# Employment Court of New Zealand



## Kumar v Icehouse (NZ) Ltd AC 57/06 [2006] NZEmpC 98; [2006] ERNZ 381 (6 October 2006)

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Last Updated: 4 June 2011

**IN THE EMPLOYMENT COURT AUCKLAND**

**AC 57/06**

**ARC 39/05**

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN CHANDRA KUMAR Plaintiff

AND ICEHOUSE (NZ) LTD Defendant

Hearing: 16 and 17 February 2006 (Heard at Auckland)

Appearances: David Fleming, Counsel for Plaintiff

Barbara McCarthy, Counsel for Defendant

Judgment: 6 October 2006

**JUDGMENT OF JUDGE B S TRAVIS**

[1] The plaintiff has challenged a determination of the Employment Relations Authority. It found that the defendant company ("Icehouse") had conducted a full and fair enquiry which had disclosed information capable of being regarded as serious misconduct, namely the sexual harassment of a fellow employee and that therefore he was not unjustifiably dismissed. The plaintiff sought a complete rehearing of the matter.

**The facts**

[2] Icehouse is a manufacturing company making products out of textiles and paper. The plaintiff worked for Icehouse as a guillotine operator from 20 August 2001 until his dismissal on 10 June 2004. The terms of his employment were governed by a collective employment contract negotiated by the National Distribution Union (the

"Union"). On about 31 May 2004, one of the plaintiff's fellow workers (whom I



shall refer to as Ms X) spoke to the factory supervisor, Dawn Pinfold, who in turn approached Terry Parkinson, then the manufacturing manager. Mr Parkinson gave evidence to the Court that Dawn Pinfold had told him that Ms X had told Dawn Pinfold of her concerns about working with the plaintiff at the cutting table. As a result of their discussion Mr Parkinson and Dawn Pinfold decided that they would move the plaintiff back to the guillotine area where he had previously been working, rather than the cutting table where he would have been working most of the time with Ms X. The plaintiff was told that there would be a change in his working pattern but he was not told why. In particular he was not informed that Ms X had expressed any concerns about him.

[3] At about 10am on Friday, 4 June 2004, the assistant manager of Icehouse, Robin Warin, was in the factory talking to various members of her staff. The following is a summary of Ms Warin's evidence to the Court.

[4] Ms X looked very upset and asked to speak to Ms Warin about a problem she was having. Ms Warin took Ms X to her office where Ms X said she did not want the plaintiff helping her with the cutting that day or at any other time. Ms Warin told Ms X she needed to know the reason for such a statement and Ms X told her that she felt the plaintiff was doing his utmost to stand as close to her as possible and to push past her at any opportunity he could. Ms X told her that she had asked the plaintiff, late the previous week, to stop standing so close and brushing up against her. Ms X also told Ms Warin of the conversation she had previously had with Dawn Pinfold. This had led to Mr Parkinson's actions in moving the plaintiff. Ms Warin asked Ms X if anything in particular had happened that day to make her so upset. Ms X replied in the affirmative and said that the plaintiff had walked past and bumped into her. Ms X said it was quite forceful and not just a brush past. Ms X said that on other occasions when the plaintiff had touched or bumped into her, he had just moved off without saying anything to her, but on this occasion her reaction and her alarm made him realise he had gone too far, and he said, "*sorry touch*" and hurried off to the guillotine area. Ms X said she felt that she was being sexually harassed. Ms X said that this had been witnessed by Jenny Pinfold, the daughter of Dawn Pinfold who was standing on her other side.

[5] Ms Warin said she immediately made a note to herself of the complaint by Ms X, which reads (with the name of the complainant removed):

*[Ms X] made a complaint to me at 9.40-9.45 that Chandra had been Sexually*

*Harassing her.*

[6] Ms Warin then contacted Paul Tremewan, Icehouse's employment lawyer, for advice and also Mr Parkinson, who was away on leave. They agreed that the plaintiff would be required to attend a meeting on 8 June 2004 regarding the matter and that he was to be suspended on full pay until that time.

[7] The plaintiff was called into a meeting on 4 June by Joe Tuaru, the plaintiff's supervisor. Without consulting the plaintiff, Ms Warin had appointed Mr Tuaru as the plaintiff's witness. Also present at the meeting was Dawn Pinfold. Ms Warin gave

evidence that after talking with the plaintiff at the meeting, she told him he was suspended and explained why this action had been taken. In answer to her question as to whether he had any questions, the plaintiff said he did not, because he knew that he was innocent and would never do such a thing. He denied anything had happened that day as he had not been in that part of the factory all morning.

[8] Ms Warin's evidence was that this was untrue as she had seen the plaintiff talking to Ms X at the cutting table where she worked. The plaintiff was never told at any stage in the investigation that Ms Warin thought his explanation was untrue because of what she personally had seen.

[9] Ms Warin could not recall what she had told the plaintiff about the complaint at the 4 June meeting. However, after some prompting by the defendant's counsel at the hearing, she said she had told him that there had been a very serious complaint of sexual harassment but had declined his request to know who had laid the complaint and did not tell him what it was that he was alleged to have done. Ms Warin said that she did not consider it necessary to give any more details, as when she had asked the plaintiff, after his protestations of innocence, whether he had any further questions or required any more detail, he had declined to ask any questions but had continued his denials. She agreed, however, that the plaintiff did appear to be upset at the meeting. She confirmed that the plaintiff had said that he treated all the female staff with the utmost respect, the same as he would his own daughters and that he was a man of the Church. The plaintiff was told that he was required to leave the workplace immediately and that there would be a meeting on 8 June to which he could bring support people if he wished.

