

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Lisa Grimes (Applicant)
AND T & R Distributors Limited (Respondent)
REPRESENTATIVES Peter D Lawson, Advocate for Applicant
Finn Collins, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 28 July 2005
DATE OF DETERMINATION 26 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lisa Grimes worked for T & R Distributors Limited from about February 2004 until 26 August 2004 when her employment was terminated as a result of redundancy. There are two aspects to her problem. First, Ms Grimes is critical of the manner in which the decision to make her redundant was made and implemented. To resolve that problem, I will need to assess some factual disputes as to exactly what happened on 26 August 2004. In particular there are disputes between Ms Grimes and Steve Adams, the company manager. Secondly, Ms Grimes says that she was sexually harassed by Mr Adams on 26 August 2004 and on another occasion during the employment. Again, it will be necessary to resolve the disputed accounts of Ms Grimes and Mr Adams.

[2] Despite mediation, Ms Grimes and T & R Distributors were not able to resolve this problem.

The redundancy decision

[3] Ms Grimes was employed as a Customer Services Warehouse Person at the business premises in Christchurch. The Christchurch business of Angus Ceilings Limited, a subsidiary company, is also based at the same premises which comprise an office and a warehouse. Patrick Nicholas is the manager of Angus Ceilings Limited and Ms Grimes worked under his supervision. Ms Grimes was the only T & R Distributors employee based at those premises.

[4] When Ms Grimes started work, she had to set up her office and systems as no-one had been employed in that role previously. She is critical of how well T & R Distributors supported her position because the sales representative support was based away from Christchurch. That amounts to a criticism of T & R Distributors' business judgement. Ms Grimes also believes that Mr Nicholas wanted a man employed rather than her in the position. However, it is common ground that T & R Distributors has not employed anyone else in Christchurch following the

decision to disestablish Ms Grimes's position. In those circumstances, there can be no doubt about the genuineness of the redundancy situation.

[5] The first Ms Grimes knew about any proposed redundancy was when she was phoned on 19 August 2004 by Mr Adams who asked her to stand by the fax to receive a letter from him which he then sent. The letter advised that consideration was being given to redundancy and proposed a meeting on 24 August in order to outline the rationale and discuss the possible implications for Ms Grimes. Ms Grimes was encouraged to bring a support person or representative.

[6] That meeting took place on 24 August. Ms Grimes had with her Peter Lawson and Mr Adams and Mr Nicholas represented T & R Distributors. Mr Lawson is an experienced union official. The meeting took about 30 minutes. Mr Adams outlined the company rationale and responded to questions from Mr Lawson. Arrangements were then made for a further meeting for 10.00 am on Thursday 26 August as an opportunity for Ms Grimes to present any options given the company's situation as outlined. Mr Nicholas made some notes during the meeting from which he typed up a fuller note afterwards. I accept the typed notes as an accurate summary of what happened at the meeting.

[7] Ms Grimes believes that T & R Distributors had already decided to dismiss her before this meeting. However, I accept that the meeting was a genuine attempt by T & R Distributors to consult with Ms Grimes about a proposal.

[8] Ms Grimes spent some time drafting a response after the 24 August meeting. In particular, she pointed to her good work to date, the original intention that her position was for the long term, and the difficulties with sales representative support. She queried why she had only recently been provided with a written employment agreement for signing and asked T & R Distributors to consider her proposal that her position be continued to achieve higher sales results.

Events of 26 August

[9] The meeting on Thursday 26 August involved the same participants. Mr Adams and Mr Nicholas were given a copy of Ms Grimes's written response and took an adjournment to consider it. When they returned to the meeting, Mr Adams went through and responded to the various points made by Ms Grimes. He then said that the position could no longer be sustained and spoke about it ceasing immediately. Mr Lawson and Ms Grimes then took an adjournment after which Mr Lawson spoke on his own to Mr Adams and Mr Nicholas. Mr Lawson indicated that Ms Grimes was prepared to cease work immediately with pay in lieu of notice but she wanted a reference confirming the redundancy. That was agreed and Mr Lawson then returned to where Ms Grimes was and confirmed she could finish collecting her personal possessions and leave. Mr Lawson then left the office. To this point, there are no grounds for any complaint by Ms Grimes.

[10] T & R Distributors say that, during the brief discussion between the three men, Mr Lawson was asked to remain until Ms Grimes had left. Mr Lawson did not give evidence as he represented Ms Grimes in the investigation meeting. Mr Adams said in evidence that he was present in the office as Mr Lawson left but he did not ask Mr Lawson to remain while Ms Grimes finished packing up. With hindsight, I can say that what followed probably would not have happened if Mr Lawson had remained but Mr Lawson's departure does not affect the merits of what happened shortly after he left.

[11] Once Mr Lawson had left, only Ms Grimes and Mr Adams were in the office. Mr Nicholas was still upstairs. Ms Grimes was behind her desk at her computer deleting personal emails and the

like. Mr Adams says that he asked Ms Grimes what she was doing, did not receive a response, asked her not to delete any company information, again did not get a response, then went over to the desk, and from in front of the desk put his right arm out to block the screen and told her to stop. He says that Ms Grimes leaned forward as if to stop him seeing what was on the screen at which point her upper arm came into contact with his arm. Ms Grimes then leapt up from her chair and claimed that he had sexually harassed her. Mr Adams says that he never went behind the desk.

[12] Ms Grimes says that Mr Adams came down the stairs after Mr Lawson had left, she was standing behind the desk deleting her emails, she told him she was deleting her emails, then Mr Adams threw his hands around her chest across her breasts and pulled her away from the computer. Ms Grimes accused Mr Adams of sexual harassment and told him to get away.

[13] There is also a disagreement about whether Mr Adams went upstairs to get Mr Nicholas or whether he just called upstairs. Mr Nicholas's evidence is that Mr Adams came upstairs to get him. I accept Mr Nicholas's evidence on the point. I also accept his evidence that he went straight downstairs with Mr Adams, that Ms Grimes made the allegation about sexual harassment and that he was present when Ms Grimes reached into her briefcase to get Mr Lawson's phone number. Mr Nicholas also gave evidence that Ms Grimes said that Mr Adams had sexually harassed her on previous visits to Christchurch, that Mr Nicholas had never liked her and that an Angus Ceilings employee was about to leave. I accept this evidence but I do not accept that Ms Grimes claimed to have been told by Mr Adams that she could keep the job if she kept quiet about the harassment.

[14] There is a dispute between Ms Grimes and Mr Adams about another point. Ms Grimes says that she reached for her work briefcase to get Mr Lawson's phone number and that Mr Adams pushed the briefcase away from her saying that it was company property. She then explained what she wanted from the briefcase, Mr Adams let her get it and she rang Mr Lawson who returned immediately. Mr Adams denies touching the briefcase or referring to it as company property. However, I accept the evidence of Mr Nicholas that he was present when Ms Grimes got the phone number from the briefcase and called Mr Lawson. Nothing untoward happened while Mr Nicholas was present.

[15] The call to Mr Lawson was made at 10.51 am. He had not got far in his car and returned within a few minutes. Mr Lawson returned, assisted her to gather up her possessions and they left.

[16] Ms Grimes received her final pay including pay in lieu of notice. T & R Distributors complied with the terms of the written employment agreement which says that no compensation beyond the express terms of the agreement are payable in the event of redundancy. T & R Distributors had only recently completed the exercise of drafting Ms Grimes's employment agreement for her signature. The timing is unfortunate as it created the impression that they wanted for her to agree that no redundancy compensation would be payable before raising the redundancy with her. However, there is not sufficient evidence to confirm Ms Grimes's suspicions on the point.

[17] On or about 9 September, Ms Grimes got Mr Lawson to send some papers to Mr Adams for signing to support her claim for mortgage protection insurance. Mr Lawson followed up on 20 September and Mr Adams replied on 22 September saying that he had been away on business *the past week* and the *Paperwork will be sent today*. Ms Grimes is critical of T & R Distributors for the delay. However, it was a task that Mr Adams could only attend to on his return and I am not satisfied that there is any legitimate ground for complaint.

Sexual harassment

[18] As part of her complaint that she was sexually harassed on 26 August, Ms Grimes refers to an earlier occasion when she claims that Mr Adams also sexually harassed her. Ms Grimes could not give the date of the earlier incident except to say that it happened within the first 3 months of the employment. She made no complaint at the time. On her account, while she and Mr Adams were working alongside one another going through data on the computer as they did at the end of each month, he deliberately rubbed his leg against hers. She moved her leg away but said nothing. She also says that on another occasion, she noticed Mr Adams looking at her and he said *Sometimes I forget you are my employee* in a way that made her feel very uncomfortable.

