

SEXUAL HARASSMENT

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The sexual harassment provisions of the Labour Relations Act

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The statutory provisions: an overview

Sexual harassment is not wholly self-contained, in that it can be relevant to other types of personal grievance. There is no reason why sexual harassment could not, for instance, amount to constructive dismissal. In this paper I will focus on the specific sexual harassment provisions of the 1987 Act.

The applicable provisions are sections 210, 212, 221, 222 and 227. Significantly, these provisions fall within Part IX of the Act, which deals with personal grievances. The sexual harassment provisions have been grafted on to the well-established personal grievance procedures and thus obviously must share all of the advantages - and limitations - of the personal grievance system.

Section 210 explicitly includes within the definition of "personal grievance":

...(d) That the worker has been sexually harassed in the worker's employment.

Section 211 attempts to define the concept of "sexual harassment." I will return to these definitional aspects later. The section is concerned essentially with sexual harassment by the employer, or the employer's "representative" (an employer's representative is defined in section 210(2) to mean an employee who either "has authority over the worker alleging the grievance" or, alternatively, "is in a position of authority over *other workers* in the workplace of the worker alleging the grievance"). Section 222 deals with sexual harassment of a worker by persons other than an employer or an employer's representative, such as, for instance, the employer's customers or clients, or by

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other workers not in a position of authority over the complainant. In such a situation the affected worker can make a complaint in writing (section 222(1)); the employer is obliged to "inquire into the facts" and, "if satisfied" that the complaint has been made out, shall take "whatever steps are practicable to prevent any repetition of such a request or of such behaviour".

Sexual harassment by co-workers or customers only constitutes a personal grievance, however, if there is a repetition of the behaviour after the complaint *and* the employer "has not taken whatever steps are practicable to prevent the repetition of such a request or such behaviour" (section 222(3)). The Act, in other words, draws a clear distinction between sexual harassment by the employer, or the employer's representative (a personal grievance in its own right) and sexual harassment by other persons. This distinction is fully in accordance with the statutory definition of sexual harassment, as will be seen. Whether the distinction is sensible, or appropriate, is of course another matter. It might be argued that sexual harassment by co-workers is every bit as much of a menace as by employers or foremen, and in the former category it might seem unreasonable for the employee to have to wait for a repetition of the behaviour and for the employer's failure to act before he or she has a valid personal grievance.

Section 221 sets up some special statutory procedures to apply where sexual harassment has been alleged. I will consider this provision in detail a little later. Section 227 lists the various remedies that a grievance committee or the Labour Court can grant if a personal grievance has been made out. These include reinstatement, reimbursement of wages, and compensation. These can all be relevant to a case of sexual harassment, of course, but the Act also lists some additional remedies in section 227(e), which stipulates:

If a grievance committee or the Labour Court finds a worker to have been sexually harassed in that worker's employment [the committee or the Labour Court may make] recommendations to the employer concerning the action the employer should take in respect of the person who made the request or was guilty of the behaviour, which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person.

The power is only, it should be noted, one of making recommendations.

The definition of sexual harassment

Sexual harassment, according to section 212, exists where the employer or his representative:

- (a) Makes a request of that worker for sexual intercourse, sexual contact, or other form of sexual activity, which contains -
 - (i) An implied or overt promise of preferential treatment in that worker's employment; or
 - (ii) An implied or overt threat of detrimental treatment in that worker's employment; or
 - (iii) An implied or overt threat about the present or future employment status of that worker; or
- (b) By -
 - (i) The use of words (whether written or spoken) of a sexual nature; or
 - (ii) Physical behaviour of a sexual nature, -
 subjects that worker to behaviour which is unwelcome or offensive to that worker (whether or not that is conveyed to the employer or representative) and which is either repeated or of such a significant nature that it has a

detrimental effect on that worker's employment, job performance, or job satisfaction.

Clearly two rather different kinds of behaviour are proscribed here. "Type A" sexual harassment is where sexual contact is requested of a worker coupled with a threat - that is, unless the request is granted, certain employment-related consequences can follow. In other words, it is a misuse of the power imbalance in a contract of employment to obtain sexual gratification of some kind. A useful label is "sexual exploitation". "Type B" is the situation of unwelcome sexual attention - fondlings and pattings or comments for instance, which I will label as "sexual nuisance" harassment. Again we see a distinction drawn between different categories, and a ranking of them. "Sexual exploitation" is obviously regarded as a more serious matter than "sexual nuisance" harassment. That is because in the latter category the behaviour must either be *repeated* or have a "detrimental effect" on the worker's employment, job performance or job satisfaction, before the behaviour amounts to "sexual harassment".

Whether this categorisation is appropriate and whether our legislators have got their priorities right is of course open to argument.

Does the harassment have to take place at work?

The answer is no. Section 212 does not require that the threats or nuisance behaviour occur at work; nor does section 222, although with section 222 it might be argued that a requirement that the behaviour take place at work is *implied* (why require the *employer* to take action?). With section 212, however, there is clearly no justification for limiting the scope of the provisions to incidents which occur at work. A sexual demand coupled with a threat could just as easily be made after office hours, over the telephone for example. It is the employer-employee nexus which is significant, not the locality. Thus if the requirements of section 212 are met then the worker is deemed to have been "sexually harassed in that worker's employment", and a personal grievance exists.

Relationship with personal grievance procedures in awards and agreements

The sexual harassment provisions of the Act have so far surfaced in the Labour Court only once, in *Northern Industrial District Distribution Workers and Hawke's Bay Province Stores, Packing and Warehouse Workers IUW v AB Ltd.*, unreported, Labour Court, 1 August 1988, (ALC 77/88, 503/87), Finnigan J. One of the issues which arose was the relationship between the *statutory* procedures relating to sexual harassment and the personal grievance procedures set out in an award or agreement.

The procedures set out in section 221 are obviously intended to supplement, not replace, personal grievance procedures set out in an award. Section 221(d) stipulates, in effect, that the usual procedures will continue to apply. The most significant requirement is section 221(c), which forbids - reasonably enough - the grievance committee from taking into account evidence of the worker's "sexual experience or reputation".

In the *AB Ltd* case the union, after determining to proceed on the worker's behalf, wrote to the employer requesting the manager to attend a Personal Grievance hearing constituted under section 221. This request was complied with, but there was considerable uncertainty as to whether the procedure which had been used was correct, uncertainty which was, as the event proved, well-founded: the Labour Court held that the grievance proceedings adopted were "informal". Fortunately for the union's case, however, the Court used section 315 of the Act, which allows for the validation of informal proceedings, to validate the procedure which had been employed.

The Court summarised the relationship between the statutory definitions and procedures and award/agreement procedures as follows:

...At the hearing the union relied upon the definition of "personal grievance" in section 210 of the Act which includes a worker's claim of sexual harassment, and upon the definition of "sexual harassment" in section 212. It is submitted that these definitions have been effective since the date the current Act came into force. We accept that submission. It is then submitted that these definitions are incorporated into the personal grievance procedures of the New Zealand Retail (Non-Food) Employees' Award dated 3 March 1987 (the award). This in our view is also sound. Pursuant to sections 364(1), 160 and 171 of the Act, the proper procedures are those contained in the award. That is a situation of law created by the Act. The Act therefore excludes the procedure which the union adopted. We conclude that while the award remains in force, the proper procedures for personal grievances, among which are now included sexual harassment as defined in section 212, is the award procedure. We so hold.

Matters of evidence and proof

The Labour Court in the *AB Ltd* case (supra) also dealt with some important matters of evidence and proof. The Court concluded that the *burden* of proof falls on the union (or the individual worker, in those restricted situations where an individual can bring proceedings). The standard of proof, somewhat oddly, was equated with that normally applicable in contested paternity cases. This standard was in turn defined in *Hall v Vail* [1972] NZLR 95 as a standard of the balance of probabilities "giving due weight to the gravity of the applicant's allegation of paternity". Why the test for paternity cases, of all things, was thought of as appropriate in this context is hard to understand. In view of the Labour Court's subsequent discussion of the Court of Appeal's judgement in *T v M* [1984] 1 FRNZ 326 (where Woodhouse J made it very clear that in his view the "gravity of the allegation" component was implicit in the test of the balance of probabilities in any event) it might have been better for the Labour Court, with respect, to have said that the appropriate standard was the ordinary civil standard and to have left it at that.

The Labour Court also determined that "similar fact" evidence, not permitted in criminal cases, is admissible in the Labour Court. In other words, a complainant can support the allegation of sexual harassment by giving evidence of similar behaviour on the part of the harasser on other occasions, or indeed, other persons can give such evidence. The Labour Court noted its flexible powers to receive evidence under the "equity and good conscience" provisions, especially section 303(1) which gives to the Court power to "accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not". Therefore:

Evidence called to corroborate allegations of sexual harassment and evidence called with a view to establishing what are called "similar facts" is clearly admissible at law if the Court in equity and good conscience sees fit to admit it, and if admitted may be challenged in this Court only as to its probative value.

(*AB Ltd* case, supra, p.7)

This also prompts some considerations of the relationship between the sexual harassment provisions of the Labour Relations Act 1987 and the criminal law. Some types of sexual harassment are criminal offences, and the complainant always has the option of reporting the matter to the police. The point I wish to emphasise is that even if a criminal prosecution fails, a complaint of sexual harassment may still be made out on

the same facts, because of the differing standards of proof and the different approaches to the admissibility of certain kinds of evidence.

Conclusions

It is far too early to make any generalisations about the success or failure of these provisions. There has not been any sudden explosion of sexual harassment cases since the enactment of the 1987 Act, at least if Labour Court decisions are anything to go by. It is possible that more cases are being dealt with at the grievance committee stage, but it is, of course, equally possible that they are not, and there is no easy way to find out. My suspicion is that the 1987 Act has had little impact on the problem of sexual harassment, but this is an entirely subjective view. Personal grievance procedures are still largely the province of a worker's union, and the effectiveness of the Act is certainly dependent upon the willingness of unions to take complaints of sexual harassment seriously, and on a worker's willingness to bring the matter to the attention of her union in the first place.