

knowledge of any complaints about the other employee, [name withheld because that person was not present and has not given any evidence]. Mr Gorrie accepted that Ms McKenzie was required to wear a uniform and garments for promotions. He says that Ms McKenzie did not communicate any concerns about the size of the tee shirt she was required to wear and did not complain. Mr Gorrie says if he talked loudly (rather than yelling at her) it was to overcome noise in the workplace. He denied that Ms McKenzie's reason for leaving was due to any breach serious enough and foreseeable to cause her to resign.

Issues

[3] The employment relationship problem needs me to determine what happened and who do I believe? Next, does the alleged behaviour amount to harassment and bullying? Finally are there grounds to establish a constructive dismissal when the applicant resigned?

[4] Ms McKenzie and Mr Gorrie agreed that this matter will require a determination based on their word about what happened because neither of them brought any witnesses when they had every opportunity to do so.

The facts

[5] Ms McKenzie was employed by the Grand Hotel Wanganui (2004) Limited from 4 July 2008 until 13 August 2008. She was employed in the position of waitress/barmaid. She accepts that she received an intended employment agreement but never signed it and says it was taken back without her being able to keep it. She disputes receiving any policies and procedures apparently attached to that agreement.

[6] She accepted that she read and signed a letter of offer on 9 July 2008. Also she signed off permission to access certain personal information for checking any criminal record and convictions and to meet the requirements of the Sale of Liquor Act. She also received job descriptions and human resources information.

[7] Mr Gorrie and Ms McKenzie have different recollections about what happened to the employment agreement. Ms McKenzie says she did not have a copy.

Mr Gorrie says that she never returned it. Whatever happened to the employment agreement remains uncertain and unclear. Neither Mr Gorrie nor Ms McKenzie has been able to establish what happened to the agreement; although they have tried to explain what they think happened. Also Mr Gorrie informed me that the office manager (a woman) had a role in distributing the documents, but he could not establish what she did when Ms McKenzie was employed. A generic template agreement was provided by Mr Gorrie.

[8] There is another issue about whether or not Ms McKenzie was given a copy of the house rules and policies? There is a house rules and policy document in existence that was produced, but it is not relevant, I hold. This is because Mr Gorrie primarily relied on the provisions of the employment agreement. There are no prescriptive and procedural policies in that agreement as to how an employee is to make complaints and the procedure to be followed about sexual harassment and bullying. It is not an absolute requirement for an employer to have such policies, but a prudent employer would have written policies and a procedure to be followed (especially where complaints are made about a supervisor and an owner of a business and a co-worker) and be available to all staff in the event of such complaints. This business has at least 22 employees so therefore it would be realistic to expect such a policy to be provided. Mr Gorrie says that he relied upon the employment resolution process under the employment agreement that follows the statutory regime under the Employment Relations Act. That may be so, and if Ms McKenzie knew about that she could have followed a number of options available to deal with her problems in her work.

[9] Ms McKenzie alleged that Mr Gorrie said to her that he had said to another employee that that employee “... *must put a skirt on to compete with you...*”. Mr Gorrie denied saying such a thing, but says he did recall a patron saying something like it. On its own such a comment would not have been harassment, but certainly the comment would not have been appropriate. Ms McKenzie did not complain or rebuke Mr Gorrie. However, she says that she genuinely found the comment offensive. I have come to the conclusion that it is more than likely Mr Gorrie did make a comment because while he could not recall ever making the comments:

- He changed his evidence in regard to the issues about the employment agreement and included new evidence for the first time at the Authority’s investigation meeting.

- He never disclosed until the Authority's investigation meeting that the comment related to a patron saying something like it.
- He informed me that after finding out that the other employee had been texting Ms McKenzie he gave that person a final written warning, but then retracted that evidence. I put it to him that he was making it up, and he expressed that he was sorry about saying it because he could not properly recall what he did.
- His evidence was incorrect when he said that Ms McKenzie's evidence was not correct when she says that the worksite had no clear sexual harassment prevention policies, procedures or any training. Ms McKenzie was correct that there was no sexual harassment prevention policy and no particularised complaint procedure for sexual harassment and bullying. The employment agreement only expresses principles. When I probed Mr Gorrie's evidence further he accepted that there was no training in regard to sexual harassment and bullying.
- Mr Gorrie was unclear about the tops given to employees. Ms McKenzie denied being given a top as part of her uniform. Mr Gorrie could not challenge her evidence.

[10] Ms McKenzie was adamant about what she recalled Mr Gorrie saying and she was more consistent in her evidence than he was. Also she was much clearer about what she recalled happening, despite adding new evidence for the first time at the Authority's investigation meeting. This was the only example she referred to about the alleged sexual harassment by Mr Gorrie. She provided no other details to support any repeated behaviour by Mr Gorrie. On its own it is not enough to establish sexual harassment.