[19] Sexual harassment is defined by section 108 of the Employment Relations Act 2000. For current purposes, Ms Grimes was sexually harassed if Mr Adams by the use of language or physical behaviour of a sexual nature subjected her to unwelcome or offensive behaviour that, either by its nature or through repetition, had a detrimental effect on her employment. Whether language or physical behaviour is of a sexual nature is judged objectively: see *Lenart v Massey University* [1997] 1 ERNZ 253.

[20] I find that any contact when Mr Adams and Ms Grimes worked alongside one another at the computer in the early part of the employment was accidental. As to the comment apparently made by Mr Adams, it must be recalled that Mr Adams is based in Wellington, not Christchurch. Neither situation was of a sexual nature. Accordingly, there was no sexual harassment. I am reinforced in that view by the evidence that Ms Grimes gave Mr Adams a bottle of wine in July for his birthday. Mr Adams returned it to her and suggested she and her partner drink it as it was not company policy to buy birthday presents. However, Ms Grimes arranged for a sales representative to take the bottle to Wellington for Mr Adams. If the two incidents had been of a sexual nature and caused Ms Grimes some detriment, it is unlikely that she would have given a present to Mr Adams.

[21] What remains is the incident on 26 August. The situation suggests that it is unlikely that Mr Adams intended any behaviour of a sexual nature. Ms Grimes had just been dismissed as redundant and Mr Adams knew that she was disgruntled and upset about that. It is common ground that his physical approach to her was caused by his concern about what she was deleting from the computer. To that point, there was nothing of a sexual nature about the situation. I find that Mr Adams probably came around behind the desk to see what was happening. His evidence was that he deliberately kept the desk between them, but he had no reason to be overly cautious about his physical proximity and I prefer that aspect of Ms Grimes's account. I find that Mr Adams used his arm across Ms Grimes's chest in an effort to move her away and prevent her from continuing to delete material from the computer. In notes made by Ms Grimes and dated 1 September 2001 she wrote *He comes over to me and asks me what i am doing, and when i reply he grabs my chest (the breast part) and throws me out of the way of the computer.* In evidence, Ms Grimes described herself as having been *manhandled*. On the probabilities, Mr Adams put his arm across Ms Grimes's chest, just below her collar-bone. In the circumstances, that was not physical behaviour of a sexual nature. It follows that Ms Grimes was not sexually harassed.

Unjustified dismissal

[22] I am left with the finding that Mr Adams *manhandled* Ms Grimes out of the way when he became concerned that she might be deleting company information from the computer.

[23] In *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601 the Court of Appeal said *A just employer, subject to the mutual obligations of trust confidence and fair dealing, will implement the*

redundancy in a fair and sensitive way. The conduct of Mr Adams on 26 August is a significant blight on what was otherwise a fair and reasonable process. It gives rise to a personal grievance of unjustified dismissal.

Remedies

[24] Because it was a genuine redundancy and the grievance made no difference to the mutually agreed end date for the employment, there can be no compensation for lost remuneration. Appropriately, none was claimed.

[25] There is a difficulty assessing compensation for distress. It became apparent during the investigation meeting that issues unconnected with the employment and the grievance were causing Ms Grimes a considerable amount of distress at and after the date of the grievance. It is necessary to try and ignore any distress connected with those issues. Putting that to one side as best one can, I find that the grievance caused Ms Grimes considerable distress at the time. She remains very angry about what happened to her and her continued distress manifested itself during the investigation meeting. I assess an appropriate award of compensation as \$8,000.00.

[26] I find that Ms Grimes did not contribute to the circumstances giving rise to the grievance in any blameworthy way. Even if Ms Grimes had not responded to Mr Adams's question, he was not entitled to manhandle her out of the way. However, I prefer her evidence that she did tell him what she was doing. He simply did not accept the truth of her response.

Summary

[27] Ms Grimes was unjustifiably dismissed. The respondent is to pay Ms Grimes compensation of \$8,000.00 pursuant to section 123 (c) (i) of the Employment Relations Act 2000.

[28] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority