

Reference No. HRRT 033/2015

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN YASODHARA DA SILVEIRA
SCARBOROUGH

PLAINTIFF

AND KELLY SERVICES (NEW ZEALAND)
LIMITED

FIRST DEFENDANT

AND ASSA ABLOY (NEW ZEALAND) LIMITED

SECOND DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines QC, Chairperson

Mr RK Musuku, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Ms Y Scarborough in person

Mr CHB Bennett, agent for first defendant

Mr AJ Lloyd and Mr JCS Kimpton for second defendant

DATE OF HEARING: 2 and 3 December 2015

DATE OF DECISION: 16 December 2015

DECISION OF TRIBUNAL¹

¹ [This decision is to be cited as: *Scarborough v Kelly Services (NZ) Ltd* [2015] NZHRRT 53]

Introduction

[1] In November 2014 Ms Scarborough was a “temp” contracted to Kelly Services (New Zealand) Ltd (Kelly Services) who in turn assigned her to work at Assa Abloy (New Zealand) Ltd (Assa Abloy) for a period originally anticipated to be six weeks in duration.

[2] In these proceedings under the Human Rights Act 1993 Ms Scarborough alleges that while working at Assa Abloy she was sexually harassed by the Operations Director, Mr JN McColl. Allied to this claim are allegations of discrimination in employment (s 22), indirect discrimination (s 65) and victimisation (s 66).

[3] The central issue in this case is whether Ms Scarborough’s claims are credible and whether she has established her case to the requisite standard, being the balance of probabilities. As will be seen it is our finding that there is no truth whatever to the claims and we emphatically reject the allegations made against Assa Abloy, Mr McColl and Kelly Services. That having been said, however, it is also our finding that Ms Scarborough, in her own mind, honestly but mistakenly believes she has been the victim of sexual harassment. Objectively, however, there is no rational basis for that belief.

[4] Ms Scarborough’s predisposition to read into circumstances that which is not there is perhaps illustrated by her misreading of the outcome of the mediation meeting facilitated by the Human Rights Commission.

The mediation meeting

[5] In her evidence to the Tribunal Ms Scarborough asserted the outcome of the March 2015 mediation meeting facilitated by the Human Rights Commission was that the Commission established that Ms Dickinson of Kelly Services and Mr McColl “acted wrongly and should not have deprived [Ms Scarborough] of work and an income”.

[6] What the letter dated 11 March 2015 from the Human Rights Commission actually says is that the complaints of sexual harassment were not resolved at the meeting, that there was no agreement regarding the facts, that the parties could not agree on an outcome and that without admitting liability, Kelly Services had made an offer of settlement:

Following yesterday’s mediation meeting, your complaints of sexual harassment and victimisation were not resolved. Both parties discussed the matters fully. However, despite each party having heard each other’s perspectives, there was no agreement regarding the facts. Proposals were put forward by each party for closure of the matter. You stated that an offer of employment by Kelly Services would resolve the matter for you. Without admitting liability, Kelly Services offered counselling through EAP, some career coaching and a verbal reference. The offers were made within mediation and are therefore confidential to the parties and their legal advisers. The parties could not agree on an outcome.

[7] It will be seen that even on the most optimistic construction of this letter, it is not possible to say the Human Rights Commission “established” that Kelly Services and Mr McColl acted “wrongly”. When this was pointed out to Ms Scarborough during the course of the hearing she was undeterred, insisting the Human Rights Commission had made findings in her favour to the effect that Kelly Services and Mr McColl had acted in breach of the Human Rights Act.

Service of the common bundle of documents

[8] Preparation of the common bundle of documents is ordinarily the responsibility of the plaintiff. However, as Ms Scarborough is self-represented, at the first teleconference

convened by the Chairperson on 3 September 2015 Mr Lloyd offered to undertake this task.

[9] On Friday 20 November 2015 a courier retained by MinterEllisonRuddWatts attempted to deliver the common bundle to Ms Scarborough at her residential address which is also her address for service. The courier found Ms Scarborough no longer lives at the address and returned the bundle of documents to Mr Kimpton. By email dated Tuesday 24 November 2015 Mr Kimpton asked Ms Scarborough for her new postal address so the bundle of documents could be delivered to her. On Wednesday 25 November 2015 Ms Scarborough replied to the effect that she did not know how Mr Kimpton could possibly know she no longer lived at the particular address because she had not notified the parties of any change of address. If the bundle had been left at her former home she would have collected it from there. Mr Kimpton replied on the same day asking again for Ms Scarborough's new address. Further correspondence followed but without a new address being notified.

[10] In the result, it was only at the hearing that Ms Scarborough was provided with the common bundle. She did not seek an adjournment or claim any prejudice.

[11] The point of this narrative is that during the course of her evidence Ms Scarborough cited the non-delivery of the bundle of documents as evidence of bad faith by Mr Lloyd and Mr Kimpton. Asked how she arrived at this conclusion Ms Scarborough said the "delay" in the follow-up email asking for her new address was "not efficient enough" for her. Asked by the Tribunal why she had not notified the parties (and the Tribunal) of her change of address Ms Scarborough remained adamant that the solicitors for Assa Abloy were acting in bad faith. It must be observed that there is no evidence whatsoever of bad faith but the incident does illustrate the at times conspicuous lack of sense, reason and logic in Ms Scarborough's evidence.

Unfounded allegations made by Ms Scarborough

[12] Unfortunately Ms Scarborough has not assisted her case by making unfounded allegations against Mr Bennett and Mr Lloyd who represent Kelly Services and Assa Abloy respectively. She has become preoccupied, if not obsessed with a claim neither can appear before the Tribunal and in her statement of evidence dated 6 November 2015 went so far as to allege Kelly Services, Assa Abloy, Mr Bennett and Mr Lloyd have acted in collusion so as to "obstruct, prevent and pervert the course of justice which is an offence pursuant to s 116 of the Crimes Act 1961". Ms Scarborough has also alleged Mr Bennett's firm as well as MinterEllisonRuddWatts "may be dealing with money laundering".

[13] Ms Scarborough's obsessive preoccupation with the ability of Mr Bennett and Mr Lloyd to represent their respective clients has been accompanied by a seemingly endless barrage of emails sent by her daily. As commented by the Chairperson in his *Minute* dated 3 September 2015, these emails have caused a substantial waste of professional time and have become an unwelcome distraction. Notwithstanding the emphatic ruling in the *Minute* that the allegations against Mr Bennett and Mr Lloyd were unfounded and that both had an unqualified right to represent their respective clients, Ms Scarborough has continued to return to the point. Following a further teleconference held on 5 November 2015 the Chairperson's *Minute* issued on that date summarised the position as follows, recording that Ms Scarborough was unrepentant and would insist on pursuing what the Chairperson described as her irrational claims against Mr Bennett and Mr Lloyd:

[7] I reminded Ms Scarborough the standing of Mr Lloyd and Mr Bennett to represent their clients has already been addressed in the *Minute* of 3 September 2015 and that it is a waste of time for Ms Scarborough to continue returning to the point. I also drew attention to the fact she was not assisting her case by her seemingly endless emails on the same subject. I specifically mentioned the 15 emails sent by her to the Tribunal's Case Manager and copied to Mr Lloyd and Mr Bennett (among others) between 8:54am on Friday 30 October 2015 and 4:38am on Wednesday 4 November 2015 alleging (inter alia) Mr Bennett and Mr Lloyd cannot lawfully represent their clients and "possible illegality" surrounding Minter Ellison Rudd Watts and the Employment Law Centre. In addition to their content the timing of the emails gives an indication of the obsessive nature of the correspondence.

Friday 30 October 2015	8:54am
Friday 30 October 2015	11:59am
Friday 30 October 2015	12:16pm
Friday 30 October 2015	12:47pm
Friday 30 October 2015	11:12pm
Friday 30 October 2015	11:57pm
Saturday 31 October 2015	7:03am
Sunday 1 November 2015	7:12am
Sunday 1 November 2015	9:57am
Sunday 1 November 2015	10:03am
Sunday 1 November 2015	12:18pm
Monday 2 November 2015	7:51am
Monday 2 November 2015	12:15pm
Tuesday 3 November 2015	5:12am
Wednesday 4 November 2015	4:38am

[8] The last email (Wednesday 4 November 2015 at 4:38am) has the subject line "Money laundering and/or tax evasion or similar offences".

[9] I have attempted to dissuade Ms Scarborough from sending further emails and from pursuing her irrational claims but she is insistent she will make them part of her case.

[14] Ms Scarborough's attack has been conducted on a broad front and has included a stated intention to "finish" the careers of Ms Dickinson and Mr McColl. See her email of 29 August 2015 to Assa Abloy:

I would just like to complement this e-mail that I have written to Mr Lloyd with regard to non-qualified lawyers and how unethically and unlawfully they will act, on behalf of their clients. And Mr Lloyd is not even capable of giving proper legal advice ...

...

I stress that if the matter is not resolved in the Tribunal, I will be filing an application in the High Court under the Crimes Act 1961. And that is where I am going to finish Ms Dickinson's career if she ever thought about becoming a manager, and Mr McColl's career as a manager and/or director because dishonest persons are not permitted to manage companies under the Companies Act 1993.

[15] As mentioned the making of these unfounded allegations has not assisted Ms Scarborough's case. We do not, however, detect any malice. Ms Scarborough has convinced herself of the righteousness of her cause and of the "truth" of her allegations notwithstanding they are without any foundation in fact.

High Court challenge foreshadowed

[16] On several occasions during the hearing Ms Scarborough acknowledged she had no evidence of sexual harassment or discrimination independent of her own testimony but, undaunted, stated she would be appealing any adverse decision of the Tribunal to the High Court. Indeed, in opening her case she asked the Tribunal to state a case for the High Court under s 122 of the Act on the grounds that "fraud has taken place, and I have been ignored from the very beginning of the proceeding". She expressed the view the High Court had ample jurisdiction to deal with her claim of sexual harassment and

the consequential detrimental consequences in respect to her employment, victimisation and other matters which have arisen during the course of her proceedings.

[17] It is apparent from the face of s 122 a case can only be stated on a question of law arising in the proceedings before the Tribunal. As no such question arises, there is no jurisdiction for a case to be stated. The outcome of the proceedings will depend entirely on findings of credibility and of fact. The unsuccessful party will then have a right of appeal to the High Court. In these circumstances it would be improper for the Tribunal to state a case under s 122. Furthermore, none of the so-called "questions of law" identified by Ms Scarborough in her opening submissions (Exhibit 1) are in truth questions of law and in addition, none of the questions relate to issues relevant to the case.

THE EVIDENCE

[18] Although the parties have diametrically opposed positions on whether there is any truth to the allegation of sexual discrimination, there is at least some common ground as to the circumstances in which Ms Scarborough was placed by Kelly Services at Assa Abloy.

Ms Scarborough's contract of employment with Kelly Services and her placement with Assa Abloy

[19] Assa Abloy is a manufacturer of window and door security products for the local and export market. Its manufacturing plant, warehouse and New Zealand head office are located in Albany, Auckland. The international head office is located in Sweden.

[20] Assa Abloy operates with short lead times and the Tribunal was told that for the efficient operation of its business it must be able to raise and lower its staff numbers in the factory at short notice to follow market demand. Experience shows that demand spikes and troughs are accentuated around the end of the calendar year. Kelly Services is Assa Abloy's provider of temporary staff. Throughout 2014 a total of 151 temporary staff were on site. The average duration for a temporary assignment was 4.25 weeks.

[21] Team Leaders and Team Coordinators are responsible for the management of their labour resources. They meet on a weekly basis with the Production Managers to review labour usage both for their team and across the business. At this meeting they review sales orders and decide on staffing levels for the week to come. This decision is reviewed on a daily basis at a morning meeting.

[22] It is the responsibility of the Team Leaders and Team Coordinators to make direct contact with Kelly Services regarding their requirements for temporary staff. The Team Leader or Coordinator emails a request to Kelly Services outlining the requirements and where possible, the likely length of the assignment.

[23] There is flexibility in the duration of an assignment period, the Team Leader being required to inform Kelly Services at least 24 hours before the assignment is to be terminated.

[24] The two months leading up to Christmas are peak production periods for the company and there is a higher than average number of temporary staff on site in this period. In January the lowest number of temporary staff are on site. The factory was closed on 19 December 2014 with most of the production team returning only in the week of 19 January 2015. For the period October 2014 through to December 2014,

Assa Abloy employed a total of 84 different temporary staff through Kelly Services. Thirty-four were on short term placements of less than four weeks.

[25] On 7 November 2014 Ms Scarborough signed Kelly Services' standard Temporary Employment Agreement. In clear terms this document stated there was no guarantee that any assignment would be of a fixed duration and at any time the period of an assignment could alter in accordance with the client's needs.

[26] The signing by Ms Scarborough of the Temporary Employment Agreement was accompanied by an induction by Ms Dickinson of Kelly Services. During the registration and induction meeting Ms Dickinson discussed a potential temporary assignment opportunity at Assa Abloy from 10 November 2014 to 19 December 2014 when the factory was due to close for the Christmas shutdown period.

[27] On 7 November 2014 Kelly Services was contacted by Ms Nirali Amin, Keying Line Leader at Assa Abloy who requested four different temporary staff for her team for various time periods. At approximately 3.45pm on 7 November 2014 Ms Dickinson advised Ms Scarborough via text message that Ms Scarborough would commence a short-term temporary assignment with Assa Abloy commencing on 10 November 2014 and reporting Ms Nirali Amin. Ms Scarborough commenced her temporary assignment on 10 November 2014.

[28] By the third week of December 2014 Ms Amin's department experienced a reduced workload and the order intake was not consistent owing to the impending holiday season. It became apparent three of the temporary staff (out of four) were no longer required and a decision was made by Ms Amin on 10 December 2014 that Ms Dickinson of Kelly Services would be advised the following day that the assignments of the affected temporary staff would be ending. That decision was approved by Ms Amin's Team Leader.

[29] On Friday 12 December 2014 Ms Amin sent an email to Kelly Services confirming Ms Scarborough and two other temporary staff would end their placement with Assa Abloy that day and were not to report for their shift on the forthcoming Monday. On the same day (12 December 2014) Ms Scarborough was advised her temporary assignment would end that day and that she would not be required for the following week. There is no dispute that Ms Scarborough's last day at Assa Abloy was on 12 December 2014.

Ms Scarborough's evidence

[30] Ms Scarborough told the Tribunal that while at Assa Abloy she saw one of the managers (Mr McColl) "looking at her" but at first she did not make anything of it. While other workers at Assa Abloy initially seemed "very normal" to Ms Scarborough, by the beginning of December 2014 she felt something had changed. For some reason workers were looking at her differently and whispering things such as "she's sexy but has no idea" and "it's flirting time". It was not only the workers on the factory floor who were looking at her differently; she saw other employees from the office looking at her in the same manner. It was as if they had all heard something about her and were curious. She did not say anything to anyone and stayed focused on her job.

[31] Ms Scarborough alleges that at Mr McColl's request, and without warning, Kelly Services terminated her placement at Assa Abloy on 12 December 2014 and did not offer her any further work. She alleges that the sexual harassment by Mr McColl comprised looking at her two to three times, spreading "whispers" among the workforce

and arranging for Kelly Services to terminate her placement “in order to take advantage of the situation, and to pursue his personal interest in me”.

[32] Ms Scarborough accepts she never met Mr McColl, was never introduced to him, was never approached by him and agrees they have never spoken. Yet notwithstanding there was not what Ms Scarborough describes as “flirting”, Mr McColl has prohibited Ms Dickinson of Kelly Services from offering Ms Scarborough work and this is sexual harassment. He has caused Ms Scarborough a great deal of harm because she is still unemployed twelve months later and cannot find work as Ms Dickinson has allegedly sabotaged Ms Scarborough’s chances of finding employment somewhere else by giving bad references about Ms Scarborough.

[33] Ms Scarborough accepts that she did not hear Mr McColl say anything about her but believes he made remarks about her to one or two people and these persons then spread the “whispers”. Asked how she knew that it was Mr McColl who had said things about her, she answered “because I know”. She added that Mr McColl thought she was sexy and wanted sex with her. Asked how she knew she responded that “he is a man”. In her view the sexual harassment was Mr McColl not speaking to her and then causing her dismissal for a personal reason, not a professional or business reason. By personal she meant a personal interest in her.

[34] When it was put to her that she was overly sensitive and overly suspicious about how people looked at her, she responded that if the person putting the question had been on a job seeker benefit for over a year like her, the questioner would not have asked the question. She insisted she was telling the truth.

[35] Ms Scarborough says the evidence given by the Assa Abloy and Kelly Services witnesses (Mr McColl, Ms Amin, Ms Sanft and Ms C Jackson) is all lies and that she (Ms Scarborough) believes Kelly Services has become an escort agency and is operating a sex business on the side, forcing workers into prostitution to please its clients and to stay in business with them. This claim was made not only in her oral evidence but also in her email of 7 November 2015 to the Human Rights Commissioner, the Secretary, Mr Bennett and Mr Lloyd. Challenged at the hearing that there is not a shred of evidence to support this allegation, Ms Scarborough acknowledged she did not presently have evidence but said “one must use one’s brain”.

The evidence for the defendants

[36] Mr McColl told the Tribunal he has never met or spoken to the plaintiff. The first time he saw her was at the Tribunal hearing. He has not received or sent any emails to Ms Scarborough or communicated with her in any way. He did not arrange for the termination of her employment or otherwise have anything to do with her employment. The first he became aware she existed was when he was advised of her allegation of sexual harassment.

[37] In cross-examination Ms Scarborough asked him one question only namely “What did you gain from interfering with my employment?”. Mr McColl’s response was that he had never interfered with Ms Scarborough’s employment.

[38] Ms Nirali Amin, the Keying Line Leader confirmed Mr McColl had no involvement at all in her decision to engage Ms Scarborough through Kelly Services or to end Ms Scarborough’s engagement. Ms Amin was the only person to talk to Kelly Services about no longer needing Ms Scarborough’s services. The decision to stop three temp staff assignments (including Ms Scarborough) had been made at a weekly meeting

between Ms Amin and her Team Leader on 10 December 2014 and it was after that that Ms Amin had contacted Kelly Services directly.

[39] Ms J Sanft, the Human Resources and Information Systems Director of Assa Abloy confirmed that it is the responsibility of Team Leaders to manage their labour resources and to make direct contact with Kelly Services regarding their temp requirements.

[40] When the allegation of sexual harassment was first notified to Assa Abloy Ms Sanft was tasked with carrying out a formal investigation. That investigation led to a comprehensive report by Ms Sanft dated 26 March 2015. In the course of her investigation Ms Sanft contacted Ms Scarborough on 12 March 2015. In this telephone interview Ms Scarborough told Ms Sanft:

[40.1] She had not met Mr McColl but had seen him look at her when he was talking to another staff member.

[40.2] Asked why she thought Mr McColl would terminate her employment, Ms Scarborough said it was because he was prejudiced against production workers and that he did not want anything to do with her because she was a production worker. She said if she had been an office worker he may have been “interested” in her.

[40.3] Ms Scarborough was unable to provide any witness or to name individuals who would be able to support her claim there were comments such as “she’s sexy”.

[40.4] Ms Scarborough was unable to provide any evidence that there had been any collusion between Mr McColl and Ms Dickinson.

[40.5] Ms Scarborough alleged Mr McColl had sent her an email stating he had a “proposition for her”. When Ms Sanft said she would need evidence Ms Scarborough initially told her to speak to Mr McColl. Ms Scarborough later sent to Ms Sanft an email address which she claimed to be Mr McColl’s. On Mr Sanft doing a Google search the email address was reported on a number of sites as being the source of spam and hoax emails.

[41] At the Tribunal hearing Ms Scarborough said the email address was used by Mr McColl even though it might also be used by others. It is to be noted Ms Scarborough has produced no evidence that Mr McColl ever communicated with her by email whether via the address she gave to Ms Sanft or via any other address. Mr McColl said he had never sent an email to Ms Scarborough.

[42] We do not find it necessary to make reference to the evidence given by Ms C Jackson for Kelly Services.

FINDINGS OF FACT

[43] Having seen and heard the witnesses called by Kelly Services and Assa Abloy we conclude, without hesitation, that each has given a true and accurate account. Their evidence was given in measured, objective terms and was supported in material respects by contemporaneous documentation and emails.

[44] Our assessment of Ms Scarborough is, however, the opposite. She lives in a world of her own and is not anchored in reality. Sadly, she believes her perception and understanding of events is the truth and cannot be shaken from that view. Her evidence

was inherently implausible, characterised by outlandish if not bizarre claims which made no sense at all. There is no evidence to independently support her account.

[45] It is accepted Ms Scarborough honestly believes everything she has narrated to the Tribunal. But the world inhabited by her is not the world inhabited by the witnesses, the Tribunal and most other people. Her sincerely expressed but objectively baseless illusions cannot in any way establish a case of sexual harassment against Mr McColl, Assa Abloy and Kelly Services.

[46] While it is not for the defendants to prove anything, their evidence was both decisive and overwhelming. On that evidence we are satisfied beyond reasonable doubt no sexual harassment or other misconduct occurred while Ms Scarborough was on assignment at Assa Abloy.

DECISION

[47] Ms Scarborough having failed to prove any part of her case and the defendants having established conclusively none of her allegations are true, these proceedings must be dismissed.

COSTS

[48] At the conclusion of the hearing there was a brief discussion of costs. At the request of Mr Bennett and Mr Lloyd costs are reserved. Unless the parties are able to reach agreement on costs, the following procedure is to apply:

[48.1] Kelly Services and Assa Abloy are to file their submissions within 14 days after the date of this decision. The submissions by Ms Scarborough are to be filed within a further 14 days with a right of reply by Kelly Services and Assa Abloy within 7 days after that.

[48.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without an oral hearing.

[48.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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Mr RPG Haines QC
Chairperson

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Mr RK Musuku
Member

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Mr BK Neeson JP
Member