

Attention is drawn to the order prohibiting publication of Page 8, paragraph 32 referred to in this determination

Determination Number: AA 180/06
File Number: AEA 72/06

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ashok Kumar (Applicant)
AND McDonald's Restaurants (New Zealand) Limited (Respondent)
REPRESENTATIVES Christopher Lennon, Advocate for Applicant
Eska Hartdegen, Counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 28 and 30 March, 19 and 21 April 2006
DATE OF DETERMINATION 23 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Ashok Kumar was summarily dismissed by his employer, the respondent McDonald's Restaurants (New Zealand) Limited, on 3 October 2005. Mr Kumar had been employed as Assistant Manager at McDonald's Glen Innes restaurant.

[2] McDonalds confirmed the dismissal to Mr Kumar in a letter dated 4 October 2005, saying it had resulted from complaints of sexual harassment that had been made against Mr Kumar by two employees working under his supervision. McDonald's said in the letter that it had believed the complaints.

[3] Mr Kumar through his union Unite challenged the dismissal, maintaining that it had been unjustified. He tried to resolve his personal grievance by using mediation. When that was unsuccessful he lodged a claim in the Authority seeking reinstatement to his job, reimbursement of lost wages and compensation for hurt feelings, distress and humiliation caused to him by the dismissal. The claim for reinstatement was later withdrawn, at the end of the Authority's investigation meeting.

[4] Mr Kumar contends that he has a personal grievance because before deciding to dismiss him McDonalds;

- i. had failed to adequately investigate the complaints of sexual harassment made against him by the two employees, and
- ii had failed to obtain any evidence to substantiate the employees' allegations, and

- iii had breached principles of natural justice in the way it ran a disciplinary meeting on 30 September 2005.

Withdrawal of complaints

[5] Particulars of a fourth problem raised about the dismissal were given in the statement of problem as follows;

The written withdrawal of the allegations by the two complainants has effectively:

- (i) *destroyed any substantive case against the applicant in finding serious misconduct due to sexual harassment;*
- (ii) *damaged the credibility of the two complainants to the point where their evidence simply cannot be relied on.*

[6] This fourth problem was raised with reference to the fact that on 15 December 2005, about 10 weeks after Mr Kumar's dismissal, the two employees who had complained of being sexually harassed by him gave written statements to a Unite organiser in which they each purported to withdraw those complaints. The complainants expressed themselves as giving their statements "under no duress" and as being "not influenced in any way." The signing of both statements was formally witnessed, in one case by a Police officer and the other by a Justice of the Peace, according to stamps and marks on each document.

Mr Kumar's response to the complaints

[7] When the allegations were enquired into by McDonalds, Mr Kumar admitted only that he had made statements to the complainants about taking them out and also about dreaming of them dancing together naked. He has maintained that in the particular context in which they were made, those statements were not sexual harassment. All other allegations in relation to his words and conduct he denied. Throughout the investigation meeting he steadfastly maintained that he had not sexually harassed the complainants in any way.

Principal focus of Authority investigation

[8] Given Mr Kumar's strong and continuous protestation of innocence, it needs to be emphasised that the primary matter that has been investigated by the Authority is whether the McDonald's managers who made the decision to dismiss had reasonable grounds for believing that Mr Kumar had sexually harassed the complainants or had committed serious misconduct of that kind. The focus of the investigation has been on the employer and the way it went about enquiring into the complaints, rather than on Mr Kumar and whether he did or did not sexually harass anyone. His actions only become relevant if his dismissal is found to have been unjustifiable and the Authority must assess his entitlement to remedies. The Authority must then decide whether Mr Kumar did anything that was blameworthy, as the Employment Relations Act 2000 requires the Authority to consider reducing remedies where an employee has been found to have been at fault through any of his actions that were linked to the unjustified dismissal.

Glen Innes restaurant

[9] At material times the Glen Innes restaurant manger was Ms Nazreen Khan. She had been employed by McDonalds for nearly 20 years, although she had been the manager of that particular restaurant for only a little over two weeks. One of two assistant managers that Ms Khan had responsibility for was Mr Kumar and he in turn was directly in charge of the two complainants.

They were young women of 17 and 18 years old who were employed as crew members at the restaurant. One had worked there for a few months and the other for a much shorter time. Their allegations of sexual harassment against Mr Kumar were first made to Ms Khan. She in turn passed them on to Mr Ray Hall, a more senior McDonald's manager and supervisor.

The first complaint

[10] On 23 September 2005, I find, Mr Hall received a report from Ms Khan that one of the complainants had told her the same day that Mr Kumar had been touching her and saying bad things to her. Ms Khan reported that the complainant had told her she was not comfortable working with Mr Kumar because of his behaviour. Ms Khan also told Mr Hall that a week before, on 16 September 2005, she had seen Mr Kumar touch the complainant on the bottom and that straight afterwards she had spoken to Mr Kumar and had warned him against the behaviour she had seen.

[11] After he had heard Ms Khan's report on 23 September, Mr Hall met the first complainant. He and Ms Khan started to talk to her, before Mr Hall withdrew to save the first complainant from upset and embarrassment she began showing. A statement was then taken from the complainant by Ms Khan who wrote it down. Mr Hall then returned and with the complainant's approval went over the statement with her. Several words and some dates were added to it and then, when Mr Hall asked her to, the complainant signed the statement.

[12] The statement recorded allegations against Mr Kumar that he had;

- in the restaurant while she was working, put his hand around the complainant and said that he wanted to "take her out",
- called her into his office and told her he had dreamed of her and the second complainant "dancing naked",
- approached her while she was working and said that he wanted to "fuck you till you bleed," and
- one morning had "touched my bottom," and at other times had put his hand around her as well.

[13] A few days after the first complainant's statement had been taken Mr Hall formally notified Mr Kumar that a disciplinary meeting was to be held to enquire into allegations of misconduct. Mr Kumar was given a copy of a written notice which detailed his conduct in the way that had been alleged by the first complainant in her signed statement of 23 September. The notice also referred to conduct of Mr Kumar on 16 September that Ms Khan had said she had witnessed. It referred to Ms Khan having spoken to him about that conduct at the time she had seen it. A definition of sexual harassment was given in the notice.

[14] Mr Kumar, on 27 September, I find, in this way was given several days notice of the disciplinary meeting before it was held on 30 September. He was given full particulars of the allegations against him made by the first complainant and by Ms Khan. He was advised of his right to have a support person or representative at the meeting and he was told that the purpose of the meeting was to seek his explanation in response to the allegations. It was emphasised in the notice that dismissal was one possible consequence of McDonald's concluding that the allegations had substance.

The second complaint

[15] The second complainant was approached by Mr Hall on 26 September, a few days before he was due to meet Mr Kumar and begin enquiring into the complaints that had been made about him on 23 September. The second complainant's name had been mentioned by the first complainant as a possible victim of sexual harassment by Mr Kumar. Mr Hall asked her if there had been any offensive or unwanted behaviour by Mr Kumar towards her and she replied there had not. Three days later however she approached Ms Khan to make allegations against Mr Kumar. A statement was obtained from her in writing in the same way that the first complainant's statement was taken, with Mr Hall not being present to begin with and then talking to her to confirm the statement and ask the complainant to sign it, which she did.

[16] The statement of the second complainant recorded allegations against Mr Kumar that he had;

Once.....touched my breastand a few times also touched my bottom

[Said] *things like*

- * *You promised me that you will sleep with me.*
- * *If you want to marry me*
- * *Every day when he comes to work he tells me he had a dream about me. He has said to me that he dreamt of having sex with me - Fucking me from behind.*
- * *He once had dreamt of having sex with [first complainant and second complainant together]*

He also said to me that I was sweating a lot in his dream when he was fucking me.

[17] Before the disciplinary enquiry began on 30 September, the existence of these allegations made by the second complainant had not been notified to Mr Kumar, in the way he had been informed in advance of the first complainant's allegations. The allegations were read to him only at the start of that meeting, before Mr Hall and Mr Paul Mallard (who was assisting Mr Hall) left him for 20 minutes to think about them. As he had arrived without a representative, he was asked if he wanted to continue the meeting on his own and confirmed that he did.

[18] At the meeting on 30 September and 3 October, Mr Kumar admitted only to saying to the complainants that he would take them out for a drink and that he had dreamed of them dancing together naked. He explained to Mr Hall and Mr Mallard the context in which he had said those things. (In evidence to the Authority he conceded that the latter statement about his dream had not been the right thing to say.) Mr Kumar denied all other allegations of physical and verbal harassment as had been alleged against him. He summed up his explanation by saying to Mr Hall and Mr Mallard, "I am just innocent." To the Authority he said, "it never happened, none of it."

Particular issues

[19] I have given particular consideration to several aspects of the disciplinary enquiry conducted by McDonalds. They are as follows;

- (a) Mr Kumar admitted that he had said to the first complainant he had dreamt of her

dancing naked with the second complainant. His explanation was that this was merely a quip he had made spontaneously in response to banter of a sexual nature from the complainants on a particular occasion. Mr Hall however did not put that explanation back to the complainants to see if they confirmed taunting Mr Kumar with the highly personal remarks he claimed had provoked his response. In the circumstances I do not consider that in this regard any failure in process arose. I accept that Mr Hall was reasonably able to reject Mr Kumar's explanation for saying what he had admitted to, for the reason that a manager or supervisor should not have responded in that way to those he was in charge of, even if they had been offensive to him. The statement he admitted making was also very plainly of a sexual nature and could be viewed as adding weight to the allegations about the other statements which he denied making.

(b) As a response to the touching by Mr Kumar of the first complainant, Ms Khan who claimed to have witnessed that episode, said she had spoken to Mr Kumar and warned him about his conduct. I find that this step did not in the circumstances prevent McDonald's from later revisiting the conduct and its response to it in the course of the disciplinary enquiry. Mr Kumar denied that he had touched the first complainant or that he had been spoken to about that by Ms Khan, so it is hard to see what prejudice he could reasonably feel he was caused. In any event I find that the revisiting of the matter occurred within only a few days and, most significantly, that the occasion for that was the making of fresh and serious allegations by the alleged victim herself. No unfairness to Mr Kumar resulted, I find.

(c) The second complainant's allegations were more than corroborative of the conduct alleged against Mr Kumar by the first complainant. They were separate instances of similar misconduct which McDonalds was entitled to enquire into on that basis. However, unlike the first complainant's allegations, those made by the second complainant were not formally presented to Mr Kumar in advance of the enquiry. To find fault with this situation would be to require process to be followed merely for its own sake and not for some practical purpose. I consider that in their nature and detail the allegations were not complex matters that might have taken Mr Kumar by surprise or that caused him to confess to something he may not have done. He was capable of responding to them immediately if he wished, and he had confirmed that he wanted to proceed with the 30 September meeting. There could have been no prejudice to him in having the second complainant's allegations presented at the beginning of the meeting, as he denied outright the allegations. Had he asked for more time to consider the second complainant's allegations or to obtain representation, there is no reason to think that his request would not have been granted.

(d) Mr Kumar accused the second complainant of having been motivated by malice to make a false complaint against him. He gave details of an occasion when, he said, she had spoken threateningly to him. I am satisfied that Mr Hall fairly reacted to this by extending his enquiry to having an interview with another person who may have witnessed the threatening exchange. That was a fair procedure and I am satisfied that Mr Hall therefore made full enquiry before deciding whether to accept Mr Kumar's explanation.

(e) In a written statement of evidence prepared by him in advance of the investigation meeting, Mr Mallard candidly described some negative feelings he had gained about Mr Kumar. Mr Mallard said that about two years earlier when he had worked more closely with Mr Kumar, he had regarded him as "sleazy." When questioned by Mr Lennon and the Authority however Mr Mallard could not point to a factual basis to

explain how he had come to have that feeling. I find that Mr Mallard might have said nothing about this at all but chose to honestly articulate an intuitive feeling he had developed about another person whom he knew and had observed. Very few people if any deny themselves having thoughts and opinions, good or bad, about individuals they come into contact with. It would be going to far to say that Mr Mallard was actually prejudiced by what his senses told him, when the enquiry had left him (and Mr Hall) with a considerable amount of material evidence to make a decision from rather than relying only on intuition. I am satisfied that both Mr Mallard and Mr Hall made a decision by a process of reason and analysis and did not rely on blind instinct.

Direct evidence from the first complainant

[20] Mr Kumar summonsed the first complainant to attend the Authority's investigation meeting and give evidence. This was done because some doubt had earlier been raised as to whether, on 15 December 2005, in purporting to withdraw her complaint against Mr Kumar (after he had been dismissed) she had in effect resiled from her claims that Mr Kumar had sexually harassed her. The same doubt was raised in relation to the second complainant, although she was not summonsed to the Authority, presumably because of difficulties locating her.

[21] A retraction of a 'complaint' about misconduct, or a disavowal of the factual circumstances on which a complaint had been originally founded, on its own cannot turn back the clock and destroy any justification for a dismissal which existed at the time the dismissal occurred. In the statement of problem the applicant's advisors seemed to think this was the effect of the purported change of mind on the part of the complainants, but I find they were mistaken in that view.

[22] As I explained during the investigation, the legal test of justification requires the Authority to consider what a reasonable employer would have done in all the circumstances at the time the dismissal occurred. Those are the words used in s.103A of the Employment Relations Act 2000, which sets out the test to be applied in this case. What is relevant is what the complainants told the employer in September 2005 had happened to them, not what they might wish to tell the Authority about that after he has been dismissed. If it was reasonable for Mr Hall to believe that the truth had been told by the complainants when they made their statements in September 2005, later revelations that in fact lies were told are of no assistance to the dismissed employee.

[23] In her sworn evidence given to the Authority the first complainant, who remains an employee of McDonalds, did not confess to telling lies earlier. She did not change her account of what Mr Kumar had said and done to her, from the version recorded in the statement she had signed on 23 September 2005. Mr Hall and Mr Mallard had been faced with a strong conflict in the accounts of Mr Kumar's conduct towards them given by the two complainants, and in the account given by Mr Kumar. Mr Hall and Mr Mallard, not the Authority, had the responsibility of deciding whom to believe. Having had the opportunity myself of seeing and hearing the first complainant, I consider that it was reasonable for Mr Hall in particular to regard her as credible and to conclude that her account was truthful.

[24] Evidence was given by another witness that after Mr Kumar's dismissal Ms Khan had made a statement suggesting that the account she had given to Mr Hall of having seen Mr Kumar touching the first complainant and of having told him off, was untrue. As discussed above in relation to the first complainant, if Ms Khan had later resiled from her original account, that does not help establish that Mr Kumar was unjustifiably dismissed. The presence of justification is to be looked for at the time the decision to dismiss was made, not afterwards, and the question for McDonalds was whether at that time it could rely on Ms Khan as having told the truth. Having seen and heard Ms Khan as a witness giving sworn evidence, I find that it was reasonable for Mr Hall and Mr

Mallard to conclude that she had told the truth about observing Mr Kumar touch the first complainant.

[25] Ms Khan took no part in the disciplinary enquiry that followed in the meetings held by Mr Hall and Mr Mallard with Mr Kumar. At one stage during that enquiry she was told by Mr Hall that Mr Kumar had denied that she had seen him touching the first complainant on the bottom and had warned him about his behaviour at the same time. Ms Khan I accept responded by telling Mr Hall that her earlier account of this happening was true.

[26] Mr Hall said that the enquiry that began on 30 September and concluded on 3 October left him with the impression that Mr Kumar was not believable in his denials of the complained of harassment. Ms Khan was considered to be truthful in her account of having seen Mr Kumar touch the first complainant on the bottom on 16 September and of having told Mr Kumar off about that conduct. Mr Hall and Mr Mallard also considered the two complainants to be credible and unlikely to have maliciously fabricated their complaints, as Mr Kumar accused them of doing.

[27] I conclude that in the way they conducted the disciplinary enquiry Mr Hall and Mr Mallard, with the information they obtained and the interviews they conducted, put themselves in a good position from which they could fairly judge whether it was probable that Mr Kumar had sexually harassed the complainants as alleged. That was their decision to make on behalf of the employer and it is not for the Authority to rerun the disciplinary enquiry and see what decision it would want to make.

Determination

[28] There has been no dispute that the type of behaviour Mr Kumar was alleged to have directed towards the complainants was sexual harassment as defined. The gross nature and degree of that behaviour was such as to constitute serious misconduct for which summary dismissal was a response available to McDonalds, I find.

[29] Mr Hall and Mr Mallard decided that dismissal was the appropriate penalty for the misconduct. Given the nature of it and of McDonald's business as a major employer of young people, there was no real alternative. The concerns raised for McDonalds to address were well stated by Mr Hall to be as follows;

As a company, McDonald's has a duty to provide staff with a safe work environment. The Company cannot allow or tolerate any form of sexual harassment to occur and go undealt with at work. These were young girls who were entitled to be protected from those who would take advantage of their age and lack of maturity, especially those people who were in a position of power over them.

[30] The Authority is satisfied from its investigation that McDonalds thoroughly enquired into the allegations and did so to a depth where it was reasonably able conclude that the allegations were established and that Mr Kumar's denial of them could be rejected. Applying the test of justification under s.103A of the Employment Relations Act 2000, objectively I find that a fair and reasonable employer would have dismissed Mr Kumar in the circumstances. His claim of unjustified dismissal or any other type of personal grievance cannot therefore be sustained. As McDonalds has acted lawfully, the Authority makes no orders against the employer to resolve this employment relationship problem.

Contribution

[31] Had the Authority found that Mr Kumar's dismissal was unjustified for some reason to do

with the second complaint and the way it was investigated, or to do with the way the employer handled the touching episode of 16 September that Ms Kahn had observed, the Authority must almost inevitably have also found that Mr Kumar contributed to the situation that gave rise to his personal grievance. The first complainant and Ms Kahn gave evidence that was credible and compelling of experiencing and witnessing sexual harassment perpetrated against the former by Ms Kumar. The conduct and its strong link in the chain of causation leading to the dismissal are likely to have disentitled Mr Kumar to any remedies for his grievance.

Non-publication orders

[32] In the interests of justice, an order is made by the Authority under clause 10 of Schedule 2 of the Act, prohibiting publication of the names of both the first and second complainants and any information that might tend to identify them.

Costs

[33] The parties through their representatives are to confer with a view to resolving by agreement any question of costs arising from this investigation. If that cannot be done an application in writing may be made to the Authority, asking it to fix costs.