[11] Ms McKenzie did say that she was required by her supervisor [name withheld because that person has not given evidence] to wear a promotional tee shirt, which she says was too small and revealing, and this caused unwelcome comments and attention from patrons. She told me that she was not consulted about wearing the tee shirt and the proper size. Mr Gorrie had no knowledge of this matter, except for what he has learnt during this process. That has not been challenged. Ms McKenzie did not raise this issue during her employment.

[12] Ms McKenzie says the other employee, referred to earlier, made comments that contained sexual innuendo. I accept Ms McKenzie's evidence because that person also sent her texts. Mr Gorrie accepted that the employee sent texts: one of which, he found out, said "*I love you*". Ms McKenzie says that she received a number of texts from that person, and she says she received them late at night or in the morning. The truth of that was accepted by Mr Gorrie. That is because he disclosed to the Authority that he had found out about the texts when the supervisor interviewed the other employee when the personal grievance allegations were made, shortly after Ms McKenzie left her employment.

[13] Also, Mr Gorrie informed me that the supervisor kept notes of that meeting. Mr Gorrie says he did read the notes. Mr Gorrie never disclosed this information voluntarily before now. It leaves an impression that he has tried to avoid being open about that matter. I find that this does not impact on Mr Gorrie's credibility because he did voluntarily disclose the information verbally during the Authority's investigation. I accept it was more than likely he had not previously referred to it because it was not identified as being relevant earlier by Ms McKenzie, it became an issue during the Authority's investigation meeting and the information became available after Ms McKenzie had resigned.

[14] Ms McKenzie had some real concerns about the other employee's behaviour and conduct. This makes it more likely that her allegation about being touched and brushed against by that person has a ring of truth too, especially considering the texts she received.

[15] Mr Gorrie tried to explain away the touching and brushing by saying that the reason why that could happen is that the bar area is a small area and touching and bumping into each other can not be avoided when it is busy. However I find that Mr Gorrie's explanation is not plausible because he says that when he disciplined the other employee he informed that employee to avoid such situations from occurring. Therefore I conclude that with some proactive input, if Mr Gorrie had been informed, unwelcome touching and brushing could have been avoided. Next, Mr Gorrie could have arranged to call evidence. I would have expected him to reasonably do so as opposed to Ms McKenzie calling the supervisor and the other employee, to support any defence in the matter and rebut any allegations.

[16] Thus, it must not have escaped Mr Gorrie that training and preventative action is a necessity now in the workplace and it is important to have proper policies and procedures in place.

[17] It is clear that Ms McKenzie's feelings about the other employee were reasonable concerns at the time because of the texts. In that context the other employee's actions were harassment, because from what Ms McKenzie says the person's actions were sustained, and I have no doubt that Ms McKenzie was concerned that they happened more than once. As such the other employee's actions represent harassment by a co-worker considering the existence of the text messages, notwithstanding that the messages were sent outside the work hours.

[18] Ms McKenzie has been critical about that employee asking her to attend after work functions and she says she found out when she was asked to go out that it involved only the person and a friend of that person's.

[19] Ms McKenzie raised this claim for the first time during the Authority's investigation meeting. Although there was no opportunity for the person to comment Mr Gorrie could have reasonably expected more allegations, such as this, given the information he had about that person texting the applicant and the nature of Ms McKenzie's claims in the statement of problem and her written statement provided in advance of the investigation meeting. Also, Mr Gorrie raised an issue about whether or not Ms McKenzie had any contact with the other employee independently out of work, of which I find there was none of any significance, and that she did not have a personal relationship in a social setting with that person. It was not challenged that the employee had her telephone number, which she says she gave to the employee for the purpose of being able to be contacted for work.

[20] I find that Ms McKenzie thought about talking to her employer to make Mr Gorrie aware of how she felt, and what had happened, but she says that she did not do so. This was because she says that she could not approach Mr Gorrie or her supervisor, because she felt uncomfortable with Mr Gorrie and that he and her supervisor had too much of an established working relationship. She certainly

acknowledged she needed to do something, and she sought advice from outside of work, and was told to take her issues to mediation. She did not follow that advice. The employer is not responsible if it does not know about any harassment involving a co-worker.

[21] Ms McKenzie has claimed that she was bullied when Mr Gorrie went “ballistic” and yelled “*Are you looking for another job*”, that he refused her a break during her shift, and yelled at her about staff discount cards and when she had the newspaper open. He denied yelling at Ms McKenzie and relied on his experience in the trade, that he would not have done that in front of customers and patrons and that if he needed to give instructions he would sometimes have to raise his voice over the noise. He did not allow employees to read the newspaper. Those are plausible explanations and I can only conclude that whether or not he yelled has to be viewed in the context of how Mr Gorrie and Ms McKenzie recall and believe what happened. Without more detail, instances and times I am not able to find for Ms McKenzie that Mr Gorrie yelled at her, despite the examples she has raised because there is such a direct conflict between them. Although I have decided against Mr Gorrie in other matters that is not enough to say he is not credible on this claim given the context in which the comments could have been made and the absence of any other witnesses. Neither Ms McKenzie nor Mr Gorrie brought any supporting witnesses. An employer is entitled to raise issues to do with work and that would include reading the newspaper during work time, requests for breaks and issues over staff discount cards. The lack of detail does not support Ms McKenzie. Thus I conclude that the instances she has relied on do not amount to bullying.

[22] Ms McKenzie says that on 13 August Mr Gorrie said to her “*I’ll let you go tonight. I don’t like the way you are presenting yourself... If you are not happy you should look for a new job... If you don’t want the job you don’t have to have it.*” It is agreed that Ms McKenzie was not happy. He says that if he said the above it was because she was visibly not happy and that is why he would have commented, which he does not deny. He was not very sensitive in the circumstances.

[23] I have reached the above conclusion because the allegations about Mr Gorrie yelling must be viewed in the context of both his and Ms McKenzie’s recollections and beliefs about what occurred given they rely on their own word about what

happened without calling any witnesses when they had the opportunity to do so. Also, the incidents that she has recalled and relied upon are matters related to the workplace and an employer has every right to raise them with an employee.

[24] Mr Gorrie's insensitive comments on 13 August on their own would not support a reason to resign and claim a constructive dismissal given that he has put forward another context in which he may have responded to her when she was visibly unhappy in her work. Also, she went on sick leave and had been given advice to use mediation and could have raised her complaints with at least the office manager.

[25] Finally, although Ms McKenzie believed that she could not approach Mr Gorrie because she had issues about his alleged behaviour and believed he yelled at her, I find, given the conflicts, beliefs and context in which Ms McKenzie and Mr Gorrie have about this matter, the examples given by Ms McKenzie do not meet the standard required to establish any bullying.

[26] On 13 August she went to the doctor because she says she was upset about the above and she was declared unfit for work for a week. She obtained a medical certificate and Mr Gorrie accepted that Ms McKenzie's mother gave it to him. He says if she formed any adverse view about his reaction, by allegedly shrugging it off and rolling his eyes, which he denied, any reaction from her mother has to be considered with him being busy at the time. Ms McKenzie could not contradict this because she did not reasonably get her mother to give any evidence on handing in the medical certificate. She raised this for the first time during the Authority's investigation meeting. Mr Gorrie accepted that Ms McKenzie was sick. She obtained another medical certificate, which was also handed in to her employer, to have time off work, and to arrange discussions on the employment issues according to her doctor. However, by the time the doctor made that statement in the second medical certificate Ms McKenzie had decided not to return to work and raised a personal grievance.

[27] The parties attended mediation and it now falls on the Authority to make a determination.

Determination

[28] Ms McKenzie's alleged sexual harassment complaints were about three people: Mr Gorrie for making at least one comment she found offensive, the supervisor for telling her to wear a tee shirt that was too small and the co-worker who sent her texts and who allegedly touched and brushed against her and made comments including sexual innuendo.

[29] First, Mr Gorrie's inappropriate comment when she first started did not amount to sexual harassment on its own. There is no evidence of repeated behaviour of that sort involving him. Ms McKenzie had no other evidence and details of any other comments made by Mr Gorrie that included sexual innuendo on a repetitive basis. It is not safe for me to simply accept or assume because of one disputed comment that it follows that there were other comments without details.

[30] Secondly, it has not been established that Mr Gorrie had an involvement with the tee shirt and Ms McKenzie did not challenge that in reply. I accept on the basis of her evidence and in the absence of any evidence from the supervisor that she felt the situation caused unwelcome comments and attention from patrons, but she was not able to again provide sufficient details to support her allegations. Thus, she has not established that Mr Gorrie and the supervisor were sexually harassing her. If she had complained she could have reasonably expected her employer to take action on the allegations about the tee shirt to avoid any unwelcome and offensive comments from patrons and to take any action against the supervisor for any proven improper behaviour.

[31] Thirdly, Ms McKenzie was harassed by a co-worker considering that worker's behaviour as a whole; including the texts, and the other employee touching and brushing against her, despite the size of the bar area. It is more than likely that she experienced comments also of a sexual nature that she found offensive and did not have to put up with, and which did not cease because of the unwelcome texts and requests to attend after work functions with that employee and that employee's friend. She had no other personal relationship with that employee.

[32] I accept that Ms McKenzie requested the employee to cease making comments with sexual innuendo and according to Ms McKenzie the person did not cease doing so. Thus, I find that the employee's behaviour amounted to co-worker harassment that was repeated. However, because Ms McKenzie never made any complaint and Mr Gorrie did not find out until after she had resigned the employer can not be held responsible for failing to take any action. I accept that he did not find out until the personal grievance was raised, which was after she had resigned.

