

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ian Whyte (Applicant)
AND DG Services Limited (Respondent)
REPRESENTATIVES Paul Pa'u for Applicant
Katherine Burson for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 24 November 2004
**WITNESS INTERVIEW BY
TELEPHONE CONFERENCE** 16 December 2003
SUBMISSIONS 14 March 2004, 22 March 2004
DATE OF DETERMINATION 19 May 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The respondent company operates a block of serviced apartments. Mr Whyte and his partner Ms Baird were respectively Building Manager and Guest Manager for the block, and lived on the premises. They reported to the managing director, James Leslie. Cleaning services were contracted out to another company, Spotless Services Ltd.
- [2] In early August Mr Leslie was told by a member of the cleaning staff that Mr Whyte had made comments to her of a sexual nature and that she had found this offensive. Mr Whyte was alleged to have said "*you must be good in bed*" and "*you have good child bearing hips.*" Mr Leslie spoke with Mr Whyte, who did not at the time deny making the comments and so Mr Leslie advised him "*that this behaviour was to stop.*"
- [3] On 22 August 2003, Mr Leslie received a further complaint from the same woman. This time the allegation was more serious. For this reason, and because it was the second such complaint, Mr Leslie decided that he should now proceed to treat it as a disciplinary matter. On 2 September, after an inquiry, he concluded that Mr Whyte had sexually harassed the complainant, and dismissed Mr Whyte for serious misconduct. Mr Whyte says that this dismissal was procedurally unfair and substantively unjustified.
- [4] The issues for determination are:
- whether Mr Leslie's inquiry was full and fair;

- whether it was open to him, on the basis of this inquiry, to conclude that serious misconduct had occurred, and
- whether, in all the circumstances, the dismissal was fair.

Was there a full and fair inquiry?

[5] 22 August was a Friday. Mr Leslie was away over the weekend. On Monday 25 August Mr Leslie told Mr Whyte that he had received another complaint. Mr Whyte asked to speak to Mr Leslie in private that evening however Mr Whyte became aggressive and Mr Leslie decided not to continue the meeting.

[6] On Tuesday 26 August Mr Leslie advised Mr Whyte in writing that he proposed to meet with him the next day to:

“discuss concerns that [he] may have engaged in inappropriate behaviour and sexual harassment of another staff member. In particular [complainant] has advised that on 20 August [he] showed her pornographic photos and made suggestive personal remarks. She has advised that this conduct was offensive to her.”

[7] The letter went on to advise Mr Whyte that he was entitled to bring a support person to the meeting.

[8] Also that day Mr Leslie interviewed and took statements from the complainant and the other cleaner who was also present at the time of the alleged incident. On the morning of Wednesday 27 August Mr Leslie provided Mr Whyte with a copy of the complainant’s statement. In her statement the complainant said that she had been cleaning an apartment with another worker when Mr Whyte came in with a magazine open at an image of a naked woman with her legs apart and “*put it in her face*” with the words “*woman has needs too*” She said she looked at him and said “*you are sick*” at which he smiled and walked out. The complainant went on to say that she was scared of Mr Whyte, who had previously done similar things, and would stare at her while she was working.

[9] The other worker who was present confirmed what the complainant had reported except that she had not seen the picture in the magazine and could not comment on that. She did say, however, that the complainant appeared distressed by the incident. Mr Leslie did not take a written statement from this person. He did tell Mr Whyte that he had spoken to her and that she confirmed what the complainant had said.

[10] At Mr Whyte’s request the proposed meeting was postponed several times over the next week. During that time Mr Leslie was subjected to rude, aggressive, and even threatening behaviour from Mr Whyte. Mr Whyte also abused the complainant to Mr Leslie. Some of this is evident in written correspondence from Mr Whyte to Mr Leslie during this period. By way of example I cite from Mr Whyte’s letter to Mr Leslie dated 27 August 2003 which served to advise that he would not be attending a proposed meeting on 28 August:

“Go to hell about 3pm meeting 28th - that’s you James...

she is a very dangerous woman...

[11] Mr Whyte also provided a the following brief written response to the complaint the relevant parts of which read:

“she loves talking sex true

I deny any aspects and say that any statement is in fun which is why I don’t mind that others hear what I say and that there is nothing personal to [complainant] That she goes with the flow means she knows the comments are fun and just harmless banter, the whole thing is out of context.

If you continue to harass us we will take it to Spotless and Spotless will dump you.

I VERIFY THE THIS IS A TRUE AND ACCURATE RECORD OF THIS REPLY

Nothing indelicate, no exposure, no suggestions, no touching, no police.”

[12] Mr Whyte clarified for me that when he said “*Spotless will dump you*” he was referring to the complainant.

[13] The meeting finally took place on Tuesday 2 September 2003. Present were Mr Leslie, Mr Whyte, Ms Baird and DG Services Ltd lawyer, Mr Schirnack.

[14] Mr Whyte confirmed to Mr Leslie and Mr Schirnack that he had shown or offered a magazine to the complainant but claimed that it was not offensive, saying that “*you could buy this at any dairy.*” He left the meeting briefly to retrieve a magazine which he said was the one in question. He returned with a recent edition of “FHM” which he showed to Mr Leslie and Mr Schirnack. They had a quick flick through it before he took it back. Mr Whyte said that he felt that the complainant had been “*put up to*” making a complaint and that there was no case to answer. He was asked if he had anything else he wished to say, but made no further response.

[15] Mr Whyte and Ms Baird then abruptly left the meeting. They took the magazine with them.

[16] Mr Leslie told me that although he had only had a brief look at the magazine, it did not appear to contain anything as graphic and offensive as what the complainant had described seeing. Straight after the meeting Mr Leslie went out and tried to buy the edition so that he could ask the complainant whether this was what she had been shown. However it was no longer in the shops. Mr Schirnack also spoke again with the complainant who stuck to her story.

[17] There was of course no dispute that the complainant had been shown unsolicited material, although Mr Leslie could not say for sure whether it was an “FHM” or not. He told me that because of the complainant’s reaction to the material and the alleged comments (which was confirmed by her co-worker) he accepted that she was upset and offended at what she had seen. He concluded that she must have had good reason for reacting this way. He also decided that Mr Whyte knew or should have known that this was inappropriate conduct. He concluded that serious misconduct had occurred.

[18] Mr Leslie told me he was aware of his obligation to provide a safe workplace. Given the prior discussions on this issue and the serious nature of the offence he felt he no longer had trust and confidence in Mr Whyte. This had been compounded by his rudeness towards Mr Leslie and about the complainant in the week after he was advised of the allegation against

him. Mr Leslie decided that dismissal was warranted. He did not think he needed to hear from Mr Whyte regarding the appropriate penalty.

[19] Mr Leslie confirmed Mr Whyte's summary dismissal to him in writing later that day. In that letter the reason given for dismissal was "*conduct that brought the business into disrepute and for which the business may be liable.*"

[20] The Building Manager and Guest Manager were employed pursuant to a joint employment agreement, which included provision of on-site accommodation. Ms Baird did not wish to leave her job so she stayed on for a salary of half the original joint remuneration. For a time both she and Mr Whyte continued to live on site for a time however they subsequently gave notice that they proposed to live off site and did so.

[21] Mr Whyte says that the process was unfair in the following ways:

- he received short notice, it was rushed, and he was not given a proper opportunity to explain his side of the story;
- he did not see a written statement from the other witness to the incident;
- he felt that Mr Leslie had pre-determined the matter on the basis of his own opinion of him;
- the reason given in the letter of dismissal was not the same as the allegation put to him for comment, so he was dismissed for something he never got to answer to;

[22] I do not accept that the process was rushed. Mr Leslie interviewed the other two individuals who had knowledge of the events which were the subject of the complaint. He provided Mr Whyte with the complainant's statement. Mr Whyte was told what the witness to the incident had said and was not prejudiced in any way by the fact that this was not written down. Mr Whyte asked for, and got, extra time to respond. When the parties were finally able to meet, he cut the discussion short.

[23] I am not satisfied that the matter was predetermined. I heard evidence that Mr Leslie and other directors of the respondent had previously expressed concerns about aspects of Mr Whyte's performance. In itself this does not amount to predetermination. This was not enough to convince me that Mr Leslie failed to give this matter fair and unbiased consideration.

[24] Nor am I concerned about the wording of the letter of dismissal. It is true that it was not expressly stated there that the conduct "*that brought the business into disrepute and for which the business may be liable*" was the alleged sexual harassment. However, Mr Whyte could have been in no doubt that this was what was being referred to.

[25] The one respect in which the process was not entirely ideal was in Mr Leslie's failure to tell Mr Whyte of his conclusion that there had been serious misconduct and to seek his response on the issue of penalty before proceeding to dismiss. However, Mr Whyte had walked out of the meeting before Mr Leslie had concluded it or outlined the next step in the process. Against the background of Mr Whyte's conduct over the preceding week, I consider it reasonable for Mr Leslie to proceed to complete the process without further input from Mr Whyte.

Was it open to the respondent to conclude that serious misconduct had occurred?

[26] Mr Whyte says that it was not open to the respondent to conclude that serious misconduct had occurred because:

- there is no specific reference in the employment agreement to sexual harassment being serious misconduct;
- the image shown to the complainant was not that described, being a less offensive image from “FHM;”
- there was no substantive justification for the dismissal because the magazine was clearly not offensive by any objective assessment;
- the respondent does not appear to have considered the conduct to be serious since it did not even suspend Mr Whyte during the inquiry;
- Mr Whyte acted in jest and the complainant was not offended.

[27] I accept that it is not possible for Mr Leslie to be entirely certain that image was specifically that described. The complainant herself had only a brief look at the image. However, I do not think it matters whether the magazine was FHM or something else. FHM is a men’s magazine; it contains images of scantily clad women in suggestive poses. I am satisfied that even these, if pushed in her face and accompanied by suggestive comments, could be very offensive to the complainant and sufficient to constitute sexual harassment. I note that I do not consider the failure to suspend Mr Whyte to indicate that the matter was not taken seriously.

[28] Regarding the suggestion that she was amused by the incident, I note that Mr Leslie knew both parties and was in a position to form his own conclusions on that point. I have to say that the complainant’s distress came through very clearly in the complaint itself. In addition, at the applicant’s request, she gave evidence at my meeting with the parties and was a very credible witness, quietly spoken, dignified and still clearly very upset at what had happened.

[29] As for the absence of a specific reference to sexual harassment in the agreement, I do not consider this to be of any relevance. In order for a summary dismissal to be justified there must be conduct which impairs the trust and confidence in the employment relationship. It is well established that sexual harassment may do so, whether or not there is an express reference to it in the employment agreement. I am satisfied that the conduct alleged here is sufficient to destroy the trust and confidence the employer had in its Building Manager, especially given that he was required to work with women staff.

[30] I conclude therefore that the incident took place as alleged, that it amounted to sexual harassment and that the harassment was sufficiently serious to constitute serious misconduct.

Was the dismissal fair?

[31] It has been argued for Mr Whyte that there was a disparity of treatment in that another worker similarly misconducted herself (after his dismissal) and was not dismissed. That other worker was the complainant in this case, who had by then left “Spotless” and gone to

work directly for the respondent. It was alleged that she spoke of sexual matters in the hearing of Ms Baird, in a way that had offended Ms Baird, and that after Ms Baird raised this matter with her employers, the complainant received only a warning letter.

[32] The conversation in question is not denied. The person concerned told co-workers of an incident in which a neighbour had exposed himself to her and she had complained to the police. In the circumstances this may have been a tactless, even distressing subject, to discuss in front of Ms Baird. However, it is not sexual harassment and is not a misdemeanour of even remotely the same magnitude as what Mr Whyte had done. Disparity of treatment was justified by the disparity in the conduct.

[33] I am satisfied that the dismissal was fair in all the circumstances. It was established that there had been serious misconduct and it was open to the respondent to dismiss. The dismissal was procedurally and substantively justified. I can do nothing more to assist Mr Whyte with his employment relationship problem.

Costs

[34] The issue of costs is reserved. If the parties cannot resolve it between themselves they have a period of 28 days from the date of this determination in which to request that the Authority dispose of it.

Y S Oldfield
Member of Employment Relations Authority