Determination Number: AA 489/05
File Number: AEA 33/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Elsa Parohinog (Applicant)
AND	ANZ Bank Limited (Respondent)
REPRESENTATIVES	Graeme Norton, Advocate for Applicant Andre Lubbe, Advocate for Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	3 November 2005
SUBMISSIONS RECEIVED	13, 23 and 28 November 2005
DATE OF DETERMINATION	19 December 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The ANZ Bank ("the bank") employed Elsa Parohinog as a personal banker at a branch in Queen St, Auckland.

[2] By letter dated 31 October 2003 the bank gave Ms Parohinog a written warning in respect of an alleged failure on her part to follow bank policy when opening an account for a customer. Ms Parohinog says the warning was unjustified and caused her disadvantage in her employment. She has raised a personal grievance in respect of it

[3] Ms Parohinog has also raised a personal grievance on the ground that she was sexually harassed in her employment by a representative of her employer.

[4] The bank says the warning was justified. It also says it investigated Ms Parohinog's allegations of sexual harassment and concluded that one of the allegations, even if true, did not amount to sexual harassment. As for the remaining allegations, it concluded they were vague and imprecise, and in the face of the manager's denials they were not taken any further.

Application for orders prohibiting publication

[5] Applications were made during the investigation meeting for orders prohibiting the publication of the names of the parties.

[6] The only reason given in support of the applications was that the subject matter concerned sexual harassment. No further reason was advanced in support and the allegations of sexual harassment, even if proved, were at the low end of the scale. I told the parties at the time that such

broadly-stated applications were not enough to displace the public interest in having this problem determined openly. I declined the applications, and formally confirm that position.

The warning

[7] As a personal banker, Ms Parohinog's duties included opening accounts for new customers. Consistent with obligations under the Financial Transactions Reporting Act 1996, bank policy was to require staff members opening accounts for new customers to sight evidence of the customer's identity using two separate forms of acceptable identification. When completing associated signing authorities, the staff member concerned was required to obtain the customer's signature and to record, among other things, details of the identification sighted.

[8] In addition to the branch network in which Ms Parohinog worked, the bank operated specialist service centres. One such centre provided services in respect of customers' term deposits, among other things. Mafida Ali was employed on term deposit work in the centre.

[9] A difficulty arose when three term deposits held by a Ms Ly matured. Because of a change in bank policy it was not possible for the bank to reinvest the funds on maturity, and there was no other account in Ms Ly's name to which the funds could be transferred. The change in policy was that term deposits were no longer accepted in sums of less than $5,000, as Ms Ly's deposits were. The bank sought to pay the funds to Ms Ly but because she was based overseas there were difficulties and delays, then another change of policy cut off that avenue for dealing with the problem. Eventually, in October 2003, a decision was made to open a new savings account for Ms Ly and deposit the funds into it. To do that, it was necessary to obtain a base account number for Ms Ly. Assigning base account numbers was the responsibility of branch staff.

[10] At the relevant time Ms Ali was handling the matter. Since she did not have authority to open a new base account, on instruction from her manager she contacted the branch where the term deposit had been held. She happened to speak to Ms Parohinog. Ms Ali explained the problem with the Ly deposits and told Ms Parohinog she needed an account number so an account could be opened and Ms Ly's funds deposited. Ms Parohinog was apparently unfamiliar with procedures Ms Ali might be expected to follow, so she enquired about whether that was the way they 'did things'. Ms Ali replied to the effect that that was what they 'normally did'. Accordingly Ms Parohinog provided Ms Ali with the base account number she needed, an account was opened through the service centre where Ms Ali worked, and Ms Ly's funds were transferred into it.

[11] It came to the attention of the service quality manger, Annette Dunn, that the new account number was attributed to Ms Parohinog, and had been opened without Ms Parohinog's obtaining the apparently necessary signing authority. Ms Dunn was also concerned because it seemed from the documentation that Ms Parohinog was claiming the account as a sale, which would give her points towards an incentive. Ms Dunn sought a formal meeting with Ms Parohinog for 31 October 2003.

[12] A meeting went ahead between Ms Parohinog and her union representative, as well as Ms Dunn and John Kuzmich, the bank's investigations manager. Ms Parohinog described the approach from Ms Ali, but denied repeatedly that she was the one who opened the account. Although she accepted that she had provided the account number and completed some records indicating she was responsible for 'the sale', she characterised her action as 'helping' Ms Ali. She also accepted that she had not sought the necessary identification for Ms Ly. She denied seeking any benefit from 'the sale'.

[13] The bank's view of Ms Parohinog's explanation was that, if she genuinely believed the opening of the account should not be attributed to her, she should have noted the sales report to that

effect. In addition, as a personal banker Ms Parohinog was expected to take care not to expose herself or the bank to liability for breach of statutory obligations, and she should have taken some responsibility for ensuring the opening of the Ly account was compliant. She was told she would receive a formal written warning.

[14] In a letter dated 31 October 2003 Ms Dunn issued the warning in the following terms:

> "The Bank's view is that you should have taken more responsibility to ensure that the account opening was compliant with Policy and the FTR Act. You clearly indicated on the Sales Force Report that the entries against your name were correct ….
> After considering your explanation you are warned on this occasion. "

[15] On being told she would be warned, Ms Parohinog asked what would happen to Ms Ali. Ms Ali was not disciplined, and no service centre staff members were interviewed in association with the investigation into Ms Parohinog's actions. One of the reasons why Ms Parohinog has a problem now is, as she said in her evidence, that she did not believe she should have been the only person to be disciplined, and her sense of grievance has continued because she was the only one who received a warning.

[16] It was not until January 2004 that Mr Kuzmich and another member of the investigations team interviewed some of the staff in the relevant area of the service centre. The delay was because of absences on leave first of Ms Ali, then of Mr Kuzmich.

[17] Ms Ali was not singled out for an interview, although she participated in discussions. According to her evidence the discussions revealed that her section had no written policy about what to do when term deposits of less than $5,000 matured, the account-holder was overseas, and there was no other account into which the funds could be deposited. Instead there was a practice in which branch staff would be approached for a new account number so that new accounts could be opened. It was rare for those circumstances to arise.

[18] The outcome of the discussions in the service centre was a decision that no new accounts would be opened for matured term deposits under $5,000, rather the monies would be paid unto a fund for unclaimed monies.

Whether the warning amounted to a disadvantage grievance

[19] The warning was not a final warning, and was revoked in the following terms by a letter to Ms Parohinog's representative dated 3 March 2004:

> "There is no dispute that a breach of policy took place, however we are conscious that the warning is a source of considerable distress to your client. In the circumstances, therefore, we are prepared to revoke the warning, as we believe the point has been made, and your client has taken heed of our concerns."

[20] Even so, for a period Ms Parohinog's employment was subject to a warning which she considers was not fair. Her position was described in submissions as one of principle. She believes there was a disparity between her treatment and that of others involved in the opening of the Ly account; and there was no full and fair investigation into the matter in that the role of the others involved was not followed up at the time.

[21] The bank's position was that, regardless of the overall context of Ms Ali's actions, Ms Parohinog provided Ms Ali with the means to open a new base account for Ms Ly without ensuring the necessary verification had been carried out. Requiring verification was such a fundamental part of Ms Parohinog's day to day role that her failure to make a suitable check when responding to Ms

Ali's request was not acceptable. As was said in submissions, all she had to do was ask Ms Ali about whether a suitable identification process had been followed.

[22] It was apparent that the bank's investigation in January 2004 revealed a gap in bank policy and procedures applicable in the service centre, and as they related to term deposits like Ms Ly's. However that is all the more reason why it would not be appropriate to discipline Ms Ali or the term deposit team. There was no such gap in Ms Parohinog's obligation to follow a verification process. She did not make an attempt to do so. Accordingly I do not accept there was a disparity between Ms Parohinog's treatment, and that of service centre employees including Ms Ali, of a kind that renders Ms Parohinog's warning unjustified.

[23] Ms Parohinog is on stronger ground when she criticises the bank's failure to enquire fully into the circumstances prior to issuing her with a warning. Although the bank says Ms Parohinog was guilty of a breach of policy irrespective of the context in which it occurred, declining to fully investigate the context prior to taking disciplinary action was a risky approach.

[24] That is because the bank pre-empted the possibility that there were mitigating factors, and inevitably failed to take those factors into account. The effect of its submissions now is to say such factors do not make any difference to the outcome, but that does not satisfactorily address the failure to attempt to identify or consider them at the time. The full circumstances, as eventually identified in January 2004, amounted to at least arguably mitigating factors and should have been investigated before a decision was made about Ms Parohinog's part in the opening of Ms Ly's account. In that respect the bank's action in warning Ms Parohinog was unjustified.

[25] Further to whether Ms Parohinog suffered any disadvantage, the presence of a warning did render her employment less secure than it would have been if her record was clean. That is sufficient to amount to a disadvantage.

[26] For these reasons I conclude Ms Parohinog has a personal grievance on the ground that her employment was affected to her disadvantage by an unjustified action on the part of her employer.

[27] Regarding an appropriate remedy, I take into account that the bank withdrew the warning, albeit several months later. I also take into account that Ms Parohinog made an error of judgment in that she did not make the enquiries she should have before providing Ms Ali with a base account number for Ms Ly. She contributed to the circumstances giving rise to the warning.

[28] Finally, the personal grievance as I have found it flows from the bank's failure to investigate or take into account possible mitigating factors. Ms Parohinog's loss also flows from that, and takes the form of injury to her feelings. However bearing in mind all of the above I do not believe a significant amount of compensation for that injury is warranted. The bank is ordered to pay her $750 under s 123(1)(c)(i) of the Employment Relations Act 2000.

The allegations of sexual harassment

[29] The allegations of sexual harassment comprise four incidents. All four occurred just after Ms Parohinog advised she was pregnant, and her evidence suggested that she perceived them as linked to her pregnancy. She was some three months pregnant when she informed her manager of that fact on or about 17 November 2003. She also told the manager she wished to continue to keep the pregnancy private because it was possible there was a problem with it.

[30] The incidents were:

(a) 21 November 2003. Ms Parohinog said she was standing in front of a mirror in the lunch room, when the manager came up to her and commented that her nipples were getting bigger;
(b) Unspecified date, probably November 2003. Ms Parohinog was in the area near the bank's safe when the manager put his hand on her stomach;
(c) Unspecified date, probably November 2003. The manager commented to Ms Parohinog that she was not getting enough sex; and
(d) 5 December 2003. At a staff meeting that day the manager commented that Ms Parohinog had 'something she wanted to tell everyone' (being a reference to a possible announcement of her pregnancy).

[31] Ms Parohinog complained to the bank about these matters at a meeting on 22 December 2003. With the possible exception of her account of the meeting of 5 December, the allegations were expressed considerably more vaguely than was the case during the investigation meeting. Moreover - for reasons I will explain shortly - Ms Parohinog's own account of the 5 December meeting obviously did not give rise to a claim of sexual harassment and should not have been pursued in that context. Nevertheless the bank embarked on an investigation, and spoke to the manager on 23 January 2004 in the presence of his solicitor. The manager explained the comments he had made at the 5 December meeting, and otherwise denied the allegations.

[32] A member of the bank's human resources staff questioned Ms Parohinog's colleagues about their perception of the manager, by way of an 'audit' of his management style. She also questioned the staff about the circumstances surrounding 5 December meeting, being the only incident to which there were witnesses.

[33] As a result of its investigation the bank concluded there was not enough information to support a conclusion that sexual harassment occurred, and did not discipline the manager. Although it did counsel him about aspects of his behaviour as identified in the audit, the counselling related to matters unrelated to possible sexual harassment on his part.

The definition of sexual harassment

[34] Sexual harassment is defined, for the purposes of the right to bring a personal grievance, in s 108 of the Employment Relations Act 2000. Material parts of the definition as it applies to Ms Parohinog's allegations are:

> "(1) … an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer –
> (a) …; or
> (b) by –
>
> (i) the use of language (whether written or spoken) of a sexual nature; or
> (ii) …; or
> (iii) physical behaviour of a sexual nature, -
>
> directly or indirectly subjects the employee to behaviour that is unwelcome or offensive 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."

[35] The term 'representative of that employer' is further defined in s 103(2) as follows:

> "…a representative, in relation to an employer and in relation to an alleged personal grievance, means a person –
> (a) who is employed by that employer; and
> (b) who either –

(i) has authority over the employee alleging the grievance; or
(ii) …."

[36] The manager fell within the definition in s 103(2). Accordingly if his actions amounted to sexual harassment, then the bank can be held liable for them in the context of an associated personal grievance.

Whether sexual harassment occurred

[37] With reference to the definition in s 108(1)(b)(i) I do not accept that the words used at the staff meeting of 5 December were words of a sexual nature. There was nothing sexual about them at all. Although Ms Parohinog was very unhappy that the manager was drawing her colleagues' attention to something she wanted to keep private, his words did not even arguably amount to sexual harassment. Further, although it is not essential to that conclusion, I accept the manager genuinely misread Ms Parohinog's intentions concerning an announcement of her pregnancy.

[38] The manager has continued to deny the other three allegations. Questions therefore arise as to whether the alleged incidents occurred, and, if they did, whether they fell within the definition in s 108(1). Regarding the former, the Court of Appeal put the evidential test this way in **Managh v Wallington** [1998] 2 ERNZ 337, 342 ll 22-26:

> "The conventional common law approach as affirmed in **Honda** should be applied in all cases involving sexual harassment, however they arise. The onus is on the person making the allegation to establish the facts asserted on the balance of probabilities consistent with the gravity of the facts and the consequences of the allegation."

1. The incident of 21 November

[39] Ms Parohinog kept a diary in which she habitually noted a range of things including phone calls and other accounts of conversations she had. Her entry for 21 November 2003 recorded that the comment that her nipples were getting bigger was made in the lunchroom at about 12.45 pm, while Ms Parohinog was looking at herself in the mirror.

[40] She expanded on that in her oral evidence by saying the manager stood and looked in the mirror too when he made the comment. He did not look directly at her. There was no allegation in her oral evidence, her diary note or the account she gave to the bank at the time that, for example, he stood inappropriately close to her, lingered inappropriately or anything else of that kind. Quite clearly the comment itself was the only thing to which Ms Parohinog took exception.

[41] Ms Parohinog referred to the matter again when she addressed the staff at a meeting on 8 December 2003. She did so because, after the manager's statement on 5 December about her announcement she had said 'it's none of their fuckin' business to know', and she was to apologise for her swearing. She did so by launching an attack on the manager, but according to her prepared note she also said:

> "What I said is nothing compared to what he said to me like 'my nipples are getting bigger and I don't get enough sex'."

[42] Despite the manager's denial, bearing in mind Ms Parohinog's acknowledged habit of making notes, as far as the comment about nipples is concerned I believe that two such relatively contemporaneous references are persuasive. I consider it more likely than not that the comment was made as Ms Parohinog described it in her diary entry.

[43] In many circumstances the sexual nature of a comment about a woman's nipples would be obvious, and the comment would fit within s 108(1)(b)(i). In other circumstances the facts might

support a view that it amounted to an inappropriate and even offensive comment on a physical effect of pregnancy, for example, but not that it was sexual in nature. However the manager's denial here means there is no evidence to indicate the alternative view is available, so I find the comment falls within s 108(1)(b)(i). Even then it is only barely so, in the light of the context I have described.

2. The incident near the safe

[44] There were no references to this incident in Ms Parohinog's diary. Whether the manager placed his hand on her stomach as Ms Parohinog said he did came down to her word against his. I acknowledge the evidence of Miriama Lavasii, who was nearby at the time and was a credible witness. However Ms Lavasii did not see the incident, rather she heard Ms Parohinog tell the manager not to 'do that'. She did not know what prompted Ms Parohinog to say those words. Such evidence did not shed any light on whether the incident happened.

[45] Accordingly I am not persuaded on the balance of probabilities that the incident occurred.

3. The comment about not getting enough sex

[46] There were no diarised references to the comment, although Ms Parohinog referred to it at the staff meeting on 8 December. However she has never provided any further details as to date, place, time or context. In the face of the manager's denials, I am not persuaded on the balance of probabilities that the incident occurred.

4. The effect of the incidents

[47] The definition in s 108 requires more than evidence of the occurrence of incidents of the kind listed in s 108(1)(b)(i) – (iii). In addition it requires evidence that the relevant behaviour was unwelcome or offensive to the employee concerned, and for present purposes I accept that was true of the behaviour alleged here. Further, it requires evidence that the behaviour, by its nature or through repetition, had a detrimental effect on the employee's employment.

[48] While the comment about Ms Parohinog's nipples was unacceptable, I am not persuaded the incident went further and had a detrimental effect on her employment. It was abundantly clear that her overwhelming concerns at the time were: her view of the appropriateness of the manager's opening the door at the 5 December meeting to an announcement of her pregnancy; and her anger at being asked to apologise for swearing during the meeting. She raised the comment about her nipples because she did not see why she should have to apologise for her language, given comments like that had been made to her.

[49] Further, I found unconvincing her evidence that she had not raised the comment about her nipples, and her other allegations, any earlier because she did not feel comfortable doing so. She is obviously someone who does not hesitate to raise concerns of any kind directly with managers, and she was comfortable enough to raise the comment openly during a staff meeting.

[50] I am therefore not persuaded that Ms Parohinog was sexually harassed in terms of the definition in s 108(1), and find she does not have a personal grievance in that respect.

Summary of orders

[51] The bank is ordered to pay to Ms Parohinog $750 as compensation for injury to her feelings in respect of her disadvantage grievance.

Costs

[52] Costs are reserved.

[53] The parties are invited to agree on the matter themselves. If they seek a determination from the authority they shall have 28 days from the date of this determination in which to file and serve memoranda on the matter.

R A Monaghan
Member, Employment Relations Authority