[33] Next is the issue of alleged bullying by Mr Gorrie. The evidence does not support Ms McKenzie's claim for the reasons given.

[34] Taken together these are not matters on their own that would be so serious to breach any duty required of the employer that would make it foreseeable an employee would resign when no complaints had been raised with the employer.

[35] Ms McKenzie's problem is that she did not make any complaint where alternatives to resigning existed such as complaining in writing, raising the matter with the office manager and taking the matter up with the Department of Labour and getting more information about what she could do given an acquaintance had told her to go to mediation. Furthermore she had time off sick and could have postponed any decision to resign until she had more information and had time to clear her mind given she was sick, and to get other people involved to help assist in the detail and arranging a process to complain and deal with her allegations.

[36] Generally any sexual harassment would make it foreseeable to an employer that an employee would resign, except that in this case Mr Gorrie did not know that Ms McKenzie had issues about him personally, and how she felt about his behaviour on at least one comment, and he did not know about the other employees' (the supervisor's and the co-worker's behaviour) at the time.

[37] I put it to Mr Gorrie that his reaction and defence might have involved him being in denial. He denied that and relied upon not knowing how Ms McKenzie felt because she never raised any complaint and if she could not raise it with him she did not raise it with anyone else or put it in writing, all things she could have done.

[38] During the investigation Ms McKenzie told me she did complain to a new kitchen manager in her last week of employment and she left it to that person to take up her concerns, but nothing was done. This was the first time she mentioned this and had never included it in any written statement and correspondence earlier. I have not given it any weight because she never raised it earlier. She could not name the person; she never followed it up at the time and made no arrangements to have that person corroborate her evidence. Ms McKenzie accepted that raising it now, when she had every opportunity to raise it earlier, may not assist her. I have given it little weight and determined that it does not impact on her credibility.

Conclusion

[39] There was sexual harassment in the work place involving a co-worker's behaviour in regard to unwelcome texts and unwelcome brushing and touching against her that was repeated. It was not foreseeable that such behaviour would cause Ms McKenzie to resign because she took no action with her employer and did not make any complaint when there were alternatives available to resigning. She would be required to raise such complaints and bring them to the attention of her employer to take action. The employer had no opportunity to do anything about that employee's behaviour until after Ms McKenzie had resigned and the details became known.

[40] The evidence does not support Ms McKenzie's other claims that Mr Gorrie sexually harassed and bullied her. Ms McKenzie made no complaints about her supervisor requiring her to wear a tee shirt that was too small and revealing to cause unwelcome comments.

[41] Ms McKenzie's personal grievance claim was based on a cause of action involving her claim of constructive dismissal. I have looked at considering this matter as a personal grievance other than the one which has been raised. I find that this employment relationship problem does not fit within that category because there was never any complaint made by Ms McKenzie for the employer to act upon in regard to her complaints about bullying and sexual harassment.

[42] I find that Ms McKenzie did not make a complaint to make it foreseeable that her claims of offensive and unwelcome attention would cause her to resign.

Furthermore she had alternatives to raise the issues instead of resigning to enable the matters to be dealt with including having time off while she was on sick leave, instead of resigning. Therefore her decision to resign was precipitous. In the circumstances I cannot find that she has a personal grievance. I cannot apply the usual range of remedies for a personal grievance.

[43] It is a fact that there were no policies and procedures relating to harassment and bullying complaints. Ms McKenzie did get advice from an acquaintance that she did not follow and use mediation. She went to the community law centre for advice. Even her doctor suggested she should have discussions on her employment issues, but by then she had resigned. There clearly were other options available, especially given that Ms McKenzie had not complained and drawn the employer's attention to her allegations.

Costs

[44] I signalled during the investigation meeting how costs might be resolved. I was informed that the only costs incurred by the parties include the filing fee of \$70 that Ms McKenzie incurred, and disbursements for travel incurred by the Grand Hotel for its advocate from the industry's professional body. It is commendable that costs have been restricted. Ordinarily costs would follow the event and an order made for reasonable disbursements. Ms McKenzie should not be out of pocket given the mixed findings and conclusions that in part support that she had some issues in her employment and that the Grand Hotel needs to consider its employment policies and procedures to deal with complaints concerning harassment and bullying. Therefore I order the Grand Hotel Wanganui (2004) Limited to pay Laura McKenzie the \$70 filing fee.

Outcome of the Authority's investigation meeting

[45] Ms McKenzie's claims are dismissed.

[46] The Grand Hotel Wanganui (2004) Limited is to pay Laura McKenzie the filing fee of \$70,000.

P R Stapp
Member of the Employment Relations Authority