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LEGAL FORUM

Sexual Harassment Case Law under the Employment Contracts Act 1991

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Abstract

This paper examines case law applying to sexual harassment as it developed under the jurisdiction of the Employment Contracts Act 1991. Legal protection against sexual harassment is relatively new. It is a complex and sensitive area. The need is to distinguish between acceptable sexual interaction and sexual harassment. Sexual politics are involved. As with all change it takes time for people to adapt to the new realities. That reality is, as the case law shows, sexual harassment is unacceptable. Employers, and employees, must be proactive in eliminating it from the workplace.

Sexual harassment in the workplace is not a new phenomenon but legal recourse for its victims is (*Zarankin v Wessex Inn,* 1984). The term "sexual harassment" began around 1975 and by 1978 was a recognised theme (Aggarwal, 1987). Case law on sexual harassment initiated offshore where sexual harassment was considered within the context of sexual discrimination. Sexual harassment is "the most intimate manifestation of employment discrimination faced by women" (Curtin, 1984: 75). Sexual harassment law developed on a case basis resulting in inconsistencies regarding the type of behaviour which constitutes sexual harassment, whether the standard of offensiveness is objective or subjective, and the extent of employer liability for co-employees and clients (Einfeld and Lipper, 1992).

Personal grievance provisions, first introduced in the Industrial Relations Act 1973, were inadequate for dealing with sexual harassment. It was questionable whether the personal grievance committees had jurisdiction over sexual harassment cases, no statutory definition of sexual harassment was provided, and employers could bring evidence of previous sexual history. The result was a lack of clarity and consistency. The first case of sexual harassment, *H v E* (1985) was heard under s.15(1)(c) of the Human Rights Commission Act

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1977. The decision was severely criticised for having "virtually apologised to a defendant for finding him guilty of sexual harassment" (Grainer, 1993: 127). Another difficulty was that same sex and bisexual harassment could not easily be accommodated within a sex discrimination approach. Up to 1987 it "was unclear whether sexual harassment was actionable as discrimination under NZ law" (Shaw, 1986: 17).

The Labour Relations Act 1987 was the first legislation to deal specifically with sexual harassment. It established clear provisions defining sexual harassment and making it unlawful. These provisions were carried into the ECA.

Employment Contracts Act 1991 (ECA)

The ECA establishes sexual harassment as an unlawful behaviour, provides procedures for hearing complaints, incentives for employers to stop, and remedies for victims of sexual harassment.

Sexual harassment is in Part III of the ECA. The relevant sections are 27(1)(d), 29, 35, 36 and 40(1)(d). Quid pro quo harassment is the threat to current, or the promise of better employment conditions in return for sexual favours, and is covered by s.29(1)(a). Hostile environment is harassment that has the purpose of "interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" (EEOC, cited in Paetzold and O'Leary-Kelly, 1993: 29) and is covered by s.29(1)(b). Section 35 prohibits any account of an applicant's previous sexual history being raised in a case, while s.36 requires an employer to investigate any complaint. Section 40(1)(d) empowers the Employment Tribunal (Tribunal) and Employment Court (Court) to give recommendations "concerning the action the employer should take in respect of the person who made the request or was guilty of the behaviour".

The standard of proof

In *A v Z* (1992) the applicant claimed constructive dismissal as a result of sexual harassment. The onus lies with an applicant to show a prima facie case that the resignation was a constructive dismissal resulting from sexual harassment (*Parland v NZ Police*, 1991). The Tribunal ruled that for sexual harassment to be proved it was necessary to show that the behaviour was sexual in nature, it was unwelcome, and had a detrimental effect on the harassed employee's employment.

> The first (test) is . . . whether the words or the physical behaviour is of a sexual nature. That, in my view, is an objective assessment. If that step is survived then, in my view, the employer must take the employee as he or she finds that employee; in short, that is then a subjective test of whether that employee found that behaviour unwelcome or offensive" (*A v Z*, 1992, 505).

In determining the balance of proof, the Tribunal applied *Northern Distribution Union v AB Ltd* (1988) and the Court of Appeal in *Honda v NZ etc Shipwrights etc Union* (1990),"that due weight . . . be given to the gravity of the allegations" (*A v Z*, 1992, 506). The more serious the allegation the higher the standard of proof required. The Tribunal found for the applicant and the case was appealed. It was the first sexual harassment case to be appealed to the Court (*Z v A*, 1993).

The major issue concerned the correct standard of proof. The Tribunal had stated that due weight must be given to the gravity of the allegations made. The Court ruled that the correct standard of proof is the balance of probabilities. The correct approach is the 'but for' test, but for the sexual harassment the resignation would not have occurred. To prove a constructive dismissal to this standard the applicant had to show a "breach of duty by the employer, resignation by the employee, and a causal link between the two" (*Z v A*, 1993, 473).

The Court ruled that the Tribunal was wrongfully influenced by the *AB Ltd* (1988) case and misapplied the *Honda* test. The Court postulated two types of cases: "that of an employee accused of sexual harassment and that of an employee bringing a personal grievance based on sexual harassment against an employer" (*Employment Law Bulletin* (ELB), 1998, 101). In the latter, the ordinary civil standard should apply; in the former the seriousness of the allegations should be examined as per *Honda* ie. reflect the gravity of the allegations made. This dichotomy came under review by the Appeal Court in *Managh v Wallington* and *Crawford* (1998). The applicant appealed to the Court of Appeal claiming four errors of law. The first dealt with the standard of proof to apply to allegations of sexual harassment.

The appellant's claim was that Goddard CJ erred in law in *Z v A* (1993). The Appeal Court re-examined *Honda v NZ Shipwrights* (1990). An employee was dismissed for unauthorised possession of company property. The Appeal Court cited with approval Somers J. "the court will require the high degree of probability which is appropriate to what is at stake" (*Budget Rent-A-Car Ltd v Auckland Regional Authority*, (CA), 26). "It would be manifestly wrong for an allegation of, say, wholesale theft to be treated as of no greater gravity than one of, say, absenteeism" (*Honda v NZ Shipwrights*, 1990, 26).

Courts should focus on the seriousness of the conduct complained about, adjusted for the potential consequences to those concerned. This influences the level of proof required. "The suggestion that there are different standards of proof depending on the dual categorisation in *Z v A* is wrong in law" (*Managh v Wallington & Crawford*, 1998, CA, 6). If the alleged conduct is the same, then the standard of proof will be the same, the balance of probabilities consistent with the gravity of the allegations. It is irrelevant whether the alleged harasser is the employer, senior employee or co-employee. The standard applied in the Honda case stands.

A particular consideration in appeals is that of credibility. In *M v B* (1999) the appellant challenged, amongst others, the Tribunal's credibility rulings which favoured the respondent. Palmer J noted that he was at a disadvantage compared to the Tribunal as he

does not hear evidence first hand. Regardless, the appellate body is required to reach its own decisions, assisted by the Tribunal's findings. "If the . . . finding depends . . . on the credibility of the witness, the finding must stand unless . . . the trial judge 'has failed to use or has palpably misused his [or her] advantage' or has acted on evidence which was 'inconsistent with facts'" (*M v B*, 1999, 198). This principle is so well established that Palmer J noted that the optimism of counsel in bringing such cases "is difficult to understand" (*M v B*, 1999, 199).

In *L v M* (1994) the Tribunal allowed as evidence of sexual harassment phone calls, despite the complainant's failure to establish them as sexual. Under s 29(3) sexual harassment can be by word or physical nature. The Tribunal ruled that the phone calls must be considered in context. The calls involved words that are intimidatory, and made because of the complainant's sexual orientation. This comprises sexual harassment under s.29(1)(b)(i). Included are calls that comprise only heavy breathing. The Tribunal also ruled that the calls came under s.29(1)(b)(ii) in that phone calls are a physical act and that they were made because of the complainant's sexual orientation. The insidious nature of sexual harassment has resulted in a liberal treatment of evidence.

Employer's responsibility for actions of a representative

In *Bhaskaran v Tranz Rail* (1998), the Tribunal examined an employer's responsibility for the actions of an employee, where those actions were made as a representative of the company. This case refers to s.27(2) of the ECA. It is the first judicial interpretation of this clause. Three personal grievances were laid:

- sexual harassment by a representative of employer (acting Chief Medical Officer);
- unjustified disadvantage in that the employer failed to take appropriate action and then complainant suffered monetary loss – see Remedies;
- the action of the employer amounted to a breach of s.36(3) – failure to take practicable steps to prevent repetition. This argument failed, as there was no repeat of the behaviour of the kind described in s.29(1)(a) or (b).

The complainant alleged the acting Chief Medical Officer, who also held the position of First Mate, sexually harassed her. It was accepted the defendant had no direct authority over the complainant in his capacity as First Mate. He did have company authority to place his hands on the complainant in his capacity as Medical Officer. But such authority is limited to giving medical aid with consent, and did not constitute authority in terms of the legislation, "Has authority over the employee alleging the grievance" (s.27(2)(b)(i)). The employer argued that such authority must relate to the right to control behaviour in some way.

Second issue was whether s.27(2)(b)(ii) applied. The employer argued that the alleged harasser had no such authority. The complainant worked in the catering area. The alleged harasser had no direct authority over such staff and no involvement in catering matters. The reporting lines were different.

The Tribunal rejected the employer's argument. The harasser was a senior staff member who reported directly to the ship's captain. He had control over many areas of the ship, areas through which the complainant had to pass. What is important is who has control in the workplace. In this case the ship defined the workplace, and as a senior staff member, he had control over employees in that workplace, and albeit indirectly, control over the complainant. The Tribunal found s.27(2)(b)(ii) proved. The employer was responsible as the employee was their representative and had control over the complainant.

Complaints to be in writing

In *X v AB Co* (1994) oral complaints were made against X. After an inquiry he was dismissed. The Tribunal held that s.36(1) is permissive, not mandatory. Goddard CJ addressed the issue in *Turk's Poultry Farm v Adkins* (1996). An employee made an oral complaint to the employer against another employee. The Tribunal here ruled that s.36 makes it a mandatory precondition of employer liability that a complaint be in writing. However, it took the view that it could "validate this informality by recourse to s.138 of the Act" (*Turk's Poultry v Adkins*, 1996: 379). The Court noted, obiter, that complaints generally "should be in writing . . . if the respondent's personal grievance had depended . . . solely upon a claim that she had been sexually harassed . . . her case might be difficult for want of a written complaint. I do not decide, although I incline to the view, that it would have been impossible" (*Turk's Poultry v Adkins,* 1996, 382). For non-management employees, for an employer to act on an allegation of sexual harassment, the allegation must be made formally and that means in writing. Nor can the failure to put a complaint in writing be validated under s.138. As a written complaint is a statutory requirement "then I doubt whether it is open to the Tribunal by recourse to s.138 or other exercise of discretion to exempt any person, however deserving, from having to meet or have met that requirement" (*Turk's Poultry v Adkins,* 1996, 381). Failure to put "the complaint in writing will . . . be fatal to any future action, no matter how seriously the employer took the matter, or how formal the oral complaint" (*ELB*, 1996, 90).

Evidence heard

In *Kettyles v Forman* (1998) the issue arose whether the Tribunal member, having rejected a submission in part, should continue to hear the case. The applicant had filed a part of the same grievance, that relating to sexual harassment, with the Human Rights Commission. Acting under s.26(e) the Tribunal struck out that evidence. Having heard and struck out that evidence, the probity of the Tribunal member to hear the case was raised. The Tribunal ruled that "such knowledge does not preclude my ability to hear and determine this case in a fair manner" (*Kettyles v Forman*, 1998, 2).

In *Crawford v Managh* (1995) the Tribunal member hearing that case had adjudicated in a similar case against the respondent (*Wallington v Managh,* 1995). The Tribunal member noted that although he had heard both cases no account of the evidence presented in the first case

was taken into account in adjudicating in the second case. The Tribunal is not compromised by hearing evidence which it later declares inadmissible or in hearing more than one case against the same respondent.

Section 36 inquiry

In *B v NZ Amalgamated Engineering Union Inc* (1992), the Tribunal stated that the primary purpose of s.36 is preventative or remedial. Then, after an investigation if satisfied that sexual harassment has occurred, the employer is required to take "whatever steps are practicable" (s.36(2)) to prevent any repetition. If there is a repetition of the harassment, the employer is liable (s.36(3)).

In *L v M* (1994), upon receipt of a complaint of sexual harassment, the employer conducted a thorough investigation which upheld the complaint. The employer undertook a number of activities including reassurance to the individual, and his associates, that management condemned such harassment and expressed concern for their welfare. What management refused to do was issue a supportive public statement. This refusal was based on the company's assessment of how best to deal with the situation. The reasons were not given to the complainant. The Tribunal defined practicable steps as those within the power of the employer to carry out. The company had the power to issue the statement, its refusal meant that the company failed to take all practicable steps.

The Tribunal noted that employers have limited discretion in determining which steps to implement. The interpretation in *Fulton v Chiat Day Mojo Ltd* (1992) that practicable steps were all steps that could be thought of is limited by the employer's right to consider the possible consequences of taking a particular step, for example, further ligation. Where no such consideration exists, the step should be actioned. The Tribunal also noted that repetition does not occur until after the practicable steps have been actioned, although such a finding would be determined on the facts.

Section 36(2) imposes a dual obligation on the employer to treat fairly both complainant and accused. "Care must be taken not to confuse the employer's obligations to enquire into the victims complaint by means of a s.36 enquiry, and any desire it may have to prosecute a complaint of its own against the offending employee" (*Sloggett v Taranaki Health Care*, 1995, 558).

In *Sloggett* a nurse made a complaint of sexual harassment against an orderly. Under the hospital's rules sexual harassment was not classified as serious misconduct. The hospital investigated and dismissed the employee, not for sexual harassment but for "behaving in a manner likely to affect one's safety, cause injury or unreasonable distress to a(n) . . . employee" (*Sloggett v Taranaki Health Care*, 1995, 558). The Tribunal upheld the dismissal and the case went to the Court on appeal. The Court found that the Tribunal had erred. It had examined the dismissed employee's conduct rather than the dismissal process. The employer's inquiry also was procedurally wrong. The Court stated that a s.36 inquiry commenced when:

> "the respondent as employer had received from one of the nurses employed by it a complaint in writing . . . that she had been subjected to . . . behaviour of a sexual nature that she found unwelcome or offensive or both. She also made it . . . clear . . . that the behaviour was both repeated and of such a significant nature that it had a detrimental effect, if not on the totality of her employment, at least on her job performance or job satisfaction. She identified the appellant . . . as the perpetrator. Thus all the elements of a complaint of sexual harassment under s36 of the Employment Contracts Act 1991 were present in copious quantity" *(Sloggett v Taranaki Health Care*, 1995, 557).

The Court ruled that the employer's inquiry did not meet the requirements of a s.36 inquiry. It did not inform the nurse "whether or not it was satisfied that the alleged behaviour took place and, if so, what steps the employer had taken, or proposed to take, to prevent a repetition of the behaviour. It embarked instead upon disciplinary action against the appellant on different grounds and dismissed him" (*Sloggett v Taranaki Health Care*, 1995, 558). The stated reason for dismissal was never put to the harasser, and was not the true reason for the dismissal. "Whether conduct justifies dismissal depends on the seriousness of its impact upon the employment relationship and not upon degrees of ingenuity in the drafting of manuals or subtlety in their later application" (*Sloggett v Taranaki Health Care*, 1995, 556). The correct procedure to follow is to give the employee notice of the specific allegations against them and its likely consequences if established. An employee is also entitled to a real hearing and to have their explanation fully considered, free from bias, predetermination and uninfluenced by irrelevant considerations. Only following this can an employer reach a decision. If misconduct is determined, the employer must determine if it is "serious" as classified under its rules.

Procedural fairness

In *L v M* (1994) the Tribunal also held significant the Chief Executive Officer's (CEO) failure to meet personally with the complainant. The CEO had previous dealings with the complainant regarding support for the homosexual support group. His failure to meet with the complainant, to explain his position and actions, and to listen to the complainant, contributed to the latter's feeling of isolation and abandonment. These failures supported the case for constructive dismissal.

Whether serious misconduct, if proved, removed the need for procedural correctness was examined in *Sloggett*. The Court noted that in England the rule had been thought to be that a dismissal could be justified despite the failure to follow a fair procedure, if on the facts proved an employer could have dismissed if a fair procedure had been followed. The situation was clarified in *Polkey v Dayton* (1987): "an employer having prima facie grounds to dismiss . . . will . . . not act reasonably . . . unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation" (983).

This means that the employee's actions, if not established by a fair inquiry at the time of the dismissal, cannot justify an unjust dismissal. Both substance and procedure are required to

justify a dismissal. It is irrelevant that an employer could have dismissed after following a fair procedure. It is hypothetical, as one cannot know the outcome if a fair procedure had been followed.

The requirement to inform, as noted above, is included in the right to make a complaint. Failure to comply can have serious consequences. In *Turks v Adkins* (1996), the employer acted on the complaint but did not inform the complainant. The harassment continued. On several occasions the employer "inquired . . . as to whether she was still subjected to sexual harassment and was assured by her that she was not" (*Turks v Adkins*, 1996, 376). The complainant subsequently claimed a constructive dismissal. The company argued that "its obligation, if any . . . was to take whatever steps might be practicable to prevent a repetition and that reporting back to the respondent, not being a step capable of having such an effect, was a requirement of courtesy, not of law" (*Turks v Adkins*, 1996, 379).

The argument was rejected. An inquiry into an allegation of sexual harassment requires more "than just talking to the harasser and that there needed to be feedback to the victims so that they know what is going on and feel empowered within that process" (*Turks v Adkins*, 1996, 379). By not receiving feedback, the complainant is entitled to feel that the complaint is not being treated seriously and that management cannot be depended on to provide security. The lack of feedback "left the respondent feeling that nothing had happened that would make any difference to her life. That feeling was . . . confirmed when the harassment recommenced immediately after the warning had been given" (*Turks v Adkins*, 1996, 379).

However, in *Bhaskaran* (1998) the Tribunal ruled that the failure to explicitly inform the complainant did not amount to procedural failure. The complainant was not informed whether the complaint was upheld, or what actions the employer proposed to adopt to prevent recurrence. The Tribunal ruled that these failures did not amount to a failure overall as implicitly, through actions of the employer or her representative (union), it could reasonably be held that she was informed. The Tribunal also noted that a complainant has a right to be "consulted about the outcome . . . (but) no right to determine it" (*Bhaskaran v Tranz Rail*, 1998, 17).

Sexual behaviour

As noted above, whether behaviour is sexual is an objective test. In many cases it is relatively easy to apply, in some it is difficult. Such was *Lenart v Massey University* (1997). Lenart was found to be unjustifiably dismissed and reinstated. Because of contributory fault, no compensation was awarded. Both Lenart and the University appealed.

The issue before the Court was whether the words and actions were of a sexual nature as per s.29(1)(b). "This matter is to be objectively determined and a distinction has to be drawn between behaviour that is 'inappropriate' or 'unwelcome' or even 'offensive' and behaviour that has a sexual connotation or is of a sexual nature" (*Lenart v Massey University*, 1997, 267).

The correct test to apply is "whether a reasonable employer after a complete and fairly conducted inquiry could objectively reach the view that . . . (the) words or physical behaviour complained of . . . were sexual in nature" (*Lenart v Massey University*, 1997, 267).

The actions and words complained of were not clearly of a sexual nature. The complainant alleged that Lenart had come into close physical contact, embraced her, spoke in a "soft husky voice", called her "darling" and "sweetheart", told her she was beautiful, that her boyfriend was lucky, and "fondled (her hair) lingeringly twice" (*Lenart v Massey University*, 261). She claimed that he smelt of alcohol. While admitting the incident, Lenart denied the interpretation. It was claimed that he was "an incurably demonstrative man" (*Lenart v Massey University*, 1997, 261). There was evidence that he regularly hugged both males and females, and that he referred to people as darling when he could not remember their names. The incident occurred in a lit, public area.

The university conducted an inquiry and considered his explanation, but dismissed his intentions as irrelevant and ignored them. The Court found that the behaviour was capable of being viewed as sexual and of a kind described in s.29(1)(b). But Lenart was able to advance an innocent explanation of his behaviour and this is a relevant consideration *(Lenart v Massey University*, 1997, 271). Thus while guilty of the behaviour complained of, the evidence was not sufficient to establish serious misconduct justifying dismissal. A finding of sexual harassment does not automatically entitle an employer to dismiss. To do so fairly, an employer must be able to dismiss the harasser's explanation on the *Honda* (1990) test (*Lenart v Massey University*, 1997, 265).

Failure to complain - contributory fault

Sexual harassment can continue for long periods before a complaint is lodged. Is this contributory fault by the complainant and thus a consideration in determining remedies? In *A v Z* (1992), the Tribunal ruled the failure to complain should not be held against the complainant. It is "excluded under s.29 on the threshold level". Section 29 states that sexual harassment is behaviour that is offensive to the employee "whether or not that is conveyed to the employer or representative". In *Adkins v Turks* (1994) the Tribunal ruled that the complainant's denials that the sexual harassment was continuing was a contributory fault and reduced the remedies by 20 percent. On appeal the Court noted that "her failure to repeat her complaint even when asked directly whether sexual harassment was continuing was in no way blameworthy but the result of a sense of hopelessness" (*Turks v Adkins*, 1996, 380). The failure to admit that the harassment was continuing was a result of the employer's failure to provide feedback. The complainant's attitude is understandable in the circumstances, and thus not a contributory factor. In contrast is the approach adopted by the Court in *Clarke v Attorney-General* (1997). Three employees sent pornographic material to each other through the e-mail system. They were discovered and dismissed. While awaiting the appeal, they applied for interim relief in the form of job preservation. The Court was not well disposed towards the applicants. It ruled that its equity provision could not apply: "the plaintiffs have

. . . disqualified themselves by their own action from the assistance of the Court in its equitable jurisdiction. Those who seek equity must do equity" (*Clarke v Attorney-General*, 1997, 612).

Nor did the fact that the material was circulated only between the dismissed employees mitigate the offence. The Court noted that the material could "easily have fallen into the wrong hands and done severe injury to those affected by them or referred to in them" (*Clarke v Attorney-General*, 1997, 611). In coming to its decision the Court took into consideration the interests of third parties, "especially female employees" and that a Government department is required to "operate a personnel policy that includes provisions recognising the employment requirements of women (*Clarke v Attorney-General*, 1997, 611).

The Court dismissed the application. This approach is aligned to that taken by the Court in *New York Gear v Hughley* (1996). Here the Court ruled that while the allegations of sexual harassment did not form part of the case, nevertheless they could be considered when assessing remedies as "conduct which reduced or negatived Mr Hughley's claim for compensation for humiliation and hurt feelings" (14). If a person engages in sexual harassment, they can expect it to be raised at some future date. Whether or not it forms part of the case, it will be considered as a contributory factor.

In *Lenart v Massey University* (1997), despite being reinstated no compensation was awarded. This was because "the events that gave rise to the complaint were wholly attributable to Mr Lenart" (*Lenart v Massey*, 1997, 278). Lenart's behaviour was a contributing factor in determining remedies. But also considered was the fact that the complainant had suffered and was entitled to no compensation.

> "the Tribunal was entitled to take into account not only Mr. Lenart's contributory conduct but also the effect of that conduct on Ms X. It would be inequitable and unconscionable to award Mr. Lenart . . . compensation in circumstances where he had damaged Ms X, albeit unwittingly, and she is entitled to no compensation" (*Lenart v Massey University*, 1997, 279).

It appears that two categories exist. Where the complainant receives compensation from the employer, the alleged harasser, where the case is dismissed, may also receive compensation. But were the complainant does not receive compensation, neither may the alleged harasser, despite having the case against them dismissed.

Remedies – s.40(1)(d)

In *A v Z* (1992), the Tribunal noted it "appear(ed) not to have the extensive powers to order certain remedial actions which are possessed by the Human Rights Commission" (510). In particular, s.40(1)(d) limits the Tribunal to recommendations regarding "rehabilitative behaviour" (510). In the *Bhasharan* case the claim of unjustified disadvantage was dismissed. The complainant suffered a monetary loss. She wanted the company to pay for her counselling, to make her a permanent employee, and to order that certain people not work together. The Tribunal cannot rule or give remedy to such demands.

Identity of the employer

Section 29 applies to the "employer or a representative of that employer", whereas s.36 applies to "Sexual harassment by a person other than the employer". In *A v Z* (1992) the complainant's contract was with a private company, owned and managed by the respondent, so technically it was the employer, not the respondent. The case proceeded against the respondent as if he was legally, as he was in fact, the employer. Not "hiding behind any technical defence" was to "the respondent's credit" (*A v Z*, 1992, 503). Such praise was premature. In the appeal (*Z v A*, 1993) the appellant submitted he was not the employer, rather it was a company under his ownership and control. The Court ruled that the finding of fact that the company was the employer precluded the Tribunal from making any finding or order against any other party, including the appellant. Section 36 did not apply, the appellant was not the employer, but a representative of the employer. The employer was therefore not a party to the proceedings. However, the Court ruled that "It would be unjust to allow the company now to rely on the Tribunal's slip in omitting to add it as a party or its error in declining to do so" (*Z v A*, 1993, 484). Therefore, under s.138 (validation of informal proceedings) and s.140 (power of Court as to joinder) the Court added the "company as a respondent in the Tribunal and an appellant in this Court" (*Z v A*, 1993, 485).

Conclusion

Sexual harassment "poisons the atmosphere in the workplace. It is wholly unacceptable and entirely devoid of any redeeming features. It is insidious and deceptive in character" (*Z v A*, 1993, 472). The sexual harassment provisions of the ECA give recognition to "women's rights to equality, job security and dignity at work" (*ELB*, 1994, 35). It is clear from case law that sexual harassment is too widespread, not acceptable, and employers and employees have a responsibility to be pro-active in challenging and eliminating it.

Sexual harassment is also covered by the Human Rights Act 1993. Cases heard under this Act are important and must be considered in order to achieve a fuller understanding of the law regarding sexual harassment.

References: texts

Aggarwal, A.P. (1987), *Sexual Harassment in the Workplace*, Butterworths.

Curtin, D. (1984), *Sexual Harassment in Employment* - developing a standard of employer liability.

Paetzold, R.L. and O'Leary-Kelly, A.M. (1993*), Organisational Communication and the Legal Dimensions of Hostile Work Environment Sexual Harassment*, in Kreps, G.L. (Ed) (1993), Sexual Harassment, Hampton Press.

Einfeld, M. and Lipper, N.R. (1992), *Sexual harassment in the Workplace*: a comparative study of Great Britain and United States, 13 Comp Lab LJ 293

Employment Law Bulletin (1994), *Sexual Harassment in the Workplace*, Issue no.3, 35.

Employment Law Bulletin (1996), *Turks Poultry Farm v Adkins*, Recent Case Comment, Issue no.5, 90.

Employment Law Bulletin (1998), *John Managh v Wallington and Crawford*, Recent Case Comment, Issue no.5, 101.

Grainer, V. (1993), *Refining the Regulation of Sexual Harassment*, 23 VUWLR 127,128.

Shaw, M.J.M. (1986), *Sexual harassment in Employment*, Law Faculty, Victoria University of Wellington.

Case references

A v Z [1992] WT 69/92, 3 ERNZ 501.

Adkins v Turk's Poultry Farm Ltd [1994] 2 ERNZ 368.

B v NZ Amalgamated Engineering Union Inc [1992] 2 ERNZ 554 AT79/92.

Bhaskaran v Tranz Rail Limited [1998] WT 69/98, unreported.

Budget Rent-A-Car Ltd v Auckland Regional Authority [1985] 2 NZLR 414, 425 (CA), 26.

Clarke v Attorney-General [1997] 1 ERNZ 600.

Crawford v Managh [1995] unreported, WT96/95.

Fulton v Chiat Day Mojo Ltd [1992] 2 ERNZ 38.

H v E [1985] 5 NZAR 333.

Honda (NZ) Ltd v NZ Shipwrights Union 1990] 3 NZILR 23.

Kettyles v Forman Insulation Sales Ltd [1998] unreported, AT 101/98.

L v M Ltd [1994] 1 ERNZ 123.

Lenart v Massey University [1997] 1 ERNZ 253.

M v B [1999] 1 ERNZ 191.

Managh v Wallington and Crawford 1998] unreported, CA 229/96.

New York Gear Limited v Hughley [1996] unreported, AEC 3A/96.

Northern Distribution Union v AB Ltd [1988] NZILR 761.

Parland v NZ Police [1991] 3 ERNZ 721.

Polkey v Dayton Services Ltd [1987] 3 All Er 974,976 (HL).

Sloggett v Taranaki Health Care Ltd [1995] 1 ERNZ 553.

Turk's Poultry Farm Ltd. v Adkins [1996] 1 ERNZ 374.

Wallington v Managh [1995] unreported WT95/95.

X v AB Co Ltd [1994] AT 189A/ 94, 2 ERNZ, 419.

Z V A. [1993] 2 ERNZ 469.

Zarankin v Wessex Inn [1984] 5 Canadian Human Rights Reporter Decision 387.