

EMPLOYMENT EQUALITY ACT, 1977

EQUALITY OFFICER'S RECOMMENDATION NO: EE 01/1999

PARTIES

**A Claimant
(Represented by a Union)**

AND

**A Company
(Represented by a Solicitor)**

File No: EE 12/1998

1. DISPUTE

- 1.1** This dispute concerns a claim of sexual harassment of a female employee (claimant) by a male employee (Mr. A) contrary to Section 2(a) and Section 2(b) of the Employment Equality Act, 1977. It is alleged that, over a period of time, the claimant was subjected to both physical and verbal harassment of a sexual nature.

2. BACKGROUND

- 2.1** The Company named in this claim is in the catering business. The claimant is employed as an Administrator and Mr. A is employed as the Production Manager. The claimant says that from November, 1997 Mr. A has subjected her to both physical and verbal sexual harassment. She states that she gave the Company a number of opportunities to deal with the situation and the Company failed to take, what she considered, adequate and appropriate action.
- 2.2** Consequently, the Union, on behalf of the claimant, submitted a claim to the Labour Court dated 1st April, 1998. The Labour Court referred the claim to an Equality Officer for investigation and recommendation.
- 2.3** Due to the sensitive nature of this claim I do not propose to identify any of the parties to the claim. Therefore, throughout this recommendation the person alleged to have been harassed will be referred to as the claimant, the person alleged to have harassed will be referred to as Mr. A, the Union representing the claimant will be referred to as the Union and the Company against which the claim was lodged will be referred to as the Company. Witnesses for the claimant will be referred to as witness 1 and witness 2 and witnesses on behalf of the Company will be referred to on the basis of their job title e.g. Managing Director, Personnel & Training Manager, etc. Information received, but not included in this recommendation because of its sensitive nature, is available to the Labour Court should it require access to it.

3. SUMMARY OF THE UNION'S SUBMISSION

- 3.1** The claimant has been employed in the respondent Company since June, 1995. Her office is one of three in a portacabin adjacent to, but away from, the main building in which is located all the main facilities including the canteen, toilets, etc. The Union, in its submission, outlined a number of incidences of both a physical and verbal sexual nature which it says occurred on 13th November, 4th and 5th December, 1997. The Union also says that the incidents which occurred on 13th November and 4th December, 1997 were witnessed by two different witnesses.
- 3.2** On 14th November, 1997 the Union states that the claimant met with her shop steward and told her that from July/August, 1997 Mr. A had made repeated sexual remarks and advances towards her. The claimant, on each occasion, asked him to stop and made it quite clear that she did not like any of his remarks or advances, all she wanted was to do her job. The shop steward spoke with the Personnel & Training Manager that same day and the Personnel & Training Manager met with the claimant. The Personnel & Training Manager asked the claimant if the Managing Director spoke with Mr. A would that be sufficient and the claimant agreed. Then on Monday, 17th November, 1997 the Personnel & Training Manager informed the claimant that she had spoken to the Managing Director and he had agreed to speak to Mr. A. On 28th November, 1997 the Personnel & Training Manager asked the claimant if any further incidents had occurred and the claimant told her that, while no further incidents had occurred, she was staying away from the main building as much as possible.
- 3.3** The Union says that the claimant attended a meeting with the Managing Director and the Personnel & Training Manager on 10th December, 1997 at which the Managing Director said that he had spoken to Mr. A who had denied everything. The Union states that the Managing Director found it hard to believe that Mr. A would do such a thing, as Mr. A had told him, on many occasions, how much he disliked the claimant. The Managing Director agreed to investigate the matter and in a letter to the claimant dated 16th December, 1997 he states “that there is not enough evidence to conclude beyond a reasonable doubt that the alleged incidents took place”. He also states that he has asked Mr. A to maintain minimum contact with the claimant. The Union says that the claimant considers this inadequate as between 14th November and 10th December, 1997 Mr. A continued his unwelcome behaviour.

- 3.4** The Union says that, on 16th February, 1998 it met with Company representatives to say that their decision was unacceptable. The Union was unimpressed with the Company representatives as they attended the meeting without any files or notes from their investigation, they were unable to identify any reasons for disbelieving the witnesses and could not identify any specific piece of information that was untrue. According to the Union the representatives said that Mr. A denied the allegations and the Managing Director refused to answer any further questions and left the meeting.
- 3.5** The Union says that the claimant considered that the Company was not doing enough to stop this harassment, these incidents have deeply affected her and caused her great trauma and distress. The Union states that, despite being aware of the anxiety and distress caused to the claimant, the Company has refused to move Mr. A from this location given that the Company is a multi-location employer and, as such, would have a wider range of options available to them other than dismissal or lay-off. The Union also says that the Company's response to its internal investigation of the matter gives a clear signal that the alleged incidents are either of insufficient gravity or their occurrence is questionable. The Union considers that either interpretation is demeaning to the claimant. The fact that Mr. A is still working in the same location and the claimant is asked to stay away from the main building adds to the perception that she is guilty, according to the Union. It says that this is a classic example of double victimisation.

4. SUMMARY OF THE COMPANY'S SUBMISSION

- 4.1** The Company says that the claimant is employed since June, 1995 and works as an Administrator for another Company, hereinafter referred to as Company 2. The Company denies that it treated the claimant unfairly and says that the claimant has failed to show that she was treated less favourably than a person of the opposite sex or of the same sex but a different marital status in accordance with the provisions of the Employment Equality Act, 1977.
- 4.2** The Company says that it took the allegations, made by the claimant, seriously at all times. The Managing Director and the Personnel & Training Manager held a series of meetings with the claimant, the Union and with the two witnesses named by the claimant. They also spoke

to Mr. A on a number of occasions. The Managing Director concluded, following the Company's investigation, that the claimant's allegations were not proven. The Company, in its submission, notes that the claimant's desired outcome in processing her allegations changed over time. In the middle of November, 1997 she wished the alleged harassment to stop while some weeks later she wished Mr. A to be moved.

4.3 The Company's decision, following its investigation, was communicated to both the claimant and Mr. A and an appeal was initiated by the Union. The meeting to process the appeal on 16th February, 1998 was inconclusive and the Company says it left the meeting when the Union officials became derogatory. The Company says that it wrote to the Union subsequently inviting them to reconvene at their leisure but no response was received. The Company, therefore, feels that this present claim was initiated without exhausting internal agreed procedures. The Company says that, while on the balance of probabilities it did not find that the claimant was being harassed by Mr. A, it kept the matter under informal review.

4.4 The Company says that its evidence is at variance with that given by the claimant. Contrary to what she has indicated the claimant is seen in the main building of the Company on a daily basis looking relaxed and enjoying herself with work colleagues both in the staff canteen and in the offices. The Company says that the claimant shows and has shown no signs of "trauma" as she alleges. The Company considers that it did everything it could or ought to have done in investigating the alleged incidents and ensuring a satisfactory result.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 The claim referred to me for investigation by the Labour Court was that since 13th November, 1997 the Company discriminated against the claimant in terms of Section 2(a) and Section 2(b) of the Employment Equality Act, 1977 and contrary to Section 3 of that Act. In making my recommendation in this claim I have taken into account all the submissions, both written and oral, made to me by the parties. To repeat information submitted to me in the course of this investigation is available to the Labour Court should it require access to it.

5.2 A question arose over who was the correct respondent in this claim. The Company, named

by the Union on the referral form, said that the claimant was initially recruited by it in June, 1995. However in December, 1995 the claimant was appointed to the position of Production Administrator. According to the Company this position was in another Company i.e. Company 2 with which the respondent Company had a close working relationship. I note, however, that Company 2 has no legal connection with the respondent company. At the hearings of the claim the claimant said that she was and is employed by the respondent Company and she also said that she was given no reason to think otherwise. I asked the respondent Company to submit details of the claimant's contract of employment when she was appointed to the position of Production Administrator. From my examination of the information submitted I am satisfied that the correct respondent has been named by the Union in this claim. I note also that the organisation structure has the claimant reporting to the Production Manager (i.e. the person named as the alleged harasser/Mr. A in this claim). The claimant also submitted information in this regard and I am satisfied from this evidence that her perception was that she worked for Company 2, not the respondent Company and she behaved accordingly. However, the facts clearly show that the claimant was recruited and employed by the respondent Company and there is no documentary evidence that any change took place in relation to her employer.

5.3 It is now necessary to examine all the evidence available (in the form of oral evidence at the hearings, written submissions, etc) and decide whether or not it supports the Union's allegations. I note that there are a number of conflicts in the evidence regarding the facts for example:

- In its submission the Union said that the claimant told the Personnel & Training Manager that Mr. A had made repeated sexual remarks and advances towards her over the period from July/August, 1997. At the hearing the claimant said that Mr. A had made sexual remarks to her between July/August and early November, 1997. She said that no incident of physical contact occurred before 13th November, 1997. In relation to the remarks of a sexual nature the claimant was unable to give precise details of the alleged remarks e.g. what exactly was said, when the remarks were said and the context in which they were said.
- The incident alleged to have taken place on 13th November, 1997 happened in the

claimant's office according to both the Union's submission and the claimant's statement attached to that submission. At the hearing the claimant said that the incident occurred in a colleague's office. This colleague, she said, was out sick that day and, as a result, she was working in her office at the time. I note that, based on Company attendance records, this colleague was in attendance that day and not on sick leave as stated by the claimant. According to the colleague herself she rarely took sick leave or was missing from the office for a couple of hours because it resulted in a reduction in her pay.

- At the hearing the Union said that it had wanted a face to face meeting between the claimant and Mr. A but this had been refused by the Company. The Company denied this and said that it had suggested to the claimant that she have a face to face meeting with Mr. A but the claimant refused to agree to such a meeting. The claimant, both in her written statement attached to the Union's submission and at the hearing, accepted that the Company had made this suggestion and that she had refused it.
- In her statement, attached to the Union's submission, the claimant said that, following a meeting with Company management, she waited in the room with the Managing Director and the Personnel & Training Manager until witness 2 had arrived to be interviewed by management so that she could not be accused of having influenced this witness. The Managing Director, in his statement, said that the claimant had been very agitated at this meeting and she had stormed out of the office without waiting for witness 2 to arrive. This was confirmed both by the Personnel & Training Manager and the Union Representative who were also present at the meeting.
- The Company says that witness 1 gave conflicting evidence when he was spoken to in relation to the alleged incident on 13th November, 1997. I note that the account of the incident as described by witness 1 in his written statement differs to some extent from what both the Managing Director and the Personnel & Training Manager recorded in their notes of the conversation they had with him following the

alleged incident. I further note that the evidence given at the hearings differs somewhat from the witness's written statement and also from what was told to the Company during its investigation of the matter.

- The sequence of events as outlined by witness 2 (for the claimant) in her statement differs from her description of the events at the hearing of this claim. Furthermore this witness was unable to answer many of the questions put to her by the Equality Officer on the basis that she could not remember.
- At the initial hearing of this claim the alleged harasser (Mr. A) outlined in detail the reason why he went to the claimant's office on 4th December, 1997 while at the second hearing Mr. A said that he could not recall why he went to her office.

5.4 Because of all the conflicting evidence it is impossible to say that these alleged incidents did or did not occur. In my opinion the Union has failed to substantiate the allegations that the claimant has made against Mr. A. The evidence submitted is based on one's best recollection of events and a number of versions of events transpired between the written statement of the claimant and her witnesses and what they subsequently said both in an internal investigation of the incidents and at the hearings of the claim before an Equality Officer. I note that Mr. A emphatically denies the allegations but I find that he cannot submit any evidence to prove that these allegations did not occur. Furthermore I find it surprising, given the first allegation of which Mr. A had been made aware, that he put himself into a position subsequently that he was alone with the claimant in her office.

5.5 In its defence the Company referred to the High Court case of the Health Board and BC and the Labour Court¹. In his judgement Mr. Justice Costello held that "*an employer is vicariously liable where the act is committed by his employee with the scope of his employment*". Hence the Company argument that, had these alleged incidents occurred, Mr. A was not acting within the scope of his employment. As I have found that the Union has been unable to substantiate its contention that the claimant was sexually harassed the issue of vicarious liability is no longer relevant.

¹ Reported in Employment Law Reports Vol. 5 No. 1 1994

5.6 Having said that I wish to point out that, on the basis of the Labour Court's finding in the case of A Company and A Worker², I am satisfied that Mr. A as Production Manager was employed by the Company into a position of authority. Based on the organisation chart which was submitted of the Production area I note that the claimant reported directly to the Production Manager and, on that basis, I am satisfied that Mr. A had a responsibility over her in terms of work, discipline, etc. I note that Mr. A was present with the Personnel & Training Manager when another member of his staff was dismissed and I am, therefore, satisfied that he would have an input into any decision that might be made in relation to the claimant including dismissal. Consequently, I find that the Company is varcariously liable for the behaviour of the Production Manager given that the Company employed Mr. A and assigned him a position of authority and, therefore, it must be liable for his actions while exercising that authority.

5.7 While the Company did act on this complaint by talking to the claimant and holding an internal investigation I note that it has no written sexual harassment complaints procedure and I would recommend that the Company put in place a sexual harassment complaints procedure in accordance with the Employment Equality Agency's Code of Practice.

6. RECOMMENDATION

6.1 Based on the foregoing I find that the Company did not discriminate against the claimant contrary to the provisions of the Employment Equality Act, 1977.

Gerardine Coyle
Equality Officer

² Order No. EEO294 of 17th June, 1994

28th January, 1999