[10] Ms Warin gave evidence that as soon as the plaintiff left the workplace, three other female staff members came and knocked on her office door and told her that they had also experienced uneasy feelings when the plaintiff was around them. They said he would stand behind them so closely that when they turned around they could not avoid their bodies touching. One said that he made sexual actions with his body. Ms Warin said these staff were not interested in making formal complaints as they could not pinpoint any one day on which these incidents had happened, but they had experienced a general uneasiness with the plaintiff over a long period of time. She claimed that as this information was not formal or the subject of any complaint made against the plaintiff, it was not taken into account in the company's decision making process.

[11] Present at the meeting on 8 June were Ms Warin, Mr Parkinson and Dawn Pinfold for Icehouse, the plaintiff, Michael Coleman for the Union and a Minister from the plaintiff's Hindu Church, Sunil Sharda. Ms Warin had prepared a note for prompting purposes before the meeting which she and Mr Parkinson had agreed on after obtaining advice from Mr Tremewan, and which, I find, was intended to cover the key points they wished to raise at the meeting.

[12] It is common ground that Ms Warin started the meeting by saying that Icehouse had a zero tolerance policy about sexual harassment, which was not always about physical touching but as much about being in people's personal spaces. From the prompt sheet it appears that Ms Warin told the plaintiff that Ms X had made a formal complaint that when he had been working in her area he was making a point of physically pushing past her or standing over her while she was working, or being so close that she could not move away without touching him, and that this had happened on several occasions. Ms Warin said she told the meeting that Ms X had said the plaintiff had blocked her way and was standing over her on Friday morning,

4 June. From the prompting sheet it appears that she may have told the meeting that the plaintiff had said "*sorry touch*" only after Ms X had reacted in an alarmed manner. Ms Warin said that other employees had come forward with similar concerns but they did not wish to pursue them as formal complaints. It was of concern to the management that other employees had had similar things happen to them.

[13] In cross-examination, Ms Warin said that she had not given the plaintiff any specifics of what the three other employees had said when they came forward. Ms Warin accepted in cross-examination that the fact that others had come forward with serious similar areas of concern was a key point to bring up at the meeting, was of particular concern to her and was therefore noted on the prompting sheet. She claimed to have said at the meeting that these were not formal complaints and they would not be taken into account. She also accepted in cross-examination that she had not given the plaintiff any details of the other occasions when similar incidents had occurred involving Ms X.

[14] Mr Parkinson was responsible for the decision that was then made to dismiss the plaintiff. He gave evidence that what Ms Warin had told the Court was an accurate account and that at the meeting on 8 June the plaintiff had simply denied that

he had done anything or been in the area with Ms X. The plaintiff had said that he was a man of the Church and that some of the female staff called him “uncle”. Mr Parkinson said the main part of the plaintiff’s explanation that he had refused to accept was the plaintiff’s denial that he had been in Ms X’s area. Mr Parkinson knew this to be wrong as the plaintiff had been seen there. He decided the plaintiff’s denial had undermined his credibility. Mr Parkinson said that in the end they considered there was no justification for the plaintiff’s story, and therefore they had no option to accept the validity of Ms X’s complaint and to terminate the plaintiff’s employment. He stated in evidence:

*We considered if another sanction might be appropriate and giving a warning was not an option as we had not been convinced by Chandra that he had not done what was alleged.*

[15] Following the meeting, Mr Parkinson discussed the position with Ms Warin, and they took further legal advice. Mr Parkinson said in evidence that once they had concluded that sexual harassment had occurred the only appropriate outcome could be dismissal. Mr Parkinson also confirmed that although he had discussions with Ms Warin and Dawn Pinfold, he did not have any discussions with Jenny Pinfold, although he knew from Ms Warin that she had witnessed the incident. He also did not speak with Ms X. Mr Parkinson claimed that the plaintiff was dismissed only for the sexual harassment that he found had occurred on 4 June and not for any sexual harassment of Ms X or any other female employee that had occurred earlier.

[16] The plaintiff was advised of his dismissal on 10 June and given a letter prepared by Mr Parkinson, which concluded:

*We have accepted the formal complaint and do not accept your explanation of what took place. We believe that what took place, following a reasonable investigation and following a fair procedure, amounted to gross misconduct and as a result your employment has been terminated with one weeks pay in lieu of notice.*

[17] Mr Parkinson was cross-examined as to what had led him to conclude that the plaintiff’s behaviour was of a sexual nature. He could not explain this and said he had relied on what he had been told of Ms X obviously feeling uncomfortable and at risk. He accepted that because he understood the conduct was unwelcome to Ms X, he had concluded it was sexual in nature.

[18] In answers to questions in cross-examination as to what he had decided the plaintiff had done to Ms X, Mr Parkinson said that the specific description Ms X had given to Ms Warin was that she was bending down to get some fabric from under a table and when she stood up again she found that the plaintiff was in very close contact behind her, virtually over the top of her, so that when she stood up, she stood right back into him. He said this was obviously a continuation of previous occurrences and on this occasion it had caused her to show extreme distress which had made the plaintiff react by apologising because he knew something had happened.

[19] Mr Parkinson was asked whether he was aware that Jenny Pinfold had given a different description of what had taken place. He answered that he was aware that she was in the proximity but considered that she may not have been fully aware of what had taken place. Therefore her description might vary from what Ms X knew had happened. He accepted however that he had not felt the need to find out if anyone else had seen or heard what had taken place. He also accepted that he considered the onus was on the plaintiff to explain away what he was alleged to have done.

[20] Although much of the evidence given by Ms Warin and Mr Parkinson for the defendant was not disputed, the plaintiff in evidence denied saying at the meeting on

4 June that he had not been in a particular part of the factory that morning. It was common ground that at the 4 June meeting he was not told the name of the complainant or any details of the allegation other than it was one of sexual

harassment. In those circumstances it is difficult to see how the plaintiff could have denied being in a particular area if he had not been told who the complainant was, or any details of the allegations. It was also clear he was very upset at that meeting and it may be that there was a misunderstanding between him and Ms Warin about his denials.

[21] The plaintiff's evidence was supported by that of Mr Tuaru who confirmed the plaintiff's surprise at being accused of sexual harassment at the 4 June meeting and the lack of details that were given of the allegation. Mr Tuaru said that he did not even know who had made the allegation against the plaintiff or what the plaintiff was supposed to have done even though he was present throughout that meeting. I therefore prefer the plaintiff's evidence to that of Ms Warin as to what the plaintiff said at the 4 June meeting.

[22] As to the investigation meeting on 8 June, Mr Coleman accepted in cross- examination that the two main arguments put forward by the plaintiff were first, that he had not done it and, second that he could not have done it because he was not in Ms X's area that morning. The plaintiff's evidence to the Court was that he had gone to the area where Ms X was working in the ordinary course of his employment, at least twice, to obtain material. It is somewhat difficult to reconcile that evidence before the Court with his denial that he was in the area where Ms X worked. However, if it had been made clear to him by Ms Warin that she had seen him in that area, and that his denial was undermining his credibility, he may have been able to have responded to that direct allegation by clarifying what he meant. That is the whole point of putting allegations to employees who are the subject of disciplinary investigations. This is especially necessary when, as here, English is not the employee's mother tongue.

[23] Julie Lauder, who had worked with the plaintiff in the factory, gave evidence that she had seen nothing untoward on 4 June. The substance of her evidence was that the plaintiff had always acted properly towards the female staff, was a helpful gentleman who would always walk away from any rude discussions the female staff were having. She said she had never heard the plaintiff make any sexual suggestions. She had provided Icehouse with a letter supporting the plaintiff. A similar letter in support was signed by 11 fellow employees which stated that they

were upset to learn that the plaintiff had been charged with sexual harassment at work, because he had always been a very helpful gentleman and they had never heard or seen him do anything that would have damaged his career. Their statement also appears to affirm that the plaintiff had never been involved in any discussions of a sexual nature.

[24] Mr Sharda gave evidence he had known the plaintiff for 20 years and that the plaintiff was a respected and senior person in the Hindu society. In substance he said he had told the disciplinary meeting that the plaintiff was not the kind of person who would improperly touch a female employee and that they must have got it wrong. He also gave evidence of the effect on the plaintiff of the allegation and the dismissal.

[25] There was an issue as to whether or not the plaintiff was told that Ms X had made a complaint in writing. Both Ms Warin and Mr Parkinson denied that there was any written statement and said that they had refused the plaintiff's request for a copy of the statement because there were no written notes. It is common ground that the plaintiff was told by Ms Warin, at the 8 June meeting, that Ms X had made a "*formal*" complaint. Mr Coleman gave evidence that he had asked Ms Warin at that meeting whether any of the allegations from Ms X or the other complainants were in writing and her response was that they were stated to her verbally. Mr Coleman gave the following evidence:

*Robyn did say however that she had taken down* [Ms X]*'s allegations against Chandra, but felt it was inappropriate at this stage to show them to anyone else.*

*Chandra said he would like a copy of the written complaint and this request was supported by myself as being fundamental to the case against him.*

*Robyn responded by saying she would consider his request and will get back to him.*

[26] He was not challenged on that evidence in cross-examination. I therefore accept it and in any event I had no doubts as to Mr Coleman's credibility.

[27] It is also common ground that on 11 June the plaintiff came into Icehouse's office and asked Ms Warin and Mr Parkinson for copies of any written statements or complaints. According to the evidence of Ms Warin and Mr Parkinson the plaintiff was told that there were no written statements or complaints and they therefore had

nothing to give him. Ms Warin also claimed that the plaintiff was fully aware that there was nothing in writing and would have known this from the 4 June meeting.

[28] I have some difficulty with the denials made on behalf of the defendant. First, because nothing was said about whether the complaint was in writing at the 4

June meeting. Second, on 11 June, Ms Warin made a written note saying:

*Chandra came to ask for a copy of [Ms X]'s statement. Was told we are not in a*

*Legal Position to do so.*

*11.10-11.25.*

[29] Ms Warin was cross-examined on this note and continued to deny there was a written statement. She said she had not had a chance to speak to her legal adviser to find out whether she was legally required to get a statement and to give it to the plaintiff. I found her answers to be illogical and at odds with what she had written at the time. I am, however, satisfied that the defendant did not obtain a written statement from Ms X and the only written record obtained by Icehouse of Ms X's complaint was Ms Warin's note which I set out in paragraph [5].

[30] The plaintiff had observed Ms Warin reading from a written document at the

8 June meeting. This was the prompt sheet. As it purported to give some details of Ms X's complaint I can well understand why the plaintiff may have thought that this was the written statement that Ms X had given. The responses given by Ms Warin on 11 June to the further request for the statement, as evidenced by her own file note, would clearly have confirmed his understanding that Ms X had given a written statement. Further, describing the complaint as "*formal*" may well have suggested it had been reduced to writing. I therefore find that the defendant's responses, whether intentional or unintentional, had the effect of misleading the plaintiff into thinking that there was a written statement from Ms X, upon which the defendant was relying in the disciplinary investigation.

[31] A more material difficulty for the defendant arises from a diary entry made by Jenny Pinfold on 4 June. Ms Warin claimed in evidence that she had spoken to Jenny Pinfold on 4 June and had been told that she was next to Ms X who was bending down when the plaintiff came by. As Ms X stood up he was so close that she had bumped into him. Ms Warin claimed that Jenny Pinfold had appeared to have taken the incident seriously because of the plaintiff's reaction. Ms Warin

claimed not to have seen Jenny Pinfold's diary note until much later. That diary note, insofar as it is relevant, reads as follows:

*...Couldn't find the swatch needed so asked* [Ms X] *to help.* [Ms X] *was looking in the boxes trying to find the swatch when Chandra walked pass* [sic] *and bumped into her. I made a joking sarcastic comment along the lines of "Just push us out of the way" or "just walk through us". I was laughing.* [Ms X] *wasn't. Found swatch, confirmed number and returned to office.*

*There is plenty of room between tables to pass through without having to touch anybody.*

[32] The last sentence appears to be in a different handwriting.

[33] The file note indicates that Jenny Pinfold did not take the matter seriously and was laughing and making joking sarcastic comments. Her account is of the plaintiff walking past Ms X and bumping into her. This may be contrasted with Mr Parkinson's understanding of Ms X's complaint from what he was told by Ms Warin. This was that Ms X had claimed the plaintiff was in close contact behind her as she was bending over so that she stood up into him.

[34] These differences in the way Ms X's complaint was reported become material when considering whether the plaintiff's physical behaviour on 4 June 2004 was of a sexual nature. This problem could have been avoided if a written and signed statement had been obtained from Ms X. Apart from talking to Ms X and Jenny and Dawn Pinfold it does not appear that Ms Warin made any other enquiries of any of the other staff who were working in the open plan factory and who could well have witnessed any incident involving the plaintiff and Ms X. Mr Parkinson, the decision maker did not speak to Jenny Pinfold or Ms X about the 4 June incident.

[35] Mr Parkinson maintained that what had occurred on 4 June was the only ground for the dismissal. However, as Mr Parkinson himself said, he considered that this was "*the straw that broke the camel's back*". He accepted that if this had been the only incident that had happened Ms X probably would never have complained or even have thought that it amounted to sexual harassment. He considered it was against the background of the other complaints that the incident on 4 June became serious misconduct. He candidly accepted that he was influenced by the earlier complaints or actions that he knew had taken place. Otherwise the incident on 4

June of someone bending over and standing back and bumping someone else could have been regarded as entirely innocent.

[36] Mr Parkinson said that the other matter which had affected his decision was the very clear denial by the plaintiff that he had been in the area at the time. Mr Parkinson knew that was untrue because the plaintiff had been seen there by both Jenny Pinfold and Ms Warin. This is what Mr Parkinson had been told by Ms Warin. He accepted that at no time had the plaintiff been told at the 8 June meeting that they knew he was not telling the truth when he had denied being in the area.

[37] Mr Parkinson was questioned on the way he had dealt with the incidents reported on 31 May in comparison to the incident reported on 4 June. He said that he regarded Ms X's reporting of the 4 June incident as a "*formal*" complaint. Mr Parkinson said he understood that meant that the employee had approached management. Mr Parkinson accepted that in fact Ms X had been approached by Ms Warin on 4 June. He was asked to contrast that with the 31 May matter, when Ms X had approached Dawn Pinfold and had allegedly said she was uncomfortable working with the plaintiff and wanted something done about it. He accepted that was as much a formal complaint as what had taken place on 4 June. When asked why he had not treated this earlier report from Ms X as a formal complaint and had failed to inform the plaintiff of her concerns, he conceded that he had not considered the situation was serious enough and, on reflection, that may have been a mistake.

**Conclusions**

***The suspension***

[38] Mr Fleming submitted that disciplinary policies contained in employment agreements must be complied with, particularly where serious allegations are made and that a significant departure from agreed procedures will render disciplinary action unjustifiable, citing *Clough v Dunedin City Council* [1992] 2 ERNZ 646. The Icehouse collective employment agreement contains such a detailed disciplinary procedure. Under the heading "***THE INVESTIGATION***", the procedure states:

*Should you break any of these rules or commit any other offence that the Company thinks is wrong, you will be:*

*(a) Told about the allegation.*

*(b) Given an opportunity to have a representative or witness present during any meeting/s.*

*(c) Be given an opportunity to comment on or explain your actions.*

*At this point the Company may decide to investigate the allegation further and if your alleged breach is sufficiently serious, you may be suspended on full pay while this investigation takes place.*

[39] I accept Mr Fleming's submissions that these procedures were not complied with. The defendant had already reached a decision to suspend the plaintiff before the 4 June meeting. He was not given the opportunity to have a representative or witness present. Mr Tuaru was called to the meeting by the defendant without any prior consultation with the plaintiff. He was then only told that there was a very serious complaint of sexual harassment against him but Ms Warin refused to disclose the name of the complainant or any other details. He was not given an opportunity to comment on any specific allegation or to explain his actions before being suspended.

