

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 278/08
5115904

BETWEEN SUSAN SIFFLETT
 Applicant

AND D & L INVESTMENTS LTD
 Respondent

Member of Authority: Vicki Campbell

Representatives: Alan Taylor for Applicant
 Dave Gillies for Respondent

Investigation Meeting 23 July 2008 at Hamilton

Determination: 5 August 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship problem

[1] Ms Sifflett was employed by D & L Investments Ltd as a Forecourt Attendant at the Shell Service Station in Matamata on 4 July 2007. Ms Sifflett tendered her resignation from her employment on 19 November 2007 with a last day of work of 7 December 2007.

[2] In a second letter also dated 19 November 2007 and handed to her manager on 20 November, Ms Sifflett raised a formal complaint of sexual harassment against another employee. Ms Sifflett's letter reads (verbatim):

The first night I worked with him. I was doing my end of day cash up and I dropped sum money on the floor wen I bent dwn to pick it up he made the comment while ur down there. Then he made a coment to a young male customer about me saying u'd better watch out for her she likes little boys.
He has also made a coment about having his nob polished by his girlfriend.
Then 2 days ago I mentioned I had a sore throat he then said I knw sumthing that fixes that I asked him what he said cum fixes it. This has all ocured over the past few weeks. As a result of this I have resigned my position at Shell. If nothing is done about this matter I will have no choice but to take this matter further.

[3] The letter of complaint was given to Mr Dave Gillies, the Service Station manager, on 20 November 2007 after the letter of resignation, which had been put on Mr Gillies desk the previous night.

[4] Mr Gillies met with Ms Sifflett to discuss the allegations made in her letter, on 21 November 2007. Mr Gillies assured Ms Sifflett that an investigation into the allegations would be undertaken. Ms Sifflett was also advised that Mr Gillies would take steps to ensure she was not left alone with the employee while the investigation process was under way.

[5] At this meeting Ms Sifflett was asked if the complaint she had made about sexual harassment was the reason for her resignation. Ms Sifflett told Mr Gillies that the allegations were only partly the reason. Other reasons given for the resignation include the fact that the 3-11pm shift was hard on her children and she couldn't continue with the shifts and Ms Sifflett did not find the service station to be a team place to work. Ms Sifflett also told Mr Gillies she had felt pressured by another employee to do fuel reconciliations and she had had words with another employee about the use of a console at change over.

[6] Following his investigation into the allegations of sexual harassment, Mr Gillies concluded that no sexual harassment had occurred. He concluded the allegations of sexual harassment were false and that Ms Sifflett's conduct in making the false allegations, constituted serious misconduct.

[7] Mr Gillies wrote to Ms Sifflett on 23 November and requested her to attend a disciplinary meeting as a result of the concerns he now had over Ms Sifflett's claim of sexual harassment.

[8] The meeting took place on 27 November 2008. The notes from the meeting show that from the outset of the meeting Mr Gillies did not accept Ms Sifflett's claim that she had been sexually harassed by the employee.

[9] Mr Gillies advised Ms Sifflett that her behaviour in making such an allegation was a deliberate act causing harm to another person. Mr Gillies pointed out to Ms Sifflett that he considered her actions to constitute serious misconduct and he summarily dismissed her.

[10] Ms Sifflett claims her dismissal was unjustified. Ms Sifflett also claims that during her notice period she was disadvantaged in her employment by unjustifiable actions on the part of her employer.

[11] The Respondent denies all the claims. Mr Gillies says the dismissal was both justified and carried out in a procedurally fair manner. He says Ms Sifflett made a false claim of sexual harassment in the work place.

[12] Pursuant to section 103A the Authority must actively scrutinise D & L Investments Ltd's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[13] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[14] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*White v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

Sexual Harassment

[15] Ms Sifflett alleges she had been subject to sexual harassment in her employment. The sections of the Employment Relations Act 2000 which are relevant to Ms Sifflett's claim are:

108 Sexual harassment

(1) For the purposes of section 103(1)(d) and 123(d), an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer –

- (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains –
 - (i) an implied or overt promise of preferential treatment in that employee's employment; or
 - (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
 - (iii) an implied or overt threat about the present or future employment status of that employee; or
- (b) 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 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.

