New Zealand Employment Relations Authority Decisions

D v E Limited (Auckland) [2013] NZERA 943; [2013] NZEAR Auckland 338 (5 August 2013)

Last Updated: 4 June 2017

Note: Orders prohibiting the publication

of certain information appear at [6] of this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2013] NZEAR Auckland 338
5385321

BETWEEN

AND

D Applicant

E LIMITED Respondent

Member of Authority: R A Monaghan

Representatives: D Erickson and J Greenleaf, counsel for applicant

G Mayes, counsel for respondent

Investigation Meeting: 18 March and 31 May 2013

Determination: 5 August 2013

DETERMINATION OF THE AUTHORITY

A. D was sexually harassed by co-workers in her employment.

B. D was not sexually harassed by her employer or a representative of her employer, so that her personal grievance on the ground of sexual harassment is not established.

C. D's resignation was not a constructive dismissal because it was not caused by a breach of duty on the part of E Limited.

Employment relationship problem

[1] E Limited (EL) operates in the hospitality and food service industries. It employed D as a sales cadet, commencing on 7 February 2012. D was appointed with a view to an appointment as sales representative once she was trained.

[2] D was still employed as a sales cadet when she resigned from her employment on 30 April 2012. Her letter of resignation cited unprofessional behaviour amounting

to sexual harassment by other employees at Auckland. The letter said the behaviour comprised comments and behaviour of a sexual nature which occurred frequently throughout her employment, and which she could tolerate no longer. This was the first time D had raised a concern about the behaviour in question, or said that it amounted to sexual harassment.

[3] Of the large number of staff employed at Auckland, four people in particular were said to have behaved in this way. Many of D's allegations concerned individual conversations or encounters with these employees, although from time to time more than

one of them was involved. The employees concerned were: a showroom employee of several years' service (the senior showroom employee); a second showroom employee; a warehouse employee; and a sales representative. These employees believed they were workplace friends of D's, and the managers who gave evidence were also under that impression. The employees considered their relationship with D involved banter which she either initiated or engaged in willingly.

[4] D has raised a personal grievance on the ground of sexual harassment (the sexual harassment grievance), and says in addition that her resignation amounted to a constructive dismissal. Accordingly she has raised a second personal grievance on the ground of unjustified dismissal (the constructive dismissal grievance).

[5] EL denies any sexual harassment occurred. It also says it could not be held responsible for such behaviour - if it occurred - because the employees concerned were co-workers of D's, and the absence of any complaint meant it had no opportunity to address the matter. For similar reasons it says it did not breach any duty to D, and her resignation did not amount to a constructive dismissal.

Orders prohibiting publication

[6] I order that the following information not be published:

(i) the applicant's name and any details which may identify her, including the

name of her partner and his former workplace;

(ii) the medical evidence produced in support of the applicant's claim; (iii) the respondent's name and any details which may identify it,

[7] These orders are made under clause 10 Schedule 2 of the Employment Relations Act 2000. The outcome of this employment relationship problem means I have amended orders made during the investigation meeting, with the above result.

A.The sexual harassment grievance

[8] The issues in respect of the sexual harassment grievance are:

(i) was D subjected to sexual harassment in her employment in that she was,

• subjected to language or physical behaviour of a sexual nature,

• which was unwelcome and offensive to her, and

- which by its nature or through repetition had a detrimental effect on her employment or job satisfaction1; and

(ii) was EL responsible for the harassment in that the harassment

carried out by D's employer or a representative of her employer.2

Was D subjected to sexual harassment in her employment

1. Language or physical behaviour of a sexual nature

[9] D is a young woman with an older partner. At the relevant time her partner was employed by a customer of EL's. Much of D's concern was with behaviour she described as mockery and attacks on her relationship with her partner, although she also said that throughout her employment she was subjected frequently to other offensive conduct. She had identified only the worst of it.

[10] The acts of harassment which D alleged were:

• comments of a sexual nature on her appearance, including,

o early in her employment, comments to customers on her sexy appearance and an invitation to customers to rank her

appearance,

1 s 108(1)(b) Employment Relations Act 2000

2 s 108(1) and s 103(2)

o suggestions that she was dressed in a sexual way, especially when she was not so dressed,

o a suggestion that she not put items in her trouser pockets as this obscured the view of her bottom, and

o a comment about her sexy appearance made when she was standing on a step ladder and felt vulnerable;

• frequent references to her relationship with her partner, including,

o mocking use of the term ‘badoosh’ and -doosh’ in reference

to her partner or the relationship,

o suggestions she was going home at lunch time to be

‘banged by badoosh’,

o questions and suggestive comments about whether she was sexually satisfied, and

o an offer to service her needs in the evening, since her partner was not likely to be home at that hour; and

• other statements and actions including,

o a suggestion by the showroom employee that she was touching herself up on an occasion when she was pinning a name badge to her chest,

o a suggestive comment by a fifth employee about D’s knowledge of ‘easy access,’ made during a site visit,

o the sales representative once gave D a slap on the bottom when she was standing on a step ladder, and

o the senior showroom employee once arranged a piece of equipment to resemble an erect penis.

