

**ATTENTION IS DRAWN TO THE
ORDER IN THIS DETERMINATION
PROHIBITING PUBLICATION
OF THE SECOND APPLICANT'S NAME**

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Luke Mohi (First Applicant)
AND Mr B (Second Applicant)

AND Parts and Services Limited (Respondent)

REPRESENTATIVES William Lawson, Counsel for Applicant
Glenys Steele, Counsel for Respondent

MEMBER OF AUTHORITY Dzintra King

INVESTIGATION MEETING 16 February 2005

**ADDITIONAL EVIDENCE
TAKEN** 3 March 2005

SUBMISSIONS RECEIVED 18 April 2005 from Applicant
27 April 2005 from Respondent

DATE OF DETERMINATION 11 May 2005

DETERMINATION OF THE AUTHORITY

The applicants, Mr Luke Mohi and Mr B, bring personal grievance claims. Both applicants claim that they have been unjustifiably dismissed. Mr B also claims that he was sexually harassed by Mr Grant Perry, the Operations Manager. The respondent, Parts and Services Ltd, says the dismissals were as a result of genuine redundancies and that the respondent's actions regarding the sexual harassment allegation have not disadvantaged Mr B in any way. The applicants claim that the termination was in breach of the Apprenticeship Training Agreements of the two applicants, which claim is denied.

Harassment

Mr B commenced his employment in February of 2000 and in August started an apprenticeship. When he started Mr Perry was the foreman but he was promoted at the end of 2001 to the Operations Manager's position. At first Mr B was the only apprentice. He felt Mr Perry was singling him out and putting him down. He said Mr Perry subjected him to verbal and physical sexual harassment. This consisted in questions about Mr B's sex life and comments about homosexual activities. Mr Perry touched Mr B on the backside around Christmas 2000 and on

occasion would push or jostle Mr B, making comments like “listen here pal, you have to work more overtime”. At the beginning of 2001 Mr Perry asked Mr B to do overtime. Mr B said he had to go home and Mr Perry reached down and touched Mr B’s genitalia. Mr B told him to fuck off. About a month later Mr Perry approached him and again grabbed his genitalia. Mr B told Mr Perry that he was not gay and he did not like being touched. About six months later Mr Perry again grabbed his testicles. Mr B punched him on the shoulder to make him let go. Mr Perry said he could lose his job for doing that.

Mr B said he hated what Mr Perry was doing and wanted to say something but was scared he would lose his job. He needed the income and felt Mr Perry had total control over him.

In early 2002 on two occasions Mr Perry approached Mr B from behind and started dry humping him. These incidents were witnessed by other employees. On Friday May 5 2003 Mr Perry stood behind Mr B and grabbed his testicles.

The following Monday Mr B told his supervisor, Mr Wainscott, what Mr Perry had been doing. Mr Wainscott arranged for a meeting with Mr Roy Marsden, the Managing Director. Mr Wainscott attended that meeting. Mr B said he told Mr Marsden everything that Mr Perry had done. There is a dispute about this but I accept that the touching of genitalia was referred to. Mr Wainscott was very clear about this. Mr Marsden told them it was a difficult situation and that he would seek advice and get back to them.

The following Friday, May 9, the three men met again. Mr Marsden said that because Mr Perry had not admitted the allegations he could not fire him but that he had told Mr Perry to have no contact with the staff in the engineering workshop and that any instructions were to be given through Mr Wainscott.

Mr B said he had not reported the matter to the police as he was afraid and embarrassed. However, he learned that another employee, a female, had also been harassed by Mr Perry and that she had reported the matter to the police. Mr B was dissatisfied with the way his employer had dealt with it so he also made a complaint. Mr Perry was charged with sexual assault and a bail condition was imposed to the effect that Mr Perry was not to come within 20 metres of either complainant in the workplace, other than inadvertently.

Mr B said he continued to be put into a situation where he came into contact with Mr Perry. He said he was the one who left the room to avoid contact. It was a very awkward and embarrassing situation to be in at work.

In terms of s.108 Mr Perry, a representative of the employer, directly and indirectly made a request for sexual contact that contained an implied threat of detrimental treatment; and by the use of language of a sexual nature and physical behaviour of a sexual nature directly and indirectly subjected Mr B to behaviour that was unwelcome and offensive to Mr B, and which, by its nature and through repetition, had a detrimental effect on his employment and job satisfaction.

Mr Marsden said that when he made enquiries about the allegations Mr Cairns, another employee, told him he had noticed that Mr Perry was aggressive towards Mr B. Mr Cairns also stated that he had seen Mr Perry with his arm around a female employee and that Mr Perry had touched her on her bare midriff. Mr Marsden had evidence that Mr Perry had behaved in an improper manner not just toward Mr B but also towards a female staff member. Mr Marsden did nothing about this.

When I asked Mr Marsden whether he had a sexual harassment policy he told me he did not have one. I asked him whether he thought he should have introduced one after the incidents of sexual harassment came to light. He said he did not see the need for one as he would know if something

like that was going on. Unfortunately, the evidence clearly showed he did not as at least two staff members (and probably another young woman) had been harassed by Mr Perry without Mr Marsden knowing anything about it.

Mr Marsden denied that sexual harassment had in fact taken place. He claimed there was nothing sexual in Mr Perry's touching of Mr B's genitalia and simulating sexual intercourse. Mr Marsden told me that sexual remarks and behaviour were common in engineering workshops and that apprentices used to be stripped naked and have oil poured over them. Neither did he think the actions constituted assault. He saw Mr Perry's actions as improper because he had been promoted to a managerial position. He did not see them as being serious misconduct and likely to lead to dismissal. Mr Marsden said he gave Mr Perry a warning in front of Mr Mark Davis and told him he would make notes of the discussion. The notes read:

Obviously witnesses indicate

Unhealthy sexual overtones in many contexts if in jest then very poor taste

[B] has asked you to desist & witnesses confirm pushing away on twp occasions

If you want to deny or not accept situation then formal investigation & witness statements.

Not going to name witnesses – as hopefully continuing work relationship – no indication of

You have overplayed your hand to almost bullying but the sex overtone adds a nasty image

I hope you control it

Formal warning. No contact with [B] & minimum direct with my staff

In Sloggett v Taranaki Health Care Ltd [1995] 1 ERNZ 553 the Court held that the employer breached its legal obligation to tell the complainant whether or not it was satisfied that the sexual harassment had occurred and what steps it would take to prevent repetition.

Mr Marsden did not tell Mr B whether or not he was satisfied the alleged behaviour had taken place. Mr B wanted Mr Perry dismissed. Mr Marsden told him he did not think Mr Perry's actions were serious enough for dismissal. Given the nature of the behaviour that is a surprising conclusion, especially given that Mr Perry does not appear to have denied that the behaviour took place.

The notes quoted above indicate, and Mr Marsden confirmed in his oral evidence, that Mr Perry was not told that if the behaviour continued his employment would be at risk. Mr Marsden said he could not see anything that was not correctable – but he took no steps to do anything. Mr Perry not sent on any courses and no sexual harassment policy was developed. Mr Marsden did not put in place any procedure whereby he would check with Mr B whether there were any further problems; nor was Mr B told to whom to complain should there be further incidents. No support or counselling was offered to either Mr B or to the female victim of the harassment. The steps taken to deal with the complaint were not adequate.

Mr B said he would have liked someone to ask him how it was going but the one day he saw Mr Marsden the only comment was that it was not busy. Mr B said the instruction to stay away only lasted about a week before Mr Perry started coming in and giving instructions. Mr B felt intimidated and very uncomfortable. He said he told Mr Wainscott but did not know what if anything happened from there. There had been no further physical contact. Mr Marsden said that

he saw the actions as being carried out in low jest and therefore not having sexual connotations and that the sexual side of it did not come across so he didn't know if Mr B was overreacting. Mr Marsden thought it was "more a bullying sort of thing than a homosexual sort of thing."

Mr Marsden said that when Mr B complained about Mr Perry's coming within 20 metres of him he learnt about this afterwards, did not bother to speak to Mr B and said he was left with the impression that Mr B had made a vindictive complaint that had no substance to the police. He said that when it came to his attention he did not see it as anything he had to follow up on or do anything about.

When, during the investigation, there was discussion about the female employee who had complained to the Police, Mr Marsden told me that "Young people who have bare midriffs are inviting people to put their hands on them".

Sexual harassment is not a matter of being politically correct. It is a matter of understanding and having respect for a person's integrity and right to privacy. It is also matter of having compassion for a person whose rights have been violated. Unfortunately, Mr Marsden's evidence showed that he did not understand how a person subjected to the kind of treatment meted out to Mr B might feel. Indeed, I was told that Mr B was being vindictive in bringing the claim and that it had been brought because an application for a pay increase had been declined by Mr Perry. This was despite Mr Marsden having obtained independent verification of the two humping incidents from other staff.

