

Attention is drawn to the order prohibiting publication of certain information referred to in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 255
3119393

BETWEEN	AKD Applicant
AND	CLARENCE STREET WAREHOUSE LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Ashleigh Fechny, advocate for the Applicant Russell Drake, advocate for the Respondent
Investigation Meeting:	22 and 23 February 2022 and 4 April 2022
Submissions Received:	16 March 2022 and 4 April 2022 from the Applicant 16 March 2022 and 4 April 2022 from the Respondent
Date of Determination:	20 June 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] AKD was employed as a bakery assistant in a supermarket owned and operated by Clarence Street Warehouse Limited (CSW).

[2] In the course of her employment AKD says she was subjected to sexual harassment from the assistant manager in the bakery department.

[3] In particular, on 6 August 2020 the assistant manager made an offensive remark to AKD and subsequently made an inappropriate gesture in front of her. AKD complained about these two incidents.

[4] CSW investigated AKD's complaint and the conduct in the bakery department and then had an independent person review the investigation.

[5] AKD was unhappy with the outcome of the investigation and after various discussions with CSW, including discussions about returning to work, she felt she had no choice but to resign.

[6] As a result of the events that occurred AKD raised personal grievances for sexual harassment, unjustified action causing disadvantage and unjustified dismissal.

The Authority's investigation

[7] The parties were unable to resolve AKD's personal grievances and she lodged a claim in the Authority. It is this claim that I have investigated and that this determination resolves.

[8] AKD's claim, that I have investigated, is comprised of:

- (a) A personal grievance for sexual harassment.
- (b) An unjustifiable action causing disadvantage grievance.
- (c) A personal grievance for unjustified dismissal based on constructive dismissal.
- (d) An allegation that CSW breached the obligation of good faith owed to AKD.

[9] I investigated AKD's claim by receiving written evidence and documents, holding an investigation meeting on 22 and 23 February 2022 and 4 April 2022, and assessing the submissions of the parties' representatives.

[10] In my investigation meeting, under oath or affirmation, witnesses confirmed their written evidence and gave oral evidence in answer to questions from myself and the parties' representatives. The representatives then provided oral and written submissions.

[11] As permitted by 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Non-publication orders

[12] AKD seeks non-publication orders in relation to her identity and personal medical information. The basis for this application is that AKD's claim centres on allegations of sexual harassment and her concerns include:

- (a) Being publicly associated with these circumstances and her medical information, which is relevant to how she responded to what occurred, might cause her unnecessary embarrassment and retraumatise her.
- (b) Being publicly associated with the circumstances giving rise to her claim and her medical information will impact on her ability to obtain further employment and potentially lead to further adverse treatment in any future employment.
- (c) The interest of justice support victims of sexual harassment being able to raise complaints in a safe environment where they are supported and not subject to adverse consequences – publication of a complainant's identity in relation to her complaint runs contrary to that.

[13] CSW opposes AKD's application for non-publication. It says she was a participant in inappropriate behaviours in the workplace and, actually, she seeks non-publication because she does not want to be identified as the person who initiated and participated in this behaviour. CSW says granting AKD protection from association with such behaviour would be unjust.

[14] I reject this argument for two reasons:

- (a) There is no basis to assume or infer this is the reason for AKD's application for non-publication. AKD's reasons for seeking non-publication are set out and are credible and plausible based on her personal circumstances and the circumstances of her claim.

(b) I do not believe that CSW's conclusion that AKD initiated and willingly participated in inappropriate behaviour in the workplace was a sound decision to make. This decision should not have been used to inform its views in the process it undertook – I will explain this further in the substance of my determination – and it also follows it is not a basis to oppose non-publication.

[15] So, turning to consider AKD's reasons for seeking non-publication I am looking to see if the reasons advanced for seeking non-publication are sufficient to displace the principle of open justice i.e., parties being named and identified in litigation.¹

[16] Given the nature of this claim there is potential for publication of AKD's identity to cause her embarrassment and anxiety and to impact on her future employment. Therefore, it is appropriate that I prohibit from publication AKD's identity, any information that may identify her and her personal medical information that was presented in my investigation.

[17] Pursuant to clause 10 of the Second Schedule of the Act I prohibit from publication the name and identity of the applicant and her medical information provided in evidence in my investigation. For the purposes of this determination the applicant will be referred to as AKD.

[18] I do not consider it necessary to prohibit from publication the identity of other employees involved in the circumstances giving rise to AKD's claim. However, naming certain individuals in this determination will likely identify AKD by association. Naming certain individuals could also cause embarrassment to some individuals in circumstances where they did not give evidence in my investigation and have therefore not had an opportunity to explain their actions. So, for the purposes of this determination only, the assistant manager in the bakery department will be referred to as TDP and other employees will not be named but referred to by their role.

¹ *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94; and *JGD v MBC Ltd* [2020] NZEmpC 193.

Issues

Sexual harassment

[19] A personal grievance for sexual harassment is covered by sections 103, 108, 116, 117 and 118 of the Act. Based on these provisions the steps for a sexual harassment personal grievance are:

- (a) Where an allegation of sexual harassment concerns the behaviour of a fellow employee, the employee must first raise it with the employer i.e., make a complaint.
- (b) The employer must enquire into the complaint.
- (c) If the employer is satisfied that the complaint has substance the employer must take such steps as are necessary to prevent any repetition of the behaviour.
- (d) If the behaviour then continues and the employer has failed to take steps to address it, the employee will have a personal grievance based on sexual harassment.

[20] Therefore, the following questions are relevant to assessing AKD's claim for sexual harassment:

- (a) Did AKD raise a complaint of sexual harassment?
- (b) If so, did CSW investigate the complaint?
- (c) Had AKD been sexually harassed – i.e., was CSW satisfied that AKD's complaint had substance?
- (d) Was AKD then subjected to further sexual harassment?
- (e) If so, had CSW failed to take steps to prevent the further sexual harassment from occurring?

Unjustifiable action causing disadvantage

[21] An unjustifiable disadvantage personal grievance is set out in section 103(1)(b) of the Act, which states that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[22] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If so, did the actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions unjustifiable?

[23] AKD complains about two things:

- (a) CSW had not dealt with an earlier complaint of sexual harassment that she made in June 2020.
- (b) CSW had failed to ensure the confidentiality of her August 2020 complaint.

[24] So, for each of these complaints I will consider if that action occurred, then if it did whether it caused disadvantage to AKD's employment, and if it did whether the action was justified.

Unjustifiable dismissal

[25] The first issue for an unjustifiable dismissal grievance is, was the employee dismissed?

[26] Dismissal in this case arises out of a resignation. AKD alleges that her resignation amounts to a dismissal because she resigned in response to breaches of duty by CSW; this is a constructive dismissal.

[27] The relevant case law shows that for a constructive dismissal I need to be satisfied that:²

- (a) There was a breach of duty by CSW.
- (b) The breach of duty was sufficiently serious, that is repudiatory or dismissive, to warrant AKD's resignation.
- (c) It was reasonably foreseeable that AKD might resign in response to the breach.
- (d) AKD did resign in response to that breach of duty.

[28] If these things are established and AKD was dismissed I must then consider the second issue; was the dismissal justified?

What happened?

AKD's role at CSW's supermarket

[29] AKD worked in differing roles for CSW in its supermarket from January 2017. On 25 July 2019 AKD commenced work as a bakery assistant, working 40 hours per week as part of the bakery team.

TDP starts work and begins to harass AKD

[30] In August 2019 a new assistant manager, TDP, started work.

[31] AKD says that shortly after he started work TDP began commenting on her appearance. These comments became more frequent and overt over a period of six months as he started talking about his sex life and asking AKD about her personal life.

[32] AKD says she largely tried to ignore TDP but on occasion was drawn into conversations of a sexual nature either with him directly or part of the "banter" a group of male employees, including TDP, working in the bread section of the bakery department, would engage in.

² *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

[33] AKD says TDP's comments made her feel uncomfortable and she found them and his behaviour offensive – she describes herself as getting to the point that she was sick of it.

[34] AKD says she complained about this behaviour to the Bakery Manager in June 2020. The Bakery Manager denies this and says he did not receive a complaint from AKD.

The incidents on 6 August 2020

[35] On 6 Aug 2020 there was an incident where TDP made a sexual comment to AKD that was offensive, with the comment being made in the presence of the Bakery Manager. Whilst TDP subsequently denied making the comment when asked about it, it is clear that it was made; both AKD and the Bakery Manager described the comment to CSW's HR Manager as part of AKD's complaint and CSW's investigation and both confirmed in evidence to me that the comment was made.

[36] The Bakery Manager's immediate response was to take TDP away from AKD and he told him to be more careful with his comments as that type of language could result in a complaint being made. TDP replied saying he was only joking as he did with AKD and she would often joke back to him. TDP did acknowledge that this comment could be seen to be inappropriate and he should be more careful.

[37] AKD says that a while later on the same day, TDP made a gesture of a sexual nature towards her, which she saw. That this occurred is also clear from the evidence AKD gave in my investigation meeting and is consistent with her complaint and the admission TDP made in his interview as part of CSW's investigation.

[38] This event caused AKD to break down - she described the action as causing her to completely shut down and break; her heart was racing; her breathing became erratic; and she started shaking. AKD walked away from TDP, taking some time to compose herself but she could not return to work so she went to see the HR Manager.

[39] AKD spoke to the HR Manager briefly about what had happened that day with TDP and then, with the manager's agreement, she left work.

AKD complains to HR and an investigation is commenced

[40] AKD then had her two rostered days off work and returned to work on Sunday, 9 August 2020. AKD described herself as not being okay and detached from what had happened and what was happening at work.

[41] On Monday, 10 August 2020 AKD met with the HR Manager again. She provided the manager with a written statement setting out what had occurred on 6 August and describing other incidences involving TDP that had sexual connotations, which were unwelcome, inappropriate and/or offensive.

[42] At the conclusion of the meeting the HR Manager advised AKD that he would commence an investigation. He also discussed with AKD that she could take some time off work to ensure she got appropriate support. And he then raised with her the prospect of her returning to work and what might be done in terms of her working relationship with TDP; the HR Manager suggesting that they could consider suspending TDP. AKD offered to stay away from work in the interim period until progress had been made on the investigation and her health had improved.

[43] The next day AKD went to her doctor and obtained a medical certificate and provided that to CSW.

[44] Over the course of the next few weeks the HR Manager carried out an investigation into AKD's complaint. That investigation involved interviewing 10 employees in the bakery department including AKD and TDP.

[45] AKD was interviewed on 24 August 2020.

AKD raises a personal grievance

[46] Before AKD was provided with any outcome from the investigation, on 25 August 2020, she raised a personal grievance for sexual harassment and unjustifiable action causing disadvantage based on allegations that CSW failed to investigate AKD's complaint appropriately, CSW failed to provide AKD with a safe work environment, and CSW failed to treat her concerns in confidence.

[47] AKD's concerns about CSW's investigation included the timeliness of the investigation, that AKD was asked about her own conduct in relation to conversations of a sexual nature and that TDP had not been removed from the workplace pending any outcome of the investigation - suggesting CSW had predetermined that TDP was not a risk to staff, thereby dismissing AKD's concerns.

[48] The HR Manager responded to AKD's personal grievance on 26 August 2020. In his letter he advised:

- (a) CSW took the complaint very seriously and he was investigating it.
- (b) In order to ensure complete transparency in the investigation process and outcome, an independent person would be tasked with reviewing it.
- (c) AKD's complaint had been treated confidentially.
- (d) Whilst CSW had initially paid AKD whilst she was away from work, it now understood she was receiving ACC payments and as a result CSW had stopped paying her.
- (e) On the basis that AKD's medical certificate was due to expire on 27 August CSW invited her to return to work, which could be in a different department pending the outcome of the investigation into her complaint.

[49] There was then an exchange of emails between Ms Fechney, who was acting for AKD, and the HR Manager, regarding three things:

- (a) That AKD was not receiving ACC and was therefore not being paid for the week ending 30 August 2020. CSW agreed to pay AKD for this week but no more than that as it expected AKD to return to work the following week.
- (b) CSW's expectation that AKD would return to work given that her medical certificate was expiring. CSW's offer was to allow AKD to work in a different department. AKD then provided a further medical certificate signing her off work for an additional four weeks from 24 August 2020 and sought payment of

either special leave or annual leave. CSW agreed to pay her annual leave for any continued absence.

- (c) AKD's allegation that CSW was not treating her complaint seriously – including not maintaining confidentiality as TDP was discussing her complaint with others. CSW denied this but this was not accepted by AKD.

The draft report

[50] Based on his investigation into AKD's complaint, the HR Manager produced a draft report dated 27 August 2020. The findings set out in the draft report were that:

- (a) TDP had used sexual language that was significantly offensive.
- (b) AKD was genuinely distressed in her interview and this was also apparent from her written complaint.
- (c) AKD had initiated conversations of a sexual nature, contributed to conversations of a sexual nature and reacted and responded in these conversations as a willing participant.
- (d) Most of the employees in the bakery team were involved in conversations of a sexual nature.
- (e) TDP or AKD were most likely to initiate conversations of a sexual nature.
- (f) AKD occasionally made physical contact with employees – such as smacking colleagues on the bottom or hugging colleagues – and this was viewed as inappropriate despite the contact not having any sexual intent.

[51] The recommendations set out in the draft report were that:

- (a) Disciplinary action be commenced against TDP on the basis that he used language or discussed topics that were significantly offensive.
- (b) All of the bakery team be notified of expected behaviour within the supermarket and conversations and language of a sexual nature must stop.

(c) Bakery management be trained in identifying and dealing with sexual harassment.

[52] The HR Manager forwarded the draft report and other material to Russell Drake for him to independently review the investigation – noting at this time that Mr Drake was not retained by CSW in respect of any claim by AKD.

[53] Mr Drake's review of the investigation was based on AKD's written complaint, the interview notes of the various bakery employees interviewed by the HR Manager, AKD's personal grievance letter, the draft report of 27 August 2020 and the emails exchanged with Ms Fechny.

[54] Mr Drake's findings after his review were set out in a letter dated 31 August 2020. The key conclusions were:

(a) In her written complaint, AKD raised concerns about TDP's conduct occurring from September 2019. Despite this AKD did not raise any concerns or complain about sexual harassment for some time. In her written complaint AKD does not mention complaining about TDP's behaviour prior to 6 August 2020 but in her personal grievance letter TDK says she complained to the bakery manager in June 2020. Whether this earlier complaint had been made had not been investigated and the HR Manager should do this before finalising his report.

(b) Otherwise, Mr Drake agreed with the findings set out in the draft report and the recommendations.

[55] The HR Manager then sent the draft report, Mr Drake's assessment of the investigation and the interview notes of the employees interviewed in the investigation, to Ms Fechny on 31 August 2020. The HR Manager noted in his email that he intended to interview the Bakery Manager again and would provide a finalised report after that.

[56] The HR Manager then interviewed the Bakery Manager to ask about AKD raising a sexual harassment complaint in June 2020. As a result of that interview the HR Manager concluded that it was questionable whether AKD had reported any concerns regarding TDP to

her manager in the bakery department prior to 6 August 2020. This conclusion was added to the draft report and this was forwarded to Ms Fechny.

Subsequent discussions about resolving matters and AKD returning to work

[57] There was then further exchanges of emails between the HR Manager or Mr Drake and Ms Fechny in which Ms Fechny sought to try and resolve AKD's personal grievances and create a basis for her return to work.

[58] Despite these discussions, including in mediation, the parties were unable to resolve AKD's concerns. AKD resigned, giving notice of her resignation on 18 September 2020.

Analysis

[59] In dealing with AKD's claim there appears to be a lot of emphasis from CSW on its conclusion that AKD was involved in discussions in the workplace of a sexual nature. CSW says some employees may have found this offensive and/or unwelcome and it shows that AKD was a willing participant in conversations of a sexual nature.

[60] These conclusions were drawn from the interviews conducted by the HR Manager as part of his investigation. I have two concerns about this; first this appears to dismiss other interview notes in which a colleague says AKD was never offensive and second, none of the allegations that were gleaned from the interviews were put to AKD to respond to. So, without giving sufficient weight to other interview notes and without considering what AKD would say in response, my view is the conclusions drawn by the HR Manager about AKD's behaviour were not justified.

[61] Further, none of the employees who were interviewed gave evidence in my investigation meeting so their statements about AKD could not be tested. So, there was no direct evidence in my investigation meeting of AKD discussing anything of a sexual nature that was offensive or unwelcome. And there was no evidence that anyone ever complained about AKD's behaviour.

[62] In contrast AKD's evidence in my investigation meeting when answering questions was to deny the allegation that she discussed matters that were offensive or unwelcome. AKD

admitted she discussed things like her period as that impacted on her health and her work. And AKD admitted she discussed personal relationships with some colleagues.

[63] My conclusion is that:

- (a) AKD did not speak or act in an offensive or unwelcome manner to any colleague. I think CSW has assumed that AKD discussing her period or personal relationships including sexual matters with colleagues was offensive and unwanted. And then it has taken untested and limited references to these types of discussions by colleagues in the HR Manager's investigation as being proof that colleagues found such conversations unwelcome and offensive. But there is no direct evidence to show this was the case.
- (b) AKD was not a willing participant in all conversations of a sexual nature – particularly conversations with TDP. I think that CSW has assumed AKD was comfortable with all conversations or behaviour of a sexual nature because it believed she participated and even initiated many of these conversations or behaviours. But this conclusion was not put to AKD to respond to and her clear and consistent evidence in my investigation was that she not comfortable with nor did she welcome many of the comments, conversations or behaviours of a sexual nature that TDP engaged in.

[64] And, I must make the point, even if AKD did discuss matters of a sexual nature that were offensive or unwelcome including participating in such conversations with TDP, this does not mean what he did or said to her was excused or okay, as CSW seems to suggest. An example of this is in its Statement in Reply, CSW says AKD was not subjected to an unsafe workplace or unjustified disadvantage as it is evident from the witness statements of other team members (this must be a reference to the interview notes) that she was a key initiator in these inappropriate behaviours herself. This is not correct and not a logical conclusion to draw.

[65] In contrast I am satisfied on the evidence I heard from AKD and the Bakery Manager that TDP initiated and participated in conversations of a sexual nature and these were at times offensive or unwelcome.

[66] To this end, the Bakery Manager denied hearing TDP discussing matters of a sexual nature but his evidence on this was not credible. He became hesitant and vague with some answers about what he saw or heard and was inconsistent in some of his evidence. I conclude he did hear TDP discussing matters of a sexual nature that were offensive, such as porn, sexual preferences and sexual activity. But he, as did most of the bakery staff, dismissed much of this as boys' jokes or banter. He and other staff appeared to condone this behaviour by participating in it or simply ignoring such conversations.

[67] AKD's evidence on TDP's actions and conversations was clear, consistent and credible. This was the case for the written complaint she made about TDP, through her interview in the HR Manager's investigation, in her personal grievance letter and her claim, as well as her written and oral evidence in my investigation.

[68] I am also satisfied, based on AKD's evidence that TDP made unwelcome and/or offensive remarks of a sexual nature that were directed at AKD and this had a detrimental effect on her job performance and her job satisfaction; TDP sexually harassed AKD prior to 6 August 2020 and on 6 August 2020.

[69] The final observations I make relate to CSW's knowledge of what was occurring in the Bakery Department, particularly TDP's behaviour.

[70] First, I am satisfied that the Bakery Manager was aware of conversations and behaviour of a sexual nature that may have been unwelcome or offensive going on in the department. The Bakery Manager heard discussions of this kind going on amongst the employees, particularly the male staff who worked in the bread department and were led by TDP. In fact, I am satisfied the Bakery Manager not only knew of the behaviour, he participated in some of the conversations or at the very least he condoned the behaviour, accepting it as just the boys' jokes or perhaps the girls' gossip.

[71] Second, I am not persuaded that AKD complained to the Bakery Manager about being harassed by TDP in June 2020. AKD's evidence on this was not convincing and somewhat vague. The Bakery Manager's evidence was more consistent including with what he said when interviewed by the HR Manager, and withstood scrutiny under questioning. His denial of having received a complaint also "hung together" in terms of my perception of his overall view

of the culture in the Bakery Department. That is, he viewed the conversations and behaviour of a sexual nature as being workplace gossip and banter and saw it as relatively harmless, with employees avoiding being involved if they did not like what was happening. He did not feel the need to intervene as he did not see anyone distressed or upset nor did anyone complain. In contrast when he did see AKD upset by TDP's comments on 6 August 2020 he intervened. Therefore it follows that if he had received a complaint from AKD in June 2020 he would have intervened either by speaking to TDP or escalating the matter to HR; he did not do this so it fits with his evidence that he did not receive a complaint.

Personal grievance for sexual harassment

[72] The first requirement for a sexual harassment personal grievance is that the employee must raise their concern with the employer. I do not have evidence that AKD did this prior to 6 August 2020.

[73] AKD did complain after the 6 August 2020 events and CSW investigated the complaint. After this however there was no further incident of sexual harassment that CSW can be held liable for, in terms of any suggested failure to take steps to prevent further harassment from occurring. Therefore, AKD cannot succeed with her personal grievance.

[74] Whilst this finding precludes a personal grievance for sexual harassment it does not impact my finding that AKD was sexually harassed by TDP, nor does this finding rule out an alternative claim.

Personal grievance for unjustifiable action causing disadvantage

[75] The two actions complained of for the unjustified action personal grievance are that CSW did not action AKD's complaint in June 2020 and that CSW did not protect her privacy when it dealt with the 6 August 2020 complaint.

[76] On the evidence in my investigation meeting, I am not satisfied that either action occurred. First, as I have already stated I am not satisfied that AKD complained in June 2020 so I cannot find that CSW failed to take action. Second, I am not satisfied that CSW breached any obligation of privacy or confidentiality it owed to AKD when it investigated her 6 August 2020 complaint.

[77] So, AKD's personal grievances for unjustified action do not succeed.

Personal grievance for unjustified dismissal based on constructive dismissal

[78] In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* the Court of Appeal set out three categories in which a resignation can amount to a constructive dismissal. One of the categories, which is relevant here, is where there is a breach of duty by the employer that leads an employee to resign.³

[79] Applying the relevant case law, the requirements for AKD's personal grievance for constructive dismissal based on a breach of duty are:⁴

- (a) Was there a breach of duty by CSW as alleged?
- (b) Was the breach of duty sufficiently serious to warrant AKD's resignation?
- (c) Was it reasonably foreseeable that AKD might resign in response to the breach?
- (d) Did AKD resign in response to that breach of duty?

[80] AKD says there were two breaches of duty that caused her to resign:

- (a) CSW failed to provide a safe work environment as she was sexually harassed by TDP.
- (b) CSW did not maintain trust and confidence because of the way in which it dealt with her complaint, including the investigation and the subsequent attempts to resolve it.

[81] Turning first to the obligation to provide a safe work environment, the starting point is that employers have an obligation to take all reasonable practical steps to maintain a safe workplace, a workplace that meets health and safety requirements.⁵

³ In *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374-375.

⁴ *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

⁵ *FGH v RST* [2018] NZEmpC 60 at [191] – [199].

[82] In terms of a duty to provide a safe workplace, an employer need only protect employees against a risk of harm that is foreseeable and what the employer must do to protect employees against that harm is take steps that are proportionate to the known risk, i.e., do what is reasonably practical in the circumstances.⁶

[83] The question of whether CSW failed to provide a safe work environment for AKD involves the following:

- (a) Was AKD sexually harassed by TDP as alleged?
- (b) If so, was the harassment a foreseeable risk?
- (c) If so, did CSW take reasonably practicable steps, in the circumstances, to protect AKD against that harassment?

[84] As I have already stated AKD was sexually harassed by TDP.

[85] The question of whether this harassment was foreseeable turns on consideration of whether CSW knew of the risk or ought to have known of the risk. As I have found that the Bakery Manager knew of the conversations and behaviour of a sexual nature that may have been offensive or unwelcome, occurring in the Bakery department, I find that CSW knew of the risk of sexual harassment occurring.

[86] CSW took some generic steps to prevent sexual harassment occurring in its supermarket – it had a policy on harassment and it trained some managers in identifying and dealing with bullying and harassment. However, it took no steps in relation to the actual behaviour occurring in the Bakery Department; for example, it could have intervened at any time in terms of the conversations occurring and shut the behaviour down, or it could have reminded employees in the department of expectations around unwanted and offensive behaviour. CSW did nothing and in doing so condoned the behaviour.

[87] CSW did not take reasonably practicable steps to prevent AKD from being sexually harassed.

⁶ *Attorney-General v Gilbert* [2002] 1 ERNZ 1.

[88] In conclusion, CSW breached the obligation it owed to AKD to provide her with a safe work environment.

[89] The second alleged breach is that CSW failed to investigate AKD's August 2020 complaint appropriately, vilifying AKD through the investigation process and the negotiations over resolving her personal grievances, including any return to work. The point being that CSW wrongly formed the view that AKD was involved in conversations and behaviour of a sexual nature that were offensive or unwelcome in the workplace and this coloured its view of whether she had been sexually harassed, which in turn informed how it responded to AKD's personal grievances and any return to work.

[90] On this point I find that:

- (a) CSW carried out an appropriate investigation into AKD's August 2020 complaint.
- (b) But CSW did not do enough around the concern it had over AKD's involvement in any unacceptable behaviour, which arose in that investigation.
- (c) The conclusion CSW came to about AKD being involved in unacceptable behaviour was not justified - because CSW should have enquired further about these things before reaching a conclusion.
- (d) CSW's view on AKD's behaviour should not have influenced its view of her complaint and the outcome. This is because its conclusion about AKD's behaviour was not safe, but even if CSW was correct in its view about AKD's involvement in any unacceptable behaviour this should not have influenced how it responded to her complaint.
- (e) AKD was sexually harassed at work and regardless of her own conduct CSW needed to address that with AKD in order to resolve it and provide a safe way for her to return to work. CSW failed to do this.

[91] This is a breach of the duty of trust and confidence and a breach of the duty of good faith.

Sufficiently serious breaches

[92] The remaining elements of constructive dismissal are reasonably straightforward:

- (a) The two breaches by CSW are sufficiently serious to warrant AKD's resignation.
- (b) I also accept that it was foreseeable that AKD might resign in the circumstances of these breaches.
- (c) And I accept that AKD did resign because of these breaches.

[93] So, AKD was dismissed by CSW.

[94] The second issue is then, was that dismissal justified. The answer to that is no, it was not.

[95] Therefore, AKD was unjustifiably dismissed by CSW.

Remedies

[96] As AKD has been successful with her unjustified dismissal claim I will now consider what remedies she may be entitled to.

Compensation

[97] Compensation is an award for the humiliation, loss of dignity and injury to feelings that an applicant has suffered as a result of the actions giving rise to the personal grievance and is made pursuant to s 123(1)(c)(i) of the Act.

[98] In assessing the amount of compensation AKD may be entitled to I need to consider the effects of the dismissal and the events giving rise to that dismissal, on AKD. This involves identifying the harm caused to her and the loss she suffered as a result of any humiliation, loss of dignity or injury to feelings arising out of CSW's actions. Then I must quantify that harm and loss.⁷

⁷ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[99] The evidence of the humiliation, loss of dignity and injury to feelings AKD suffered as a result of CSW's failure to provide AKD with a safe work environment, CSW's breaches of trust and confidence and good faith in dealing with AKD's August complaint and AKD losing her job are set out in paragraphs [75] – [85] of her written evidence. I am not going to set this out because of the non-publication order I have made in relation to AKD's personal medical information – I simply record that I accept the evidence as set out.

[100] The only other factor that I mention is that some of the psychological harm that AKD suffered manifests as a personal injury for which ACC related compensation may be awarded and is precluded from being assessed as part of the compensation I can award as it is a personal injury.

[101] After weighing all of the evidence and separating out what I consider arises out of the personal injury aspect of the compensation I consider \$30,000.00 to be the appropriate value of the compensatory sum.

Reimbursement

[102] AKD seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal. I am satisfied that AKD is entitled to be reimbursed for lost remuneration.

[103] I must calculate and award the appropriate sum for reimbursement pursuant to s123(1)(b) and s 128 of the Act. The starting point is three months ordinary time remuneration but this may be extended by exercise of discretion in appropriate circumstances if the actual lost remuneration is greater than three months ordinary time remuneration.

[104] AKD's lost remuneration exceeds three months as she has been unable to work since she left CSW. I have considered the relevant factors for exercising my discretion under s 128 of the Act and I conclude that twelve months ordinary time remuneration is the appropriate award for lost remuneration.

Contribution

[105] As I have awarded remedies to AKD, I must now consider whether she contributed to the situation that gave rise to her dismissal.⁸ This assessment requires me to determine if AKD behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievances.⁹

[106] I am satisfied that AKD did not act in a blameworthy or culpable manner.

[107] There was no contributory behaviour from AKD that warrants a reduction in remedies.

Recommendations

[108] AKD has also requested that I make a recommendation to CSW about how it should deal with harassment in its workplace – both prevention and dealing with complaints. Given the findings I have made and the way in which I have expressed them I believe CSW failings and where it might improve are obvious. And I understand it has already taken appropriate steps to deal with the prevention of harassment in its workplace. In the circumstances a recommendation is not necessary.

Summary

[109] CSW unjustifiably dismissed AKD and in settlement of this grievance it must pay AKD:

- (a) \$30,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
- (b) Twelve months ordinary time remuneration pursuant to ss 123(1)(b) and 128 of the Act.

Costs

[110] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, AKD may lodge, and then should serve, a memorandum on costs within 14 days of the date of

⁸ Section 124 of the Act.

⁹ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

issue of this determination. From the date of service of that memorandum CSW would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[111] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.¹⁰

Peter van Keulen
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.