

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 481  
5455310

BETWEEN                      ELLA NEWMAN  
   Applicant  
  
A N D                              TAXI LEASE LIMITED t/a  
   THE PLANT PLACE  
   Respondent

Member of Authority:      Anna Fitzgibbon  
  
Representatives:              Simon Scott, Counsel for the Applicant  
   Andrea Twaddle, Counsel for the Respondent  
  
Investigation Meeting:      4 November 2014 at Hamilton  
  
Submissions Received:      6 November 2014 from the Applicant  
   6 November 2014 from the Respondent  
  
Date of Determination:      24 November 2014

---

**DETERMINATION OF THE AUTHORITY**

---

- (a)    **Ms Newman was not sexually harassed in her employment.**
- (b)    **Ms Newman was not unjustifiably constructively dismissed.**
- (c)    **Costs are reserved**

**Employment Relationship Problem**

[1]    The respondent, Taxi Lease Limited t/a The Plant Place (The Plant Place), is a small garden centre in Hamilton which sells plants and gifts. Mr Bruce Sanson is the sole shareholder and director of The Plant Place. There are a number of other businesses that share premises with The Plant Place including Café Fresca and Humble Gift Store & Collectables (Humble).

[2] The applicant, Ms Ella Newman was employed by The Plant Place in the garden centre for two years from 19 December 2011 until her resignation on 29 December 2013.

[3] On 28 December 2013, following a joke between them, Mr Sanson “slapped” Ms Newman’s bottom. Ms Newman says the slap was a hard hit which caused her pain and resulted in her resignation the following day. Mr Sanson says the slap was a “fun slap” and he had no intention of offending or hurting Ms Newman.

[4] Following her resignation, Ms Newman claimed that during the course of her employment at The Plant Place she was sexually harassed by Mr Sanson. Ms Newman says following the incident on 28 December she felt she had no other option but to resign. Ms Newman claims her resignation amounted to an unjustified constructive dismissal.

[5] Mr Sanson denies sexually harassing Ms Newman during the course of her employment. Mr Sanson does admit to the slap on 28 December but claims this was not sexual harassment and Ms Newman was not forced to resign.

### **Issues**

[6] The Authority must determine the following issues:

- (a) Was Ms Newman sexually harassed by Mr Sanson during her employment at The Plant Place;
- (b) If Ms Newman was sexually harassed, was her subsequent resignation a constructive dismissal which was unjustified in the circumstances;
- (c) If the answers to the first two issues are “yes”, what remedies should be awarded?

### **First Issue**

#### **Was Ms Newman sexually harassed by Mr Sanson?**

#### **Ms Newman’s employment at The Plant Place**

[7] Ms Newman was initially employed by The Plant Place as a garden assistant, potting plants, weeding and feeding. Ms Newman had no formal gardening qualifications but had gained experience gardening with her parents from a young age.

[8] Ms Newman commenced employment on 19 December 2011. Ms Newman was given an individual employment agreement (the agreement) which she and Mr Sanson signed respectively on 24 and 28 December 2011. Ms Newman's job description attached to the agreement included tasks such as:

- weeding;
- repotting/re-bagging plants and general garden centre tasks; and
- helping customers as required.

[9] After approximately a year at The Plant Place, Ms Newman took on more responsibilities, including opening and closing the shop, placing orders for stock and handling deliveries. Ms Newman also obtained an NZQA certificate (level 4) in horticulture/nursery.

[10] Over the course of her two years of employment Ms Newman's wages increased from \$13 gross an hour to \$20 gross an hour to reflect her increased qualifications, experience and responsibilities.

[11] Ms Newman was a hard worker and Mr Sanson held her in high regard. Mr Sanson hoped that Ms Newman would manage the garden centre as he moved into semi-retirement.

[12] The garden centre is small and the staff got on well. Ms Newman was popular with both staff and customers. Ms Newman was friendly with Mr Sanson with whom she would often share a joke or a laugh. Ms Newman often brought in home baking to share with the other staff and on occasion bought chocolates for Mr Sanson who she knew had a "sweet tooth".

### **Allegations of sexual harassment**

[13] In Ms Newman's Statement of Problem (SOP), she claims that during her employment she was touched, fondled and hit inappropriately by Mr Sanson.

[14] Ms Newman claims that soon after commencing employment Mr Sanson hit her on the bottom on two occasions. Ms Newman claims that this incident was followed shortly after by being slapped on the bottom by Mr Sanson on three separate occasions over the period of a week, Mr Sanson brushing his hand past her bottom

and on one occasion while physically grabbing her by the shoulders to talk to her, “accidentally” having her breasts brushed by Mr Sanson. Ms Newman further claims Mr Sanson grabbed and squeezed her bottom as he assisted her to alight a truck and that he hit her bottom.