Redundancies

Two engineering workshop meetings were held in September 2004. The first on 16 September was attended by Mr Marsden and Mr Shane Pretorius, the General Manager, and the workshop staff, with the exception of Mr Mohi, who was absent on ACC. There was mention of the poor financial state of the company. There was reference to the possibility of redundancies. And staff were told there would be a second meeting when they would have the opportunity to present their ideas about how profitability could be improved.

On 19 September the second meeting was held. It was attended by Mr Pretorius and the staff but Messrs Mohi and Marsden were absent. There was some discussion about the way work was done and staff were told the department would not be closed down.

Mr Mohi was spoken to individually by Mr Pretorius. He was given the opportunity to make suggestions and chose not to make any. The suggestions he was invited to make were not about the potential loss of his job.

On 13 October Messrs Mohi and B were called to a meeting. The letter notifying the meeting was written on 9 October. It reads:

You are hereby notified to attend a meeting that will be held in the offices of the General Manager on Monday the 13th October to continue discussing the reorganizing of the Engineering Department.

You are advised that if you so wish, you may seek representation or assistance at this meeting.

Yours sincerely

Shane Pretorius

General Manager

At the meeting both apprentices were told that they were redundant. It was presented as a fait accompli and letters notifying the redundancies were given to the two employees.

The matter of the dismissals is easily dealt with. Neither applicant was given the opportunity to comment on the possibility of dismissal. While there had been general discussion about the financial state of the company and the possibility of redundancies neither Mr B nor Mr Mohi knew their jobs were on the line until they were told they were redundant. The letter notifying the meeting was misleading. The purpose of the meeting was not to continue discussing the reorganisation; it was to tell the two staff that a decision had been reached to make them redundant. The dismissals were unfair and therefore unjustified.

Selection Process

There are two elements to this. In the first place, both employees allege that they were selected for redundancy because Mr B had made a complaint about Mr Perry's sexually harassing him. They allege that Mr Perry was seen as a valuable employee and that they were expendable. They also allege that both were made redundant rather than just Mr B because to make just one apprentice – Mr B, the longer serving employee – redundant, would look suspicious.

While I can understand the employees' feelings I do not think that the redundancies were approached with that level of sophistication.

Secondly, the rationale for dispensing with the apprentices was that they were among the least skilled members of the staff and they needed supervision which took other staff away from their other duties. Neither employee was given the opportunity to comment on this rationale. Mr Marsden said Mr B did require supervision and had been getting bad marks in his apprenticeship. His counsel commented that if that were the case then the sexual harassment may well have played a part. That is a valid comment and it is the sort of issue that the applicants should have been given the opportunity to raise.

I was told that an advertisement had been placed on January 20 2004 for a fitter/welder tradesperson. The advertisement asks for a certified fitter/welder and neither of the applicants were qualified.

These were genuine redundancies but were effected unfairly.

Remedies

Mr Mohi was absent on ACC and was not available for work until a couple of weeks prior to the hearing. Mr B obtained a new position immediately after his termination and on a superior rate of pay. Neither applicant can, therefore, have a claim for reimbursement of lost wages.

The terminations were not in breach of the Apprenticeship Training Agreements. The applicants have also claimed reimbursement for accommodation and block course expenses associated with the apprenticeships. The respondent is not liable for these. Any fees incurred were the responsibility of the applicants and the benefits accrued from the apprenticeship are transferable to another apprenticeship.

Both applicants are entitled to an award of compensation for hurt and humiliation. Mr Mohi is to be paid \$2,500 pursuant to s.123 (c) (i). Mr B is entitled to a greater award to take account of the

failure of the employer to deal with his complaint in an adequate manner. Mr Marsden did not regard it as serious, did not ensure that Mr Perry was either counselled or, at the very least, told that his employment was at risk. Mr Marsden did not offer Mr B any support nor did he put in place any mechanism for ensuring that any breaches of the no contact instruction could be dealt with promptly. Mr B is to be paid the sum of \$6,000.00 pursuant to s.123 (c) (i).

Section 123 (d) (ii) provides that the Authority may make recommendations to the employer about any other action that it is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee. Although Mr Perry has left the respondent's employment the employer would be well advised to compile a sexual harassment policy and to ensure that all staff are aware of it. The Human Rights Commission has information for employers and trainers available in the community.

Name Suppression

I grant permanent name suppression to Mr B.

Costs

The parties should endeavour to resolve this matter. If they are unable to do so the applicants should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicants' memorandum

Dzintra King
Member of Employment Relations Authority