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**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 450
3078032

BETWEEN NIX
 Applicant

AND AWF LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Sarah McKenzie and William Chapman, counsel for the
 Applicant
 June Hardacre, counsel for the Respondent

Investigation Meeting: 11 August 2020 at Invercargill

Submissions Received: On the day

Date of Determination: 2 November 2020

DETERMINATION OF THE AUTHORITY

Prohibition from Publication

[1] Proceedings were initially lodged in the Authority against a second respondent. The applicant has settled her claim with the second respondent.

[2] Ms Hardacre in correspondence to Ms Townsend and the Authority shortly before the investigation meeting stated that as matters had been resolved confidentially with the second

respondent, it may be appropriate to anonymise any reference to that company in these proceedings.¹ Ms McKenzie took a neutral view.

[3] The Authority did not hear from the second respondent. The applicant has settled her claim with the second respondent and any publication may impact on any confidentiality pertaining to that settlement.

[4] Both those factors persuade me that it is appropriate to refer to the second respondent by initials only that bear no resemblance to its name. I shall refer to the second respondent as SRR. The applicant complained about sexual harassment whilst on assignment at SRR. It is appropriate that her name is also prohibited from publication for that reason and that she was the other party to the confidential settlement with SRR.

Employment Relationship Problem

[5] NIX says that she was unjustifiably disadvantaged by AWF Limited (AWF) by its actions on 11 January 2019.

[6] She seeks compensation under s 123(1)(c)(i) of the Employment Relations Act (the Act) in the sum of \$10,000 together with costs.

[7] AWF say that NIX has no claim against it for unjustified disadvantage. AWF say that it did not take any unjustifiable actions that affected NIX's conditions of employment to her disadvantage and that she is not entitled to the remedy that she seeks.

The Issues

[8] The Authority needs to resolve the following issues in this matter:

- (a) What was NIX's employment status with AWF after 28 December 2018?
- (b) If the employment relationship did not continue beyond the end of the assignment with SRR were there on-going obligations on the part of AWF?
- (c) Was it reasonable for AWF not to take any steps before 28 December with SRR?

¹ Email to Authority and Ms McKenzie from Ms Hardacre dated 5 August 2020.

- (d) Were there unjustifiable actions on the part of AWF that resulted in disadvantage to employment at the meeting on 11 January 2019 and in particular that NIX:
- (i) Was not told of her right to bring a support person/representative to the meeting.
 - (ii) Was required to speak about distressing events.
 - (iii) Was told that her grievance was not likely to go anywhere.
 - (iv) Was dissuaded from getting legal advice.
- (e) If an unjustified disadvantage grievance is made out then what remedies are appropriate.

The relevant background against which to assess the issues

[9] AWF is a labour hire business. It enters into casual employment agreements with its employees and places them on temporary assignments of varying durations with clients.

[10] NIX signed a casual on-hire temporary employment agreement with AWF on 16 August 2018 and commenced a temporary work assignment with SRR on 17 August 2018. She had been interviewed by SRR's management prior to commencing the assignment.

[11] During the assignment NIX says that she was subjected to behaviour in the nature of sexual harassment from the person she directly reported to at SRR who I shall refer to as A.

[12] On 24 December 2018 the Branch Manager of AWF, Michelle McSoriley, was advised by the Director of SRR that they no longer required NIX because there was insufficient work for her to do.

[13] Ms McSoriley decided to wait until after Christmas to advise NIX about this. A telephone discussion took place on 28 December 2018. NIX disclosed for the first time to AWF that she thought her assignment had ended due to sexual harassment that she had experienced at SRR. Ms McSoriley recalls NIX was upset during the telephone call. She said that she was shocked as well by what NIX said and said that she would discuss the matter with the Human Resources Manager.

[14] On 7 January, I find it likely from the evidence that NIX met with Ms McSoriley at AWF offices in Invercargill and there was a discussion about what had occurred at SRR. Ms McSoriley asked NIX to put together a written statement so that she could address the concerns with SRR.

[15] NIX provided a written statement and asked that her concerns be investigated further and any developments be communicated back to her. She also advised that she was seeking legal advice regarding both her termination from SRR and the matter of sexual harassment by A.

[16] On 8 January 2019, Ms McSoriley sent an email to NIX and asked if she was happy for a copy of her statement to be shared with SRR. She wrote that they needed to request that SRR investigate the matter further and that AWF would not be placing any females with the client under A's management.

[17] Fleur Board, the General Manager of AWF, was in Invercargill for a routine visit on 10 January 2019. She was not aware of any specific issues when she first arrived. Ms McSoriley picked Ms Board up from the airport and updated her about the situation with NIX. Ms Board also read the statement. She asked Ms McSoriley to call NIX to see if she would be willing to meet the following day.

[18] A meeting then took place on 11 January 2019 with NIX, Ms McSoriley and Ms Board. The complaint was discussed as well as NIX's desire for an apology from SRR and there was a discussion about a financial payment.

[19] On 14 January 2019 Ms McSoriley met with the Director of SRR.

[20] On 15 January 2019 Ms McSoriley telephoned NIX to advise her of what had occurred at the meeting.

[21] On 25 January 2019 there was a response from SRR about severance pay and Ms McSoriley attempted to contact NIX to arrange a meeting by email, advising that she would need to work through that with the Human Resource manager and would call her next week to arrange a meeting.

[22] On 29 January she emailed NIX asking her to call her but NIX did not respond.

[23] On 30 January 2019 NIX raised personal grievances with AWF and SRR.

What was NIX's status with AWF after 28 December 2018?

[24] Ms Hardacre refers to clauses 4.3 and 4.4 of the employment agreement to support her submission that there was no employment relationship on foot after 28 December 2018. She submits that from 28 December 2018 when the assignment with SRR ended, AWF no longer owed NIX any obligations under the Act including any duty of good faith but nevertheless took reasonable steps in respect of her concerns.² She accepts that NIX remained an “open candidate” on the AWF system who could be advised of other assignments.

[25] The employment agreement provides in clause 4.3 that its terms and conditions will be effective from the start date of an assignment until the termination of the assignment in accordance with the clause.

[26] Clause 4.4 provides

I understand and accept that the nature of my employment means that each Assignment is a separate engagement and that once an Assignment is completed or terminated without any further Assignment have been agreed, the employment relationship between me and the Company terminates and there is no continuing employment relationship.

[27] Clause 4.4 is reinforced by clause 4.5 that confirms there is no guarantee of continuous work once an assignment terminates and that there is no obligation to accept or for AWF to offer a further assignment.

[28] Clause 29 is a completeness clause providing that the terms and conditions set out in the agreement and each confirmation of assignment represents the entire agreement of the parties. At clause 26 it provides for variation confirmed in writing.

[29] Ms McKenzie submits that NIX was retained by AWF as an employee after her placement at SRR was terminated. She relies on various correspondence and actions taken by AWF after that time.

[30] Ms McKenzie refers to the email from Ms McSoriley to NIX dated 28 December 2018 in which she writes amongst other matters:

² Hally Labels Ltd v Powell [2015] NZEmpC 92 at [128].

We won't resign you just yet, as this may not be your final timesheet – we may have another assignment.

[31] Ms McKenzie also relies on the request for a statement from NIX and the meeting on 11 January. She also refers to meeting notes from Ms Board that provide amongst other matters

Both that in this case the situation was muddled by the fact SRR was not her legal employer..we were..and we had been unable to intervene on her behalf because we knew nothing about the situation until we received her letter after the assignment had been terminated.

[32] Additionally she refers to the provision of the Code of Conduct that AWF had introduced for its temporary and permanent field employees on 22 February 2019 to NIX.

[33] On 20 June 2019 the Group People and Safety Manager Melanie Ault wrote to Ms McKenzie advising that NIX's employment has never been finalised. She notes in her letter that NIX "remains an open candidate on our database, and has annual leave owing of --."

Conclusion on NIX's status as at 11 January 2019 with AWF

[34] Whilst the employment agreement provided that NIX's employment with AWF would terminate between assignments it is somewhat unclear if that occurred, or if it did, when. There is the communication of 28 December 2018 about delaying the resignation. I do not place weight on the meeting notes of 11 January 2019 because the reference to AWF being the legal employer could equally apply to the past as the present. The other matters about the Code of Conduct and holiday pay could apply to an open candidate.

[35] In response to NIX's raising of the personal grievance on 30 January 2019, Ms Ault wrote about the alleged grievance of unjustified dismissal that NIX was not dismissed but her temporary work assignment ended as in the temporary employment agreement. She then wrote that NIX remained an employee of AWF and "at the meeting on 11 January further work was discussed."

[36] The statement in reply did not explicitly state that NIX was not an employee after 28 December 2018. Ms Hardacre was instructed after the statement in reply was lodged.

[37] There was a discussion at the 11 January 2019 meeting about whether NIX wished to return to SRR. There is a contractual obligation in clause 6.1 for NIX to contact AWF immediately if there are difficulties in any assignments. Such a difficulty in an assignment could include its ending.

[38] Clause 6.1 supports ongoing obligations on the part of AWF in those circumstances to investigate and attempt to resolve difficulties in assignments. The ending of the assignment in this matter was intertwined with the complaint of sexual harassment and whether there was any correlation between the two was investigated by AWF when Ms McSoriley met with the Director of SRR. I am satisfied that NIX was regarded by AWF as an employee in the circumstances until at least 11 January 2019 although she was not on an assignment and that there were corresponding obligations to investigate her concerns.

Components of an unjustified disadvantage claim

[39] Section 103(1)(b) of the Employment Relations Act 2000 (the Act) provides that an employee may bring a personal grievance against their employer or former employee because their employment or one of more conditions of the employment was affected to their disadvantage by some unjustifiable action of their employer. Reliance is also placed on the overarching statutory obligations of good faith as contained in s 4 of the Act that a fair and reasonable employer could be expected to adhere to.

[40] There are several components to establishing a grievance of unjustified disadvantage that can be seen from s 103(1)(b). One of more conditions of employment including any conditions that survive employment need to be affected to the employee's disadvantage. There needs to be some action (or omission) on the part of the employer that is unjustifiable.

Was it reasonable for AWF not to take any steps before 28 December 2018?

[41] AWF had no knowledge of NIX's sexual harassment complaint whilst she worked on assignment at SRR. It was only after the termination of the assignment that AWF became aware of the complaint.

[42] NIX said that she could not recall being told at the AWF induction process before commencing her assignment that complaints as well as other matters must come directly to AWF. Ms McSoriley said that such advice is given as part of the standard induction process.

The employment agreement does provide that difficulties in assignments should be reported to AWF and any safety issues should be reported to AWF and the client.³

[43] Ms McSoriley recalled calling NIX on 13 September 2018 after the assignment at SRR had commenced. The call is supported by a file note. NIX was asked if she was happy and enjoying her role and responded that she was. NIX could not in her oral evidence recall that telephone call.

[44] There was also evidence of presence of AWF staff at the SRR workplace whilst NIX was on assignment. Ms McSoriley said that the person from AWF with primary responsibility for SRR relationships is a male. She appreciated that NIX may not have felt comfortable raising issues with him when he conducted toolbox meetings on a monthly basis and otherwise dropped in. NIX said that the toolbox meetings were informal and other employees and not simply AWF employees were often present at the time they were conducted. In short they were not the types of meetings she would feel comfortable raising such issues.

[45] Ms McSoriley with the other male employee conducted a toolbox meeting on 19 October 2018. NIX recalled that meeting however said that she only had a brief conversation with Ms McSoriley at that time and did not feel comfortable in discussing her issues in front of others and was scared of losing her job at that time. Ms McSoriley did not pick up at that time that there were any concerns from NIX although the file note records that she was “quiet” but that when asked responded that she was enjoying her role. The file note records the presence of two other [AWF] employees.