[40] Ms McCarthy submitted that because there was no objection to the suspension at the time it should not be able to be raised. Further she submitted that the suspension was not a disciplinary procedure and the plaintiff was given the opportunity to collect his belongings from the workplace before leaving. She contended the suspension gave him time to seek proper representation.

[41] I reject those submissions. A suspension could well have been justified in the circumstances but only after the contractually binding procedure contained in the collective agreement was followed. It was not followed. I find that the plaintiff was unjustifiably disadvantaged by the manner in which the suspension was imposed.

***The investigation***

[42] I also accept Mr Fleming's contention that the defendant did not conduct a full and fair enquiry. The allegations allegedly made by Ms X of sexual harassment on other occasions and the matters drawn to the attention of Ms Warin by the three other female employees were never properly put to the plaintiff in a way which he could respond to them. I find Mr Parkinson did take these earlier incidents into account in reaching his decision to dismiss because he did not view the 4 June incident as having taken place in isolation. If the complaint had been limited only to the 4 June incident, he accepted that the plaintiff's contact with Ms X could well

have been accidental and it was most unlikely that she would have complained about it .

[43] Mr Parkinson was made aware that Jenny Pinfold had witnessed the incident but no statement was obtained from her. If her statement had mirrored her diary entry a different outcome may have resulted. Ms Jenny Pinfold's diary entry clearly indicated that she had not taken the incident seriously and was laughing at what had happened. No other potential witnesses were approached, notwithstanding that the incident took place in an open plan factory where a number of other employees were working. At least 11 fellow employees had supported the plaintiff's assertion of his innocence but there is no evidence that their letter in support had been taken into account.

[44] The allegations of Ms X were not recorded in writing. Mr Parkinson did not speak with Ms X and relied on a hearsay account from Ms Warin of what she was allegedly told. Ms Warin's account of what she had been told by Ms X varied at the hearing. This demonstrated the necessity to ascertain the precise nature of the allegations, especially as this was only a borderline case of sexual harassment, where there were no overt words or actions of a sexual nature.

[45] Although in *Doherty v Air New Zealand Ltd* unreported, Palmer J, 29 May

2002, CC 11/02 the Court held it was not necessary for the decision maker to meet directly with the complainant, in that case there was detailed written complaint viewable by the decision maker. Here Mr Parkinson had not heard or read the Ms X's complaint in her own words and therefore, unlike the decision maker in *Doherty*, he was not in a position to form a view on its credibility. Instead he assumed that the burden lay upon the plaintiff to disprove the allegation.

[46] Finally, it is clear that the plaintiff's denial that he was in the same area was viewed as a lie which had undermined his credibility. There was an obligation to put that allegation to him so that he could clarify precisely what he meant about not being in the same area. Effectively the plaintiff was dismissed because Mr Parkinson thought he was lying in denying that he had sexually harassed Ms X. The allegation of lying should have been put, especially where English was not the plaintiff's first language.

***Were the actions of which Ms X allegedly complained of a sexual nature?***

[47] Putting the allegations against the plaintiff at their most serious, as Mr Parkinson apparently concluded, on 4 June the plaintiff stood up close behind Ms X when she was bending over so that she would have to stand up and bring her body into contact with his. This account is at odds with that of Jenny Pinfold. Hers was the only contemporary written account. It shows the plaintiff bumping Ms X as he pushed past, which caused Jenny Pinfold to laugh. However I will use the more serious version to determine whether a fair and reasonable employer could have concluded that this amounted to sexual harassment which would justify the plaintiff's dismissal.

[48] Both counsel relied on the definition of sexual harassment in s108 of the

Employment Relations Act 2000 the relevant parts of which read:

***108 Sexual harassment***

*(1) For the purposes of sections 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—*

*...*

*(b) by-*

*...*

*(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.*

*...*

[49] This section is expressed to be for two purposes. First, for s103(1)(d), which deals with a claim by an employee who has been sexually harassed in the employee's employment and, second for s123(1)(d), which allows for recommendations to the employer as part of the remedies which may be awarded when an employee has been found to have been sexually harassed. However, both counsel accepted that the statutory definition should be taken into account in determining whether or not an employee has been guilty of sexual harassment in a way that would justify that employee's dismissal.

[50] Ms McCarthy submitted that the way Ms X had described how the plaintiff had acted, in standing over her and blocking her way so that she had to have physical contact with him, was of a sexual nature, it had occurred on at least two occasions,

Ms X had thought she had been sexually harassed and she was very upset. She submitted that it was open to the defendant to have reasonably reached the opinion that there was sexual harassment.

[51] Mr Fleming submitted that the definition in s108 has both objective and subjective elements and, in considering whether the behaviour was sexual in nature, the test was objective. He cited my judgment in *Lenart v Massey University* [1997]

1 ERNZ 253 which dealt with s29(1)(b) of the Employment Contracts Act 1991, the predecessor to s108. When it came to considering whether the behaviour had a detrimental effect on the complainant's employment that was subjective because it was based on the point of view of the complainant. He referred to *Rodger v Dr G Fogelberg, Vice Chancellor of the University of Otago* [2003] NZEmpC 69; [2003] 1 ERNZ 223 at page

232, where Chief Judge Goddard stated:

*[25] ... The employer has tied itself to sexual harassment as the ground for dismissal. The only definitions of this term, and they are similar, are in the Employment Relations Act in connection with personal grievances based on a claim that the aggrieved employee was the victim of sexual harassment and in the Human Rights Act*

*1993. Without going at this stage into the full definitions, one of the requirements is that the behaviour complained of must be of a sexual nature. ...*

*[26] It is not all such behaviour that amounts to sexual harassment. It must have a detrimental effect on the complainant's employment, job performance or job satisfaction. It may have that effect of itself, because of the nature of the behaviour, or through repetition. This means that repetition may cause detriment when an isolated behaviour, though of a sexual nature, might not. This recognises that matters of degree enter into the assessment of the conduct that the complainant finds unwelcome. Whether behaviour is naturally or inherently detrimental must be viewed against the background of circumstances that are relevant to the situation. Those that are irrelevant must be disregarded. ...*

[52] In *Rodger* the complaint was that the plaintiff had taken photographs of the complainant from a notice board, told her she was beautiful, that he had "a thing" for her and that he had taken the photos home to fantasise about them. He had admitted to the employer that he had a crush on her. The Chief Judge found that this was material from which his managers could legitimately have concluded that he had engaged in behaviour of a sexual nature.

[53] The present case is one where the alleged actions of the plaintiff on 4 June were not unequivocally sexual in nature. In such borderline cases, where the sexual nature is not immediately manifested by the manner of the physical behaviour or the nature of any accompanying words used, it may be helpful to take into account the

context of the behaviour. Here it took place in front of a witness, Jenny Pinfold, who, according to her diary entry, laughed, and apparently therefore did not take it seriously. It occurred in an open plan factory in which some 13 other employees worked. Apart from an alleged apology for the contact there were no accompanying words or gestures which would indicate that the plaintiff's physical actions were sexual in nature. Where there has been an element of repetition this can lead to a conclusion that words or acts, which individually were equivocal as to the sexuality of their nature, were indeed sexual. Where equivocal behaviour is not repeated it is not likely to be objectively viewed as sexual in nature.

[54] Mr Parkinson fairly conceded that if the plaintiff had only been facing the allegation of 4 June, at its worst it is unlikely that there would have even been a complaint, let alone a finding that what he had done was sexual in nature. The event could easily have been explained as a minor and innocent accident. However, Mr Parkinson took into account Ms X's previous complaint that this had happened

before on several occasions and saw the events of the 4th of June as being the straw

that broke the camel's back. It was apparently the repetitious effects which had led Ms X to approach Dawn Pinfold to complain about them on 31 May and to insist that the plaintiff be removed from her area of work. That was as much a formal complaint as what Ms Warin found out after she had approached Ms X on 4 June. On 31 May the plaintiff was not even told about the complaints. Had he had been so told and warned that any repetition of bodily contact with Ms X, or any invading her space in any way, could be regarded as sexual harassment, then the repetition of such actions, if found to have occurred after a fair investigation, could have led to a justifiable dismissal for sexual harassment. I use the word "*could*" as directed to

by the Court of Appeal in *W & H Newspapers v Oram* [2001] NZCA 142; [2000] 2 ERNZ 448, for the parties agreed that s103A, as inserted by the Employment Relations Amendment Act (No2) 2004, does not apply to the circumstances of this case.

[55] It was Mr Parkinson's position that the plaintiff was dismissed solely for his actions of 4 June and lying that he had not been in Ms X's area. I find that those actions, as reported by Ms Warin, were equivocal and a fair and reasonable employer could not have concluded objectively that they were sexual in nature. The allegations that similar conduct had taken place involving Ms X and three other

employees was reported to Mr Parkinson and obviously taken into account in his finding that the alleged incident on 4 June was the straw that broke the camel's back. Those allegations were never properly put to the plaintiff for his explanation. The conclusion the defendant reached that the plaintiff had lied during the course of the enquiry could not be relied on as in some way showing the sexual nature of his contact with Ms X on 4 June. It was also not put to him for his explanation.

[56] I also take into account the standard of proof that is required of an allegation of sexual harassment, either for the purposes of determining whether the dismissal of an alleged harasser was justified or in dealing with the consequences to the victim of harassment. In *Managh (t/a Managh & Associates and Café Down Under Ltd) v Wallington* [1998] NZCA 108; [1998] 2 ERNZ 337, the Court of Appeal held that the standard of proof in all cases of sexual harassment was the same – the balance of probabilities consistent with the gravity of the allegations. Mr Fleming relied on the following passage from *Managh* at p342:

*The onus is on the person making the allegation to establish the facts asserted on the balance of probabilities consistent with the gravity of the facts and the consequences of the allegation.*

[57] The plaintiff was facing a very serious allegation of sexual harassment and the evidence in support of that allegation required to be proven to a high degree of probability, appropriate to the consequences of a dismissal to an employee of the plaintiff's age and status in the community. If, as Mr Parkinson claimed, the plaintiff was dismissed only for his actions on 4 June there was insufficient compelling evidence that those actions were sexual in nature and amounted to sexual harassment.

***Summary***

[58] For all these reasons I find the defendant has failed to discharge the onus of showing that, as a result of a fairly conducted enquiry, it believed that the plaintiff was guilty of serious misconduct consisting of the sexual harassment of Ms X on

4 June 2004. The plaintiff's dismissal was therefore unjustified.

***The Authority's determination***

[59] I have reached a decision that is at odds with that reached by the Authority. In a commendably brief decision the Authority found that it was open to Icehouse to conclude that serious misconduct had occurred, based on the information received from Ms X and the plaintiff's denial and untrue statement that he had not been in that area. It went on to state "*Having concluded that the incident complained of had occurred, I am satisfied that it was open to Icehouse to regard that conduct as serious misconduct*". It also found that Icehouse had conducted a full and fair enquiry which disclosed information capable of being regarded as serious misconduct.

[60] As the Authority is not required to provide a transcript of the evidence it heard as part of its investigation, I am unable to gauge the effectiveness any evidence in chief or of any cross-examination that may have been permitted. I received a copy, by way of an exhibit, of the brief of evidence from Ms Warin before the Authority but, with that exception, I am unaware of what evidence was investigated. It may well be that a different case was presented to the Authority than before me. In any event, on the evidence before me, I have reached my own conclusions, as required to so do by the provisions of s183 of the

Act.

**Remedies**

***Compensation for injury to feelings: unjustifiable suspension***

[61] The plaintiff claims $3,000 compensation for injury to his feelings as a result of the suspension that preceded his dismissal. Mr Fleming relied on the following sentence in the plaintiff's brief of evidence: "*Being suspended for sexual harassment without being told exactly what I was supposed to have done was very stressful and confusing*".

[62] The plaintiff would have been less confused if he had been told the details of the allegations and the name of the complainant. Mr Tuaru who was present at the suspension meeting said that the plaintiff seemed surprised at the allegation and did not appear to know what he had been accused of doing.

[63] Ms McCarthy submitted that the union had not protested the suspension, the plaintiff had gone back into the workplace and collected his belongings before leaving and this was not consistent with him being humiliated by the operation of the disciplinary proceedings. She submitted that if it was found that there was a disadvantage grievance, the plaintiff had not made out any case to show that he had suffered anything as a result and there was therefore no justification for an award of compensation under s123 of the Act.

[64] There is considerable force in Ms McCarthy's submissions. Very little evidence was given as to the plaintiff's distress as a result of the suspension. On his own evidence he was sufficiently in self control to have been able to have contacted the union delegate and arranged for the union organiser to be told of his suspension. Had the defendant correctly followed the contractually binding procedure then there would have been no confusion as to the nature of the allegations. It would have been open for the defendant to have suspended the plaintiff on full pay until the investigation meeting. The procedural failings, although unfortunate, do not appear to have caused the plaintiff any additional distress to that which he would have faced in any event as the plaintiff was bound to investigate the complaint made by Ms X. For the confusion and the difficulties that would have been caused in adequately preparing for the investigation meeting in the absence of any details of the complaint I award the plaintiff the nominal compensation of $500 under this heading.

***Compensation for injury to feelings for the unjustifiable dismissal***

[65] The plaintiff claimed $15,000 as compensation for the injury to his feelings as a result of his dismissal. The plaintiff's sole evidence on this aspect was: "*Being dismissed for sexual harassment has been deeply humiliating for me, and has been very stressful*". Mr Fleming referred to the evidence of Mr Sharda as to the effects on the plaintiff. Mr Sharda said that after the allegations were made against the plaintiff he became very distressed and looked very sad as well. Being accused of this and losing his job harmed the plaintiff badly and it was sad to see what had happened to him. He used to see him every week at religious meetings but the plaintiff was ashamed and became quiet, lost a lot of weight and was affected mentally. The plaintiff was a well known person from a highly respected family and

what had happened to him was very shameful for him. Mr Sharda was not cross- examined on this evidence.

[66] Ms McCarthy submitted that the plaintiff should be awarded no more than a token sum under s123 as he had produced no compelling evidence of any real hurt and humiliation suffered as a result of the termination of his employment. She pointed to the failure to provide medical certificates or extraneous evidence of other witnesses regarding the impact of the dismissal on the plaintiff. She submitted that there was no justification for any substantial claim under this head.

[67] I accept there is no medical basis for the allegations of depression or effect on the plaintiff's health, but it is clear that the serious allegation of sexual harassment of a fellow female employee would have caused the plaintiff substantial injury to his feelings, distress and humiliation, given his age, position and his church associations. The evidence from the plaintiff himself

was, however, very minimal and I could not discern from the way he gave his evidence that the effects of the distress were still apparent. I consider an award of the more modest side of the range is appropriate and fix this at $7,000.

***Reimbursement of lost earnings***

[68] When the plaintiff worked at Icehouse he was paid $545.10 per week. After his dismissal he said he made efforts to find new employment but for a long time did not have any success. He said he did some casual work in March to June 2005 packing and doing traffic counting. He produced pay sheets which covered part of that work. He began training at a service station on 11 July 2005, and on 25 July began full time work which was continuing up until the date of hearing. No evidence was given as to the earnings at that employment.

[69] Mr Fleming submitted that, after allowing for the one weeks' pay in lieu of notice, the gross loss of earnings for 55 weeks was $29,980.50. From this he deducted the earnings received during that period which totalled $1,322 making a total of $28,658.50 before tax. He submitted that where a dismissed employer has taken reasonable steps to mitigate the loss, awards of reimbursement of lost earnings should not be arbitrarily circumscribed.

[70] Ms McCarthy observed that the plaintiff had given very little evidence on what efforts he had made to find new employment and only provided information as to the work he obtained in June 2005. In fact the evidence of other casual earnings covered the period from 20 March 2005 until 1 June 2005. She submitted that the evidence supported the inference that the plaintiff had made no substantial efforts to find a new job and had therefore failed in his obligation to mitigate his own loss. She observed that he had not provided the Court with any of the contacts, interview records or job applications he had made and therefore the plaintiff had not shown that he had genuinely sought alternative employment. She observed there was no evidence of any attempts to obtain work for most of the latter part of 2004, other than his one statement that he made efforts to find new employment but for a long time did not have any success. She submitted that he should be denied any reimbursement because of his failure to mitigate his loss. Alternatively she submitted that the Court should only grant the normal three months loss of wages and should not extend the period any longer.

[71] The evidence was not satisfactory on the steps taken by the plaintiff to mitigate his loss and I am therefore not prepared to award the full amount sought. I accept Ms McCarthy's alternative submission that three months lost remuneration should be awarded less the one week paid in lieu of notice. I therefore award him 11 weeks at the rate of $545.10 per week. That figure is $5,996.10 before tax.

***Contribution***

[72] Ms McCarthy drew my attention to s124 which reads:

***124 Remedy reduced if contributing behaviour by employee***

*Where the Authority or the Court determines that an employee has a personal*

*grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—*

*(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*

*(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[73] She submitted the plaintiff was totally responsible for his dismissal. She submitted the plaintiff had alleged that he was not in the area when the action complained of had taken place but had then admitted to the Court he was in that area. She submitted that Ms Warin had said that he had apologised for his actions and it

was these actions which had led to his dismissal and thus he was totally responsible. She submitted that the award should be reduced by 100 percent based on the causative conduct of the plaintiff.

[74] Mr Fleming's response was brief and to the point. He submitted that the Court must consider evidence of the actions of the employer at the time, and the only evidence before the Court was hearsay. In the absence of any direct evidence of wrongdoing there was no basis to find contributory conduct.

[75] I was unable to find any evidence to support Ms McCarthy's submission that Ms Warin had said that he had apologised for his actions. Indeed my reading of the evidence established that throughout the suspension and investigation meetings the plaintiff maintained his denial that he had sexually harassed any fellow employee I saw no evidence that he had apologised for his actions other than the allegation that he said "*sorry touch*" to Ms X, an allegation he also denied.

[76] I have previously observed that Ms X was not called by the defendant. Dawn and Jenny Pinfold were also not called although the latter was an eye witness to the incident. Ms McCarthy in her submissions explained the defendant did not call the complainant:

*...for the obvious reasons of difficulty in having open evidence in a sexual harassment case. The other reason was that the only evidence which in our view was relevant for the Court was what the complainant had given to the employer when the incident occurred.*

[77] That is a choice the defendant was entitled to make. Insofar as the burden is on the employer to justify the dismissal I accept that there is some force in the view that the defendant is entitled to rely on what it says it was told by the complainant. However, where as here, the defendant's account of what it was told varied materially and there was no written statement obtained from the complainant, the defendant ran the risk, which has come to fruition, of not being able to justify the dismissal.

[78] When it comes to allegations of contributory conduct, the matter is different. In considering remedies the Authority or the Court is not reviewing the actions of the employer but is determining whether the grievant's actions amounted to blameworthy contributory conduct as a result of which the remedies should be

reduced. The failure to call the complainant or any eye witness to the incident has left the Court with no compelling evidence as to precisely what the actions of the plaintiff were that the defendant now claims should result in a 100 percent reduction in the remedies to be awarded to him.

[79] I find the allegation that the plaintiff lied at the 8 June meeting, by saying he was not in the area, has not been established. This was not put to the plaintiff in cross-examination. He was asked if he had denied being in the area at the 4 June meeting, and denied that he said this. In view of the lack of detail of the allegations given to him at the meeting I have considered this was not said at the 4 June meeting. Mr Malone confirmed it was said at the 8 June meeting but the plaintiff has never been questioned on this either at the time or in the hearing before me. There was room for misunderstanding on this issue which could have been removed if the 8

June lying allegation had been clearly put to him in the course of the hearing. I find the allegation of lying unproven and therefore it cannot amount to contributory conduct.

[80] I accept Mr Fleming's submission that there is no compelling direct, non hearsay evidence, in the light of the plaintiff's continual denials, upon which a finding of blameworthy contributory conduct can be based. The awards will therefore not be modified in terms of s124 of the Act.

**Costs**

[81] Costs are reserved. Mr Fleming drew attention to the award made by the Authority, a copy of which has not been provided to the Court. If the parties cannot agree, I will determine all costs issues, including those in the Authority. If no agreement is reached, the plaintiff should file and serve a memorandum as to costs within 30 days of the date of this judgment. The defendant is to have 14 days from

service upon it of the plaintiff's memorandum to reply.

Judgment signed at 12.15pm on Friday, 6 October 2006

B S Travis
Judge

Representatives: National Distribution Union, Private Bag 92-904, Auckland

Kirkby Law, P O Box 3415, Shortland Street, Auckland

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