable us all to move forward and that we would make enquiries about how the meeting would proceed and advise them.*

*It was on that note that the meeting closed.*

[58] Mr B and Mrs C's concerns that Ms A had engaged in sexually provocative conduct was first put to Ms A during the meeting with Mrs C on 12 December 2006. The meeting was impromptu, to discuss Mrs C's desire to go to mediation. Ms A was opposed to the idea and raised her concerns about the meeting the preceding day. In response Mrs C raised her concerns about Ms A's sexually provocative conduct. As Mrs C's witness statement provides this was a difficult meeting (paras 94 – 103):

[94] *[Ms A] then commented that things were discussed the day before at the staff meeting were personal only to herself and [Mr D] and that we had no right discussing them in front of other staff. I reminded [Ms A] that she herself had told all the staff and their partners at the Christmas dinner and since that date, what [Mr D] is alleged to have done.*

[95] *Throughout this discussion, [Ms A] swore and used the "f" word as well as saying I was "full of bullshit". She was very disrespectful. I asked her to stop swearing and [Ms A] then claimed that [Mr B] swore at her all the time. This is simply not true, in all the 35 years of operating this business I have never seen [Mr B] swear at any member of staff.*

[96] *I told [Ms A] that I had been closely observing both her and [Mr D] and that I didn't like her provocative, sexual behaviour. [Ms A] told me that this was not true and that I could not prove my claims.*

[97] *I did not tell [Ms A] that she had bought [Mr D's] unwanted attention on herself as claimed in paragraph 44 of [Ms A's] Brief of Evidence, nor did I suggest that she should leave her employment. I had just organized mediation, why would I suggest [Ms A] leave?*

[98] *At no time during our discussion did I refer to [Ms A's] new claim that she "had made up the accusation to seek financial gain" as now being claimed by [Ms A] in paragraph 54 of her Brief of Evidence. I had gone into my office to phone Ms G to*

arrange a mediation which Ms G thought was a good idea. Why would I be referring to [Ms A] wanting financial gain at that stage?

[99] *I asked [Ms A] why she did not say something to me regarding [Mr D] and she claimed that all the other staff had told her that I was unpleasant and difficult to deal with. This was different from what she herself had told me on 8<sup>th</sup> December where she said the reason she did not approach me was because she thought she could handle the matter herself. I told [Ms A] that I had broad shoulders and could accept this criticism as I believe that staff can at times resent me being the one to tell them “no” when they want to do something. However I believe I am approachable. I certainly have taken [Ms A’s] complaint very seriously as I am very aware of our obligation to provide a safe work environment for all staff. I then asked [Ms A] why she had not discussed the matter with [Mr B], [Ms A] replied “because he is a male”. However I note that [Mr B] was the first person she told on Monday 4<sup>th</sup> December.*

[100] *[Ms A] then asked if [Mr D] denied her accusation and when I told her he did, she claimed [Ms F’s partner] had heard what [Mr D] had said. I told her I checked with [Ms F’s partner] and he did not. [Ms A] then claimed [Mr E’s partner] had heard what [Mr D] had said and I told her I would check with [Mr E’s partner]. (I later phoned [Mr E’s partner] who denied she had heard what [Mr D] had said and stated she had never told [Ms A] she had heard).*

[101] *[Ms A] then said that we could not stop the staff from behaving how they wanted to and when I told [Ms A] they would be closely observed and kept busy, she claimed she would resign and that in fact she was leaving anyway and it had nothing to do with what we were discussing. When I repeatedly asked her why she was leaving, she refused to reply.*

[102] *During our discussion I asked why [Ms A] stayed for drinks at work on Friday 17<sup>th</sup> November when [Mr B] and I weren’t there to protect her, if she felt [Mr D] was sexually harassing her. She told me that I could not prove this and I said that staff, time books, and security video would show her and [Mr D] socializing together. She then walked out of my office saying she would be back the next morning, and has never returned to [Mr B and Mrs C’s business]. Nor did we ever hear from [Ms A] again.*

[103] *During this discussion...[Ms A] laughed, swore, sobbed, goaded, challenged, smirked, claimed she could not breathe, and acted in the most extraordinary manner. She was emotionally turbulent, swinging from laughing hysterically, to sobbing, with bouts of smirking in between and the behaviour repeated itself. She showed me no respect at all, rather she was defiant and assertive.*

[59] If Mrs C wanted to put her concerns to Ms A then the meeting should have been properly constituted. By that I mean Ms A should have received notice of the meeting and its purpose and had an opportunity to have a support person present. It was not appropriate to canvas the findings of the investigation by way of response to Ms A’s opposition to attending mediation.

**(c) Was any duty owed to the employee breached?**

[60] Mr B and Mrs C did not have a duty to believe Ms A’s complaint. However, they did have a duty to inquire into the facts of her complaint fairly and reasonably.

[61] A full and fair inquiry into the allegation of sexual harassment was not undertaken for the reasons set out above. Section 117(2) Employment Relations Act 2000 requires an employer to inquire into the facts on receiving a complaint of a sexual harassment. Such inquiry must be fair and reasonable.

[62] The obligation to inquire into the facts and report back on that inquiry<sup>2</sup> was not obviated because Mr B and Mrs C had formed the view Ms A conducted herself in a sexually provocative way. If the investigation gave rise to disciplinary concerns, as this one did, then that matter should have been dealt with separately.

[63] Mr B and Mrs C had a duty to conduct any disciplinary action against Ms A fair and reasonably. The issuing of the final written warning on 14 December 2006 fell short of the standards required.

[64] Mr B and Mrs C had a duty to deal with Ms A in good faith. The claim that Mrs C's doctor had formed an opinion that Ms A had a Borderline Personality Disorder was misleading. A medical opinion<sup>3</sup> requires familiarity with the symptoms of a patient and a formal diagnosis. This did not occur. Mrs C contacted her doctor and outlined her concerns about Ms A's conduct. I accept the doctor's evidence that this was an informal discussion and he proffered a suggestion that there may be some underlying issue such as Borderline Personality Disorder. He did not give an opinion or make a diagnosis.

**(d) Was the employment ending reasonably foreseeable?**

[65] Given the inadequacy of the investigation into the complaint of sexual harassment, the improper raising of concerns of sexually provocative conduct of 12 December 2006, the seriousness of the allegations in the 14 December 2006 final written warning, the lack of reasonable grounds for issuing such a significant disciplinary sanction and the unfounded claim that Mr B and Mrs C had an opinion diagnosing Ms A with a serious mental illness, I find the employment ending was reasonably foreseeable.

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<sup>2</sup> *Turk's Poultry Farm Ltd v Adkins* [1996] 1 ERNZ 374, 381

<sup>3</sup> Concise Oxford Dictionary "*Opinion... formal statement by expert when consulted of what he holds to be the fact or the right course, professional advice.*"

(e) **Did Ms A's employment end as a result of the breach?**

[66] Mr Chesterman's letter dated 18 December 2006 raising a personal grievance for unjustified constructive dismissal on behalf of Ms A is notice that the employment relationship has ended because Ms A believes she was sexually harassed and unjustifiably constructively dismissed. The letter sets out the basis for these beliefs.

[67] I have found the above breaches of duty occurred and I am satisfied that those breaches ended the employment relationship, as set out in the 18 December 2006 correspondence.

(f) **If Ms A was constructively dismissed was that dismissal unjustified?**

[68] This question requires an assessment of whether the actions of Ms B and Mrs C were those of a fair and reasonable employer<sup>4</sup>.

[69] For the reasons listed above I find the actions were not those of a fair and reasonable employment. Ms A was unjustifiably constructively dismissed.

**Penalty**

[70] A penalty is sought for breaches of good faith obligations. I prefer to deal with these issues the terms of the personal grievance claim.

**Remedies**

[71] Ms A has established that she has a personal grievance. She is entitled to an assessment of the remedies she seeks.

[72] Ms A seeks reimbursement of 12 months wages pursuant to section 123(1)(b) Employment Relations Act 2000. Mr Chesterman submits the damage to Ms A's confidence as a consequence of the matters which have given rise to her personal grievance and subsequent conduct of the respondent has meant she has not been able to find full time employment and that such a large award is appropriate.

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<sup>4</sup> *Hudson v Air NZ Ltd* 30/5/06, Shaw J, AC30/06

[73] No compelling evidence has been received in support of such a large claim. There was no evidence that Ms A was unable to look for work. I received evidence as to mitigation of loss, which included, tentative (I accept) attempts to find alternative employment.

[74] I accept that employment ending in the circumstances described above would be shocking. An award of three months lost wages is appropriate. Ms A's employment agreement provides that her hourly rate was \$10.50 per hour and that she was employed for 40 hours per week.

[75] **The award for lost wages is \$5040 (gross) less any income received during that period.**

[76] Ms A seeks an award of damages pursuant to section 123(1)(c)(i) Employment Relations Act 2000 to compensate for stress, humiliation and loss of dignity consequent to her dismissal. Mr Chesterman submits the large number of aggravating factors in this case warrant a high award of damages and that an award of \$35,000 is appropriate.

[77] Ms A said after her employment ended she cried frequently for two weeks and barely left her mother's house for two months. She said she believes the skin problems she has experienced since her dismissal have been caused by the stress and humiliation she has experienced since she raised her complaint. She said she has gained weight as a result of stress and her consequent lack of motivation. Ms A said she has been unhappy and insecure and this has been a factor in the ending of her relationship with her boyfriend.

[78] Ms A said she has become self-conscious about how she looks and her manner of dressing since the allegations of sexually provocative conduct were made. She said the allegations that she sexually harassed staff and made false accusations have caused her to question and doubt herself.

[79] Ms A said her wish to complete her apprenticeship has been lost as a consequence of these events and that she has had to reconsider her future. She said she does not feel she can continue her apprenticeship because of the personal

allegations made against her. She said she feels too ashamed to try to re-enter that trade in the small community in which she lives.

[80] Ms G, Ms A's mother, said she had seen an enormous change in her daughter since the events in question. She said Ms A's confidence had plummeted and self-confidence had taken an enormous knock. She said her demeanour and posture had changed and Ms A appeared physically distressed and suffered skin problems to an extent she had not seen before. She said she had gained weight and was not the same physically healthy and happy person.

[81] **An award of \$15,000 is appropriate.**

### **Contribution**

[82] Much was made in the respondents' evidence of Ms A's allegedly sexually provocative conduct. This evidence was focussed on Ms A's appearance, her clothing, how she walked, bent over, climbed ladders, touched her hair and her use of crude language. These matters were observed by the respondent witnesses prior to Ms A's complaint being issued. They made no complaint about the conduct then. The only reasonable explanation is that the conduct which they now claim amounts to sexual harassment by Ms A was insufficiently offensive to them at the time to warrant concern. It does them no credit to raise these events in this context.

[83] The strongest claim to contributory conduct (in the very widest sense) relates to a pornographic video clip Ms A is alleged to have shown to her work mates on a mobile telephone. This was raised by Mr D during Mrs C's investigation. It was open to Mrs C to put this information to Ms A for comment. This would have been the prudent thing to do in order to establish a reasonable basis for believing Ms A was responsible for bringing the video into the work place.

[84] During the course of the Authority's investigation meeting Ms A provided, for the first time, a response to the allegation about the video clip. She said the mobile phone was not hers and she had it because the phone was being handed around. I accept this was the case.

[85] To participate in such activity was not sensible but there is no link between Ms A's dismissal and the mobile telephone incident that I can ascertain.

[86] Mr B and Mrs C provided me with video and still images taken from their surveillance of Ms A after her complaint was raised. The images show a young woman (identified as Ms A) in work clothes moving about during the course of her duties. The images, though in their possession before Ms A's employment ended were not put to her to comment on. I do not accept they amount to the sexually provocative conduct Mr B and Mrs C claim.

[87] There is no evidence of blameworthy conduct on Ms A's behalf which resulted in her unjustified constructive dismissal.

### **Costs**

[88] Costs are reserved. Ms A has is legally aided. The parties are invited to attempt to resolve this issue themselves. If they are unable to them application should be made to the Authority to determine this issue. I note Mr Chesterman has included a costs submission in closing submissions filed on behalf of Ms A.

Marija Urlich

Member of the Employment Relations Authority