[46] I conclude that NIX ought to have known that she could have spoken to someone from AWF about her complaint during her assignment with SRR. NIX did raise the concern of sexual harassment with SRR and some steps were taken. There was no evidence to support that SRR raised the matter with AWF.

[47] In all the circumstances it was not unreasonable that AWF took no action before 28 December 2018 because it was not aware of the complaint of sexual harassment.

[48] After 28 December AWF did take steps. AWF advised that it would not place any females to work with A. It asked for a written statement from NIX. It met with her and then

³ Clauses 6 and 21.4(a) of the Employment Agreement.

with SRR to attempt to resolve the matter. There was some attempt to try to find an alternative placement for NIX.

Were there unjustifiable actions on the part of AWF that resulted in disadvantage to NIX's employment at the meeting on 11 January 2019?

[49] Four issues were referred to from this meeting. I will not reach conclusions until after a collective assessment of actions/omissions has been undertaken.

Meeting notes

[50] Meeting notes were taken by Ms Board during the meeting and subsequently typed up. The evidence was that the meeting was between 40 to 60 minutes in duration. The notes are not verbatim as they comprise 13 paragraphs.

[51] The tying up of the notes was not undertaken until mid-February 2019 following the raising of a personal grievance by NIX and a request to Ms Board from human resources to provide her notes. Ms Board in an email of 19 February 2019 asked Ms McSoriley to review and modify anything from the typed notes as appropriate. Ms McSoriley responded the same day and noted a couple of minor changes but nothing about content.

[52] The Authority took NIX through the notes to ascertain whether she agreed with their contents. NIX raised some issues but could recall much of what is set out in the notes as being discussed. She did raise an issue of clarification about when the matter was first raised with AWF which was on 28 December 2018 and not at the time of provision of her statement. That was unclear from the notes.

[53] NIX did not agree as stated in the notes that she had said SRR handled the situation well after she brought it to their attention until the assignment was terminated. She agreed that she was categorical in that she would not return to SRR, that she wanted an apology and for A not to do the same thing to anyone else. That is as reflected in the notes. She agreed that there was discussion about AWF meeting with the Director of SRR to see what could be done and perhaps some sort of financial contribution until AWF could find another assignment. There was some dispute about whether NIX said that it was not about money. In any event the notes also reflect that she indicated money would be helpful.

[54] NIX recalled as the notes reflect that Ms Board did use the word “admirable.” The notes show the context in which this was said was because NIX was not seeking financial contribution as in other cases that Ms Board had been involved in. NIX recalled a discussion about the reference to SRR not being NIX’s legal employer.

[55] Materially the penultimate paragraph of the notes records:

I advised she could seek legal advice but that I didn’t know what might be achieved...the cost of legal fees may well outweigh any advantage gained ...particularly when her grievance was with SRR and not AWF as her legal employer.

[56] In her written statement about her complaint of sexual harassment NIX had stated that she would be seeking legal advice.

[57] NIX accepted when questioned by Ms Hardacre that Ms Board did advise she could seek legal advice as was stated in the notes. Ms Board said that she was expressing a view about the advantage of legal advice with a grievance against SRR who was not the legal employer and because NIX only wanted an apology and not necessarily a financial settlement.

[58] Ms McKenzie submits that there should have been advice to NIX to bring a support person or representative to the meeting and that NIX was required to answer questions about distressing events. Further that Ms Board's view about any grievance and attempt to dissuade NIX obtaining legal advice was a breach of good faith and an unjustified action. She submits that Ms Board's statement that seeking legal advice would in effect be a waste of time and money is aggravated by the knowledge of the sexual harassment complaint and the fact that the assignment with SRR had been terminated unexpectedly.