[15] Ms Newman further claims in the SOP that Mr Sanson made lewd and inappropriate comments to her and that she made it clear to Mr Sanson during her employment that his sexual/physical attacks on her were unwelcome. There was no evidence of lewd or inappropriate comments before the Authority and Ms Newman told the Authority that she did not raise any of the incidents she alleged amounted to sexual harassment with Mr Sanson.

[16] At the Authority’s investigation meeting, Ms Newman confirmed that these alleged incidents did not actually occur shortly after she started employment at The Plant Place but after a number of months. Ms Newman was vague about when the alleged sexual harassment by Mr Sanson allegedly occurred.

[17] At the investigation meeting, Ms Newman says on the first occasion, Mr Sanson walked past her and gently tapped her left buttock, he then returned and gently tapped her buttock again (the first incident). Ms Newman says she did not do anything about it as she thought it was an “*unpleasant accident*”.

[18] Ms Newman says the next incident occurred a few weeks/months later. Ms Newman says she was slapped on the bottom by Mr Sanson as she was walking down the ramp (the second incident). Ms Newman says the second incident was followed by a third incident (third incident). Ms Newman says the third incident was when she was talking with some customers. Mr Sanson interrupted her to give her some instructions. Ms Newman says Mr Sanson put his hands on her shoulders and turned her in order to give her the instructions and in doing so brushed his hands across her breasts. Ms Newman says she looked Mr Sanson in the eye and felt this incident to be intentional. There was some confusion as to whether or not this particular incident occurred in the same week as the second incident or some months later.

[19] Ms Newman says she told her partner, Mr James Stewart, that Mr Sanson was sexually harassing her after the second incident. Ms Newman says Mr Stewart suggested that she consider leaving her job.

**Mr Stewart's employment at The Plant Place**

[20] For a period of time prior to Ms Newman commencing employment at The Plant Place Mr Stewart had not been employed. Ms Newman asked Mr Sanson if there was any work for him at The Plant Place. Mr Sanson met with Mr Stewart and offered him casual work in the garden centre. Mr Stewart began working at The Plant Place in about September 2012 doing various manual gardening jobs. Mr Stewart and Ms Newman often shared lunch together while they worked at The Plant Place.

[21] In response to questioning at the investigation meeting about why Ms Newman would introduce Mr Stewart into a work environment in which she was being sexually harassed, Ms Newman said she felt having Mr Stewart at work with her would help the situation. This evidence was new and was not raised in the SOP or in any of the witness statements. I do not accept the evidence as reliable. Mr Stewart was unemployed and had been for some time. That was the reason for Ms Newman asking whether Mr Sanson could employ him at The Plant Place, not because she thought it would assist with a working environment in which she was being sexually harassed.

[22] Despite Ms Newman's claims in the SOP that she "*made it clear to Mr Sanson during her employment that his sexual/physical attacks on her were unwelcome*", neither Mr Stewart nor Ms Newman spoke to Mr Sanson about the alleged sexual harassment.

[23] Ms Newman says that because she did not have formal qualifications, she felt if she raised the matter that she might not be able to get another job. Ms Newman did not wish to return to work in the retail sector.

[24] In my view, Ms Newman had an obligation to raise any issues she may have, with Mr Sanson. If, as she initially thought, Mr Sanson had accidentally touched her, bringing this to Mr Sanson's attention, may have resolved the matter. Ms Newman failed to do so.

[25] Ms Newman and Mr Stewart claimed seeing Mr Sanson hiding behind plants in the garden centre and watching customers and staff, particularly young women. Mr Stewart described observing Mr Sanson on two occasions and on each occasion described Mr Sanson as "*creepy*". Ms Linda Corlett, who owns and operates Humble located adjacent to The Plant Place says she never saw Mr Sanson acting in such a

manner. Ms Janette (Jan) Raitt who works for The Plant Place also denied seeing any such behaviour by Mr Sanson.

[26] Ms Newman said that she spoke with Ms Raitt and asked her if Mr Sanson had ever tried to grope her. Ms Newman said Ms Raitt told her that Mr Sanson had tried to grope her once or twice. At the investigation meeting Ms Raitt said Mr Sanson had never attempted to grope her and had never groped her.

[27] Ms Newman claimed speaking to Gillian, another employee, and told her that Mr Sanson had been watching her and smiling. Gillian did not give evidence.

[28] These alleged incidents of sexual harassment by Mr Sanson were never raised with Mr Sanson by either Ms Newman or Mr Stewart. The first time they were raised was when Ms Newman raised a personal grievance claim on 19 February 2014. I do not accept Ms Newman was sexually harassed as later claimed. Ms Newman and Mr Stewart gave contradictory and inconsistent evidence. I do not accept they were reliable witnesses.

[29] Ms Newman and Mr Sanson discussed Ms Newman undertaking an interior design course in 2014 at Wintech while Ms Newman continued to work part time at The Plant Place. Ms Newman applied for and was accepted for the course. Ms Newman introduced Mr Stewart to Mr Sanson and he worked at The Plant Place for a number of months. In my view this behaviour is inconsistent with Ms Newman's allegations of ongoing sexual harassment by Mr Sanson which made the work environment a hostile one.

[30] Even if I am not correct, Ms Newman failed to raise the alleged incidents of sexual harassment as a personal grievance claim within 90 days from the date the action alleged to amount to sexual harassment occurred as required by s114(1) of the Employment Relations Act 2000 (the Act). Ms Newman did not seek leave under s.114(3) of the Act to raise the grievance after the expiration of the 90 day period.

### **28 December 2013**

[31] Ms Newman says on 28 December, almost at closing time, she and Mr Sanson were joking about two women "*picking through the roses*". Ms Newman says she commented to Mr Sanson that she had better go and help. Ms Newman says as she started to walk away she saw Mr Sanson's hand go up and he slapped her on the

bottom and pushed her out of the door. Ms Newman says it was this incident that caused her to resign. Ms Newman says she sold a couple of plants to customers and then left for the day. Ms Newman says she was shocked and this was confirmed by Mr Stewart.

[32] Mr Sanson admits slapping Ms Newman on the backside on 28 December but says it was a “fun slap” and there was no indication at all by Ms Newman that she was hurt or offended by it. Mr Sanson says the slap occurred in the morning and it was after Ms Newman had given him some cheek over the floppy sunhat he had on. Mr Sanson says Ms Newman worked the rest of the day and did not mention anything to him about the matter.

[33] Ms Corlett from Humble says on the morning of 28 December, Ms Newman came to her shop and during the conversation told her that Mr Sanson had given her a whack on the bottom. Ms Corlett says Ms Newman worked for the rest of the day.

[34] I find that Mr Sanson slapped Ms Newman, but the incident occurred in the morning as confirmed by both Ms Corlett and Mr Sanson, not at closing time as alleged by Ms Newman. Mr Sanson and Ms Newman had shared a joke about Mr Sanson’s floppy hat. It was in this context that Mr Sanson gave Ms Newman a slap on the bottom. Ms Newman said nothing about the matter to Mr Sanson. Ms Newman mentioned the slap to Ms Corlett in passing and worked the day out.

### **Resignation - 29 December 2013**

[35] On the evening of 28 December Ms Newman says she wrote out her resignation letter. Ms Newman’s resignation letter reads as follows:

*Bruce*

*I am writing you this letter to let you know that your behaviour towards me at times is inappropriate. Lewd comments and behaviour are making me feel uncomfortable. I do not wish to hear your opinion on my appearance or what I could achieve if I was more “vivacious”. These comments are unnecessary and very inappropriate. Hitting me on the backside is completely unacceptable and is sexual harassment, this is an offence. This will stop.*

*Not being able to take proper length lunch and morning tea breaks when I should be able to because of under staffing is unfair and not right. Your rude and inappropriate comments about my partner James are totally unprofessional and unacceptable.*

*This letter is also my resignation. As of today (29/12/2013) I am giving my notice. As per reasons above. My final day will be the 5th Jan 2014.*

*Ella Newman*

[36] While the resignation letter refers to “*lewd comments and behaviour*” making Ms Newman uncomfortable, there was no evidence by Ms Newman about any lewd comments. Further, there was no evidence about Mr Sanson expressing his opinion on her appearance. There was also no evidence about “*rude and inappropriate comments*” by Mr Sanson about Mr Stewart.

[37] Ms Newman does refer in her resignation letter to the fact that hitting her on the backside was completely unacceptable. None of the previous alleged incidents of sexual harassment were referred to in the resignation letter.

[38] Ms Newman went to work on the morning of 29 December, opened the shop and after Mr Sanson arrived, left early, claiming that she had hay fever and that because of the wet weather Mr Sanson would not need her. Mr Sanson says he was surprised that Ms Newman had “left him in the lurch”. Mr Sanson sent Ms Newman a text message at 9.43am as follows:

*Rain has gone come bak in at 12 help me get thru afternoon not fair leaving me in the lurch like this I had plans for the day still hope to achieve some at least u shud ask rather than announce and organise a replacement staff member if u know u going to do it*

[39] Mr Sanson did not receive a reply to the text. Ms Newman and her mother returned a few hours later after Ms Newman had visited the doctor to obtain a medical certificate and gave Mr Sanson the resignation letter. The medical certificate is dated 30 December but Ms Newman says she visited the doctor on 29 December. The medical certificate states:

*Subjective boss being sexually harassing her by smacking her bottom and making remarks about her boyfriend. She quit yesterday but he is texting her. Getting nausea and dizzy and now feeling anxious and loose BM all symptoms of anxiety. P; remove herself from the scene.*

[40] Neither Ms Newman’s mother nor her medical practitioner gave evidence at the investigation meeting.

[41] Mr Sanson was serving customers when Ms Newman and her mother arrived at the The Plant Place. Ms Newman handed him the letter and she and her mother

left. After he finished serving customers, Mr Sanson read the resignation letter and was shocked.

[42] Later that afternoon, Mr Sanson sent Ms Newman a text as follows:

*Ok uv made yr point I've annoyed u but dnt resign I need u here and not too proud to say ur fans will be distraught if u go.*

[43] Ms Newman replied with a text saying:

*ANNOYED??? Understatement. My resignation stands.*

[44] Mr Sanson sent two more texts to Ms Newman asking to sort things out, the texts were not responded to.

[45] It is my view that following the final incident on 28 December, Ms Newman reflected and formed the view that the previous incidents were suspicious and sexually motivated.

[46] I do not accept that Ms Newman had been sexually harassed during her employment. Ms Newman accepted that it was only after the incident on 28 December that she considered she had been sexually harassed earlier by Mr Sanson. I do not accept the earlier incidents occurred in the manner Ms Newman now says they occurred. In any event, Ms Newman never raised the earlier incidents and is now out of time to do so.

[47] The final incident, in my view, while inappropriate and which should not be repeated by Mr Sanson, must be seen in context. The context was a joke between Mr Sanson and Ms Newman. Ms Newman was being cheeky about Mr Sanson's floppy hat and he slapped her on the bottom. It was a one-off slap which I accept was a "fun slap".

[48] Sexual harassment is behaviour which is wholly unacceptable and should not be tolerated. Chief Judge Goddard in *Z v. A*<sup>1</sup> stated:

*It has been aptly if colourfully said in a North American Court that sexual harassment poisons the atmosphere in the workplace. It is wholly unacceptable and entirely devoid of any redeeming features. It follows that its occurrence can never be met with matters of justification, excuse or mitigation. It is an attack on the basic human right that all persons must be supposed to have to pursue their economic wellbeing in conditions of freedom and dignity. Its victims*

---

<sup>1</sup> [1993] 2 ERNZ 469

*are almost invariably women. It is insidious and deceptive in character.*

[49] The question for the Authority is whether Mr Sanson's behaviour in slapping Ms Newman on the bottom on 28 December was an act which was sexual in nature. The test of whether or not the act or behaviour is sexual in nature is an objective test<sup>2</sup>.

[50] Section 108(1)(b) of the Act defines sexual harassment as:

*by –*

*(i) the use of language (whether written or spoken) of a sexual nature; or*

*(ii) the use of visual material of a sexual nature; or*

*(iii) physical behaviour of a sexual nature – directly or indirectly subjects the employee to behaviour that is unwelcome or is sensitive 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.*

[51] It is s.108(1)(b)(iii) which is of relevance in this matter.

[52] In *Kumar v. Icehouse (NZ) Ltd*<sup>3</sup>, Mr Kumar was dismissed after a co-worker complained that he had forcefully bumped her while she was bending down. The complainant alleged she felt sexually harassed by Mr Kumar and claimed the conduct had happened on at least two occasions. The Employment Court considered Mr Kumar's action in bumping into the complainant was not unequivocally sexual in nature. The Court recognised that in borderline cases where the sexual nature was not immediately manifested by the physical behaviour, it could be useful to take into account the context of the behaviour. Where there had been an element of repetition this could 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 was not repeated, it was not likely to be objectively viewed as sexual in nature. The Court held that the dismissal in that case was unjustified.

[53] In that case, the Court considered that although the question of whether conduct in question could amount to sexual harassment has to be considered

---

<sup>2</sup> *ZvA (supra)*.

<sup>3</sup> *Kumar v. Icehouse (NZ) Ltd* [2006] ERNZ 381 at paras[54]-[58].

objectively, whether the conduct was “*unwelcome or offensive*” had to be considered from the perspective of the complainant.

[54] On an objective basis, I do not consider the slap on the bottom that occurred on 28 December constituted sexual harassment under s.108(1)(b)(iii) of the Act.

[55] Ms Newman sought to rely on this incident to support her claim for constructive dismissal. I do not accept Ms Newman was able to do so. On the balance of probabilities, I find Ms Newman was not sexually harassed in her employment by Mr Sanson. On the balance of probabilities, I find Ms Newman was not unjustifiably constructively dismissed by The Plant Place. Ms Newman’s claims therefore fail.

### **Costs**

[56] Costs are reserved. The Plant Place has 14 days in which to file a memorandum as to costs in relation to both this determination and the Authority’s preliminary determination regarding Ms Newman’s application for a non-publication order<sup>4</sup>. Ms Newman has 14 days in which to file her memorandum in reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**

---

<sup>4</sup> [2014] NZERA Auckland 473