

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 95/08
5094944

BETWEEN

TONY FANTO
Applicant

AND

PACIFIC FLIGHT CATERING
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: Tony Fanto, in person
G Gorgner, advocate for Respondent

Investigation Meeting: 19 December 2007 and 7 February 2008

Determination: 17 March 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Pacific Flight Catering Limited (“PFCL”) prepares meals for airlines to serve on aircraft. It employed Tony Fanto as a chef in one of its kitchens.

[2] Mr Fanto complained to the company’s human resource manager, Gerda Gorgner, about the conduct towards him of the company’s executive chef, Zdenko Pusich. Mr Fanto was dissatisfied with the outcome of the complaint in that he believed he should have received compensation and the executive chef should have been reprimanded. He raised a personal grievance.

[3] The grievance was not identified in terms of any of the grounds set out in s 103 of the Employment Relations Act 2000. The Authority cannot provide a remedy - including compensation - unless the grievance falls within one or more of those grounds. Further, while the company had certain obligations in respect of the complaint and the circumstances it disclosed, the mere fact that Mr Fanto was not

compensated (for example) cannot give rise to a personal grievance as that matter does not in itself fall within any of the grounds identified in s 103.

[4] Accordingly this is not a simple matter of agreeing with Mr Fanto that he should have been compensated and ordering accordingly. It is necessary to identify a legal basis for the grant of such a remedy. Here the subject matter of Mr Fanto's complaints must be assessed with reference to s 103 and linked statutory provisions, as well as the law regarding the application of those provisions.

The complaint

[5] Mr Fanto approached Ms Gorgner on 17 May 2007 to say he was intimidated by the way Mr Pusich had been speaking to him. He was concerned because he had overheard Mr Pusich making negative remarks to members of the kitchen staff about his performance. He said too that Mr Pusich had been threatening him, and had used words like 'suck my cock' when he protested to Mr Pusich after overhearing the remarks.

[6] Ms Gorgner told Mr Fanto she would speak to Mr Pusich, then meet with Mr Fanto to discuss the outcome and the further steps to be taken. Ms Gorgner had at least some knowledge of the adverse comments about Mr Fanto's performance, referring to the matter in an email message to Mr Pusich dated 17 May and instructing Mr Pusich not to discuss any issues with Mr Fanto unless she was present.

[7] Ms Gorgner took a brief period of leave immediately after she received the complaint. By the time she returned Mr Fanto had become ill, and was on sick leave from 20 May - 11 June 2007. Ms Gorgner took a further period of annual leave from 11 June - 2 July 2007.

[8] However during Mr Fanto's absence Ms Gorgner had also spoken to Mr Pusich, who denied Mr Fanto's allegations. She informed Mr Pusich she would meet with both men when Mr Fanto returned from sick leave. She said in evidence that she did not expect that Mr Fanto would be absent for as long as he was. As for the effect of her own upcoming absence, Ms Gorgner ascertained that shift arrangements meant

there would be very few occasions when Messrs Pusich and Fanto would both be at work at the same time. In addition, the two men worked in separate kitchens.

[9] Ms Gorgner returned to work in early July to a complaint by Mr Pusich that Mr Fanto had been showing the kitchen staff a letter of complaint he had written about Mr Pusich and addressed to PFCL's managing director. Ms Gorgner received the letter herself in early July 2007. It did not contain any details of the allegations on which the complaint was based. Rather, the complaint was stated baldly as: indecent sexual acts to be performed; threats of violence to cause grievous bodily harm; and defamation.

[10] In a meeting on or about 9 July 2007 Ms Gorgner asked Mr Fanto to provide the necessary details in writing. She told him she would seek Mr Pusich's response, and asked Mr Fanto if he would agree to a joint meeting. He agreed.

[11] On 12 July 2007 Mr Fanto injured his back. He remained absent from work until in December 2007 his employment was pronounced at an end, for reasons unrelated to the present matter.

[12] Mr Pusich's employment ended in or about August 2007, also for reasons unrelated to the present matter.

[13] By email message dated 13 July Mr Fanto provided the details Ms Gorgner sought. They were:

- (a) on a number of occasions and in the presence of witnesses Mr Pusich had told Mr Fanto to get down on his knees and perform oral sex, while gesturing at the zip on his trousers;
- (b) on one occasion and in the presence of a witness, Mr Pusich made fun of Mr Fanto's teeth;
- (c) in May 2007 Mr Pusich called Mr Fanto to his office, informing Mr Fanto that Mr Pusich would tell him when he could go to the bathroom, and when he could take a break;

- (d) on another occasion in May 2007 Mr Pusich saw Mr Fanto in the locker room and asked why he was leaving work early. Mr Fanto said he had permission, a disagreement followed and Mr Pusich threatened Mr Fanto with assault; and
- (e) at the beginning of July 2007 Messrs Pusich and Fanto were discussing the need for Mr Fanto to assist other staff members if he was not busy, when Mr Pusich clenched his fist and made a threatening gesture.

[14] Mr Fanto included a statement that the remedy he sought was compensation, and that Mr Pusich be reprimanded.

[15] Mr Pusich responded to the allegations by email message later on 13 July. He denied the allegations relating to his use of language and his threatening behaviour, and otherwise gave his version of the incidents Mr Fanto set out. In summary:

- (a) the discussion about Mr Fanto's teeth was initiated by Mr Fanto, and Mr Pusich did no more than suggest a dental health practitioner who could assist him;
- (b) the discussion about the taking of breaks was prompted by concerns that Mr Fanto had been taking extended breaks or breaks at other than scheduled times, and according to Mr Pusich Mr Fanto responded, in effect, by refusing to accept the point Mr Pusich was trying to make;
- (c) Mr Pusich challenged Mr Fanto in a locker room about his apparent early departure and a disagreement followed, but Mr Pusich accepted in evidence that he was unaware Mr Fanto's immediate manager had authorised the departure; and
- (d) Mr Pusich spoke to Mr Fanto about assisting others when Mr Fanto was not busy because he believed Mr Fanto had not been doing so when he should have, with Mr Fanto's response being to swear at Mr Pusich and refuse to provide assistance.

[16] Mr Pusich also indicated in his response that Mr Fanto attempted to intimidate him.

[17] On 14 July Ms Gorgner met with the staff members Mr Fanto had said witnessed particular aspects of Mr Pusich's alleged behaviour. All of them denied witnessing the conduct put to them. All of them said, too, that Mr Fanto used vulgar language himself.

[18] By email message dated 16 July Ms Gorgner asked Mr Fanto to contact her to arrange a meeting to discuss progress in the investigation and how to further progress the matter. Mr Fanto responded by saying he was not feeling up to a meeting, and he would contact Ms Gorgner when he felt better.

[19] By further email message dated 19 July 2007 Ms Gorgner commented on her disappointment that the parties had been unable to meet, before moving on to raise matters associated with Mr Fanto's back injury.

[20] Mr Fanto responded in a message dated 24 July 2007, saying among other things that he, too, 'would like this matter to come to an end' and 'you can tell me everything on my email'.

[21] In a letter dated 25 July 2007 Ms Gorgner advised Mr Fanto:

"We have taken your complaint very seriously. I have spoken to all the witnesses you have mentioned in your letter, and we have sought legal advice. There is not enough to convince us that the incidents happened as you have alleged.

After due consideration we will take no further action on your complaint."

[22] Finally, I record that PFCL had a written harassment policy, which was included in a handbook provided to employees at the start of their employment. The policy covered 'sexual harassment' and 'bullying'. The subject matter of Mr Fanto's complaints fell within those headings. The policy set out a series of steps for employees to follow if they experienced any form of harassment, and included a requirement to reduce a complaint to writing. The procedure when a complaint was received included among other things the conduct of a full investigation, as well as assurances: of confidentiality; that no action would be taken without the employee's

consent; that the employee would be kept informed of progress; and that action would be taken promptly.

Determination

1. Use of language of a sexual nature

[23] There are several possible legal arguments arising out of Mr Fanto's allegations in general, but none have been raised to more than a very limited extent. This is so much so that, without losing sight of the statutory background, I move more directly to address the matter as it was put to me.

[24] In that respect there are two statutory grounds on which Mr Pusich's alleged use of language of a sexual nature could amount to a personal grievance. The first is that the behaviour was sexual harassment as defined in the Employment Relations Act, and the second is that the behaviour was part of a pattern of bullying and intimidating conduct amounting to disadvantage in employment by an unjustified action of the employer's.

[25] Regarding the first of these, I did not find persuasive Mr Pusich's denials regarding his use of language and gestures of a sexual nature. However I did not find Mr Fanto's denials that he used language that was variously offensive or sexual in nature to be persuasive either. On further discussion during the investigation meeting even those denials became denials that such language was used in front of women. Finally, although the witnesses denied the particular allegations about Mr Pusich's language and conduct, they all agreed about the kind of language used in the kitchens in general and two of them made comments to Ms Gorgner to the effect that Mr Fanto's complaint amounted to the 'pot calling the kettle black'. This was probably apt.

[26] Accordingly had the matter been raised expressly as a grievance on the ground of sexual harassment, despite its investigation PFCL could have been found directly liable for Mr Pusich's behaviour because Mr Pusich was a 'representative' of PFCL in terms of s 103(2) of the Act. However in the present circumstances I would not have found the grievance established because Mr Fanto himself was guilty of using similar

language, and I would not have accepted that he did so in order to take on a 'protective colouration'. In other words I would not have found that all of the elements necessary to establish such a grievance were present.

[27] The possibility that this aspect of Mr Pusich's behaviour was part of a pattern of intimidating conduct, and amounted to a disadvantage grievance, is incorporated in the discussion in the next section of this determination.

2. Threats of violence and other allegations

[28] It was appropriate that Ms Gorgner investigate Mr Fanto's complaint as she did. Her conclusion was that his allegations could not be substantiated, based on the denials that the identified incidents occurred both from Mr Pusich and from the people Mr Fanto had said were witnesses to those incidents.

[29] Although I do not agree with the conclusion regarding Mr Pusich's use of language and behaviour of a sexual nature, Mr Fanto's own use of such language means I would not accept he suffered any actionable disadvantage.

[30] I do agree that there was not enough evidence available to Ms Gorgner to uphold the allegations about Mr Pusich's express threats of violence. As for the remaining incidents, I am not persuaded Mr Pusich made fun of Mr Fanto's teeth, or that Mr Pusich acted inappropriately in raising the other matters he raised. Ms Gorgner heard essentially the same accounts as were given to the Authority, and was entitled to find the complaints were not substantiated.

[31] I believe Ms Gorgner was correct when she observed that the problem was one of conflict between two headstrong males. For my part I consider it likely that, when Mr Pusich raised with Mr Fanto concerns about Mr Fanto's conduct or performance, discussion deteriorated into generally aggressive behaviour on the part of both men. I have reservations about whether that wider problem was best dealt with by a finding that the particular complaints were not substantiated, but on the other hand for unrelated reasons Mr Fanto left the workplace shortly after raising the detail of his complaints and never returned. Therefore he did not suffer a disadvantage in his

employment from any failure to address the wider problem once it was brought to PFCL's attention in terms of the harassment policy.

[32] Overall I do not believe Mr Fanto has been disadvantaged in his employment by an unjustifiable act of his employer's.

3. Defamation

[33] The Employment Relations Authority has no jurisdiction in respect of defamation and cannot make any order in respect of that allegation.

[34] Having said that, Mr Fanto's complaint appeared to be based on the expressions of concern about his performance. I do not accept that anything in the evidence associated with that matter is capable of amounting to a personal grievance under s 103.

4. Conclusion

[35] For all of the above reasons I am not persuaded that Mr Fanto has a personal grievance in terms of the Employment Relations Act, or that he is entitled to compensation.

Costs

[36] Costs are reserved. Both parties may address the Authority in writing setting out their positions on costs, but they are to do so within 28 days of the date of this determination. If either party wishes to reply to the other, there shall be a further 7 days from the date of receipt of the relevant document in which to file such reply.

R A Monaghan

Member of the Employment Relations Authority