[11] Except where specified in this determination, each of the employees denied the allegations. To the extent that an element of truth appeared in some allegations, the employees said variously that D had initiated relevant exchanges or that she had taken their comments out of context. D denied this.

[12] EL said further that D was sociable, confident and outgoing. Its managers said she sought the company of the employees who are the subject of her allegations, and she was often seen talking and laughing with them. The managers gave a number of examples of conduct which indicated to them that the relationships were friendly and

even playful. These included allegations, also denied, that D would hug some of the employees in a friendly way.

[13] EL accepted that two of the actions complained of occurred. They were:

• the slap on the bottom by the sales representative, for which he apologised;

and

- the senior showroom employee arranged equipment in the form of an erect penis, and was told to dismantle it as soon as it was noticed.

[14] Of the allegations concerning comments on D’s appearance all of the employees denied allegations particular to them, but said in general that D would discuss her own and others’ clothing and appearance. The warehouse employee was said to be responsible for comments about D’s bottom. He denied making the comments, except that on one occasion he commented on her attempts to push her mobile phone into the back pocket of her trousers. He suggested to her that the phone would not fit there.

[15] It was common ground that the terms ‘badoosh’ and ‘-doosh’ were used. The terms derive from the American slang ‘douche bag’, which means a fool or an idiot. They are not sexual terms, and no sexual innuendo attaches to them on their own.

[16] However D said they were used in a sexual context in that ‘badoosh’ was coined as a reference to the sound her partner would make if he was pushed into a pool from a balcony, and that ‘-doosh’ was a direct reference to her partner. She said the use of these terms by the warehouse employee in particular was intended to suggest that, if her partner was ‘out of the way’, she could turn her attentions to him.

[17] The employees denied the terms referred to D’s partner. They said ‘badoosh’

was in general use as a slang term and neither D nor her partner was the target.

‘-doosh’ referred to the employer of D’s partner, not to D’s partner himself.

[18] D said further that the terms were used in suggestions that she was going home at lunchtimes to be ‘banged by badoosh’, and other comments of a similar kind bearing on her sexual relationship with her partner. She said the term ‘-doosh’ was used in jokes about her partner’s age, and she found these offensive. The warehouse

employee and the showroom employee in particular were said to have made such comments, and both denied doing so.

[19] The allegations regarding comments about D’s sexual satisfaction, and the offer to service her needs, were made against the warehouse employee in particular. He denied engaging in such conduct, and said D would initiate conversations about her partner with him. Both he and the showroom employee said D was the one who made suggestive comments about what she was

doing at lunchtime, although the showroom employee said the 'joke' was subsequently continued.

[20] The warehouse employee accepted that on one occasion he put his arm around D and said 'are we getting to you', but said he was joking about the workplace and was not responding to any particular indication of distress from D at the treatment she was receiving. Finally, he denied ever suggesting he would visit D at her home. He said she would talk about how lonely she became when her partner worked late, and that she would issue general invitations to visit her home.

[21] Of the remaining allegations, the showroom employee denied commenting that D was touching herself up.

[22] Finally, the comment regarding 'easy access' was said to have been made by another employee, while on a site visit to a supplier of large storage and display units. EL staff and the supplier were discussing doors on the units, and the ease of access they provided to the interior. The individual said to have made the comment did not give evidence, but a second sales cadet was present at the time and gave evidence that he heard the comment. I find it likely the comment was made.

[23] No contemporaneous record was available to assist in determining whose version of the disputed allegations to accept. There were no observations from independent witnesses, other than those of the second sales cadet. As well as the

'easy access' comment, he heard the word 'badoosh' being used in the workplace. However was unable to give any further information about the conversation or context in which the word was used so that his observations were limited.

[24] I discuss in more detail later in this determination whether the alleged behaviour was or could have been observed by EL's managers.

[25] A useful summary of other factors relevant in assessing credibility was set out in a determination of the Authority in *Van As v Auckland Airport Kiwi Hotel Limited3.* The determination in turn drew from a judgment of the Employment Court in *Griffith v Sunbeam Corporation Limited.4* Factors include:

• inconsistencies and contradictions;

• prevarication;

• concessions being made where they are due, but not to the extent that

they substantially change the tenor of the witness' evidence;

• clarity and reliability of recollection;

- consistency with other evidence including contemporaneous documentary evidence; and
- degree of accord with reality or common sense.

[26] Applying these factors, I find D's account of the harassment she experienced was materially consistent, as were the employees' denials and their explanations of events as they saw them. I am unable to apply anything in the first four bullet points above to determine whose version should be preferred.

[27] I apply the last two bullet points together. For reasons I discuss later in this determination, I accept D's account of the adverse effect on her of the behaviour as she experienced it. With that evidence as a starting point, there remains a question of whether her account of the behaviour itself should be preferred.

[28] I take into account that D had what appeared to be a friendly relationship with the employees concerned, and the employees genuinely believed the relationship was friendly. The workplace itself was said to have a culture of friendliness and banter and I find it likely D participated in the banter. For their part the employees did not deny using some of the less overtly sexual language, such as the terms 'badoosh' and

'-doosh', although they denied using them in the context alleged. It was common ground that personal appearance was discussed, although not in the terms D said it was. Some unacceptable behaviour of a sexual nature at a low level was acknowledged, and I have found the comment about 'easy access' is likely to have

been made.

3 [2013] NZERA Auckland 73

4 EMC Wellington WC 13/06, 28 July 2006

[29] Against such a background I also find it likely D's relationship with her partner was discussed, and that it was the subject of jokes and teasing. I consider it unlikely that anyone offered himself to D as an alternative. I also consider it likely that comments

were made on the sexiness of D's appearance, although if the comments were meant light heartedly they were not taken that way.

[30] In conclusion, I find it unlikely that the employees concerned sought deliberately to harass or otherwise upset D. However I find it likely that their banter and joking behaviour went too far. It was sexual in nature, although at a low level when compared with the range of behaviour capable of amounting to sexual harassment.

2. Unwelcome and offensive nature of the behaviour

[31] I accept D's evidence that the behaviour as she perceived it was unwelcome and offensive to her. Although at the time she did not make this clear to the individuals concerned, she was not obliged to do so for the purposes of her grievance.5 Even if she appeared to participate willingly in the 'banter', for her the appearance was not the reality.

3. Detrimental effect of the behaviour

[32] D, her partner and the psychologist to whom her GP referred her for counselling gave evidence of the effect of the behaviour.

[33] From this evidence I accept that by its nature and its repetition the behaviour as she perceived it distressed D. I also accept it had a detrimental effect on her employment and job satisfaction.

[34] EL submitted that the real cause of any distress D suffered was her reaction to not securing appointment to the position of sales representative. Indeed it argued further that the real reason for D's resignation was her dissatisfaction with progress towards that appointment. It pointed in support to an emailed message dated 12 April

2012, in which D commented on the recruitment of a new sales representative. Her

5 s 108(1)(b)

message said she was 'gutted' about that person's appointment because she had the

same background, as well as a university degree.

[35] D acknowledged being ambitious. However there was no evidence of dissatisfaction beyond the April message, let alone dissatisfaction so strong as to cause the distress described. On balance I find it less likely that a thwarted wish for appointment to the position of sales representative caused the distress. It is more likely that D's experience of the behaviour of the other employees was the cause.

4. Conclusion

[36] For these reasons I find D was subjected to;

• language or physical behaviour of a sexual nature,

• which was unwelcome and offensive to her, and

• which by its nature of through repetition had a detrimental effect on her employment or job satisfaction.

[37] D was sexually harassed in her employment.

Was EL responsible for the harassment

[38] EL was responsible for the harassment if D was harassed by her employer or a representative of her employer. A person is a 'representative' of the employer if the person has authority over the person alleging the harassment, or is in a position of authority over other employees.6

[39] Two of the employees concerned were said to be representatives of EL for this purpose. One was the senior showroom employee and the other was the sales representative.

[40] Formal reporting lines were as follows. D reported directly to the Auckland branch manager, C, although she was based in the showroom while she remained a

6 s 103(2)

sales cadet. If she was appointed to a sales representative's position she would report

to the Auckland sales manager.

[41] The showroom manager, G, reported to C.

[42] C reported to F, the Northern regional operations manager.

1. The senior showroom employee

[43] The senior showroom employee reported to G. He was the longest-serving member of the showroom staff and was a senior

employee in that sense, while D was one of the most junior employees. However the senior showroom employee was not employed in a position of manager or supervisor. Neither D nor any other employee reported to him, whether directly or indirectly. Moreover, EL says D was 'buddied' with a female showroom employee, but chose to approach the male employees if she needed assistance.

[44] D relied on the fact that the senior showroom employee would provide advice and assistance in the workplace, and on an expectation that his advice would be followed. She said the expectation was such that the 'advice' was in reality an

'instruction', cloaking the employee with authority.

[45] In most workplaces longer-serving and more experienced employees provide advice and assistance to new and junior employees as a matter of course. They are likely to be approached informally to answer queries about day to day matters of practice and procedure in particular, or asked to provide assistance with these matters. They may on occasion take the initiative and make suggestions or explain what is required without being asked.

[46] This was the case with the senior showroom employee. If his 'advice' amounted at times to an 'instruction', this was limited to the extent that it conveyed information about workplace requirements which were generally expected to be observed. Any experienced employee could carry out a similar role when it came to imparting such information to a new and junior employee.

[47] Nothing in the senior showroom employee's role, or his performance of it, elevated it to more than one based on longevity and experience. Accumulated knowledge and connections might give him a form of power in the workplace, but not authority over D. For a role to have 'authority' for the purposes of the personal grievance procedure, it must incorporate a more formal right to issue instructions together with the ability to impose sanctions if the instructions are not obeyed.

[48] G's role included that element, but the senior showroom employee's role did not. The senior showroom employee did not have authority over D or over other employees. He was not a representative of EL for the purposes of this personal grievance.

2. The sales representative

[49] The sales representative was not employed as a manager or supervisor. He was one of more than a dozen sales representatives, all of whom reported to the sales manager.

[50] D says the sales representative was in a position of authority both over her and over other employees, in that he had power and influence over sales cadets.

[51] As far as sales cadets were concerned the sales representative's role was one of trainer rather than of supervisor. Any supervisory element was secondary to and resulted from the training role. His role was common to all sales representatives who were expected to provide such assistance to sales cadets.

[52] In support of her view, D cited an occasion on which she accompanied the sales representative on a client visit to her partner's workplace. While inevitably the sales representative oversaw her completion of sales-related activities generated by the visit, I do not accept that meant he was in a position of authority over her.

[53] As part of their training sales cadets were scheduled to 'shadow' sales representatives for training purposes, although D's employment ended before she was scheduled to shadow the sales representative in question. Overall, I do not accept the 'shadowing' procedure was any more than part of a wider training procedure. It did not place the sales representative in a position of authority over a cadet.

[54] Otherwise D's work-related contact with the sales representative amounted to exchanges from time to time about the completion and returning of particular orders. The associated requirements did not amount to more than the communication and co- operation expected of employees working on aspects of the same client transaction.

[55] It is drawing too long a bow to say to say a sales representative was in a position of authority over D or other sales cadets through activities of the kind described above. The sales representative was not a representative of EL for the purposes of this personal grievance.

Conclusion

[56] D was not sexually harassed by her employer or a representative of her employer.

[57] The harassment was carried out by co-workers. Personal grievances based on such harassment require that: a complaint be made to the employer; the employer investigate the complaint; and, if the employer finds the harassment occurred, it must take whatever steps are practicable to prevent any repetition of the harassment7. If the required preventive steps are not taken, and the harassment occurs again, the employee is deemed to have been harassed by the employer.8

[58] As D did not complain or draw her concerns to anyone's attention before she

resigned, that procedure has not been relied on.

[59] Because D was not sexually harassed by her employer or a representative of her employer, her personal grievance on the

ground of sexual harassment is not established.

B. The constructive dismissal grievance

[60] The issues in respect of the constructive dismissal grievance are: (i) did EL breach its duty to D in that it,

7 s 108(2) and s 117

8 s 118

- knew or ought to have known she was being sexually harassed during her employment and failed to prevent it, and
- failed to take all practicable steps to ensure her safety in the workplace; and

(ii) if so,

• did the breach cause D's decision to resign, and

- was it reasonably foreseeable that the breach would cause the resignation; and

(iii) if so, what remedies are available to D.

Did EL breach its duty to D

1. Did EL know or should it have known of the harassment

[61] D pointed to the sheer frequency of the behaviour in question, and said the open plan nature of the showroom area meant managers such as C in particular must have been aware of it.

[62] The managers denied being aware of the behaviour as D described it, and it was common ground that no-one reported or raised any concern about it. D said that on one occasion she commented to C that she positioned her name badge where she did because she did not want to draw attention to her breasts. It cannot be assumed that such a comment, on its own, was prompted by a concern about sexual harassment. C did not interpret it that way, and I do not accept the circumstances were such that she should have.

[63] I turn to whether EL knew or should have known of the behaviour with reference to the nature of any opportunity to hear or observe it.

[64] The premises are built in a warehouse style and have a large floor space with a very high stud. The main entrance leads into a showroom where products are displayed, with an area along a wall set aside for the desks where the sales cadets, C, G and the senior showroom employee sat. The showroom display area leads to a separate warehouse section, the entrance to which is opposite the desks and several meters away from them. The back half of the premises comprises aisles laid out supermarket-style, and where more products are stored and displayed. Sales

representatives sit in a separate room although they move through other parts of the

premises. F's office is also in a separate room.

[65] Having viewed the premises and heard from the witnesses I accept F was unaware of and could not know of the behaviour.

[66] Behaviour occurring in the showroom was in general observable by C and G, for example, if they were at their desks. From there they would not be able to observe behaviour occurring in the aisles or in the warehouse. For her part C said she spent most of her time at her desk, and said she could see and hear most conversations in the showroom. While she was aware of giggling and talking around the water cooler she was not aware of the content of the conversations. She did not notice anything inappropriate. G, too, did not notice anything inappropriate.

[67] The size and acoustics of the premises mean that in less busy periods voices engaged in ordinary conversation in the showroom could probably be overheard up to about 5 meters from the desks. Otherwise sound did not travel clearly, and in busy periods this distance would be much less. If the senior showroom employee engaged in the behaviour of concern while at his desk or in the showroom, it was capable of being observed or overheard. Except where described in this determination there was no allegation that particular behaviour of his was observed or overheard.

[68] The alleged comments about D's sexual activity at lunchtime or in the evenings were usually made as she was entering or leaving the premises. If the comments were made in the entrance then anyone else who was nearby could hear them, but it is possible they would not be heard from C or G's desks. Exchanges occurring in the warehouse could be overheard by anyone nearby, but are unlikely to be overheard from C or G's desks. Exchanges occurring around the water cooler in the showroom could be overheard by anyone sitting at the desks, and while D said some exchanges occurred near the water cooler she could not say what they were.

[69] Finally some of the alleged behaviour occurred in the aisles, where it was unlikely to be observed or overheard.

[70] Moreover some of the language, even if overheard, was not itself sexual in nature and the listener would need to be aware of the context before interpreting it that way. If the references to 'doosh' and '-doosh' were overheard, for example, such references were not on their own sexual in nature and were not in themselves capable of putting EL on notice that sexual harassment may be occurring.

[71] Finally D did not display the distress which I accept she felt, so that there was nothing in her observed reactions to alert EL to the possibility of a problem.

[72] In these circumstances it was not open to D to expect or assume that particular behaviour of concern to her had been noticed by any of EL's managers, or interpreted as harassment if it was noticed. She could not expect the behaviour to be addressed without having drawn her concerns to anyone's attention.

[73] For all of the reasons set out above, I do not accept EL knew or should have known of any sexual harassment.

2. Failure to take all practicable steps to ensure safety in the workplace

[74] The parties' employment agreement provided at cl 14:

All parties acknowledge an obligation to take all practicable steps to ensure the safety and health of all employees while in the course of their employment. ...This includes, but is not limited to, the employee complying with all health and safety rules and procedures established by the employer.

14.1 The employee shall immediately notify management of the employer:

(a) Of any occurrence of physical injury ... and

(b) Of any workplace hazards of which the employee becomes aware; and

(c) If the employee is for any reason unable to perform normal duties to a satisfactory standard.

[75] The obligations regarding safety and health extend to obligations to prevent sexual harassment9.

[76] The contractual obligations reflect the obligations in the Health and Safety in

Employment Act 1992 (HSE Act). That Act provides that the employer's obligation

9 The general rationale for this is as discussed by the Court of Appeal in *Attorney-General v Gilbert*

[2002] NZCA 55; [2002] 1 ERNZ 31 at [77]

to take all practicable steps to ensure the health and safety of employees at work extends to all steps which are reasonably practicable to take in the circumstances. These steps are required only in respect of circumstances the employer knows or ought reasonably to know about.10

[77] Court of Appeal has said:

*If the employer unreasonably fails to take all steps practicable to remove or manage the risk and it is reasonably foreseeable that any employee may suffer harm as a result, then the employer will be in breach of the term of the contract to maintain safe working conditions*11.

[78] EL took steps to remove or manage the risk of sexual harassment occurring in the workplace. It had a sexual harassment policy which read:

The very clear policy of the company is that any form of sexual harassment is totally unacceptable. You must immediately report any incident to your supervisor or any other person in charge as soon as practicable. If you feel you are being sexually harassed in any way please contact a senior member of staff who you trust.

Sexual harassment includes unwelcome physical, verbal or visual sexual advances, requests for sexual favours or physical conduct of a sexual nature, regardless of gender.

The payroll manager will co-ordinate this policy and you can email her at ...

[79] EL also had a code of conduct which identified sexual harassment as an example of serious misconduct, for which an employee could be dismissed.

[80] Both the code of conduct and the policy were included in the Employee Manual. Copies of the manual were sent to new employees together with their written employment agreements. D's employment agreement provided that she agreed to be bound by the manual, and that the manual and other material comprised the entire agreement between the parties12.

[81] There was no other material explaining what behaviour can amount to sexual harassment, no induction or other educational

process which included such

explanation, no wider promulgation of the procedure available to employees who feel

10 s 2A and s 6

11 *Gilbert* at [92]

12 In the preamble and at cl 25.

they are being harassed, and no regular or periodic reinforcement of the sexual harassment policy.

[82] Thus while EL took some steps to remove or manage the risk of sexual harassment - including the prospect of sexualised joking and banter crossing acceptable boundaries - reasonably practicable steps such as those just listed remained untaken. In other words, the steps EL took did not go far enough to meet its obligations.

[83] In that respect EL was in breach of its duty.

Did the breach cause the decision to resign

[84] Also relevant here are employees' obligations to take all practicable steps to

ensure their own safety while at work13.

[85] D received the Employee Manual, but said she was not aware at relevant times of the sexual harassment policy. She probably did not read it.

[86] With reference to the reporting provision in the policy, D said at the investigation meeting that she would not in any event trust any of the senior members of staff. In particular she would not trust C and G because they observed the harassment but did not react to it. She pointed out further that the payroll manager was not in a position to assist because she was not based in Auckland.

[87] For reasons I have discussed earlier in this determination, I find D was too dismissive of the prospect of reporting her concerns to C or G. It is unlikely that she considered doing so, but she should have. Further, she did not consider reporting the concerns to F or the payroll manager. I accept that someone in her circumstances may prefer to approach another woman, but she was at least able to approach F in a positive and assertive way on other matters relating to her employment. Secondly while an out of town point of contact may be perceived as unable to assist someone in Auckland, the contact was a woman and could be considered independent of the

workplace at Auckland. Moreover, telephone discussions are not precluded.

13 HSE Act s 19

[88] The manual also set out a procedure for the settlement of disputes and personal grievances. The procedure included a stepped process of raising matters of concern with the employee's supervisor, then pursuing the matter further and in writing if agreement is not reached. It began with an exhortation to employees:

'*that whenever there are matters which concern them, they should be raised immediately with their supervisor. Remember – problems can only be resolved when they have been brought to the Company's attention.*

[89] D is intelligent and educated. She understood the behaviour was unacceptable and amounted to sexual harassment. She did not take the steps to raise her concerns about the matter which were not only open to her, but which she was obliged to take under the terms of her employment agreement. She did not consider doing so, and I do not accept there was good reason for that. As a result I find that she did not take all practicable steps to ensure her own safety at work.

[90] Turning to whether EL's breach of duty caused D's decision to resign, another way of addressing the matter is to consider the source of the initiative for the termination of D's employment.

[91] Viewed in that light I do not believe that EL's failure, in effect, to do enough to ensure employees were aware of the boundary between acceptable banter and unacceptable sexual harassment meant it initiated the termination of D's employment. The placement of the boundary was subjective. That does not prevent a finding that sexual harassment occurred, but nor does it mean D was relieved of any requirement to meet her own obligations. Even if EL's employees had in general been made sufficiently aware there was a boundary, EL could not reasonably be expected to protect D if it did not know that for her the boundary had been crossed. In that context D's own breaches of her obligations were significant.

[92] D chose to resign, and not to raise her concerns with EL. I find that, in making that choice she was the party who initiated the termination of her employment.

[93] For that reason I find that D was not constructively dismissed.

Costs

[94] Costs are reserved.

[95] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority
