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Sexual Harassment in Employment: An Examination of Decisions Looking for Evidence of a Sexist Jurisdisprudence

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Sexual harassment within the workplace has attracted much research over the last 15 to 20 years, although very little has been undertaken within the New Zealand context. Decisions were analysed from both the Employment and Human Rights Institutions covering the period from 1991 – 2000. From this analysis there is evidence that sexism does persist in the decisions made in these institutions, but that it may not be as severe as what the literature from other countries suggests is happening there. Examination of the decisions also highlights the apparent lack of consistency in remedies awarded, and the need for the wide legal definition of sexual harassment to be broken down into a grading of behaviours that allows decision makers to adequately address the issues of remedies with some consistency and recognition of the impacts of the behaviour on its victims.

Introduction

There is a concern expressed by some authors about how women are treated in law (Davis, 1994; Estrich, 1991; Fitzgerald, Swan, and Fischer, 1995; Grainer, 1993; MacKinnon, 1979), contending that women are disadvantaged because of a patriarchal or sexist jurisprudence. Estrich (1991) and Fitzgerald et al. (1995) claim that women who take sexual harassment claims to court are poorly compensated. (Conversely, writers such as Patai (1998) contend that claims of sexual harassment have grown out of hand in terms of quantity and substance, and these claims are being fed by a sexual harassment industry.) In New Zealand sexual harassment of employees is currently legislated against in both the Employment Relations Act (2000) and the Human Rights Act (1993). This research looks at decisions made from 1991 to 2000 when the covering legislation was the Employment Contracts Act (1991), which had similar provisions to the ER Act, and the HR Act. There are some of the most progressive statutes in the world (Davis, 1994; Fredman, 1997), Davis (1994) claimed that where the EC Act, on paper, was the best in the world, in practice it was ineffective because it was rarely used by women, and because decision makers failed to treat sexual harassment as serious, and would undermine the legislation by using their discretionary powers poorly.

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Research questions

The research reported here was designed to investigate whether there was indeed a patriarchal jurisprudence in New Zealand with respect to decisions in workplace sexual harassment grievances. The research questions convey the concerns and claims made by the some of the writers on the subject who look from a feminist perspective.

1. If the respondent does not admit to the behaviour labelled as sexual harassment by the applicant, to what extent is corroborating evidence required by the decision maker to accept that such behaviour occurred?

2. Does the applicant's general workplace behaviour, such as use of profanity, style of dress or use of "x-rated" humour have any influence on the decision made about whether sexual harassment has occurred, and if it has, on its severity?

3. Is the applicant held in any way responsible for the behaviour as a direct result of her reactions or resistance to the behaviour?

4. Is the applicant's subjective view of "offensiveness" left as subjective, or is some objective test used?

5. Does the objective test as to whether or not the behaviour caused detriment to the applicant substantially damage the applicant's case in terms of remedies?

6. What are the amounts awarded in remedies to successful applicants in a grievance of sexual harassment and is there any discernable pattern in amounts awarded according to the types of behaviours that applicant was subjected to?

Methodology

This research analysed 30 decisions of cases where there has been a claim of sexual harassment sent for adjudication in the human rights or employment institutions from 1992-2000. The qualitative aspect to the research is based around that carried out by Morris (1996), and uses a content analysis as explained by Krippendorf (1980). The process involves interpreting the words of the decision-makers looking for themes that may reflect sexist attitudes and values, or adherence to myths about how women will react to sexual harassment that could be detrimental.

A random sample of five decisions was given to two outside "experts" to analyse for answers to the research questions. A reliability test was then used to determine the extent of agreement giving a reliability coefficient of 0.96.

Results

Question 1: Corroboration

Table 1: Corroborating Evidence

		Employment institutions	*Human Rights instititutions*
		n = 19	n = 11
Corroborating Evidence	Not relevant	15.8%	9.1%
	Corroboration required	57.9%	45.5%
	Corroboration not required	26.35%	45.5%

The results for corroboration being necessary by the decision maker across institutions appear to be reasonably high at around 53 percent. Corroboration didn't necessarily mean that an independent person had witnessed the behaviour complained of, but simply whether or not the applicant discussed the problem with someone else when it had occurred. Heavy emphasis was put on this type of evidence by Goddard C J in *Managh and Café Down Under v Wallington and Jacobsen,* unreported, WEC 61/96. However such corroboration was not sufficient in *Y v X*, unreported, AT 126/92, with the adjudicator stating:

> "I do not rely on evidence of a complaint being made to people in whom she might naturally have been expected to confide as being evidence of corroboration of the facts complained of . . ."

This adjudicator may have chosen not to put weight on such evidence, but many other adjudicators do; this is sometimes the sole evidence of corroboration.

Some decisions did seem to require corroboration (for example, *A v Mr and Mrs B, and XY Ltd*, unreported, CT 25/95). Here the adjudicator agreed that there was evidence that the employer verbally harassed the applicant but not that he had physically harassed her. Witnesses for the respondent gave evidence that some of the verbal comments complained of were made by the employer, but that they were jokes and nothing to get upset about. The adjudicator agreed that this behaviour did take place. The other claims about specific requests for sex and physical harassment were not held, and the adjudicator mentions in his decision that no other staff saw the incidents described by the applicant. It is highly unlikely that an employer who offers money for sexual intercourse from an employee is going to do this in front of other witnesses.

In *Y v X*, unreported, AT 126/92, the adjudicator found that harassment had not occurred and made the following remarks with regard to corroboration at page 17:

> "What the Tribunal had and must give some weight to, however, is testimony from a number of other employees who denied that they had ever seen any such behavior from Mr X or had been made uncomfortable by his actions. This testimony from other young women who worked in the same kind of situation, and in the same kind of power relationship must be given some weight".

With respect to the point that other employees didn't feel uncomfortable by the actions of Mr X, this particular testimony should not be given weight. An employer who sexually harassers an employee does not necessarily harass all employees, and any inference that X did not harass Y because he didn't appear to harass any other employee is weak.

Managh and Café Down Under v Wallington and Jacobsen, unreported, WEC 61/96 is an appeal by an employer against the finding of an earlier Tribunal. This was in fact one of three cases against this employer for sexual harassment. The Tribunal had discounted the evidence in totality of one of the applicant's witnesses who corroborated her story, as the evidence was said to be 'dripping' with animosity towards Mr Managh. Given that virtually all the respondents' employees were making claims of sexual harassment, animosity is hardly unexpected. To expect witnesses, who had also been harassed by the respondent to give unemotional evidence seems particularly unrealistic, and implies that good witnesses should provide unemotional, rational, and very "male" evidence. The Chief Judge however rightly pointed out the flaws with the Tribunal's reasoning on appeal to the Employment Court.

In *Z v A* [1993] 2 ERNZ 469 the Chief Judge makes some comments about corroboration and credibility at 492:

> "It is not unreasonable to expect a man of the appellant's age and long business career to have left a clearer trail if inclined to act generally towards women in an inappropriate way as was suggested. I have taken into account all the literature . . . but it seems reasonable to expect some evidence of mention of this behaviour if it went on unremitting for 18 months or to expect someone to have noticed some signs of oppression of this kind even without being told."

Goddard C J claims to have taken into account the literature, but seems to reject what it has to say, in favour of how he expects women to react to harassment. Aside from this there were other witnesses who were employees, who gave evidence in support that at least some of the behaviour had taken place, but that they were not offended by it. So at least some of the behaviour was noticed by other employees over the 18-month period.

Question 2: General workplace behaviour

The general workplace behaviour of the applicant was referred to in a sexist manner by decision makers in relation to reasons for their decision in around 23 percent of the case.

References to general workplace behaviour were not particularly common but when used did show sexist connotations; there were no differences noted between institutions.

Table 2: General Workplace Behaviour

		Employment institutions	*Human Rights institituions*
		n = 19	n = 11
General Workplace Behaviour	Not relevant	5.3%	9.1%
	Applicants behaviour considered	26.3%	18.2%
	Applicants behaviour not considered	68.4%	72.7%

In *A v Mr and Mrs B, and XY Ltd*, unreported, CT 25/95 the adjudicator referred to the applicants style of dress at work as not particularly revealing. The clothes the applicant wore were shorts and a tee shirt, which were considered baggy. While in this decision the reference to the applicants clothing did not count against her, it appears that this is only so because the adjudicator found her clothes not be provocative. Reference to the applicant's clothing was irrelevant in this case and shows evidence of sexism.

Section 35 of the EC Act (1991) precludes the decision maker from putting any weight onto evidence of the applicant's sexual reputation. However, in A *v* Z [1992] 3 ERNZ 501 the adjudicator felt it necessary on two occasions to refer to a tattoo the applicant had near her breast. He does go on to say that the Act directs him to take no account of it, but if this is the case, he should not mention it at all, let alone twice.

Question 3: Applicant's responsibility

The frequency (27 percent) with which the decision maker referred to the applicant being in some way responsible for the behaviour because of her reactions or responses to it were very similar to the frequencies for general workplace behaviour.

Table 3: Resistance to the Behaviour

		Employment institutions	*Human Rights institituions*
		n = 19	n = 11
Resistance to the the Behaviour	Not relevant	10.5%	9.1%
	Held responsible	31.6%	18.2%
	Not held responsible	57.9%	72.7%

There did appear to be a distinct difference between the two tribunals' approaches on this question. The Complaints Review Tribunal made less references of this type and when they did, they were less serious or damaging to the applicants' cases.

In *A v Mr and Mrs B, and XY Ltd*, unreported, CT 25/95 the applicant did not tell her employer directly that his advances were unwelcome, but claims that he would have had to be stupid or blind not to have got the message. As the legislation makes it clear that the complainant does not have to express her concern regarding the harassment to her employer if they are the harasser, then this evidence about whether or not she told him that his advances were unwelcome is irrelevant, and should not form part of the decision.

In *Crawford v Managh and Managh and Associates*, unreported, WT 96/95 the adjudicator listed various things which gave weight to the argument that the applicant had never been harassed by her employer. These include:

- If Ms Crawford had been harassed for so long then it was unlikely that she would have continued to work for him as long as she did.

- That there were never any witnesses to the harassment.

- The applicants would have faced a 26-week stand down period if she had not taken a personal grievance.

- There was a four-day delay between the last request for a sexual relationship and the applicant's resignation.

- The applicant continued to work for the respondent during her last week despite what she had alleged had been going on.

While the Tribunal found in the applicant's favour (on what the Tribunal calls "the basis of *limited* supporting evidence") and concluded that harassment had taken place, the preceding list of things under heading "in support of the respondent's claim" indicate that these things were taken into consideration. This shows a lack of understanding about the ways in which women respond to sexual harassment, (see Fizgerald et al., 1995) and is an example of sexist jurisprudence, in that the real responses of women are ignored and some kind of male model of reaction is being used instead.

In *Managh v Crawford* [1996] 2 ERNZ 392 the Chief Judge makes a disturbing remark, interestingly in support of the victim of the harassment. He claims that "it is obvious that any self-respecting female employee would have left in like circumstance". This statement is made in support of the victim's assertion that she was constructively dismissed because of the sexual harassment, however, this is not necessarily the response that most women have to sexual harassment in the workplace. Also given the role of the Chief Judge in giving guidance to the Tribunal, such remarks could be detrimental to other complainants of sexual harassment.

In *Y v X*, unreported, AT 126/92, the Tribunal held that the employee could have ended her own difficulty with her employer by giving him an outright rejection to his repeated requests for lunch dates. The employee in this case did refuse such invitations, but clearly not as forcefully as the Tribunal would have liked; it blamed the applicant for the behaviour by putting the burden of stopping the requests onto the applicant. Again the legislation is explicit in that the recipient does not have to express their concern to the employer if they are the harasser.

Question 4: Subjective test for offensiveness

The subjective test for offensiveness was only altered to some kind of objective test in seven percent of the decisions. While this percentage is low, it should be zero. The case law that stipulates this subjective test was developed very early and should mean that it is always used. The following tables show the frequency of the subjective test for offensiveness altered in some way to an objective test by the decision maker.

Table 4: Subjective View of Offensiveness

		Employment institutions	*Human Rights instititutions*
		n = 19	n = 11
Subjective view of offensiveness	Not relevant	5.3%	9.1%
	Held responsible	5.3%	9.1%
	Not held responsible	89.5%	58.8%

In *A v Mr and Mrs B, and XY Ltd*, unreported, CT 25/95, the adjudicator explains how the test for words or actions of a sexual nature has been met, but then goes on to say that the applicant has misconstrued a number of actions by her employer, while accepting that others did cause offence. If the test has been met for establishing that the behavior was sexual, then it is not up to the decision maker to decide if the applicant should or shouldn't have been offended. In *A v Z* [1992] 3 ERNZ 501 the Tribunal held that the verbal harassment the applicant complained of was within what would be considered the normal context of humour that goes with working in a pub. As this subjective test for offensiveness is what sets New Zealand law progressively apart from other countries, it is disappointing to see it misused at all.

Question 5: Objective test for detriment

The frequencies of the use of an objective test by the decision maker that damages the applicant's case in some way was quite high at around 40 percent.

Table 5: Objective Test for Detriment

		Employment Institutions	*Human Rights Instititutions*
		n = 19	n = 11
Objective test for detriment	Not relevant	10.5%	0
	Test damaging to complainant	36.8%	45.5%
	Test not damanaging to complainant	52.6%	54.5%

Although the same subjective and objective tests apply under both pieces of legislation and case law, my interpretation of the decisions is that it is the human rights institutions which made more serious use of the objective tests to the applicant's detriment. In *A v Z* [1992] 3 ERNZ 501 the Tribunal held when referring to an incident of alleged verbal sexual harassment, that as it was neither repeated or significant, so it was not detrimental to the employee's employment. However this was only one instance among a series of incidents that included verbal harassment, unwanted touching and sexual assault. At page 509 the adjudicator states, "Did the events as alleged happen? In the affirmative – yes they did". This is a clear indication that the adjudicator accepts the behaviour complained of occurred; yet earlier at page 507 he says:

> "I accept that the incident did happen in the way the applicant and Witness "C" stated it happened. It was, however, in the context of what might be described as ribald banter in a pub . . . . In itself, that is, in isolation, I am of the view that the incident does not fall accordingly within the definition of sexual harassment. It was neither repeated nor in itself, detrimental to the employee's employment, job performance, or job satisfaction."

The comments do not make sense; on the one hand the adjudicator says he accepts that the all the incidents occurred, but on the other, he is saying that as this incident wasn't repeated, it doesn't reach the standard for sexual harassment. As he accepts that all the

incidents did occur, then the assumption is because the applicant wasn't the subject of the exact same joke told in the same way and context again, then it wasn't repeated. Clearly there was repetition of the harassment if he accepts that all the incidents occurred.

In *J v M*, unreported, AT 235/94 the applicant, among other things in her claim of sexual harassment describes an incident of forced sexual intercourse by her employer, and as such this case could be viewed as one of the more serious. In the award of remedies the Tribunal allows for $15,000.00 compensation which seems to indicate that the adjudicator does realise that the harassment was serious. However, the adjudicator also states he has chosen not to grant a higher amount for compensation as the applicant can't have been all that traumatised by the events at the respondent's house (the alleged rape) as she returned

to work for a short time before resigning. Again this rationalisation of the victim's behaviour lacks understanding of victim responses and is sexist, because of the objective test for detriment.

In *Read v Mitchell* [2000] 1 NZLR 470 the Tribunal decided that Read had suffered no detriment as she was sufficiently assertive to deal with the harassment at the time that it occurred. In *Sahay v Onepoto Service Station*, unreported, AP 277/96 Wild J held the sexual harassment had occurred but commented that the sixteen year old complainant should not be "prissy" and that the detriment suffered was low.

Question 6: Remedies

Remedies ranged from between $800.00 and $25,000.00 for humiliation, loss of dignity and injury to feeling, while the behaviour complained of ranged from general verbal comments to rape allegations. The behaviours were categorised into six general groups, and the next table shows both the mean and the median for compensation awarded according to the behaviour type.

Table 6: Average Compensation According to Categories of Behaviour

Type of Behaviour	*Mean*	*Median*
Rape	$8,500.00	$8,500.00
Sexual assault	$9,666.00	$5,000.00
Quid pro quo	$14,166.00	$10,000.00
Unwanted physical contact	$3,960.00	$3,250.00
Personal unwanted verbal attention	$11,285.00	$8,000.00
General verbal comments	$5,000.00	$5,000.00

From this table it can be seen that the highest awards for compensation are for "quid pro quo" harassment. This then indicates that this is the behaviour that is considered to be the most deserving of compensation. The reason this behaviour is considered to be so serious is probably because of the element of coercion that is inherent in such behaviour. But there is clearly coercion in rape and sexual assault also, and I believe it is a reason for concern to see that these behaviours have attracted less in compensatory remedies than "quid pro quo". The other generalisation that can be seen in these averages is that unwanted physical contact surprisingly has warranted the least in compensation.

There is a view that compensation awards link directly to the income level of complainants (Morris, 1996; McAndrew, 1997). However, regardless of this possibility there is still evidence that men will be awarded more for humiliation and hurt feelings than women,

even if the income variable is removed (McAndrew, 1997; Morris, 1996). Given the findings of these two pieces of research, and the low amounts awarded for unwanted physical sexual contact that have been found here, I believe there is evidence of sexism within the decisions on what women's hurt feelings are worth.

As has already been highlighted in *J v M,* unreported, AT 235/94 the amount awarded in compensation for what amounted to an alleged rape was $15,000.00. While this amount is definitely on the high side for the sexual harassment cases, is does seem somewhat low considering the criminal nature of the behaviour complained about, and the obvious harm caused to the victim. Another concern with the remedies in this decision is the adjudicator's comments concerning his taking regard for the part-time nature of the job. While I assume this is an issue which needs to be considered when looking at loss of income, I don't see its relevance to compensation. After all, this award is for the humiliation, loss of dignity and hurt feelings as a result of the alleged rape. The implication is that some how the applicants feelings are not as badly damaged as they would have been had she been employed full-time.

In *Laursen v Proceedings Commissioner* [1998] 5 HRNZ 18 the High Court remarked that comparison with other cases is difficult and overall the amounts awarded in New Zealand are relatively low and out of step with other jurisdictions. In *Managh and Café Down Under v Wallington and Jacobsen,* unreported, WEC 61/96 the Chief Judge pointed out several factors that need to be considered when deciding upon the level of remedies to award, which were later used again by the Complaints Review Tribunal in *Laursen.* Perhaps it would be helpful to view these factors as mitigating circumstances from which a compensation award could be further personalised to the particular circumstances of the case.

Discussion

After analysing the decisions in accordance with the research questions, I graded all the decisions on an overall global choice as to whether or not any sexist elements within them resulted in some detriment to the applicant, and found this to be the case in 43.3 percent of the decisions.

Overall I conclude that there are sexist elements to the jurisprudence in sexual harassment decisions, but that the situation is not as dramatic as the cases that have been described in the United States and United Kingdom. The legislation here does appear to be progressive by comparison to these other jurisdictions, but sexist attitudes still remain with those who have the power to use the legislation to compensate the victims. Some of the problems could be dealt with by giving clearer direction through statute or informed directions from our higher level judges. I believe that sexual harassment is a matter for direct legislation such as other minimums like holidays and wages. Clearer and precise direction in the legislation could help remove more of the decision maker's discretion, and in doing so remove some of the potential for sexist bias to be manifested.

Finally responses and reactions to sexual harassment in the workplace needs further research in New Zealand. While there is considerable literature on this subject internationally, there needs to be some in our own context. This may provide decision makers with valuable information and aid them to make decisions on fact that are more in line with the reality of responses and reactions, rather than the rhetoric of male biased rationality.

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