[59] Ms Hardacre submits that Ms Board's comments were not unjustified and she was simply providing an opinion that she did not see what could be achieved by seeking advice when an apology was what NIX was seeking. Further that there is not a positive legal obligation on AWF to advise NIX of her right to seek legal advice and that there was no attempt under s 236 of the Act to deny NIX a right to representation.

[60] In her oral evidence under questioning Ms Board said that she did not see the process on 11 January 2019 as being "adversarial" or "disciplinary in nature." She agreed with the benefit of hindsight that she should have advised NIX to bring a support person with her to the meeting. NIX had not met Ms Board previously.

[61] Advice to bring a support person in those circumstances could have been sensible given the knowledge about the nature of the complaint and that it is difficult to raise concerns of this nature. It was not a situation where there could be said however to have been a positive obligation to advise NIX she could bring a representative. The meeting was to understand the nature of the complaint and how NIX wished to proceed. NIX was not facing an outcome potentially adverse to her continued employment or terms and conditions of employment.

[62] NIX was required to answer some question about matters that were distressing to her. Ms Board in her oral evidence said that she did not consider that NIX presented in a distressed manner. She said that she was aware that there was imbalance of power and that it was a sensitive matter and had made a significant effort to be gentle. I acknowledge that NIX was asked questions about matters that she had found distressing but I am not satisfied that can be said to amount to an unjustified disadvantage in all the circumstances.

[63] In respect of the legal advice matters it was unwise in the circumstances of this meeting which NIX attended alone for Ms Board to express views about the value of future legal action against SRR. What was said and how it was intended could have been and probably was in this case misinterpreted. What the Authority needs to consider is whether this could result in a legal claim.

[64] I do not conclude that Ms Board deliberately attempted to dissuade NIX from seeking legal advice. Whilst acknowledging NIX's right to take legal action Ms Board expressed a view about the value and potential benefit of that. NIX concluded she was being told it was a waste of time and money. The conversation was against the background of a triangular relationship and in light of what Ms Board considered NIX wanted primarily as an outcome, an apology. Triangular relationships are not particularly straightforward.

[65] Not every deviation from perfection forms the basis for legal action. There can be conduct that is unwise or an honest mistake but not an unjustified action. I am not satisfied that this was conduct that reached the point of being unjustified in the sense of unreasonable or unfair. I conclude the situation in the Authority determination Ms McKenzie referred to is distinguishable.⁴ In that case there was reference to the comments made by the employee about seeing an employment lawyer undermining the business and the relationship the employer had with staff. The employee then felt fearful about his immediate employment prospects and considered it as retaliatory action. He did not return to work and there was evidence that his reaction made him medically unfit for work for one week.

[66] Even if it could be said to have been unjustified for Ms Board to express views about the merits of legal action against SRR, her comments did not in fact dissuade NIX from seeking legal advice. In oral evidence she said that she sought legal advice about a week after the meeting. No disadvantage of that nature is discernible.

⁴ *Munro v AV World (2016) Limited and Halliwell* [2019] NZERA 321 Member Arthur.

[67] I acknowledge that NIX felt deflated after the meeting and concluded that AWF wasn't really interested in resolving her concerns primarily because of the comment about legal advice. However AWF's actions after the meeting do support that they did attempt to establish what had occurred with SRR and they tried to get some outcome for NIX. There was disappointment about SRR's responses with respect to NIX's statement but AWF cannot be held responsible for that. I accept Ms Hardacre's submission that reasonable steps were taken given that AWF was unaware of the complaint whilst the assignment was ongoing and their influence therefore was reduced after it ended.

[68] I am not satisfied that a grievance of unjustified disadvantage is made out from the meeting on 11 January 2019.

[69] There is nothing further I can do to assist NIX.

Costs

[70] I reserve the issue of costs and encourage counsel to see if these can be resolved.

[71] Failing agreement, Ms Hardacre has until 23 November 2020 to lodge and serve submission as to costs and Ms McKenzie has until 14 December 2020 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority