

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN T (Applicant)
AND S A R Limited (Respondent)
REPRESENTATIVES John Shingleton, Counsel for Applicant
Paul McMEnamin, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 28 June 2005
DATE OF DETERMINATION 23 September 2005

DETERMINATION OF THE AUTHORITY

Prohibition of publication

[1] This is a claim involving allegations of sexual harassment. Given my findings I prohibit from publication the name of the applicant and the name of the representative of the employer who she says harassed her during her employment under schedule 2 clause 10(1) of the Employment Relations Act 2000. I do not prohibit from publication the name of the establishment at which the applicant was employed. I shall refer to the applicant as T and the representative of the respondent as S.

The Employment Relationship Problem

[2] The applicant T was employed as a waitress from 19 February until 20 March 2004 at a Christchurch city bar known as the Mad Cow Bar and Café (“the Mad Cow”). She was employed to work on Thursday, Friday and Saturday nights. Over the five week period T was employed her hours worked averaged out at 17.25 hours per week. Her hourly rate was \$10.00 per hour.

[3] T says that whilst employed at the Mad Cow she was subjected to sexual harassment in the following ways:

- A representative of her employer, S, repeatedly touched her bottom and lower waist.
- S requested she wear a bikini top to work and referred to her as a tease.
- She was exposed to at least one foam party at the bar where stripping took place and the disc jockey made what she described as *sleazy* comments. T said that although she asked to work in the front bar on the evening of the foam party which was held in the back bar area S would not allow her to do so.
- There were offensive photographs from the foam parties being publicly displayed in the bar as available for purchase.

- There were posters in the ladies toilets showing people having sex and advocating the use of drugs and that there were pornographic pictures in the men's toilet. The posters showed people in various positions in toilet cubicles. T said that she complained about the posters to S and they were not there the next time she went to work.

[4] T said that she decided to leave her employment on the evening of Saturday 20 March 2004 after S gave her a verbal warning. T said that S was making her feel like he wanted her to *quit*. She said that she left because she had had enough of S taking advantage of her. T says that she was sexually harassed and unjustifiably constructively dismissed from her position as a waitress and seeks \$6000.00 compensation. She also seeks a penalty for the failure of her employer to provide her with an employment agreement.

[5] T lodged her problem against two respondents in the alternative. For reasons I have referred to later in this determination I have found the first named alternative respondent did not employ T. The claim against the first respondent Trevor James is struck out.

[6] S managed the Mad Cow bar at the material time. There was no dispute that he was a representative of the employer. He denies ever touching T inappropriately during her employment. He further denies making suggestive comments to her or behaving in an inappropriate manner toward her. He says that T never complained about the posters in the ladies toilets, which were commercially available, to him and if they were removed it was probably because they were stolen. S denied asking T to wear a bikini top to work. He says that to the best of his knowledge patrons have not stripped completely naked at the foam parties and that T did not complain to him about this or ask to work in a different bar on the evening of the foam party.

[7] S says that T arrived late for work on 20 March 2004 and then spent some time following her arrival socialising with a friend. He cautioned T about wasting time. He says that he then saw T talking to a friend at the bar whilst a customer was waiting to be served. T's duty manager and supervisor at the bar was James. James said that on 20 March 2004 he was off duty but went to the Mad Cow bar. He says that he tried to attract T's attention so he could get a drink and that she responded *fuck off Jimmy. You're not working here now*. James talked to S about the exchange. S talked to T and said that he was not happy with her attitude to customers. He advised her that she would get a verbal warning. He said that T asked him to put the warning in writing. S said that T then said *I quit*. He said there was then some further discussion and she went back to work in the front bar only to leave about half an hour later saying that she had had another altercation with a customer and had enough of working at the bar.

[8] S says that he would normally have provided an employment agreement and that all the other employees have agreements. S said that it slipped his mind after he could not get a print out from the computer.

[9] The following issues arise from this case:

- The identity of T's employer.
- Whether T was subjected to language, visual material or physical behaviour of a sexual nature directly or indirectly during her employment that was unwelcome or offensive to her.
- Whether that behaviour by its nature or through repetition had a detrimental effect on her employment, job performance, or job satisfaction.
- Was T unjustifiably constructively dismissed - if sexual harassment is established would T have left her employment on 20 March 2004 but for the conduct she complained of?

- Should there be a penalty for the failure by the respondent to provide an employment agreement?

The identity of T's employer

[10] There is an issue about the identification of T's employer. There is no dispute that T was never told that her employer was a company SAR Limited. I accept that the Mad Cow bar is owned and operated by the second respondent SAR Limited. Mr McMenemy is technically correct that S should have been named as the alternative respondent. The shareholder and director of the company, Trevor Jones, made no representations at any time directly to T. In this case I am not of the view that much will turn on this. Mr McMenemy has submitted that the second respondent is solvent and if there are findings against the company it is in a position to discharge any liability. I will deal with the matter in this way. I note that there was no disclosure of the identity of the company by S and that he had no authority with respect to the first respondent. Rather than substitute him as the alternative respondent at this stage I will simply reserve leave for either party to come back to the Authority if enforcement issues arise.

Whether T was subjected to language, visual material of physical behaviour of a sexual nature directly or indirectly during her employment that was unwelcome and offensive to her?

Physical acts

[11] T says that after the first night of her employment S touched her on the bottom and around the waist. She says that this continued even though she told him not to until about a week and a half before her final day of employment on 20 March 2004. T was clear in her evidence that such touching had taken place and S was adamant that it had not. The allegation that S touched T is serious and the standard of proof to be applied is the balance of probabilities consistent with the gravity of the allegation.

[12] The age difference between S and T was not significant. My impression of S was that he was not a forceful person and not particularly authoritative in terms of his management of the bar. T on the other hand spoke up about matters that concerned her and was confident that her view of the situation was the right one. I consider if T had spoken to S in the way that she told me she did after he touched her, repeated touching by S would have been highly improbable.

[13] The alleged touching or T's reaction to it was not witnessed by any of the other staff I heard from who worked there at the material time. Whilst it is not unusual for harassment to go unobserved I did hear from several staff who worked there at the material time to the effect that the bar areas are small and there were usually a number of staff behind the bar. The staff told me they were sure someone else would have seen if such touching took place. Staff who worked there at the time agreed that they would not always be behind the bar all the time when T was there but certainly for a significant part of the time they were. I viewed the two bar areas and they were not large areas. T said that much of the touching took place by the dishwasher at the back and that S would come in through the swinging door or gates. T also said that one incident took place at the dishwasher at the front bar and another incident where she said he put his hand around her waist at the bar.

[14] T did not tell anyone about this touching during her employment. She told fellow employee and friend Theresa on the night she left employment. Not telling anyone about the touching was, I find, inconsistent with T's reaction to other matters during her employment when her reactions and state of mind would be obvious at least to some other staff members. I found Anthony who was asked by the respondent to attend at the investigation meeting particularly credible. He was a staff

member who had not been working long before T commenced her employment at the Mad Cow. He said that T did not mention anything about management to him and he never saw anything. He did not recall S being behind the bar or paying special attention to T and he said that he never heard any suggestion that there was inappropriate conduct on the part of S.

[15] The other staff who worked with T at the material time including Theresa had not experienced any difficulty with S along the lines complained of by T.

[16] T said that after S had touched her bottom for the first time she noticed the posters in the ladies toilets. She said that she immediately went to S and complained that they were offensive. I was surprised that T would have the faith in S to deal appropriately with the situation. The other matter that I find somewhat unusual is that when T left the establishment on 20 March she told Theresa for the first time that *S keeps on touching my ass*. Her evidence though was that there had been no touching for over a week and her focus, I find, on that night was on what she perceived to be the unfairness of the warning following the exchange she had had that evening with S.

[17] I have carefully considered the evidence. I am not satisfied on the balance of probabilities given the seriousness of this allegation that S sexually harassed T by touching her.

Bikini

[18] I prefer T's evidence that S asked her to wear a bikini for a beach theme evening. I also find that later when she did wear a bikini top to work under her tee shirt but tied around her neck S did comment on it and no doubt relating back to T's refusal to wear a bikini on the beach theme night referred to her as a tease. T spoke firmly to S about this and there was no repetition. Such comments are of a sexual nature and it is inappropriate to suggest an employee wear a swimsuit or comment on undergarments of choice. T said that the comments were offensive to her and I am satisfied that they had a detrimental effect on her job satisfaction because she said she felt dirty. I find that T was subjected to sexual harassment by virtue of those comments.

Posters, photos and foam parties

[19] I am of the view that the posters in the ladies toilet could cause offence and some initial alarm as to whether they were in fact pictures of people in the toilet cubicles of the Mad Cow. There was some content in the posters of a sexual nature. T said that she saw pornographic pictures in the men's toilet when the door was open. I find that her exposure to posters in the ladies and men's toilets was only for a short period over the duration of a day or so and therefore I am not satisfied that the visual material had a detrimental effect on T's employment, performance or job satisfaction.

[20] T's primary concern about the photos displayed of the people at the foam parties was about privacy for the participants in the foam parties and whether the photos had been taken covertly. T recognised one of her friends in the photos. In circumstances where T's concerns were largely for third parties I am not satisfied that she suffered a detrimental effect in terms of her employment, performance or job satisfaction because of those photos.

[21] The foam party events were held fairly regularly at the Mad Cow Bar. They involved some customers stripping off usually just their tops, being covered in foam and getting a prize or drink in return. Other customers would watch the event. It would be difficult for an employee to argue that they found such events unwelcome and offensive if they knew about them when they were employed. It then becomes an informed choice for a prospective employee whether to accept a job in a particular establishment or not.

[22] In this case I am not satisfied that T knew that there would be events at the Mad Cow involving removal of some clothing. T found the disc jockey's comments encouraging the stripping offensive. I accept that T asked S if she could work at the front bar during this party and was not permitted to. This was supported by Theresa who overheard the discussion. Anthony said that T was not happy the night of the foam party about seeing the *girl stripping and rolled her eyes and was not impressed*. T said that the foam party was one of the main reasons that she decided to leave the Bar and that she felt the environment was *sleazy*. She said to S that she had not come to work at a strip club but at a bar as a bar tender.

[23] I find that T was sexually harassed in her employment at the Mad Cow in that she was subjected to an event at which there was at least partial nudity which was unwelcome and offensive to her. She should have been allowed to work in the front bar for the duration of the event. I find that the nature of the event had a detrimental effect on her job satisfaction and employment in that she decided the Mad Cow was not the right place for her to work at.

Was T unjustifiably constructively dismissed on 20 March 2004?

[24] T's final night of employment was eventful. She arrived slightly late to work and S spoke to her that night about her lateness, talking to friends and her attitude to James. T became angry and defensive and did not accept that she had done anything wrong. I am not satisfied that it was unfair that S raise these issues with T. T insisted on the verbal warning being put in a more official way and S agreed to do so the following week in writing. There is no dispute about that. I find it unlikely given that S was to put his concerns in writing at a later date that he gave an ultimatum to T that she should either accept the comments he made about her attitude or leave her employment. In any event T returned to the bar for a short time to work as it was busy and then after about half an hour advised S that she was leaving.

[25] I find that the substantial reason for the resignation on 20 March 2004 was T's sense of grievance about the warning. Resignation was premature because S had not at that time as requested put the warning in writing. T said that she did not fully understand what the concerns were and needed the warning to be in writing. I am of the view that S was not unfair in talking to T about the concerns in her dealings with customers and performance of her work that night rather than waiting for the end of the shift.

[26] In conclusion the reason that I have found for the resignation does not in the circumstances amount to dismissive or repudiatory conduct on the part of the respondent that would justify the termination of the employment relationship.

[27] I do not find that T was unjustifiably constructively dismissed.

Remedies

[28] I have found that T was sexually harassed when she was subjected to comment about bikinis and to a foam party and some nudity and is entitled to compensation. I was not satisfied that T was aware of the foam party events before commencing work. If S had agreed that T could work the front bar then that would also have avoided her being exposed to the event. I am of the view in the circumstances that there should be a moderate award to recognise that there was some offence caused but it was limited to one evening. T then realised that the Mad Cow was not the place for her and had obtained by 20 March 2004 some alternative employment in another bar, albeit with less hours and some financial support from family. I am not satisfied that the Mad Cow should be liable for that realisation beyond that one evening. The bikini comments were not repeated and although unwelcome have to be assessed in the context of the reference back to the beach theme

evening. I am of the view that the sum of \$700.00 is a fair and reasonable award in the circumstances for both the bikini comments and the foam party. There are no issues of contribution.

[29] I order SAR Limited to pay to T the sum of \$700.00 under section 123(c)(i) of the Employment Relations Act 2000.

Penalty

[30] An employer who does not provide a copy of an intended individual employment agreement to an employee is liable for a penalty under the Employment Relations Act 2000. I accept that the failure to provide an agreement to T was not reflective of the respondent's general approach to these matters and had T remained in her employment one would probably have been provided. I am of the view that a moderate penalty should nevertheless be imposed in these circumstances because it should by now be well known that agreements should be provided.

[31] I order that a penalty be paid by S A R Limited in the sum of \$300.00. The penalty is to be paid into the Authority and will then be paid by the Authority into the Crown bank account.

Costs

[32] I reserve the issue of costs. I would encourage the parties to discuss and attempt to reach agreement about costs. Neither party was completely successful. If agreement cannot be reached the applicant has 20 days to make submissions with respect to costs and the respondent has a further 14 days to respond.

Summary of findings and orders

- The respondent was the employer of T but leave is reserved as set out in paragraph [10] of the determination.
- I have found two claims of sexual harassment were successful in relation to the bikini comments and the foam party. I made an award of \$700.00 under section 123 (c)(i) in relation to these matters.
- I have not found T was unjustifiably constructively dismissed.
- I have imposed a penalty of \$300.00 for the respondent's failure to provide T with an employment agreement. Such penalty is to be paid to the Authority and then into the Crown bank account.
- I have reserved the issue of costs.

Helen Doyle
Member of Employment Relations Authority