

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 376
3258759

BETWEEN RICHARD BYRNE
Applicant

AND ASALEO CARE LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Rose Alchin and Dorothy Bogers, counsel for the
Applicant
David France, counsel for the Respondent

Investigation Meeting: 19 and 20 June 2024 in Rotorua, and 20 and 21
November 2024 in Hamilton

Submissions received: Up to and including 8 May 2025

Determination: 27 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Richard Byrne was employed by Asaleo Care Limited (Asaleo) as a Control Systems Technician at the Kawerau Mill site. Mr Byrne commenced employment at the Kawerau Mill in 1990 and worked there for in excess of thirty years.

[2] Mr Byrne was dismissed from his employment following an incident on 26 February 2023 during which he was alleged to have said “you don’t want to do that, you’ll get raped” when a female employee (referred to in this determination as

Employee A) indicated she was about to walk through the Paper Machine Electrical Workshop (the “Workshop”).

[3] Mr Byrne claims that he was unjustifiably dismissed from his employment, including because Asaleo failed to adequately investigate all of the matters relevant to the incident and because the conduct did not meet the threshold of serious misconduct. Mr Byrne seeks reinstatement and other remedies including lost wages and compensation for humiliation, loss of dignity and injury to feelings.

[4] Asaleo denies Mr Byrne’s claims and contends that the dismissal was substantively and procedurally justified.

Non-publication

[5] Following the investigation meeting, I issued a Minute indicating that I was minded to make non-publication orders in relation to certain matters arising through the course of the investigation meeting. The Minute sought brief submissions as to that issue.

[6] It was submitted for Mr Byrne that Employee A’s name should not be subject to any non-publication order and that there should not be departure from the principle of open justice. Mr Byrne did not oppose the making of non-publication orders as to various historic matters not directly relevant to the employment and submitted that anonymisation of the identities of persons who were not witnesses would be appropriate.

[7] Asaleo submitted that non-publication orders should be made consistent with the Authority’s preliminary views, including as to Employee A, individual employees that were not witnesses in the proceedings but against whom allegations were made, and as to historic matters not related to employment.

[8] I am satisfied that there are good reasons to depart from the principle of open justice having regard to the circumstances of this matter. Such departure should be limited to that necessary to protect the interests of certain individual persons. However, in this particular matter I am satisfied that orders are appropriate to protect the interests of some individuals that might otherwise be identifiable.

[9] Such identification has the real potential in my view of causing significant distress and damage to the relevant individuals, particularly given the subject matter of alleged sexual harassment.

[10] I order, pursuant to clause 10 of schedule 2 of the Act, a prohibition on the publication of:

- (a) the name, identity, and any identifying details (other than those recorded in this determination) of Employee A; and
- (b) the names, identities, and any identifying details (other than those recorded in this determination) of any other employee against which allegations of sexual harassment or of conduct concerning any sexual element; and
- (c) all of the evidence (including witness statements, evidence given orally, and any documents) and pleadings filed to the extent that they concern sexual harassment allegations, and of the evidence of Employee A as to any events preceding her employment, other than to the extent they are recorded in this determination.

[11] The Authority's file is not to be inspected by any person without leave of an Authority Member.

Issues

[12] The issues identified for investigation and determination are:

- (a) Was Mr Byrne unjustifiably dismissed?
- (b) If Asaleo's actions were not justified what remedies should be awarded, considering:
 - (i) Reinstatement;
 - (ii) Compensation for humiliation, loss of dignity, and injury to feelings; and/or
 - (iii) lost wages?
- (c) Should either party contribute to the costs of representation (if any) of the other party?

The Authority's Investigation

[13] An initial case management conference was held on 11 December 2023. An investigation meeting was scheduled, and counsel agreed to confer as to draft timetable directions. Timetable directions were issued on 24 January 2024.

[14] Written witness statements were received from Mr Byrne; his wife Kristen Byrne; Lou Yukich, Mr Byrne's union representative; Adrian Mcallum, Control system Technician; Richard Jephson, Control system Technician; Cameron Purches, Control System Technician; and Amber Heath, former Electrical Apprentice and colleague and friend of Mr Byrne.

[15] For Asaleo, written witness statements were provided from Peter Hockley, General Manager Manufacturing Kawerau; Anna Haden, People and Growth Manager – New Zealand; Susan Gibbs, former Manager – HR Employee Relations at Kawerau Mill; Craig Foster, Operations Manager – Paper Machines; and Employee A.

[16] An investigation meeting was convened, and evidence given on 19 and 20 June 2024 in Rotorua. The evidence was not completed, and a continuation of the investigation meeting was scheduled for 15 August 2024 (and 22 August 2024 by audio visual link).

[17] An urgent case management conference was held on 14 August 2024, primarily to deal with an application and objection relating to Employee A giving evidence. I determined that it would be appropriate to hear from Employee A and that the investigation as scheduled should be adjourned and two days set aside for hearing the remainder of the evidence in person and any oral submissions.

[18] The investigation meeting resumed on 20 November and was completed on 21 November 2024. Written submissions were exchanged following the investigation meeting. Without objection, Ms Heath and Mr Purches were excused from attendance at the investigation meeting. All other witnesses gave evidence and answered questions under oath or affirmation.

[19] On 6 March 2025 I issued a Minute seeking further submissions from the parties as to the issue of non-publication. The Minute included my preliminary views, including that Employee A's name and identity should be the subject of non-publication orders.

[20] A memorandum was received from counsel for Mr Byrne on 29 April 2025 suggesting that Employee A was no longer employed by Asaleo. On 2 May 2025, I

issued a Minute including directions calling for further information from Asaleo as to that contention.

[21] On 8 May 2025, Asaleo confirmed that Employee A was no longer employed having concluded their period of fixed term employment. Alaeo noted that its opposition to reinstatement was not dependent on Employee A's ongoing employment at the site.

[22] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all of evidence and submissions received.

Was Mr Byrne unjustifiably dismissed from his employment?

[23] Mr Byrne claims that he was unjustifiably dismissed from his employment and contends that the dismissal was both substantively and procedurally unjustified.