(2) For the purposes of section 103(1)(d) and 123(d), an employee is also sexually harassed in that employee's employment (whether by a co-employee or by a client or customer of the employer), if the circumstances described in section 117 have occurred.

117 Sexual ...harassment by a person other than the employer

(1) This section applies where –

- (a) a request of the kind described in section 108(1)(a) is made to an employee by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer; or
- (b) an employee is subjected to behaviour of the kind described in section 108(1)(b) by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer; or
- (c) an employee is subjected to behaviour of the kind described in section 109 by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer.

(2) If this section applies, the employee may make a complaint about that request or behaviour to the employee's employer or to a representative of the employer.

(3) The employer or representative, on receiving a complaint under subsection (2), must inquire into the facts.

(4) If the employer or representative is satisfied that the request was made or that the behaviour took place, the employer or representative must take whatever steps are practicable to prevent any repetition of such a request or of such behaviour.

[16] The test for sexual harassment is a subjective test in the sense that it is the perception of the complainant and the observable effects on him or her that an employer is required to seriously consider in investigating complaints.

[17] I am satisfied that Mr Gillies took the complaint seriously and considered and indeed did, carry out an investigation into the complaint. Mr Gillies was entitled, after investigating the matter, to conclude that sexual harassment had not been established. But, he went further than that. Mr Gillies viewed Ms Sifflett's letter of

complaint as not only false, but also threatening in that Ms Sifflett stated that if no action was taken about the complaint she would take it further. Mr Gillies considered Ms Sifflett's actions in making what he viewed as a false complaint and the threat of further action, as constituting serious misconduct.

[18] The fact that any particular action may have serious consequences does not in itself render that action serious misconduct justifying summary termination. The conduct in question must be considered in context having regard to all the attendant surrounding circumstances.

[19] Misconduct must be serious to justify a summary dismissal and must be conduct that deeply impairs or is destructive of "...that basic confidence or trust that is an essential of the employment relationship..." (*BP Oil NZ Ltd v Northern Distribution Workers Union* [1989] 3 NZLR 580).

[20] I am not satisfied the conduct here has such a character. Ms Sifflett believed she had been subject to sexual harassment in the workplace. Given that, she was entitled, pursuant to s.117 of the Employment Relations Act to make a complaint about the conduct. The action of making the complaint was viewed by Mr Gillies as causing harm to another person.

[21] There was no evidence that harm had been caused to the complained about employee. Having reviewed the notes made from the disciplinary meeting, neither was there any evidence of any harm, said to have been suffered by the employee, put to Ms Sifflett during the disciplinary process.

[22] As to the claim that the allegations were false. The letter inviting Ms Sifflett to a disciplinary meeting does not accurately reflect that Mr Gillies thought the allegations were false. Rather the letter states that Mr Gillies has concerns over the "validity" of Ms Sifflett's claims. Essentially Mr Gillies advised Ms Sifflett that he believed her allegations were not well-founded. That is not what she was dismissed for. Ms Sifflett was dismissed for lying.

[23] I am not satisfied the allegation that Ms Sifflett was lying was put to her adequately enough during the disciplinary process to put her on notice that that was

the true reason for the disciplinary action. Further I am not satisfied the Respondent has discharged the burden of showing that its actions were those which a fair and reasonable employer would have taken in all the circumstances. Viewing matters objectively, I find that a fair and reasonable employer would not have concluded Ms Sifflett's conduct amounted to serious misconduct. I further conclude a fair and reasonable employer would not have dismissed her.

[24] Ms Sifflett was unjustifiably dismissed and she has a personal grievance.

Disadvantage grievance

[25] Ms Sifflett's personal grievance under this heading is that the respondent affected her employment, or one or more conditions of her employment, to her disadvantage by the following unjustified actions:

- Ms Sifflett was required to attend work at the same time and place as the alleged harasser while the investigation into her complaint proceeded; and
- The interviews into her complaints were conducted while she was still in the workplace; and
- Ms Sifflett was required to face the employee concerned as he left the investigation interview looking unconcerned and jovial.

[26] As set out earlier in this determination, Mr Gillies met with Ms Sifflett on 21 November to discuss her complaint. Mr Gillies and Ms Sifflett agreed that Mr Gillies would take steps to ensure she was not left alone with the employee while the investigation process was under way. Ms Sifflett, was aware that the employee concerned would be present at work during the change over.

[27] At the investigation meeting Ms Sifflett confirmed that from the period of 21 November until she was dismissed on 27 November 2007 she only worked on two days on which the employee concerned also worked. Ms Sifflett confirmed also that they were only in the service station at the same time for a maximum period of 15 minutes, during the change over period between shifts.

[28] I am satisfied that during the 15 minute change over period, Mr Gillies adhered to his promise to ensure Ms Sifflett was not alone with the employee. At all times the Service Station manager was present, although she was usually in her office. However, she had access to the video consoles and could see everything that was happening through the CCTV cameras.

[29] Ms Sifflett acknowledged at the investigation meeting that since she had made her complaint she had experienced no similar conduct in the workplace.

[30] It was common ground that the employee against whom Ms Sifflett had complained was interviewed while Ms Sifflett was working. Mr Gillies accepted that he could have waited and brought the employee in an hour or so later to avoid Ms Sifflett being in the workplace, but he understood from his conversation with Ms Sifflett on 21 November that she was happy to work as long as she was not left alone with the employee.

[31] Ms Sifflett was working at the same time as the employee left his interview. Ms Sifflett complains that when he left he looked unconcerned and jovial. Whether the employee looked unconcerned or jovial, or not, as he left the service station, would only be relevant if Ms Sifflett had alleged that the Respondent was somehow responsible for the employee looking and acting that way. I do not understand Ms Sifflett is suggesting any such thing.

[32] Having made a serious allegation against a colleague, Ms Sifflett obviously felt uncomfortable in the workplace while the respondent undertook its investigations. I am satisfied that at no time was Ms Sifflett left alone with the employee concerned. However, undertaking the interview of the employee while Ms Sifflett was in the workplace could and should have been avoided. While Ms Sifflett could be said to have been disadvantaged in her employment from that action, I do not find the action of interviewing the employee while Ms Sifflett was in the workplace to be unjustified. Rather it was misguided.

[33] Ms Sifflett's claim for unjustified disadvantage fails and I am unable to be of further assistance to her in that regard.

Remedies

[34] I have found Ms Sifflett was unjustifiably dismissed and therefore she is entitled to remedies.

Lost wages

[35] Ms Sifflett resigned for a multitude of reasons, one of which included the conduct, which she found offensive, from her work colleague. The evidence established that other reasons for her resignation included the 3pm – 11pm shift she was required to work, and her relationship with at least two other employees.

[36] There was no indication at the time Ms Sifflett resigned her employment that there were other reasons for her resignation.

[37] Ms Sifflett was due to end her employment on 7 December 2007.

[38] I consider it is unlikely, had Ms Sifflett not been dismissed on 27 November 2007, that she would have remained in employment beyond 7 December given the impact the shifts were having on her children and her concerns about her relationships with at least two other employees. Therefore the total wages lost as a result of the unjustified dismissal was six days (this is taking into account the four on, four off nature of the shifts Ms Sifflett worked). Ms Sifflett is entitled to reimbursement of lost wages in the amount of \$566.40 gross (being six days at 8 hours per day at \$11.80 per hour).

[39] Ms Sifflett seeks interest on the above amount. Exercising the discretion to award interest under clause 11 of Schedule 2 of the Act, I think it fit to order D & L Investments Ltd to pay to Ms Sifflett interest at the rate of 10 per cent on the arrears of wages of \$566.40.

[40] Interest is to be calculated from 28 November 2007 until the date the sum is paid to Ms Sifflett.

D & L Investments Ltd is ordered to pay to Ms Sifflet \$566.40 gross, plus interest, pursuant to section 123(1)(b) of the Employment Relations Act within 28 days of the date of this determination.

Compensation

[41] Ms Sifflett claims compensation for hurt and humiliation. Ms Sifflett gave no specific evidence of hurt and humiliation suffered as a result of the dismissal. Taking into account the injury to feelings inherent in being subject to a dismissal found to be unjustified, I award Ms Sifflett the sum of \$2,000 compensation pursuant to s.123(1)(c)(i) of the Act.

D & L Investments Ltd is ordered to pay to Ms Sifflett the sum of \$2,000, pursuant to section 123(1)(c)(i) of the Employment Relations Act within 28 days of the date of this determination.

Costs

[42] Costs are reserved and the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority