IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

Attention is drawn to an order prohibiting publication of parties' identification detail

[2025] NZERA 728
3387184

	BETWEEN	BEG Applicant
	AND	PCB Respondent

Member of Authority:	David G Beck
Representatives:	Andrew Marsh, counsel for the Applicant Elizabeth Coats, counsel for the Respondent
Investigation Meeting:	15 – 16 September 2025
Submissions Received:	12 and 17 September 2025 from the Applicant 17 September 2025 from the Respondent
Date of Determination:	13 November 2025

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Since an Authority determination of 5 August 2025 placing the applicant on the respondent's payroll pending the outcome of this determination, [1] an interim non-publication order has been in place pursuant to s 10(1) Schedule 2 of the Employment Relations Act 2000 (the Act) preventing identification of the parties to this employment relationship problem.

[1] *BEG v PCB* [2025] NZERA 476.

[2] In addition, I ordered permanent non-publication of any details of the identity of the complainant involved in an investigation that led to the applicant's dismissal. This order remains in place prohibiting on an ongoing basis, disclosure of the complainant's identity and any details that would lead to disclosure of the specific circumstances of their complaint beyond what I generally describe for the purposes of this determination.

[3] As directed the parties have made submissions. The applicant has made submissions that this order be made permanent. The Respondent opposes the non-publication order continuing.

[4] To assess the application for continued non-publication I need to be satisfied of a sound basis for the exercise of the Authority's discretion as non-publication may depart from the important principle of open justice. The full Employment Court in *MW v Spiga Ltd* [2] held that the existing presumption of open justice should only be departed from where sound reasons exist. This affirmed the Supreme Court decision of *Erceg v Erceg.* [3] The majority in *Spiga* set out a general twofold test for assessing applications for non-publication, i.e.:

> (1) Firstly, there must be "reason to believe that the specific adverse consequences could reasonably be expected to occur."
>
> (2) Secondly, the "Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case." The Court said this part is a weighing exercise and that equity and good conscience may be involved. [4]

[5] I do make the point that although consideration of the general approach to non-publication has been undertaken at an interim stage and such an approach is apt at a permanent stage, the court noted in *Spiga* that "the weighing of particular factors may differ at the different stages". [5] This is because at interim stage evidence has not been thoroughly tested or contested facts determined and, the interest of open justice may have less weight.

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[2] *MW v Spiga Ltd* [2024] NZEmpC 147.
[3] *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].
[4] Above n 1 at [88] and [89].
[5] Above n 2 at [91].

[6] The applicant seeks ongoing non-publication of their identity, predominantly asserting there is a significant and demonstrable risk to their reputation and future employability should they not be reinstated as a counterweight to any public interest in identification.

[7] The order is sought to protect the applicant's reputation and future career interests should they be associated with disputed conduct issues the determination has to traverse involving a conclusion during a disciplinary process that the applicant engaged in conduct the respondent categorised as sexual harassment. The applicant asserted that even if the Authority found on the facts that the applicant engaged in sexual harassment there is a broad spectrum of the seriousness of such conduct and the applicant's was objectively at the lower end of the spectrum and contextually unusual. I also observe as Judge Holden has done in *FVB v XEY*, that essentially the prurient interest of instant social media comment may lead to a "weaponised public shaming" with potential detriment objectively being in greater proportion to the offending conduct. [6]

[8] Overall, the harm associated with publication is advocated as likely to be exacerbated due to the nature of the employer's business and the prominence of the business in the community, a factor seen as potentially impacting the applicant's future employability.

[9] The applicant also suggested non-publication would preserve the interests of the complainant party although I do observe that person was not a co-worker and may be adequately protected by non-publication of their identity and other details. This dichotomy was highlighted in *Spiga* with the observation that non-publication involving sexual harassment in the workplace is a challenging and complex matter. [7]

[10] In contrast, the respondent's counsel, opposed the order suggesting granting non-publication of the parties' identities would offend against the principle of open justice and the threshold to displace this is high. The respondent suggests the applicant's concerns are the ordinary consequence of litigation and nothing specific has been established as extraordinary or compelling enough to justify suppression. The respondent highlighted that the applicant has admitted making sexually inappropriate comment and should not be shielded from

[6] *FVB v XEY* [2020] ERNZ 441 at [13].
[7] Above n 2 at [60].

reputational damage merely by the embarrassment of this admission. The respondent also suggested there was a distinct probability that co-workers had already been apprised by the applicant or others of details of the incident that led to the applicant's dismissal.

[11] The respondent also suggests they wish to foster an internal culture, in the public interest, of supporting the reporting of workplace incidents and suppression of the applicant's identity may mitigate against this but they wish to protect any details pertaining to the complainant. The respondent also suggests their employees are better protected in the workplace if they can independently consider who to interact with and suppression of the applicant's identity would hamper this choice.

Assessment

[12] I am convinced that the suggested adverse consequences on the applicant's future employment highlighted, could reasonably be expected to occur and objectively these may be disproportionate to the misconduct admitted. What makes this application difficult to assess is the applicant is seeking reinstatement.

[13] I am not convinced of a compelling case of public interest in the disputed matter is made out. The fact is, this was a dismissal in circumstances that are arguably marginal as to whether the applicant engaged in serious misconduct as opposed to misconduct as discussed below.

Finding

[14] In the circumstances, continued non-publication of the parties identities and specific details of the dispute is appropriate allied with a permanent non-publication order on any details relating to the complainant's identity.

Orders

[15] Pursuant to Clause 10 of schedule 2 of the Act, I grant a continued interim non-publication order prohibiting the publication of the identity of both the parties to this employment relationship problem and continue to use randomly identified letters to denote

the parties. A permanent order is made preventing the publication of the identity of the complainant party in this employment relationship problem.

[16] The terms of the continuing order are:

(a) The interim non-publication order is to stay in place for 28 days commencing from the day after the date of this determination, to allow the respondent to file a challenge to this or any other aspect of this determination if they so wish.

(b) If the respondent files a challenge, this interim non-publication order will be extended to remain in place until the Employment Court makes any order that renders it unnecessary.

(c) If the respondent does not file a challenge to the interim non-publication order in this determination, then the interim order will lapse and be replaced by a continuing order that prevents the publication of the parties' and complainant identities.

(d) In the interim, the parties are identified by the randomly generated letters used in the interim determination. The applicant as BEG and the respondent as PCB.

[17] I also use designated positions to denote those who gave evidence during the investigation meeting and, I have redacted parts of evidence where specific detail is unnecessary.

Employment Relationship Problem

[18] BEG worked for PCB from 2012 until 19 June 2025 when they were summarily dismissed. BEG claims the dismissal was procedurally and substantively unjustified and was reinstated on an interim basis to PCB's payroll by way of an Authority determination of 5 August 2025. [8] This determination deals with BEG's substantive unjustified dismissal claim and application for permanent reinstatement.

[8] Above n 1 at [60].

The Authority's investigation

[19] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders, but I do not record all evidence. I, likewise, have carefully considered the submissions received from both parties and refer to them where appropriate and relevant.

[20] I considered written statements and oral evidence from eight witnesses at the investigation meeting. These were: BEG, their partner; two co-workers and an independent HR Consultant and for PCB I heard from one of the company's Acting General Managers (the decision maker); a Lead of Employee Relations (the investigator) and an Employee Relations Specialist (support to decision-maker). At the end of the two days' investigation meeting submissions were timetabled.

Issues

[21] The Authority must determine:

(i) Was PCB's investigation conducted in a full and fair manner?

(ii) Was the subsequent decision that serious misconduct had been established warranting BEG's summary dismissal, the action of a fair and reasonable employer as measured against the standard set by s 103A of the Act and consideration of s 4 of the Act's good faith requirements.

(iii) If BEG's personal grievance is established what remedies, if any, should be awarded considering the claims for:

a. Reinstatement.

b. Lost wages.

c. Compensation under s 123(1)(c)(i) of the Act.

(iv) If BEG is successful in all or any element of their personal grievance should the Authority reduce any remedies granted because of any contributory conduct?

(v) How costs are to be dealt with.

What caused the employment relationship problem?

[22] BEG works in a job that objectively requires a duty of maintaining the utmost trust and confidence due to the nature of the role and wider working environment that included regular liaison with external parties, where upholding the reputation PCB was at issue. BEG had been in their position prior to dismissal for approximately thirteen years and was well regarded by PCB's local management. PCB is a large trans-Tasman organisation with developed policies pertaining to its employees that they say are the subject of regular staff awareness training.

[23] Late on an evening in November 2024 following a social meal with an allied supply business that had progressively gone on in different venues from lunch time to late night drinks, BEG engaged in an incident when by their own admission, they made an explicit and objectively lewd and offensive comment referencing a sexual act to another party who was and is not, an employee of PCB (the complainant). There was another person accompanying the complainant (a close relation) who overheard the gist of the comment, and they angrily remonstrated with BEG before both the complainant and the other person walked away. It was later alleged BEG also made a derogatory comment to the other person during their exchange. Another PCB employee (a co-worker of BEG's) was also present but was later unable to recount detail of the offending conversation.

[24] Two days after the incident BEG received a conciliatory worded text from the complainant's close relative, apologising for their reaction to the overheard comment. BEG responded by assuring it was not a problem for them and apologised for any offense the other person and the complainant may have perceived. BEG claimed they had not intended to cause offence. BEG did not at the time or thereafter, follow the matter up with the complainant.

[25] On 4 February, BEG's immediate manager informed BEG of the existence of a complaint that had been informally indicated to them by the manager of the complainant's company. BEG provided their recollection of the incident exchange and then later disclosed the text exchanges between them and the other person involved in the incident. The

manager's text response to BEG was "Tks. Over and done with." No notes were taken by the manager of the exchange with BEG and it is apparent the matter was dealt with informally. BEG's immediate manager's evidence was it was only raised informally by the supply company manager and based on BEG's explanation and the text exchanges, they considered the matter resolved and, stressed that they thought the decision to not proceed with a further investigation, was a decision within their discretion.

[26] However, evidence showed the complainant's close relative had contacted another PCB employee on 9 December to relay the complaint about the 14 November incident and, had mentioned it had been raised with their employer. The PCB employee encouraged the relative to put the complaint in writing and on 27 January, the complainant emailed a formal complaint that was forwarded to a senior PCB manager.

[27] PCB in the interim, did not immediately disclose the complaint to BEG but resolved to internally deal with the complaint and deputed their Lead of Employee Relations to undertake an initial investigation. BEG was advised of the investigation proceeding and who would undertake it, in a letter of 12 February that noted the seriousness of the allegations and, that appropriate disciplinary action may follow. The allegations were set out in specific detail and described as BEG allegedly making "comments of a sexual nature to and about [the complainant]".

[28] On 13 February, BEG's immediate manager met the Lead of Employee Relations undertaking the investigation and was apprised of a formal complaint now having been made against BEG and that it was under investigation. The notes of this meeting show the immediate manager noted BEG had worked with them for approximately 10 years and was consistently well rated. They outlined that no complaints had been made about BEG during their entire employment period apart from one occasion they had been counselled for using the word "bloody" during a phone call from an irate client. The immediate manager had attended the suppliers' function but left early evening and related no issues of concern then disclosed how they had become aware of the extant complaint and, that they had deemed the provided text exchange to be an apology. The manager then told BEG "as far as he was concerned the matter was finalised".

[29] PCB chose not to suspend BEG during the investigation process.

[30] The scope of the investigator's task was outlined to BEG, and it was noted once the investigation concluded, the investigator would prepare a report for an identified decision maker and the report would:

- detail the investigation process;
- outline whether the allegations are substantiated or not and this would be a finding based upon "the balance of probabilities";
- indicate whether the investigator found BEG's actions constituted a breach of PSB's code of ethics or any other policy.

[31] The investigation was constrained by the complainant expressing a wish after being initially interviewed, that they no longer wanted to participate and an expressed wish to make their complaint anonymous (even though they knew that their complaint had been disclosed to BEG, and others interviewed). The result of this was once BEG was interviewed, their recollection of the incident was not provided to the complainant for comment.

[32] Notwithstanding, the investigation continued, and a draft investigation report was provided on 27 March and responses from BEG were considered and changes made. The changes included, that a finding on a contextual allegation the complainant made of an interchange at the corresponding social a year earlier (and what was vigorously denied by BEG), was changed from "unable to be substantiated to unsubstantiated" due to it being uncorroborated.

[33] On the one allegation that was upheld (the lewd comment in response to the earlier allegation), the investigator's letter of 10 April, recorded BEG's "acknowledgment that [they] probably shouldn't have said it [the lewd comment] and the fact [they] has acknowledged it was inappropriate" was noted. However, the investigator noted they maintained a view that the lewd comment described a sex act and it was sexually suggestive.

[34] The 10 April letter, also notes a change in the decision-maker had been made. The investigator advised the report would go to a senior manager and to the new decision-maker

who would be in contact with BEG once the finalised report was considered. The finalised investigation report had been provided to BEG on 9 April.

[35] The final investigation report concluded that:

1) The complainant's allegation of a previous lewd interchange with BEG a year earlier, could not be substantiated due to an insufficiency of corroborating evidence.
2) The complainant's described account of the second incident in November 2024, was not upheld but the tenor of the exchange was substantiated by BEG's admission, that they made a lewd comment in reaction to being confronted by the complainant describing the nature of the previous year's lewd comment the complainant says BEG had made (a comment BEG says they had strenuously denied making to the complainant).

[36] Based on the above and the investigator's finding that "the substantiated conduct constitutes sexual harassment" as per their policy, PCB resolved to conduct a disciplinary process which they signalled to BEG by letter of 17 April. The decision maker warned BEG that a potential outcome if serious misconduct was established, was "disciplinary action may be taken up to summary dismissal." BEG remained at work during the disciplinary process and no restrictions were place on their work activities.

[37] The parties subsequently met by an audio-visual link on 6 May, at which BEG was represented by counsel. BEG during this meeting maintained the comments they made were "inappropriate" but through counsel contested in context, that they constituted sexual harassment. BEG asked that their previous clean disciplinary record and length of service be taken account of and expressed a commitment to take steps to avoid being placed in a similar setting.

[38] By letter of 27 May, PCB communicated a preliminary view that BEG's "substantiated conduct constitutes serous misconduct and summary dismissal is the

appropriate outcome". BEG was invited to make further submissions on the preliminary decision.

[39] In a letter of 12 June, BEG's counsel provided comment vigorously contesting the preliminary decision. Essentially, while conceding that the conduct under scrutiny was cable of technically being described as sexual harassment, the contextual setting of BEG's remark was described as not one where their comment was made in response to "a shocking allegation made to my client by the complainant". BEG's counsel also made further submissions claiming (in summary):

- The lewd comment made if it was deemed to be sexual harassment was only made in response to the complainant's equally lewd allegation.
- BEG's response was akin to an act of 'self-defence.'
- Comparison of PCB's Australian and New Zealand instances where dismissal had followed a sexual harassment finding, was not appropriate and PCB had not disclosed enough detail (when requested) to show that a consistent approach was being adopted.
- There was no evidence of detrimental impact on the complainant.
- The PCB decision maker's assumption that trust and confidence had partially been destroyed because BEG had refused to answer whether they thought they had or had not, breached PCB's code of conduct and was evidence of lack of awareness, was unsustainable as BEG had indicated they regretted their comment and was remorseful.
- If trust and confidence was so at issue, the fact that BEG was not suspended from duties for four and a half months made no sense.
- Alternatives to dismissal had not been fairly assessed such as a formal warning that counsel stated BEG was prepared to accept.
- BEG's unblemished work history and lack of concern from their immediate manager and some co-workers (a reference and other testimonials were provided) had not been fairly taken account of.

The dismissal

[40] In a further letter of 19 June, PCB's decision maker communicated they had carefully considered counsel's letter of 27 May but had resolved to summarily dismiss BEG for serious misconduct. The letter set out reasoning for the dismissal decision under the following headings (sequentially reproduced in summary using PCB's headings):

Substantive Justification for dismissal

1. The decision was not solely based on a technical breach of PCB's own policy but: "Rather it reflects a holistic assessment of the seriousness of your conduct in which it occurred, and the impact on the complainant."
2. The comment made was "sexually explicit" and "inappropriate" and not found to be ameliorated by BEG's suggestion it was a spontaneous reaction or self-defence (noting no physical threat had been made).

Context and Initiation of the Conversation

3. The suggestion that BEG's comment was justified by the complainant's initiating discourse was soundly rejected, citing BEG's comment as being "disproportionate, unsolicited, and inappropriate," regardless of the context claimed. BEG was reminded of an obligation to always respond professionally and seek to de-escalate matters.

Impact on the Complainant and Workplace

4. The notion that the complainant was not impacted was contested and the fact that they were not seeking BEG's dismissal did not negate "the seriousness of the misconduct or [PCB's] responsibility to maintain a safe and respectful workplace.

Trust and Confidence

5. The notion advanced by BEG that trust and confidence had not been destroyed was described as "untenable." It was suggested BEG's failure to comment on whether the

code of ethics and conduct had been breached demonstrated a lack of "insight and accountability" and "alignment with our values."

Consistency of Approach

6. A comparative approach across the trans-Tasman company was deemed appropriate to ensure fairness and consistency.

Mitigating Factors

7. PCB asserted BEG's long tenure and unblemished record had been considered but found to not outweigh the seriousness of the misconduct.

The Health and Safety Considerations

8. While noted in the context of a suggestion that implied a 'sensible host' policy had not prevailed during the supplier function and aftermath, PCB emphasised BEG needed to otherwise demonstrate responsibility for their own behaviour.

Test of Justification

9. PCB contended their decision was within a permissible range of 'what a fair and reasonable employer could do in all the circumstances.'

Your Admittance

10. PCB suggested BEG's counsel in advocating a final written warning was appropriate (in their 27 May submission on the preliminary finding), was acceptance that the threshold of serious misconduct had been reached and this could warrant summary dismissal in a range of discretionary responses.
    [I note the latter assertion may have wrongly overstated counsel's advocacy - which was that a 'formal warning' would have be an accepted sanction].

[41] PCB concluded BEG had by their own admission, breached the companies code of ethics and conduct policy and had engaged in an act of sexual harassment sufficiently

unacceptable to warrant a finding of serious misconduct that led to their summary dismissal effective 19 June 2025.

Issue 1 – was the investigation conducted in a full and fair manner?

[42] A first issue, is BEG's counsel suggestion that initially BEG's immediate manager's communication that the matter was not of concern to them after BEG had proffered an initial explanation and disclosed text correspondence with the complainant's relative, effectively disposed of the matter and, was a signal affirming ongoing trust and confidence that prevented a further disciplinary investigation.

[43] In the circumstances, I do not consider it was unreasonable for PCB to conduct a further investigation in the context of how they received a formal complaint and the nature of the complaint. The matter BEG's immediate manager dealt with informally was not raised directly by the complainant and BEG's manager consequently did not have the 'full picture' nor the delegated authority to dispose of the matter. In addition, pursuant to s 117(3) & (4) of the Act, an employer who establishes that an employee has potentially engaged in an act of sexual harassment, has a statutory obligation to investigate into the facts when receiving a complaint and to "take whatever steps are practical to prevent any repetition" of "such behaviour".[9]

[44] I do observe PCB was a bit slow in bringing the concerns to BEG's attention and should have been more transparent at an earlier stage in their investigation. However, I find the investigation was conducted in a fair and reasonably thorough manner but hampered by the complainant halting their participation before BEG's explanation could be put to them for comment. I also note the complainant did not have an 'in person' interview with the investigator (they relied on documentation and a phone interview). I find it is unlikely in the circumstances; this disadvantaged BEG. The investigation findings reflect an even-handed approach. BEG had at the time, ample opportunity to comment on the investigation report's veracity or otherwise and did so, and, their comment was partially accommodated.

[9] Employment Relations Act 2000, s 117(3) & (4).

[45] In the final analysis, the investigation report provided a factual finding on the identified issues and explained how those findings were reached. This allowed the PCB decision-maker to then hear from BEG and consider whether the conduct at issue was capable of being categorised as serious misconduct.

Issue 2 - The decision to dismiss was it justified?

[46] Before assessing PCB's decision to dismiss BEG two threshold issues arise 1) whether the conduct involved a sufficient connection to the workplace and, if so 2) was the conduct of BEG, capable of being categorised as potentially serious misconduct?

[47] The first issue is relatively simply established. BEG was attending a function as an invited representative of PCB and had an obligation to act in a manner as if in employment.

[48] The second part of this assessment is to determine what can reasonably be categorised as serious misconduct. In *Emmanual v Waikato District Health Board,* the Employment Court in applying leading authorities (references omitted) summed up an approach to determining what may constitute behaviour that deeply impairs or is destructive of trust and confidence as follows:

> [58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing or destructive of, the basic confidence or trust essential to the employment relationship, justifying dismissal. What must be evaluated are the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.
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> [59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.
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> [60] It is essential to the maintenance of the necessary trust and confidence in the employment relationship that

> employees are honest and open with their employers. It will be a serious breach of an employee's obligations to his or her employer to mislead the employer in response to specific inquiries based on the employer's concerns. The duty of good faith also includes that parties to an employment relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other. Where an employee provides misleading information to his or her employer on a matter that the employee knows is important to the employer that usually will deeply impair or be destructive of the basic confidence or trust that is an essential of the employment relationship. It will almost inevitably amount to serious misconduct.
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> [61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant in this context.
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> [62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate. [10]

[49] The above guidance on approaching a summary dismissal without notice, involves applying the justification test in s103A of the Act but in addition, the seriousness of the conduct in question must be so destructive of the employer's trust in the worker or substantial in its level of seriousness that no notice is warranted of a dismissal. The sanction of summary dismissal is reserved for the most serious cases of misconduct.

Was it sexual harassment?

[50] On the facts, it is apparent that PCB considered the first question of whether BEG's admitted conduct amounted to serious misconduct. In undertaking this exercise the first step impliedly was to determine whether the comment BEG admitted to making in context, could

[10] *Emmanuel v Waikato District Health Board* [2019] NZEmpC81 at [58]-[62].

constitute sexual harassment. The relevant definitional section of the Act is s 108(1) (b) that defines sexual harassment to potentially be where a person:

> (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains -
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> (i) an implied or overt promise of preferential treatment in that employee's employment; or
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> (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
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> (iii) an implied or overt threat about the present or future employment status of that employee: or
>
> (b) by:
>
> (i) The use of language (whether written or spoken) of a sexual nature; or
>
> (ii) The use of visual material of a sexual nature; or
>
> (iii) Physical behaviour of a sexual nature, -
>
> Directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether it is conveyed to the employer or representative) and that, either by its nature or through repetition has a detrimental effect on the employee's employment, job performance or job satisfaction.

[51] In assessing, BEG's comments made and the context they were made in, I find objectively PCB was entitled to categorise the matter as sexual harassment of a verbal nature. The comment made was of a sexual nature and objectively offensive and objectively aggressive in content (even if not delivered in an aggressive manner). I find PCB acting as a fair and reasonable employer, was entitled to conclude the content of BEG's comment referred to an aggressive sexual act. PCB was also objectively entitled to at least conclude from their investigation, that the complainant found the comment distressing and unwelcome. That is the factual finding – BEG's verbal utterance constituted sexual harassment.

[52] The next consideration is whether the nature of the misconduct found could amount to serious misconduct warranting summary dismissal. That is a more difficult assessment as it involves an evaluation of whether PCB acted in a fair and reasonable manner in reaching the conclusion in all the circumstances and that BEG's actions had irreparably destroyed the trust and confidence PCB was entitled to place in them.

[53] In the context of the incident described, this required PCB to set aside their distaste for the comment made and to objectively assess its level of seriousness including using their own disciplinary policy as a guideline and the statutory definition of what constitutes sexual harassment. Like all forms of misconduct there is a spectrum to be assessed and objectively physical behaviour involving sexual advances and a power imbalance is at the serious end of the spectrum and the use of sexualised language may depending upon the context, be at the less serious end of the spectrum. Here, as BEG's counsel has submitted the accepted context was a lewd comment made by BEG in response to an allegation from the complainant that BEG strenuously denied but accepted they used inappropriate language.

[54] I find that in such circumstances, PCB had open to them the possibility of considering the context and language used as being "abusive or obscene" that was clearly inconsistent with a known workplace standard expected of BEG. In PCB's own disciplinary policy this would if a 'one off' and 'out of character' utterance as it was established here, likely be deemed an example of misconduct. What appears to have moved the consideration to be serious misconduct, is the finding of sexual harassment. PCB's disciplinary policy does indicate: "Any form of harassment" falls into a behaviour category example of serious misconduct. However, even though I accept an employer is entitled to set high standards of conduct, without fairly taking all the circumstances into account, a mere finding of sexual harassment cannot reasonably always be categorised as serious misconduct or this would be an inappropriate 'zero tolerance' approach.

[55] In advocating distinguishing features in the contextual setting of the incident, BEG's counsel noted overall, that PCB say they solely based their decision on BEG's admitted statement and did not accept the complainant's version of the interchange (deeming it not substantiated). BEG's counsel highlighted in context the fact that significant alcohol had

been consumed and BEG recalled being accused of an explicit sexualised comment made a year previously which he reacted to albeit inappropriately with a denial and in a pejorative manner. Objectively, counsel suggested PCB was entitled to conclude that in defending themselves, BEG went beyond a mere denial and became unnecessarily offensive. However, I find it is equally objectively evident that although constituting sexual harassment, it was language used in a context that was difficult to categorise as sexually suggestive or designed as a request for sexual contact, bearing in mind there were two other persons nearby including the complainant's close relative and BEG's co-worker.

[56] Objectively, I find that given the comment was reactionary (and the decision maker's evidence was they accepted this premise), it could reasonably have alternatively, been categorised as unacceptably abusive or obscene. These are factors I find PCB could have more carefully weighed before concluding that BEG's use of offensive language be categorised as serious misconduct.

[57] Although the Authority does not have unbridled licence to substitute its decision for that of the employer [11] it may reach a different conclusion, provided the conclusion is reached objectively and with regard to assessing all the circumstances at the time the dismissal occurred. [12] The Authority is essentially deciding "whether the decision and conduct of the employer fell within the range of what a fair and reasonable employer could have done in all the circumstances". [13] This broadly requires the Authority to look at whether PCB's actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred and, I must also have regard to the Act's good faith provisions and the relevant employment agreement.

[58] The above approach, requires that I consider various contextual factors, including broadly whether concerns were sufficiently raised by the employer with the employee, whether a full, fair, and thorough investigation was completed and whether a reasonable opportunity to respond to those concerns was given and, whether the employer genuinely

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[11] *X v Auckland District Health Board* [2007] 1 ERNZ 66.
[12] *Air New Zealand v Hudson* [2006] 1 ERNZ 415.
[13] *Angus v Ports of Auckland* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [25].

considered the employee's explanations (if any) before the decision to dismiss was made including consideration of alternatives to dismissal.

[59] I find the investigation conducted met basic fairness requirements and that PCB specifically identified the issues of concern and allowed BEG ample opportunity to respond to identified concerns in a careful 'two-step' disciplinary process, of first seeking comment on the investigation report's findings and then coming to a detailed and reasoned, preliminary dismissal decision and seeking comment on such.

[60] The process was not rushed and BEG who was well represented throughout, had ample opportunity for input and time to explain their conduct and any mitigating circumstances prior to the dismissal being finalised.

[61] A key to the decision to dismiss as emphasised, was a perception that BEG did not indicate any remorse or insight into their conduct and the impact of their comments on the complainant and BEG too vigorously contested the investigation findings. While I do accept that in some circumstances this is a relevant consideration, I am not convinced here that the PCB decision maker acted objectively, and evidence showed they appear to have failed to distinguish between robust advocacy from BEG's counsel and their perception that BEG did not understand the seriousness of the remarks made and impact on the complainant by consistent use of the term they had spoken "inappropriately" rather than conceding they had breached company policy and BEG's insistence on contextualising the remarks they made. The decision maker conceded harbouring these concerns but not pressing BEG further in questioning during the disciplinary process and did not question BEG on why they categorised their remarks as inappropriate.

[62] Overall, I am not convinced that the conduct in question could have been fairly considered to reach the threshold of serious misconduct. In the alternative, should I be wrong on this assessment, I hold a residual concern that alternatives to dismissal were not fairly or genuinely considered.

[63] On the latter point, I find that a fair and reasonable employer could have taken a more proportionate approach and considered BEG's unblemished disciplinary record and

reasonably lengthy service and assurances of non-repetition that did include a willingness to engage in a self-reflective process. The decision-maker although saying they held no concern about BEG's capabilities and accepted this was a 'one off' incident, did not review BEG's personal file and did not speak to BEG's immediate manager and failed to disclose the investigation report to that manager. The decision maker says they did not seek legal advice but did engage with other senior managers on how established sexual harassment incidents had been dealt with across the company.

[64] I also find that a failure to suspend BEG in the face of supposedly serious concerns pointed to an unusual ongoing affirmation of trust and confidence given the subsequent finding of serious misconduct and the professed reasons for arriving upon that decision.

[65] BEG's counsel also highlighted concern that PCB's claim that they were in dismissing BEG, acting consistently with other trans-Tasman disciplinary decisions concerning findings of sexual harassment, lacked a convincing evidential trail. I share this concern and find that PCB in evidence, did not displace the suggestion that the decision was beyond harsh, and made seemingly in pursuit of an inappropriate zero-tolerance approach.

Finding

[66] I find in weighing all the relevant contextual factors and applying s 103A(4) of the Act, that PCB has not reasonably established BEG's conduct on the night of the out of work incident met the threshold of serious misconduct. I find that BEG's conduct fell into the category of an out of character and one-off discreet act of misconduct. As a result, I find the decision to summarily dismiss BEG, was not one that a fair and reasonable employer could have reached in all the prevailing circumstances. Put bluntly, BEG was unjustifiably dismissed as PCB acting as a fair and reasonable employer, could not have concluded BEG engaged in an act of serious misconduct.

Remedies

[67] As BEG is successful in establishing their predominant unjustified dismissal claim I turn to remedies available under s 123 of the Act.

Reinstatement

[68] The reinstatement claim is made pursuant to s 123(1)(a) of the Act. Section 125 of the Act details reinstatement is the primary remedy and subs (2) indicates:

> If this section applies, the Authority or court must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[69] The Employment Court in *Christieson v Fonterra Co-operative Group Ltd* drew a distinction between practicable and reasonable as:

> Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement. [14]

[70] The onus of proving that it is not reasonable and practicable to reinstate rests with the employer. [15]

[71] PCB witnesses could not point to any reasonable practical impediments to reinstatement. Counsel for PCB suggested that essentially nothing should be read into BEG remaining in the workplace during the investigation and disciplinary process, suggesting suspension could be seen to be pre-determining the issue. I do not accept this reasoning as suspension is often used to enable an employer to investigate where potential serious misconduct and trust matters are genuinely at issue. In the event, PCB inexplicably chose to leave BEG in the workplace while they conducted a lengthy decision-making process with little complexity on ascertaining factual issues.

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[14] *Christieson v Fonterra Co-operative Group Limited* [2021] NZEmpC 142 at [39].
[15] *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [7].

[72] Counsel for PCB, cited three key concerns should the Authority consider permanently reinstating BEG. The first was maintaining confidentiality among the small team BEG worked in. The next concern was a perceived impact on other PCB employees who may perceive that PCB does not take the use of highly inappropriate sexual comment seriously and that may deter others raising such issues and/or if appraised of matters, feel uncomfortable working alongside BEG. Counsel noted that while two co-workers of BEG gave evidence of no problems continuing to work with him this may not be the case with others. The final concern expressed returned to a perception that BEG was not contrite and had failed to accept a breach of the company policy had taken place. Counsel also noted that the Authority should also assess that contributory fault may be so substantial a factor (among others) to render reinstatement an equitable remedy.

[73] Counsel for BEG concentrated on practicability not being impeded by mere disruption caused should BEG be reinstated. Counsel noted PCB witnesses accepted BEG had engaged in out of character behaviour that reinforced the likelihood of it not recurring given the extensive scrutiny involved in the investigation and disciplinary process. BEG's counsel also highlighted BEG's willingness to engage in whatever process PCB felt appropriate to reintegrate them into the workplace and openly deal with disclosure/confidentiality matters.

[74] This is a case with no evidence of a breakdown in workplace relationships as BEG's misconduct did not involve co-workers and the fact BEG continued working without incident or other concerns being raised, for over four and a half months is indicative of an ability to restore BEG to the workplace and PCB's ability to resolve confidentiality issues.

Finding

[75] I conclude there are no insurmountable practical difficulties in reinstating BEG.

[76] I order reinstatement of BEG on a permanent basis with a suggestion this be undertaken after an initial meeting and period to discuss the practicalities of reintegration and the outstanding misconduct issue.

[77] I make the following finding on other remedies sought.

Lost earnings

[78] BEG seeks lost wages for the period from their last working day at PCB being 21 June 2025 to their restoration to their current restoration to the payroll on 5 August 2025.

Finding

[79] Exercising discretion under s 128(2) of the Act I award BEG six weeks lost ordinary time remuneration.

Compensation for hurt and Humiliation

[80] BEG gave limited evidence on the impact of how they were dismissed outside the expected anxiety of being the subject of a lengthy investigation and dismissal in distressing and embarrassing circumstances. The impact was clearly mitigated by PCB continuing to employ BEG during the investigation and disciplinary process and affirming support of co-workers. There was also nothing to suggest that PCB handled the investigation process inappropriately and they took steps to preserve BEG's confidentiality and dignity including offering confidential counselling support.

[81] Nonetheless, I have found that the decision to dismiss was unjustified and BEG's evidence was they lost weight and self-confidence; suffered sleep disturbance and relationship pressure and became withdrawn in social settings and became anxious about their future job prospects and confused by their employer's approach to expecting them to carry on working for a lengthy period.

Finding

[82] Considering the evidence proffered and the overall circumstances, I find that BEG's evidence warrants modest compensation. I fix that at $6,000 under s 123(1)(c)(i) of the Act.

Contribution

[83] Section 124 of the Act states that I must assess the extent to what, if any of BEG's actions contributed to the situation that gave rise to the personal grievances and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors summarised by the Employment Court in

Maddigan v Director General of Conservation and assessed the unusual factual circumstances of BEG's employment relationship problem[16].

[84] In the circumstances I do find BEG significantly contributed to the circumstances giving rise to their personal grievance in a blameworthy manner by engaging in an act of misconduct that constituted sexual harassment. In all the circumstances, I consider the remedies awarded be reduced by 50%.

Orders

[85] PCB unjustifiably dismissed BEG and must provide the following remedies:

(i) PCB is to permanently reinstate BEG to the position they formerly occupied pursuant of s 123(1)(a) of the Employment Relations Act 2000 by no later than 1 December 2025.

(ii) PCB must pay BEG $3,000.00 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000 for the unjustified action; and the sum of.

(iii) PCB must pay BEG three weeks gross lost wages pursuant to s 123(1)(b) Employment Relations Act.

Costs

[86] Costs are reserved.

[87] The parties are encouraged to resolve any issue of costs between themselves.

[88] If the parties are unable to resolve costs, and an Authority determination on costs is needed, BEG may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum PCB will then have 14 days to lodge any reply memorandum. Upon request by either party, an

[16] *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

extension of time for the parties to continue to negotiate costs between themselves may be granted.

[89] The parties can expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[17]

David G Beck
Member of the Employment Relations Authority

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