[24] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether Asaleo's actions, and how Asaleo acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.¹

[25] Justification requires the consideration of both substantive and procedural fairness. The onus is on Asaleo to justify its actions. Section 103A of the Act requires the Authority to consider the factors set out at s 103A(3) and also the requirements of good faith set out at s 4(1A) of the Act.

Incident of 16 February 2023

[26] On 16 February 2023, an incident occurred in the Workshop at the Kawerau Mill site. In addition to Mr Byrne, there were three other employees in the Workshop at the time, Richard Jephson, Adrian Mcallum, and Cameron Purches.

[27] Mr Byrne says that the incident occurred at approximately 3.45pm. His evidence is that the door opened and Employee A asked if it was ok to take a shortcut through the Workshop to access the fitters machine shop to get to the number three paper machine. He says he "glanced up and in what I intended as a light hearted off the cuff

¹ Employment Relations Act 2000, s 103A.

manner (with no intention of malice or offence) said “Oh I don’t know, you might get raped”.”

[28] Mr Byrne has maintained that the comment was not sexual in nature at all, that it was a joke, that he meant nothing by it, and that he didn’t mean the comment literally.

[29] Employee A says that they greeted Mr Byrne and said “I’m just passing through”, to which he responded “You don’t want to do that, you’ll get raped”.

[30] Mr Mcallum’s evidence is that Mr Byrne said “I don’t know you might get raped” and then started laughing. In response to questions at the investigation meeting, Mr Mcallum said that only Mr Byrne laughed at the ‘joke’, that he distinctly remembered Mr Byrne saying ‘might’ not ‘will’, and that he was not interviewed nor asked to provide a statement by Asaleo.

[31] Mr Jasper says that he did not hear the words Mr Byrne used but that he recalled that his voice was not out of character for Mr Byrne “to express himself in a joking manner”. He says the comment was an off the cuff stupid remark that which was taken out of context.

[32] Mr Purches says he recalls Mr Byrne saying something but not exactly what he said, but that did remember “that he was in his usual jovial mood, and he said it with a humorous intent”.

Investigation and disciplinary meetings

[33] The incident came to the attention of Ms Gibbs after she was advised of it by another staff member. She subsequently contacted Employee A by text message and then met with her on 22 February 2023.

[34] After some significant prompting, on 26 February 2023, Employee A sent an email to Asaleo detailing various concerns. The concerns included, but were not limited to, the incident of 16 February 2023. The complaint detailed Employee A’s recollection of that incident and the impact of it and included the following statement:

As the week has gone on I’ve tried to make sense of why this incident in particular has affected me so much and I now know that it is because it is not an isolated incident but one that ‘broke to the camels back’ for me, because throughout the year there has been multiple incidents and comments made to me, towards me, and about me with sexual overtones, disrespectful and derogatory in nature, which in the moment I have felt and dealt with by

laughing it off, pretending I didn't hear it or just accepting it is just the way it is, and over time has just worn me down mentally and emotionally.

[35] Mr Byrne was issued a letter dated 7 March 2023 advising him of an allegation of sexual harassment and asking him to attend a meeting on 10 March 2023. The letter outlined the comment said to have been made and other relevant details including the time, date, and location of the incident. The letter stated that the meeting was not a disciplinary meeting but that a formal disciplinary meeting might be required if Asaleo was not happy with the explanation provided at the initial meeting. Mr Byrne was encouraged to bring a support person or representative and it was also noted that if a formal disciplinary process was necessary that disciplinary action up to and including dismissal could result.

[36] Mr Byrne attended an initial meeting on 10 March 2023. Mr Byrne's evidence is that Mr Jephson attended as his support person and was his union delegate. He says he was unable to properly prepare his response for that meeting because he was not at that time provided a full copy of Employee A's statement and instead only received a summary. A copy of the full statement was provided to Mr Byrne at the meeting. He says he was given 10 minutes to review it and to provide a response.

[37] Mr Byrne says he immediately expressed remorse and his willingness to apologise to Employee A. He also says he reiterated his remorse and willingness to take any steps required to repair the relationship with Employee A. He said he made it clear that the comment had been a joke and that it was not intended to offend Employee A.

[38] Mr Foster said in questioning that Mr Byrne said at the meeting that he remembered the incident and couldn't exactly remember the words but that it sounded "about right". He says Mr Byrne explained it had been a joke and that he hadn't meant to cause offence. Mr Forster noted at the time that Mr Byrne had shown genuine remorse at the meeting and acknowledged that Mr Byrne offered to provide an apology to Employee A.

[39] Mr Jephson said at the investigation meeting that he attended as a support person, didn't speak on behalf of Mr Byrne, but that he did raise some issues at the meeting. He said they were provided Employee A's email at the meeting and that there was no pressure from Asaleo in terms of the time provided for considering the letter. When referred to notes of the meeting and reference to there having been 'no denial', he said that there was no denial from Mr Byrne that he had used the word 'raped', and

that Mr Byrne had said at the meeting that the words used were what he now maintains they were. In cross-examination Mr Jephson said he understood at the time of attending the initial meeting that the allegation was serious.

[40] Mr Byrne attended a further meeting on 16 May 2023 together with his representative Mr Yukich. Ms Gibbs and Mr Foster attended for Asaleo. Mr Byrne was dismissed from his employment at the end of the meeting.

[41] Mr Byrne says that after being advised by Mr Foster and Ms Gibbs that they didn't need to interview the others present when the incident happened because Mr Byrne had already admitted the allegation, that he told him he had not admitted the allegation at all. He says he restated the words that he now maintains were used.

[42] Mr Foster says that he attempted to hear any mitigating factors and to explain Asaleo's position as to where they were at, but that those attempts were rebuffed by Mr Yukich. At the investigation meeting, he said that there were only two possible outcomes, dismissal or a final warning. He said that Employee A did not want to see Mr Byrne, but that they hadn't told him that. He also said he did consider Mr Byrne's lack of intent when reaching the decision to dismiss.

[43] The decision to dismiss was recorded in writing in a letter dated 22 May 2023. That letter sets out that Asaleo considered Mr Byrne's conduct to have amounted to sexual harassment and therefore serious misconduct under Asaleo's "Performance, Counselling and Disciplinary Guidelines" and sexual harassment under the "Workplace Behaviours Policy".

Procedural justification

[44] Mr Byrne at all relevant times was advised of his right to have a representative or support person. At each meeting he attended he had a representative present. I do not consider Asaleo's actions were in any way unreasonable in terms of the permitting representation nor in terms of making Mr Byrne aware that it was a serious matter. Such as any issue is taken by Mr Byrne as to Mr Jephson's role at the first meeting, that is a matter for him. There is nothing inherently inadequate about a union delegate providing representation in such matters, nor is it unusual. Mr Byrne was on notice that the matter was potentially very serious and it was a matter for him to arrange representation of his choosing. Asaleo in no way impeded that.

[45] Mr Foster said he didn't consider it appropriate to attach Employee A's email complaint to the letter of 7 March 2023. To the extent that email was not initially provided, I do not consider that to be a significant procedural issue. Mr Byrne and his then representative were provided with that information at an early stage and I find that they were provided an opportunity to review the information prior to any response being provided. Had that time been insufficient, I am also satisfied that they were in a position to seek further time and they did not do so.

[46] I am satisfied that Mr Byrne was put on notice as to the potential seriousness of the issue from the outset. I do not accept what appears to be an explanation that Ms Jepson was asked to attend the meeting on the basis that the seriousness of the issue was unclear. The correspondence provided prior to the meeting was clear and set out the contentious statement. It was also the case that Mr Byrne was aware of the relevant incident. While in fact he may have considered the incident was not so serious as to potentially result in dismissal, and even on his version of the relevant events, he should have been aware that it was very serious and would likely lead to significant disciplinary action.

[47] It was submitted for Mr Byrne that Asaleo failed to sufficiently investigate the full circumstances of the alleged misconduct. That included an alleged failure by Asaleo to interview or obtain an account from the three other employees present. It is accepted by Asaleo that those persons were not interviewed, the explanation being that Mr Byrne accepted the words he used were those alleged by Asaleo and that, therefore, in effect, there was no need to make further factual enquiries.

[48] I find there is a significant difficulty with the approach taken by Asaleo. However, first, I record that I prefer Mr Foster's evidence as to what was said by Mr Byrne at the 10 March 2023 meeting in that Mr Byrne did not dispute the words put to him. While Mr Jepsen gave corroborating evidence, I do not consider that evidence is reflective of what occurred, and I consider it inconsistent with subsequent events including the absence of any immediate opposition to the content of the letter of 15 March 2023 which recorded that Mr Byrne had admitted making the alleged comment.

[49] I consider Mr Foster's approach to the 16 May 2023 meeting was genuine and that he had relied upon what he understandably took to be an admission to the allegations by Mr Byrne on 10 March 2023. The admission of the allegations is also

consistent with Mr Byrne's evidence that he "immediately expressed [his] utter willingness to apologise to [Employee A] for any offense".

[50] Notwithstanding the above, the significant difficulty that arises from a procedural point of view is that the statement was ultimately contested prior to the disciplinary finding being made. That is the case despite Mr Byrne's version of the words used being very similar to those asserted by Asaleo. It is also the case despite Mr Foster's evidence to the effect that the versions were not materially different, that he proceeded based on Mr Byrne's version. It is clear that Mr Byrne, himself or via Mr Yukich, contested the words that were used at the meeting on 16 May 2023. In assessing the relevant conduct, the gravity of it, and the appropriate disciplinary sanction, I consider it was necessary for Asaleo to investigate and make findings as to what actually occurred and the relevant context.

[51] While Mr Foster may have proceeded on the basis that he accepted Mr Byrne meant the comment as a joke and did not intend to offend Employee A, I do not consider that resolves the failure to ascertain and consider the full context of what occurred. The approach taken by Mr Foster was not to make findings and consider the full context, but rather was to conclude that the conduct was sufficient to meet the definition of sexual harassment. I deal with substantive justification below, but for present purposes I note it was still necessary that a full investigation into the incident was necessary and that regardless of whether any undisputed conduct met the threshold for a finding sexual harassment, that the full context needed to be considered.

[52] Little in the way of reliable evidence was available to the Authority from the three other individuals present at the time of the incident. The time for obtaining reliable evidence from them as to what they observed was following the incident. I consider it clear that they very likely had observations that would have been relevant, including as to Mr Byrne's likely intention and the context in which the comment itself was made. Context is important and a failure to fully investigate and consider the context and full nature of the conduct was inconsistent with what a fair and reasonable employer could have done in all of the circumstances at the time.

[53] It was also submitted for Mr Byrne that the approach to the meeting of 16 May 2023 was procedurally flawed on the basis that no opportunity was provided for Mr Byrne to raise issues in mitigation after being advised of a preliminary outcome.

[54] Mr Yukich gave evidence that there would usually be about 4 or 5 meetings as opposed to the two in this case and that his expectation would be that there would be a joint approach as to where the conduct sat. He said they were not asked to provide any information in mitigation but did volunteer some.

[55] Asaleo's meeting notes include the following:

CF then said that the company policy is one of no tolerance to sexual harassment. He went on to say that when considering the ERA definition and company policy he had no choice but to move for a dismissal....

[56] What is apparent is that there was no preliminary decision put to Mr Byrne, albeit he was on notice that termination of employment was being considered. Mr Foster accepted at the investigation meeting that the 'move to dismissal' was not a preliminary decision but instead was the final decision. Mr Foster's evidence is that he was going to provide an opportunity at the meeting for any factors in mitigation to be presented prior to any outcome. In questioning, he said that it would be normal for the person to know of the preliminary decision first. He said Mr Yukich raised some mitigating factors including Mr Byrne's clean record.

[57] Mr Foster's evidence is that he considered Mr Byrne's expression of remorse at the second meeting was not genuine, but that his remorse at the first meeting had appeared to be genuine. In recalling that, he focused on Mr Yukich being aggressive and argumentative, including in arguing about whether the actions amounted to sexual harassment. He says that Mr Byrne appeared to have changed his stance on whether his actions had been inappropriate. I find that conclusion was not one that was reasonably available.

[58] I consider Mr Foster's views on Mr Yukich also influenced the conduct of the meeting itself and the approach taken to it. I make no adverse finding against Mr Yukich and for present purposes it is sufficient to deal with the issue on the basis of Mr Foster's perception of any conduct. Taking that approach, I find that Mr Foster was somewhat exacerbated and found the experience unsettling and unpleasant. I find that influenced the approach taken and that in effect Mr Foster skipped over the issue of providing a preliminary outcome and seeking comments in mitigation as he had intended to do.

[59] While accepting Mr Foster's perception of the events as being genuine, the apparent frustration in my view led to procedural unfairness. I do not consider the

perception of the conduct during the meeting to have necessitated the approach taken by Asaleo and other steps were reasonably available that could have minimised or eliminated any difficulties while still providing Mr Byrne a preliminary outcome and fulsome opportunity to provide any final response and information as to mitigation. Those steps, for example, could have included adjourning and reconvening the meeting.

[60] I accept there was some opportunity for factors in mitigation to be presented, albeit not prior to any formal preliminary decision. Factors in mitigation were in fact put and I accept that Mr Foster considered at least some of those matters, including generally that Mr Byrne had been employed for a significant period. However, I find that the approach taken was ultimately procedurally unjustifiable.

[61] I also find that Mr Foster failed to appropriately take account of Mr Byrne's significant length of service and exemplary employment history. Mr Foster's evidence was that Mr Byrne's service was not a mitigating factor going against dismissal. In questioning at the investigation meeting, he said that it was a 'mildly negative' factor. A fair and reasonable employer could not have taken that position, especially in circumstances where the conduct concerns related to a single incident. To conclude that he should have been more aware of the inappropriateness of his conduct because of that length of service was also unreasonable. This was particularly so in circumstances where there was no history of such conduct on the part of Mr Byrne and where I find there is unsatisfactory evidence suggesting Mr Byrne was provided and appropriately trained in Asaleo's policies and procedures.

[62] Asaleo's Disciplinary Policy & Procedure includes a seven-step process to be followed where serious misconduct or misconduct is alleged. Step 5 provides:

Prior to any dismissal taking place the General Manager Operations, relevant RST Manager and Manager Employee Relations or their authorised representatives must be consulted.

[63] Mr Foster said at the investigation meeting that he had had a call with Mr Hockley and was told that it had to be his decision. He said he told Mr Hockley that it was going badly, but that he did not consult with him. While there was some conflicting evidence as to who the decision maker actually was, and as to whether consultation in accordance with "Step 5" occurred. Given Mr Foster's evidence I find there was a failure by Asaleo to comply with its own procedure and that that amounted to a procedural deficiency.

[64] Mr Foster was not aware that Employee A's written complaint had been solicited. There is no doubt that the matter was followed up with Employee A and that that led to a complaint of sorts being made. Regardless of how the complaint came about, I consider Asaleo were obligated to deal with the complaint as made in Employee A's correspondence of 26 February 2023. However, it is a matter that the decision maker should have been made aware of.

[65] Another significant issue raised on behalf of Mr Byrne was disparity of treatment. The approach Asaleo took to the investigation of Mr Byrne and to the other issues raised in Employee A's complaint was different. Some part of this might be explained by the apparent lack of detail regarding other incidents in the workplace. However, what is clear is that a drastically different approach was taken notwithstanding it was clearly being put that there had been other incidents in the workplace and that the comment by Mr Byrne was simply the one that 'broke the camels back'.

[66] One of the other incidents involved what was said to be a comment to the effect of "I bet you are anyone's after a couple of beers". The comment was alleged to have been made by supervisory staff member to Employee A. It was suggested that part of the difference in approach may have arisen from the comment being made outside of the workplace. That appears to be disputed. In any event, it does not in my view disclose a reasonable basis on which the incident was treated so significantly differently to that of Mr Byrne. The individual was not asked to attend any formal meeting, a letter such as that given to Mr Byrne on 7 March 2023 was not issued to the individual, and no apparent formal process was initiated.

[67] Whether or not the above-mentioned allegation relating to the other individual directly establishes a disparity of treatment, noting that would be relevant to the substantive justification, is not critical in my view. The issue is that the other allegations were not formally investigated whereas Mr Byrne's alleged conduct was from the outset. However, that is not the only issue. The finding made that Mr Byrne's conduct amounted to sexual harassment relied on the impact on Employee A. In considering that, the full content of Employee A's complaint was effectively disregarded or misinterpreted. While there is no doubt that at the time of the investigation meeting Employee A took real issue with Mr Byrne's conduct, the other allegations were clearly

significant issues at the time of making the complaint. Her later evidence does not change that.

[68] It was also submitted for Mr Byrne that Asaleo's conduct relating to the provision of information about the other incidents was misleading or deceptive in terms of s 4(1)(b)(ii) of the Act. That submissions relates to information that was said to have been requested but was not given to Mr Byrne in relation to the other incidents contained in Employee A's complaint. The relevant allegations related to conduct by others. I decline to find that the conduct was in breach of s 4(1)(b)(ii) of the Act as I am not satisfied that was the case based on the available evidence. However, the information sought was relevant for a range of reasons including in any assessment of where Mr Byrne's conduct sat in comparison, the consideration of any appropriate outcome, as to the treatment by Asaleo of sexual harassment allegations, and in order for Mr Byrne to make appropriate representations about any potential consequences.

[69] I also consider there was a failure to reasonably consider alternatives to dismissal. Mr Foster did not talk to Employee A about the offer from Mr Byrne to provide an apology and nor was that offer communicated to her at the time. Employee A required some not insignificant time away from work following the incident of 26 February 2023 and the incident was understandably distressing. However, I do not consider that a basis for Asaleo failing to relay the offer to apologise and had it been conveyed Employee A may have been open to it. What is also apparent is that Employee A was anticipating, following the period of leave, returning to work in circumstances where Mr Byrne would still be employed and where she would have some interaction with him.

[70] It was put to Employee A at the investigation meeting that Mr Byrne had apologised, offered to attend training, and had consistently said he was mortified. Employee A's response as to whether she could stay if he were back at work was that it was very hard for her to say if it would work or not. It was also put to her that others could be part of the process and her response was that it was possible.

[71] I consider the proposed apology was a matter that should reasonably have been explored in conjunction with other measures. Those measures might have included some form of facilitated restorative process, training in the relevant policies and procedures, other forms of disciplinary action, and/or changes in the relevant working

arrangements. While I accept the possibility of a final warning was considered, I find that Asaleo did not consider other reasonable measures that may have been consistent with being active and constructive in maintaining a productive employment relationship.

[72] I do not accept that Asaleo's decision to dismiss Mr Byrne was predetermined. Nor do I find that Mr Foster was biased or that Asaleo was required to engage an independent investigator. To the extent it was submitted that documents not provided to Mr Byrne at the relevant time evidence that approach, I do not consider that to have been the case. However, Mr Foster's notes of the 10 March 2023 were relevant and I conclude they should have been provided. That is particularly so where there was an apparent difference in views as to what had been said on 10 March 2023. The meeting notes of 16 May 2023 confirm not only that a 'zero tolerance' approach was taken, but that Mr Foster considered there was "no choice but to move to dismissal". That approach was not justifiable and full consideration of the conduct and circumstances was required in order to determine whether dismissal was warranted in the circumstances.

[73] It was also submitted that Mr Foster was closed minded, including because he held the view that "rape can never be a funny joke". I do not consider any procedural unfairness arose from Mr Foster's position. I also do not consider there any reasonable basis on which to challenge Mr Foster's position on that particular matter. The provision by Mr Byrne of an erroneous video comprising of a 'rape joke' was counterproductive and of no assistance whatsoever to the Authority. It also in no way undermined Mr Foster's position.

[74] An additional significant factor in Mr Foster's decision making was what he considered was a lack of contrition on the part of Mr Byrne. In questioning at the investigation meeting, Mr Foster accepted that he did not put that concern to Mr Byrne prior to making the decision to dismiss. He said he tried to do so but that he was told to "shut up". Mr Foster also accepted that the possibility that Mr Byrne might repeat the conduct was not put to him either. He also accepted that it was not put to Mr Byrne that his length of service was an exacerbating, rather than mitigating, circumstance. I consider that those were matters that Asaleo were necessarily required to put to Mr Byrne in order for to provide him a reasonable opportunity to respond prior to determining whether his employment should be terminated.

[75] I do not consider the identified procedural defects to have been minor and I find they resulted in Mr Byrne being treated unfairly. I conclude that the dismissal was procedurally unjustified.

Substantive justification

[76] The dismissal letter dated 22 May 2023 did not make reference to the statutory definition of sexual harassment, but referred to the following:

- (a) The definition of serious misconduct under the Performance, Counselling and Disciplinary Guidelines as including “serious harassment (including sexual harassment”);
- (b) Section 6 of the Workplace Behaviours Policy as providing that sexual harassment may include “offensive or demeaning comments” and that “a single act or continuing courses of conduct is equally capable of constituting sexual harassment”;
- (c) The meeting of 16 May and Mr Foster as having determined that Mr Byrne’s comment “constituted sexual harassment as defined by the Workplace Behaviours Policy”.

Sexual harassment – Asaleo’s policies and procedures

[77] Asaleo’s ‘serious misconduct section of the Performance, Counselling and Disciplinary Guidelines state that:

Serious Misconduct is misconduct that is more significant and will generally warrant the termination of the employee’s employment without notice and includes, but is not limited to:

...
serious harassment (including sexual harassment), discrimination, bullying or victimisation;

[78] The Workplace Behaviours Policy includes a definition of ‘sexual harassment’ as follows:

Sexual Harassment is unwelcome conduct of a sexual nature that is likely to offend, humiliate or intimidate a reasonable person in the circumstances of the person at whom it is directed.

[79] The Workplace Behaviours Policy also contains a section headed ‘sexual harassment’, states that it may include behaviour including ‘sexual jokes and innuendo’, that sexual harassment may arise from a single act, and concludes with the following:

Further, it is important to note that it is irrelevant as to whether or not the inappropriate behaviour was intended by an employee. Whether the behaviour is unwelcome is determined by reference to a reasonable person in the particular circumstances of the person being subjected to the behaviour.

[80] Asaleo's Workplace Behaviours Policy also defines 'harassment' and refers to sexual harassment as being a form of harassment dealt with separately in the policy.

[81] A copy of Asaleo's Disciplinary Policy & Procedure dated 20 August 2021, in a section entitled 'Part A; Serious misconduct', describes "sexual or racial abuse, bullying, harassment, or discrimination of a serious nature" as an example of serious misconduct. In 'Part B: Misconduct' a four-stage procedure for misconduct is provided with the following given as an example of behaviour:

Sexual or racial harassment or discrimination of a minor nature

Sexual harassment – Employment Relations Act

[82] Section 108 of the Act provides that sexual harassment includes "the use of language (whether written or spoken) of a sexual nature" where it directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee...and that... has a detrimental effect on that employee's employment, job performance, or job satisfaction".² Whether the language used is of a sexual nature is to be determined objectively, and whether it is unwelcome or offensive is to be determined on a subjective basis to the particular employee.³

[83] Section 108 deals with whether, for the purposes of the relevant personal grievance provisions relevant to an employee making a claim against their employer, the relevant employee has been sexually harassed. The statutory definitions of sexual harassment are concerned with the consequences for the person exposed to the conduct and not the intention of the perpetrator.⁴ It is clear enough that an employer needs to deal with any allegations of sexual harassment in an appropriate way, including having regard to possible personal grievance remedies where an employer has not taken practicable steps to prevent repetition of sexual harassment.

[84] The statutory definition of sexual harassment was discussed in *Craig v Slater*:⁵

[402] ... proof of sexual harassment does not require proof that the perpetrator knew or intended that it would be unwanted or unwelcome and, in statutory setting, that it would cause or be likely to cause detriment. That is because, once intentional conduct or language of a sexual nature occurs,

² Employment Relations Act, s 108(1)(b)(i).

³ *A v Z* [1992] 3 ERNZ 501 (ET).

⁴ *Craig v Slater* [2018] NZHC 2712, at [402].

⁵ *Craig v Slater* [2018] NZHC 2712.

the remaining element or elements are concerned with the responses of the person subjected to it and, in the statutory context, the consequences for that person, not with the state of mind of the perpetrator. That is also the reason why sexual harassment may be established despite the complainant not having objected or complained about it at the time.

Analysis and discussion

[85] It was submitted for Mr Byrne that his conduct did not reach the threshold of serious misconduct and that, in relation to sexual harassment, Mr Byrne meant no harm and that the comment was not sexual in nature. It was also submitted that Employee A's response was "clearly disproportionate to the incident itself" and that consideration of that reaction did not meet the "reasonable person" test.

[86] It was also submitted for Mr Byrne that Asaleo's own definition of sexual harassment needed to be considered in determining whether the conduct was serious misconduct. It was submitted that the definition, in referring to "a reasonable person in the particular circumstances of the person being subjected to the behaviour" required consideration of a reasonable person in the particular workplace, assessment of the context in which Mr Byrne made the comment, and consideration of the workplace culture generally.

[87] I accept Mr Byrne's evidence to the effect that he did not intend to cause offence by making the comment he did on 16 February 2023. I also find that Mr Byrne's conduct was completely unacceptable on any version of events put before the Authority. It was also completely unacceptable on the version of events put to Asaleo by Mr Byrne. Such that it could be described as a joke, it was not funny, and it was highly offensive. I consider it would have been on any objective standard whether by reference to a hypothetical member of the public or employee at the relevant site.

[88] I find the comment or 'joke' made by Mr Byrne was sexual in nature. He directly used the word 'rape' which is an act of sexual violence. In some cases, it may be that the word can be used to describe something else, but that is not the case here. The 'joke' was that Employee A might be 'raped' if she walked through the Workshop. I accept that the comment was not meant to be a threat, was not intended to be serious or to be taken seriously, and that it was not intended to cause offence. However, it was clearly of a sexual nature. While intended as a joke, I am satisfied that the reference to 'rape' was intended to be synonymous with the commonly understood meaning of the term as

opposed to any conceivable non-sexual meaning that might denote a non-sexual action in the absence of consent.

[89] The comment was offensive both subjectively and on any objective standard. By its nature, it had an impact on Employee A's employment. I find it also would likely have had that impact on any objective reasonable person standard.

[90] I do not accept that Employee A's reaction to the incident was disproportionate. It is the case that other factors were relevant to the impact on her. However, the impact resulting from the comment itself was profound and detrimental.

[91] I am satisfied that Asaleo's conclusion that Mr Byrne's conduct was sexual harassment was justified.

[92] It is the case that a finding that sexual harassment has occurred does not necessitate dismissal in all cases. Indeed, the Act contemplates, for example in relation to the making of recommendations by the Authority or court in the context of personal grievances, that disciplinary action, transfer, or rehabilitative action be taken in respect of the relevant person.

[93] In *Auckland Provincial District Local Authorities Officers IUOW v Northland Area Health Board*:⁶

...There are many cases in which the Court refuses to disturb an employer's decision to dismiss even if other alternatives were available to the employer because there may be a wide range of decisions available to a reasonable and fair employer. But that is not to say the Court will never substitute its own view where it considers that dismissal was inappropriate to the gravity of the offence or offences committed – in other words, that it constitutes harsh treatment. It is precisely the function of the Court and of grievance committees with their experience of such matters to adjudicate on whether the circumstances in a particular case are such that it can be said of them that the dismissal was in those circumstances justifiable or otherwise...

[94] Having regard to Asaleo's internal policies and procedures, I consider it was incumbent on Asaleo to make an assessment as to the gravity of the conduct in assessing whether it amounted to serious misconduct or misconduct of a lesser nature. Such consideration was, in one way or another, required in any event in assessing whether

⁶ *Auckland Provincial District Local Authorities Officers IUOW v Northland Area Health Board* [1991] 2 ERNZ 215 (LC) at 222.

dismissal was warranted in all the circumstances of the case even if the conduct of Mr Byrne was capable of amounting to serious misconduct.⁷

[95] I find there was inadequate consideration of the full circumstances of the conduct, the gravity of Mr Byrne's actions, and of the isolated nature of the actions. The approach taken and conclusion reached were unjustified, albeit that the conclusion as to the behaviour amounting to sexual harassment was not.

[96] While Asaleo did not obtain witness statements from other individuals that were present at the time of the incident, I do not consider that was in any way fatal to their concluding that Mr Byrne's conduct met the definition of sexual harassment. In relation to that finding, I do not consider the contention as to whether "might" or "will" was used to have been at all critical. On either version, there was sufficient evidence to establish that the actions amounted to sexual harassment. However, so far as possible, making enquiries into the words actually used was important in order to properly consider the gravity of the conduct and a fair assessment of what the consequences should be.

[97] Mr Byrne was certainly guilty of a serious error of judgement and reprehensible conduct. I do not consider Asaleo were wrong in concluding that Mr Byrne's conduct amounted to sexual harassment. It also met the relevant definition under the Act. However, that was not the end of the matter.

[98] I conclude the consequence for Mr Byrne of his actions, that being dismissal, was significantly disproportionate to his actions, including having regard to a lack of intention to cause distress. The fact of serious misconduct will not in all cases mean that dismissal is automatically justified, and consideration is still required as to whether dismissal is warranted in all the circumstances of the case.⁸ I find, taking into account all of the circumstances, it was not an option open to Asaleo acting as a fair and reasonable employer to dismiss Mr Byrne. The dismissal was manifestly harsh and excessive.

⁷ *Auckland Provincial District Local Authorities IUOW v Northland Area Health Board* [1991] 2 ERNZ 215 (EmpC).

⁸ *Auckland Provincial District Local Authorities Officers IUOW v Northland Area Health Board* [1991] 2 ERNZ 215 (LC) at 222.

[99] The dismissal was both substantively and procedurally unjustified and Mr Byrne was unjustifiably dismissed from his employment.

Remedies

Reinstatement

[100] Section 125 of the Act requires the Authority to provide for reinstatement wherever practicable and reasonable.⁹ Reinstatement is the primary remedy.

[101] There are two significant factors that I consider might go against reinstatement. First, there is evidence of a real impact on Employee A and associated issues with the working relationship moving forward. Second, evidence before the Authority that could be said to show that Mr Byrne, while he initially apologised for his actions, has not exhibited what might be considered an appropriate degree of understanding and contrition. The second factor goes to the trust and confidence that Asaleo could have in Mr Byrne and any employment relationship moving forward.

[102] There is a question as to the impact of reinstatement on third parties. This includes, but is not necessarily limited to, the potential impact of reinstatement on Employee A. As to any impact on persons not including Employee A, I am not persuaded that reinstatement is not practical and reasonable. Such as there may be perception issues in terms of acceptable conduct, I do not consider reinstatement could reasonably be seen as condoning Mr Byrne's behaviour nor as suggesting that such conduct is appropriate in the workplace.

[103] In terms of Employee A, she gave evidence as to the impacts of the conduct on her. Her evidence included the following:

At no stage did I express to the company what I thought should happen to Richard. I left that entirely in the company's hands.

[104] Employee A said that when she returned to work following the incident, that being approximately eight weeks later, that she thought it was clear a lot of people knew what had happened.

[105] Employee A provided a letter in May 2024 explaining that if Mr Byrne returned to work that she would resign. In that statement Employee A said that if Mr Byrne were

⁹ Employment Relations Act, s 125.

re-employed that she would have no alternative but to resign because working in close proximity to him would cause too much distress.

[106] There is unlikely to be any level of interaction between Employee A and Mr Byrne given the confirmation that Employee A is no longer employed by Asaleo. I am not satisfied that would be an impediment to Mr Byrne's successful reinstatement.

[107] I do not accept that reinstatement would send the message that Mr Byrne's conduct was acceptable, nor that Asaleo will tolerate or permit such behaviour in its workplace. I do not consider reinstatement would be unreasonable in circumstances where the complaint made, such as it was, concerned broader allegations about behaviour in the workplace that were insufficiently investigated by Asaleo. It is incongruous that Mr Byrne should be denied reinstatement on the basis of purported concerns regarding the impact on the wider workforce in those circumstances. While Asaleo might rightly take appropriate action to address issues of sexual harassment in the workplace, I find that is not what has occurred here.

[108] I do not consider the size of the workplace or the relationships with managerial staff to be impediments to reinstatement in this case. While there has been disagreement about the appropriate implications for Mr Byrne of his conduct, I do not consider there is animosity such that an ongoing working relationship with senior staff could not be successfully maintained. I also consider that the business is of such nature that, albeit with some active management, it could absorb Mr Byrne back into the workforce successfully.

[109] I agree to some extent with Asaleo that Mr Byrne's approach to date has lacked an appreciation as to the seriousness and impact of his actions. He should be under no illusion that his actions were both extremely serious and that there was a very real risk that they would have a profound impact on the individual which was subjected to that conduct. The impact is not overstated, exaggerated, nor unreasonable. Having said that, I am not convinced that Mr Byrne has exhibited a complete absence of understanding. In particular, there was an early acknowledgement and offer of apology at the first meeting Mr Byrne attended.

[110] The position changed somewhat afterwards, with a more confrontational approach being taken and what might be considered a reluctance to accept the seriousness of the conduct and impact of it. Mr Byrne was of course entitled to put any

defence to Asaleo and to explain his conduct. Some account must be taken of that. Mr Byrne's position and expression of remorse at the first meeting was appropriate. The approach taken thereafter had the reasonable appearance that his conduct and the impacts of it were being unduly minimised. That was not helpful and led to some reasonable apprehension on the part of Asaleo as to Mr Byrne's ongoing employment.

[111] Ultimately, I consider what is important is Mr Byrne's personal approach and understanding and not that of any other individual. While imperfect, I find that Mr Byrne is contrite, he expressed that he was contrite at the initial meeting on 10 March 2023 and it was recorded as such in the relevant notes, he understands that such conduct is not acceptable and is aware of the implications such conduct may have on his ongoing employment and on those it is directed towards.

[112] There is evidence that Asaleo has employed another individual to replace Mr Byrne. While that may have some impact, I do not consider that the implications are not manageable for an organisation of Asaleo's size. It is also the case that Asaleo have been aware for some significant time, and prior to any such appointment, that Mr Byrne was seeking reinstatement.

[113] The evidence is that Mr Byrne made a highly inappropriate joke that, whilst not intended, had a significant impact on another individual. The joke was not humorous, and it was made in circumstances where there was a power imbalance. It was entirely unacceptable. However, that does not mean that reinstatement is not practicable or reasonable.

[114] Reinstatement is the primary remedy and I have seriously considered all of the evidence and submissions. I conclude that Mr Byrne, given the isolated nature of the incident, his remorse, and his significant length of successful service, would return as a "harmonious and effective member of [Asaleo's] team".¹⁰ Mr Byrne has spent, in effect, the entirety of his working life at the Mill. Mr Byrne's service is significant and otherwise positive aside from the incident in question. While finely balanced, I find that in all of the circumstance's reinstatement is practicable and reasonable.

[115] I order that Mr Byrne be reinstated to his employment.

¹⁰ *Northern Hotel IUOW v Rotorua RSA* [1989] 3 NZILR (LC), at 501.

Compensation for humiliation, loss of dignity, and injury to feelings

[116] Mr Byrne gave evidence as to the impact of the dismissal. He says his personal identity is tied to his work and that he has been a loyal and dependable employee for some 33 years. His evidence went in to some detail as to his service, including projects he has been involved in, mentoring/supervision of others, and the provision of first aid relating to serious injuries.

[117] Mr Byrne says that he has felt extremely embarrassed at being terminated and has withdrawn from social and family events. He also expressed anxiety as to the possibility of having to explain himself if asked by others as to why he was not working.

[118] Much of Mr Byrne's evidence as to impact goes to his character and the unfairness of the allegations.

[119] Mr Byrne says that he has had difficulty sleeping, his relationship with his wife has been impacted, and reports having been angry, sad, and upset. He says the loss of employment and income has been stressful. He also says, "I truly believe that once this case has been settled, and my name is cleared, I will be able to move forward with my life in regard to future employment and my social standing in the community".

[120] Ms Byrne gave evidence as to the impact of the dismissal on Mr Byrne. She says that his self-confidence and wellbeing took a real battering, that he became restless staying at home, and that he did not want to go anywhere or be around other people. She says he was devastated by others not being interviewed when he was suspended. The children felt like they were a burden. Mr Byrne suffered anxiety, isolated himself, refused to have contact outside of the family.

[121] Ms Byrne also says Mr Byrne was staying up late worrying. She also says Mr Byrne struggled with the stigma and embarrassment and that he was put in a position where he needed to "explain the whole episode, relive the moment and grapple with both his own emotions and other people's shocked reactions". She said that amplifies the embarrassment and sense of unfairness".

[122] There is a significant proportion of the impacts which I consider lie at Mr Byrne's own feet. They are impacts of the conduct being known, or of anxiety that the conduct might become known, as opposed to being a result of Asaleo's actions. Quite aside from consideration of any issue as to contribution, I consider much of the claimed

impact would have been present regardless of the dismissal or any unjustifiable action on the part of Asaleo.

[123] But for Mr Byrne's conduct there would have been no dismissal. Mr Byrne's conduct was intentional in terms of making the statement he did, albeit that the consequences of his actions were unintended. I do not consider the making of an award to Mr Byrne for humiliation, loss of dignity, or injury to feelings would be appropriate having regard to the impacts and nature of his misconduct.

[124] Having seriously considered all of the relevant factors, including the Authority's equity and good conscience jurisdiction,¹¹ I decline to make an award of compensation for humiliation, loss of dignity, and injury to feelings.

Lost wages

[125] Mr Byrne's evidence is that he has applied for numerous jobs and has, largely, been unsuccessful in securing alternative work. He says he has applied for a number of positions but has been unsuccessful. Many of the positions advertised have been for work outside of the Bay of Plenty area but due to various commitments he is unable to work outside of the area.

[126] I consider Mr Byrne to have taken reasonable steps to find alternative work, particularly in circumstances where he has been reasonably pursuing reinstatement as a remedy.

[127] Having regard to my findings in relation to the issue of compensation for humiliation, loss of dignity, and injury to feelings, I decline to make any award of lost wages in terms of s 123(1)(c)(i) of the Act on the same basis.

[128] I decline to make any discretionary award in excess of 3 months' ordinary time wages.

[129] I am required to make an order in terms of s 128(2) of the Act subject to any deduction in relation to contribution.

[130] Subject to any reduction on account of contribution, I would order Asaleo to calculate and make payment of wages equivalent to a period of 13 weeks wages.

¹¹ Employment Relations Act 2000, s 157(3).

Contribution

[131] I am required by s 124 of the Act to consider the extent to which the actions of Mr Byrne contributed towards the situation giving rise to the personal grievances.

[132] I find that Mr Byrne contributed significantly to the circumstances giving rise to his personal grievance claim. Consistent with Mr Byrne's early apology, I consider he knew at an early stage that his conduct was unacceptable. Mr Byrne's conduct amounted to sexual harassment. His conduct, while I accept he did not intend to cause offence, was clearly inappropriate and likely to have a significant impact.

[133] In terms of the quantum of reduction that is appropriate, I have had regard to the full Court's judgment in *Xtreme Dining Ltd, (T/A) Think Steel) v Dewar*.¹² The extent of the contribution in this case is significant and at the high end, Mr Byrne was certainly at fault and his conduct was such that a reduction of remedies is required. While I accept Mr Byrne did not foresee the consequences of his actions and the impact was not intentional, his actions were nonetheless intentional. His actions were culpable and blameworthy and were causative of the response that followed to a significant extent.

[134] Mr Byrne's contribution to the circumstances giving rise to his grievance is not such that in my view he should not be reinstated. While his conduct was problematic and serious, I am satisfied that it was isolated in nature, that he was contrite from the outset and offered to apologise, and that reinstatement remains reasonable and practicable. However, I do consider his contribution to the circumstances to have been significant and that it should be considered in a substantial way as to the financial compensation that would otherwise be awarded for lost wages.

[135] I consider a reduction in financial compensation for lost wages of 50 percent is warranted in all of the circumstances.

[136] The reduction in this case is significant, so was Mr Byrne's conduct.

[137] I order Asaleo to calculate ordinary time wages equivalent to a period of 13 weeks wages and to make payment to Mr Byrne, within 28 days of this determination, of 50 percent of that sum. I also order Asaleo to reinstate any service-related

¹² *Xtreme Dining Ltd, (T/A Think Steel) v Dewar* [2016] NZEmpC 136; [2016] ERNZ 628.

entitlements, without deduction, on the basis that Mr Byrne's employment is deemed to have been continuous.

Summary of orders

[138] Asaleo is ordered to:

- (a) reinstate Mr Byrne to the role he was employed in immediately prior to the dismissal. They are ordered to reinstate Mr Byrne on the payroll with immediate effect. The parties should engage constructively to facilitate Mr Byrne's return to the workplace, which is to occur within no more than 21 working days;
- (b) calculate ordinary time wages equivalent to a period of 13 weeks wages and to make payment to Mr Byrne, within 28 days of this determination, of 50 percent of that sum; and
- (c) reinstate any service-related entitlements, without deduction, on the basis that Mr Byrne's employment is deemed to have been continuous.

Costs

[139] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[140] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Byrne may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Asaleo will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

Rowan Anderson
Member of the Employment Relations Authority