

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 88/08
5101972

BETWEEN A
 Applicant

AND B LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: David Beck, Counsel for Applicant
 Phil James, Counsel for Respondent

Investigation Meeting: 18 March and 1 May 2008 at Christchurch

Determination: 7 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms A, alleges that she has suffered a series of unjustified actions of her employer which have caused her disadvantage and also alleges that she has been constructively unjustifiably dismissed following the respondent employer's failure to properly deal with a sexual harassment complaint that Ms A made against a co-worker.

[2] In addition, Ms A claims various breaches of the employment agreement, both express and implied, and a breach of good faith by the employer.

[3] The respondent employer, B Limited, resists those allegations, denies any personal grievance and considers that it conducted a full and fair investigation of the sexual harassment allegation.

[4] Ms A was 14 years old at the time of the events leading to the employment relationship problem. She was employed in a part time capacity by B Limited as a

sales assistant until Christmas 2006 at which point she commenced what amounted to full time employment and that state of affairs continued until the employment relationship came to an end in June 2007.

[5] There had been difficulties in Ms A's previous family history and she understood that that factor contributed to her being employed by B Limited.

[6] Ms A gave evidence of the development of an inappropriate relationship with a work colleague, Mr C. Mr C, a mature man, initially developed an innocent work relationship with Ms A, but it is common ground that on at least one occasion the pair had an inappropriate conversation about sex. While Ms A gave evidence of a number of such inappropriate discussions and gave evidence of the detail of these alleged discussions, Mr C accepted only one such inappropriate discussion.

[7] The inappropriate discussion that Mr C accepts happened was on 2 June 2007, a Saturday, and Ms A's evidence is that she tried to get the conversation out of her head, was unsuccessful and eventually made a complaint to B Limited the following Wednesday, that is 6 June 2007.

[8] Mr D, the managing director of B Limited, gave evidence of seeing Ms A on the Wednesday following the incident, receiving the complaint, noting that Ms A was upset and arranging for her not to return to work that day. Because Ms A was so upset, Mr D arranged for her to see him again once she was better able to cope and he could then get further and better particulars from her about the complaint.

[9] That meeting was arranged for Monday, 11 June 2007. Ms A's mother, Ms E, rang Mr D and sought to be present to support her daughter. Mr D told Ms A's mother that he did not think it necessary for her to be present. When the meeting commenced, B Limited witnesses say that Ms A declined to have either of her parents present on the basis that there were *sensitive matters* to be discussed.

[10] Ms A denies the reference to *sensitive matters* but confirms that she did not insist on either of her parents being present but only because she was told that she would simply be asked to write down her recollection of what happened when in actual fact she says that the meeting went on for two hours and involved three members of the management of B Limited asking her detailed and searching questions.

[11] The three people present at the meeting from B Limited were Mr D, Mr F, the production manager, and Ms G, the office manager. Mr F invited Ms G on the basis that he thought she was in a good position to *look after* Ms A and because he thought that Ms G and Ms A got on well together.

[12] Mr D led the meeting from B Limited's perspective and began taking notes of the meeting but subsequently handed the note taking and the dominant role in the meeting over to Mr F. Mr D's evidence was that, while Ms A was tearful and anxious when she saw him first on the previous Wednesday to complain about the issue, her demeanour on the following Monday was confident and articulate, indeed much the same as she appeared at my investigation meeting.

[13] Ms A alleges that the interview traversed matters to do with her sexual history; Mr F confirmed that this was the case but only to the extent that Ms A raised those matters herself.

[14] There was some disputed discussion about the effect the complaint might have on Mr C.

[15] After a short period of further investigation, B Limited made a decision that it was unable to decide who started the offending conversation; Mr C alleged that Ms A had done so and of course Ms A's recollection was that Mr C had started it.

[16] From the employer's perspective, in the absence of any conclusion as to who had been responsible for starting the conversation, the conclusion had been reached that there was no sexual harassment. In consequence, Mr C was not dismissed although was apparently subjected to a warning. Mr F, who was the investigator, reached a conclusion that: *Ms A had freely admitted to me that she was the primary instigator of turning the conversation along inappropriate lines and I was also convinced that Mr C had continued with it.*

[17] Mr F then decided to recommend to Mr D, the decision-maker, as follows:

I was left in the position that I believed there was some fault on both sides even taking into account the disparity in the ages and decided that it would be best dealt with by a final written warning to (Mr C) and a verbal warning to Ms A (...).

[18] Clearly, the outcome of Ms A's complaint was a huge shock to her and there was a meeting between Ms A, Ms E and Mr F on 15 June 2007 at which Ms A and her

mother endeavoured to understand the conclusion that the employer had reached. Amongst other things, Mr F indicated the employer's desire for Ms A to return to duty again on Monday, 18 June 2007, the matter having been resolved in the eyes of the employer.

[19] Ms A, however, being so upset with the results of her complaint, tendered her resignation from 18 June 2007 and subsequently raised her personal grievance.

Issues

[20] The issues for determination are first whether B Limited conducted a proper inquiry of Ms A's allegation of sexual harassment and second whether the result of that inquiry could reasonably be expected to result in Ms A resigning her employment having been constructively dismissed.

The investigation

[21] There is unchallenged evidence that there was an inappropriate sexually loaded conversation between Ms A and Mr C on Saturday, 2 June 2007. Ms A's evidence, which is contested, is that that conversation was simply the final straw in a series of inappropriate conversations between herself and Mr C. Mr C denies the earlier conversations but admits to the conversation on 2 June 2007.

[22] Being unable to remove the conversation from her head, Ms A lodged her complaint the following Wednesday, 6 June 2007. She spoke initially to other staff members but was speedily referred to Mr D, the managing director. Mr D describes Ms A as being tearful and unable to communicate with him adequately. However, he obtained from Ms A sufficient intelligence to identify the nature of the issue that she wished to raise and he then proceeded to confront Mr C who acknowledged the 2 June 2007 conversation and accepted it was inappropriate but denied any earlier conversations.

[23] Mr D then rang Mr F, the production manager, who was then on annual leave, told him about the issue and indicated to Mr F that there appeared to be a matter that required investigation and that he (Mr F) would be doing it on his return from leave.

[24] At this point, there had been the briefest of discussions between Mr D and Ms A on the one hand to receive the *bare bones* of the complaint, and then

subsequently between Mr D and Mr C at which the latter accepted the inappropriate conversation on 2 June 2007.

[25] The next step was a more formal discussion between B Limited and Ms A and this took place on Monday, 11 June 2007. Ms A describes this interview in detail in her evidence and I am satisfied that, given her age and the nature of the matters complained of, B Limited ought not to have agreed to proceed with the interview without Ms A having appropriate support. When this process commenced, Ms A was disclosing that she was the victim of sexual harassment; by the time the process concluded, Ms A was the subject of a disciplinary warning and yet at no stage during the investigation process did B Limited ensure that Ms A had a support person or family member with her to assist in what must have been a very stressful experience for her.

[26] This is all the more apparent when it is remembered that Ms A was at the time these events happened just 14 years old. Plainly, as a matter of law, she is of an age when she should be receiving the care and protection of one or both of her parents and despite her representations on the subject, in my judgement, B Limited ought not to have proceeded with the investigation meeting involving her without her having a support person (preferably her mother) present.

[27] B Limited protests that Ms A rejected the idea of having either of her parents present. It says that because Ms A referred to *sensitive matters* that needed to be discussed. Ms A denies using that phrase but does agree that she accepted that it was not necessary for one of her parents to be present but only because she thought that was what B Limited wanted and because she understood that the nature of the meeting on 11 June would be different from the way it actually panned out.

[28] Ms A thought that the meeting on 11 June would be progressed on the footing that she would write down her complaint in detail and that that would be the end of it, but of course in actual fact she was confronted by three members of the management of B Limited who, she says, proceeded to question her on the issue for two hours.

[29] It is plain to me from Ms A's evidence that she rejected the idea of her mother being involved because of a mistaken belief about the nature of the meeting itself and because she discerned (I think correctly) that B Limited did not want either of her parents present. In my opinion, B Limited had obtained Ms A's consent to not having

a support person present by failing to make clear the nature of the process that it was proposing to use and by (no doubt inadvertently) allowing it to become evident that it preferred to conduct its inquiry without Ms A having her parents present.

[30] Even if Ms A had vehemently opposed the presence of one or other of her parents (and on the evidence I heard that is clearly not the position here), but even if that were the position, in my judgement B Limited is still absolutely obligated to ensure that a 14 year old young person is properly protected in going through this sort of process and by its failure to ensure that Ms A had support during the initial part of the process, which of course was of a fact-finding nature, it effectively invalidated the fairness of its proceeding. Worse than that, when at the end of the process it determined that Ms A needed to be disciplined as a consequence of what it found she had done to contribute to the allegation of sexual harassment, it then issued a 14 year old young person with a warning, again without giving her any opportunity to have a support person present or even to make submissions or comments about the step that it was proposing to take. On this ground alone, I am satisfied that the process used by B Limited was unfair and therefore must be set aside.

[31] Furthermore, the conclusion reached that Ms A initiated the subject of conversation and therefore it cannot be considered that that conversation constituted sexual harassment is not, in my opinion, a conclusion which is soundly based. I accept B Limited's evidence that it understood Ms A to confirm to it during the course of its investigation that she had initiated the subject of conversation. It seems to me unlikely that Ms A would have made that statement because it is not congruent with the fact of her complaint. There is no question that she complained nor that she was distressed when she complained. I think it likely that she started the conversation but not the inappropriate part of it and the evidence supports that conclusion.

[32] What is more, I do not think that B Limited took sufficient account of the various other conversations which Ms A alleges took place but which Mr C denies. Further, there are other factors which seem to me to mitigate against the conclusion which B Limited reached. For instance, there was evidence given before the Authority that Ms A was subjected to offers to give her rides home from Mr C and that on one occasion she actually got into Mr C's car but was only with him for a short distance before she saw her mother's car and asked Mr C to let her out. There was no particular secret about this aspect, though I accept B Limited's evidence that it

did not know about this aspect at the time. That suggests to me that the investigation was not as thorough as it might have been. If the company had had more experience at dealing with a sensitive matter of this kind, it might well have conducted further and better inquiries which would have revealed this information. Mr F, the investigator, quite properly conceded at the investigation meeting that he would have been much more concerned about the sexual harassment allegation had he known about Mr C intending to get Ms A to ride home with him.

[33] Again, there is disputed evidence about whether B Limited knew that Ms A was the victim of familial sexual abuse. Mr F said unequivocally in his evidence that he did not know that and Mr D confirmed that while he knew there had been a family difficulty, he was not aware that Ms A was herself a victim. This is contradicted by evidence from Ms A's father who gave evidence that he had told Mr D anyway about Ms A's previous experience as a victim of sexual abuse.

[34] Because it is not clear whether the employer parties knew about Ms A's unfortunate family history, it is impossible to expect it to take that history into account in its interactions with Ms A.

[35] However, one matter which clearly B Limited was able to take into account was its obligation to both of its employees. Ms A formed the view and gave evidence of this view that B Limited had a longer relationship with Mr C and that he was a more valued employee and therefore it would prefer his view of matters to hers. Whether that is true or not, it is certainly true that Mr D confirmed in his oral evidence that the consequence for Mr C would be *very grave indeed* if he was *found guilty*. Given that Mr D acknowledges that those remarks were made by him in the presence of the 14 year old victim, it is difficult not to conclude that there was an enthusiasm from B Limited for a result on the sexual harassment complaint which fell short of the termination of Mr C's employment.

[36] In the end, I reach the conclusion on the balance of probabilities that the employer's decision to prefer the evidence of Mr C over the evidence of the complainant, given the deficits in the investigation process I have already referred to, was not the action of a fair and reasonable employer faced with a complaint of sexual harassment.

[37] I am reinforced in that conclusion by the relative age of the complainant and of the alleged harasser and the pretty obvious power imbalance between those two individuals as a consequence, the failure of B Limited to adequately protect Ms A in the investigation process, the doubts I have expressed about the fairness and balance of the investigation, particularly around the apparent importance of Mr C to the business and the relative unimportance of Ms A, and the ultimate decision to punish her without taking any proper steps to warn her of the possible disciplinary outcomes for her of the investigation into her complaint.

Constructive dismissal?

[38] I am satisfied on the balance of probabilities that Ms A has made out her claim for an unjustified constructive dismissal by B Limited. In all the circumstances, I consider that the decision made by B Limited had the inevitable consequence of attracting Ms A's resignation. Having raised the complaint of sexual harassment against a co-worker three times her age, Ms A is confronted with an unsatisfactory investigation process where she is inadequately protected, she is not believed and the evidence of Mr C is preferred and in the final analysis she is subjected, without warning, to disciplinary consequences for her alleged wrongdoing and Mr C (in her eyes anyway) is exonerated but as a matter of fact remains in the workplace. In those circumstances, it is difficult to see what else Ms A could have done except resign her employment. Such resignation I find was not volunteered but was an inevitable consequence of the employer's breach of duty in failing to conduct a proper investigation of Ms A's original complaint and then failing to reach a credible outcome which she could have reasonably been expected to find acceptable.

Determination

[39] I am satisfied on the balance of probabilities that Ms A has made out her claim of a personal grievance by reason of having suffered disadvantage as a consequence of the unjustifiable actions of her employer, B Limited, in the unsatisfactory process that B Limited adopted to investigate her sexual harassment complaint. I am also satisfied that Ms A has made out her claim for a personal grievance by reason of an unjustified constructive dismissal occasioned by the disposal of her complaint by B Limited such that it was an inevitable consequence of B Limited's decision (which I hold was a breach of its duty to Ms A) that Ms A would resign her employment in order to protect herself.

[40] Ms A also claims breach of various implied and express terms of her employment agreement and breaches of good faith. I prefer to deal with the matter exclusively in terms of her personal grievance claim.

[41] I award Ms A the sum of \$12,750 as a global sum in compensation for the hurt, humiliation and injury to her feelings which she has sustained by reason of the two personal grievances I have found proved.

[42] Because Ms A was forced to resign her position she lost income. That income lost will need to be quantified. I direct that counsel for the parties are to engage with a view to identifying and quantifying that sum. Once quantified, I direct that the amount identified is to be paid by B Limited to Ms A. The calculation is to be from the date of termination to date of hearing.

[43] In terms of s.124 of the Employment Relations Act 2000, I have given earnest consideration to the question of whether the behaviour of Ms A contributed in any way to the circumstances giving rise to either of her personal grievances. It will be recalled that B Limited maintained that Ms A had initiated the 2 June conversation and that she herself had confirmed that. I do not think that, even if Ms A did say that she initiated the conversation, that that remark, of itself, can be relied upon as B Limited does, either to sheet home some liability to her or indeed to require me to find that her behaviour contributed to the personal grievances. In my opinion, the process was so completely flawed that I am uncomfortable about relying on anything that emerges from that process. As I have said before, it seems to me inconceivable that this young woman would initiate a complaint of sexual harassment in circumstances where it is said she initiated some or all of the unacceptable behaviour even although, as I have found, she may have initiated an innocent beginning of the conversation. It follows that I do not accept that Ms A has contributed in any way by her behaviour to the matters leading to her personal grievances.

[44] This is a case where it is appropriate for me to make recommendations to the employer party in respect of the steps that ought to be taken where sexual harassment is alleged. These recommendations are made pursuant to the Authority's power under s.123(1)(d)(ii).

[45] First, it is my considered view that this employer ought to have a robust sexual harassment policy and that the development of such a policy become a priority for the

employer. There are a number of resources available in the wider community to assist smaller employers to develop appropriate policies. Law firms practising in the employment jurisdiction would be able to assist, as would the local Employers' Association and of course the Human Rights Commission which produces excellent material in relation to dealing appropriately with sexual harassment.

[46] I am particularly troubled by the quality of the investigation conducted by B Limited. In saying that, I want it to be very clear that Mr F, the senior manager of B Limited who conducted the investigation, did so to the very best of his ability and that he genuinely tried to produce a proper outcome. However, it was absolutely clear from the nature of his responses to questions asked during the investigation meeting that he did not have the necessary experience or background to conduct an investigation of the sort required in this particular situation. That being the position, in my judgement, for an enterprise of this size, there may well be merit in any subsequent inquiries of this kind being conducted by an experienced independent and outside person on a fee-for-service basis. That will avoid the present predicament the employer finds itself in and remove a significant stressor from a senior manager who, in my judgement, genuinely tried to deal with the matter appropriately but simply was bereft of the necessary resources.

[47] Last, but by no means least, this employer needs to adopt a conviction that it will deal assertively with any future episodes of sexual harassment such that there is a clear signal sent that sexual harassment is not tolerable or negotiable in any way in this workplace.

[48] Sadly, it is my considered view that the effect of the decision this employer made in relation to Ms A is simply to encourage the view that sexual harassment is not going to be assertively responded to.

Costs

[49] Costs are reserved.

James Crichton
Member of the Employment Relations Authority