

Mr Key had been overly friendly but it did not claim that he had sexually harassed her.

[4] The complainant N worked within a different team from Mr Key, under a different manager, and had not had any previous contact with Mr Key prior to making a complaint about him. N's complaint arose out of interactions that occurred between N and Mr Key on Thursday, 02 July 2015 while they were at Andrew Sims Mitsubishi in Newmarket having their work vehicles serviced.

[5] Mr Key was introduced to N by one of the staff from Andrew Sims Mitsubishi as someone who also worked for PFM. Mr Key and N chatted together for an hour or so while they were waiting for their vehicles to be serviced. N asked Mr Key to take her back to the PFM office with him because his car was ready earlier than hers.

[6] During the drive back to the office N texted Mr Key her mobile phone number. N says she did that because Mr Key had been attempting to put her phone number into his phone whilst driving. N said she only texted Mr Key her number so that he would return his focus to the road.

[7] On Friday 03 July N approached Mr Marius Nortje, Operations Manager for PFM, raising concerns about her interactions with Mr Key the day before. Mr Nortje asked N to email him her specific concerns which she did at around midday that same day. I refer to this email as "*N's complaint*" and note that this is the only written record in N's own words of her concerns.

[8] Mr Key was not made aware of this email so the first time he saw it was when he received the joint bundle of documents on 08 October, four working days before the Authority's investigation meeting.

[9] N's email complaint says:

"[...] I found Fred very friendly, although at times felt a bit uncomfortable with his comments as although they could be construed as being friendly – I did feel they were inappropriate.

He invited me several times to have coffee with him, which I rebuffed or changed the subject.

On the drive back to Penrose, I had to prompt him to take the Penrose motorway exit, and when I asked him to take this exit, although he did reluctantly, I felt awkward, and he then said he would prefer to take the 'long way' to continue talking with me (not exact words).

I understand that he is very friendly, however the discussion was over-friendly and not appropriate at times. I was left feeling quite awkward, and nervous of what is to follow. [...]"

[10] Mr Key says that he offered N coffees when he got up a couple of times to make himself a coffee while they were waiting for their vehicles to be serviced. Mr Key says he offered coffee to everyone who was waiting not just N.

[11] Mr Keys says that N declined his offers although others who were waiting accepted his offer to make them a coffee while he was making himself a coffee. Mr Keys say there was some talk of maybe catching up for a coffee either during the ride back to the office or around the end of the ride.

[12] Mr Key says he was taking the route back to the office which in his experience was the fastest way back because it had less traffic. However when N asked him to take a different route which she believed was more direct he did so. Mr Key denies commenting to N that he wanted to keep talking to her. Mr Key says that N asked for a ride back to the office and that during the drive back she texted her mobile number to him.

[13] Mr Nortje sent N's complaint to Nicola Williams, Senior Contracts Manager for PFM. He also advised N that she should meet with Ms Seema Odedra, Human Resources Adviser for PFM if she wanted to pursue a formal complaint against Mr Key.

[14] Mr Nortje spoke to Mr Key at work on 03 July to tell him that a complaint had been made against him so he could expect to be contacted by Human Resources (HR) about it. Mr Nortje says that Mr Key's response was that he had done nothing wrong.

[15] On Tuesday 07 July Ms Williams told Mr Key that he was being suspended as a result of allegations that N had made against him. Ms Williams handed Mr Key a letter instructing him to attend a formal disciplinary meeting on Monday 13 July at

2pm to put forward his explanation to *“allegations of inappropriate conduct with PFM employee on Thursday 2nd July 2015.”*

[16] The disciplinary letter advised that the outcome of the meeting could result in *“a formal warning/your dismissal.”* Mr Key was advised of his right to consult and also to have a support person with him at the disciplinary meeting. PFM did not provide Mr Key with any information about the specific concerns N had raised.

[17] Mr Key instructed his lawyer Ms Olinda Woodroffe on 10 July 2015 and she wrote to Ms Williams that same day asking for the disciplinary meeting to be rescheduled because PFM had not disclosed all relevant information which had to occur before a disciplinary meeting could be held. Ms Woodroffe advised that Mr Key would be returning to work on Monday 13 July.

[18] Mr Key attended work on Monday 13 July but around 1pm he received a call from Mr Nortje who told Mr Key to pack up his things and go home. This was confirmed by an email that afternoon which asked Mr Key to stay off work until HR had sent him a rescheduled time for his disciplinary meeting.

[19] Ms Woodroffe emailed Ms Odedra and Mr Nortje on Monday 13 July asking for urgent disclosure of all relevant information.

[20] On 14 July Mr Odedra wrote to Ms Woodroffe stating that PFM was investigating *“allegations of sexual harassment made by N”*. Ms Odedra set out that the specific allegations regarding inappropriate conduct towards N included:

1. *Asking N out for coffee repeatedly (five times).*
2. *Stating to N “you’re tall, the kind of lady I’d like to take out”.*
3. *Asking N for her phone number and handing her his phone to enter his number, during the car ride back to the office.*
4. *When prompted by N to take the correct exit on the motorway (to get back to the office), suggesting he would prefer to take the long way to continue talking with her.*

This is a potential breach of clause 16.6 of Mr Key’s individual employment agreement (attached) and of Programme’s anti-harassment policy (attached) as the alleged behaviour was uninvited, unwelcomed and unacceptable and made N feel uncomfortable and nervous.

[21] PFM did not disclose N's complaint or any other information or documents other than the employment agreement and policy referred to above.

[22] The disciplinary meeting was held on Friday 17 July. Mr Key attended with his lawyer, Ms Woodroffe, and Mr Moreland attended with Ms Odedra who provided HR support and advice.

[23] Ms Woodroffe expressed concern after the disciplinary meeting that Ms Odedra had attempted to put additional questions to Mr Key about what N had allegedly told Ms Odedra, when that information had not been disclosed to Mr Key either prior to or at the disciplinary meeting.

[24] Mr Moreland says he formed an adverse view of Mr Key's explanation in part because Ms Woodroffe seemed to be doing all the talking. I find that was unfair and unreasonable. Mr Key was entitled to representation and it is entirely appropriate for his representative to speak on his behalf. Mr Key was very upset stressed and distressed at the time of the disciplinary meeting and English is his second language.

[25] Mr Key claims that his dismissal was substantively and procedurally unjustified. Mr Key withdrew his reinstatement claim after seeing the historical information PFM filed against him. Mr Key disputes the accuracy of that material and says PFM's presentation of it to the Authority has fatally undermined his trust and confidence in PFM to act appropriately towards him if he returned to work.

Issues

[26] The following issues are to be determined:

- (a) Was Mr Key's dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) What if any costs should be awarded?

Was Mr Key's dismissal justified?

[27] Justification is to be determined in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether PFM's actions and how it acted were what a fair and

reasonable employer could have done in all the circumstances at the time it dismissed Mr Key.

[28] A fair and reasonable employer is expected to comply with its statutory obligations. These include the s.4(1A) good faith obligations and each of the four procedural fairness tests in s.103A(3) of the Act. Failure to do so is likely to substantially undermine an employer's ability to justify its actions and/or dismissal of an employee.

[29] The Authority may also consider other appropriate factors in accordance with s.103A(4) of the Act but pursuant to s.103A(5) of the Act it may not find that a dismissal is unjustified merely because of minor process errors which did not result in unfairness to the employee.

Good faith

[30] Section 4(1A) of the Act requires an employer who is proposing to make a decision which may adversely impact on an employee's ongoing employment to provide that employee with relevant information and an opportunity to comment on it before a final decision is made. I find that this did not occur in this case.

[31] The decision-maker, Mr Moreland, received verbal information from Ms Odedra which had in turn been obtained verbally from N but which was never shared with Mr Key. Accurate records of these discussions were not kept and the fact that these various discussions had even occurred came out for the first time during the Authority's investigation.

[32] N's compliant was also never shared with Mr Key. Ms Odedra shared her views about N being very distressed and seeming credible. This influenced Mr Moreland's findings on credibility but Mr Key was not privy to this information so could not respond to it.

[33] Mr Moreland also told the Authority that he was influenced by his personal knowledge and view of N because they had worked alongside each other for a number of years. Mr Moreland described N as a "*down to earth robust farm girl*" who was used to working in a male environment with male team members and was not prone to overreaction or sensitivity.

[34] Mr Moreland candidly admitted to the Authority that his favourable perception of N had influenced his view of the veracity of her complaint. Again these matters were not shared with Mr Key so he had no opportunity to address them. Mr Moreland also formed an adverse view of Mr Key because his lawyer mainly spoke on his behalf during the disciplinary meeting.

[35] I consider this failure to comply with s.4(1A) of the Act fundamentally undermines PFM's ability to justify Mr Key's dismissal because it meant that he was not fully or fairly aware of the information which Mr Moreland was considering against him. It follows that Mr Key was effectively deprived of an opportunity to respond to it.

Compliance with s.103A(3) tests

[36] I find that PFM did not sufficiently investigate its concerns in breach of s.103A(3)(a) of the Act. This failure to sufficiently investigate the concerns and PFM's serious breaches of good faith meant PFM failed to adequately raise its concerns with Mr Key before dismissing him contrary to the requirements of s.103A(3)(b) of the Act.

[37] It is also clear that all of the information PFM considered adverse to Mr Key was never disclosed to him in breach of s.103A(3)(b) of the Act.

[38] These fundamental process defects mean that Mr Key was not given a reasonable opportunity to respond to PFM's concerns (because he simply did not have all relevant information) in breach of PFM's obligations under s.103A(3)(c) of the Act.

[39] It follows that because Mr Key did not know exactly what information he needed to respond to or what specific concerns he needed to address his explanation to PFM's concerns could not be "*genuinely considered*" by PFM in breach of its obligations under s.103A(3)(d) of the Act.

[40] PFM acknowledges that Ms Odedra interviewed N then verbally conveyed her views of that discussion to Mr Moreland. The specific information N gave Ms Odedra was not accurately recorded. This made it impossible to determine with any clarity what N's specific concerns or allegations or even evidence about the events in issue was apart from what she had written in her email complaint.

[41] Reading N's complaint it is clear that a fair and reasonable employer could not take disciplinary action against Mr Key without first undertaking further investigation which necessitated inquiries being made of N and Mr Key. That did not occur. PFM spoke to N off the record then launched straight into disciplinary action without first getting clear about the specific facts it relied on or what evidence it had to support its concerns.

[42] The problems that caused is evident in Ms Odedra and Mr Moreland having differing views of what N was actually concerned about and why. This led to Mr Moreland having to rely on hearsay evidence from Ms Odedra which I find created a lack of clarity regarding the evidence relevant to the disciplinary concerns.

[43] The fundamental deficiencies in the initial investigation of N's complaint meant there was not a clear or accurate record of what N had actually said about Mr Key's actions or why she was so concerned.

[44] I do not consider a fair and reasonable employer could rely on unrecorded double hearsay information to support a disciplinary allegation as serious as sexual harassment bearing in mind the potentially very adverse consequences of dismissal on Mr Key. N's concerns needed to be fully and properly investigated which necessarily involved obtaining Mr Key's account of the matters in issue. PFM was unable to satisfy me that had occurred.

[45] The failure to record N's discussions with Ms Odedra resulted in Ms Odedra and Mr Moreland each having a different perspective on what the specific disciplinary concerns involved. For example, each of them had a different timeline in mind in terms of the requests for coffee that Mr Key had allegedly made as well as regarding what requests were inappropriate and why.

[46] Given that Mr Key and N were sitting in a public waiting area together for a period of time and then shared a short drive back to the office it was important to establish a timeline to determine when N became concerned and why. I find that did not occur. Even during the Authority's investigation PFM witnesses contradicted themselves or were unclear about timeline issues.

[47] Mr Moreland told the Authority that essentially N believed that Mr Key had been hitting on her or coming onto her which had made her feel very concerned. PFM

appears to have just accepted N's views about that without ever putting them to Mr Key to respond to.

[48] In summary, there was no clarity about N's specific issues with Mr Key. PFM had relevant information it never shared with Mr Key. Mr Moreland had formed an adverse view of Mr Key and a favourable view of N for reasons that were never disclosed to Mr Key and therefore could not have been addressed by him. Mr Moreland was also improperly influenced by historical (non-disciplinary) matters that Mr Key was never made aware of.

[49] These fundamental failures effectively deprived Mr Key of a genuine opportunity to respond to adverse factors that were influencing Mr Moreland's decision making. I find that PFM's dismissal of Mr Key was procedurally unjustified.

Substantive justification

[50] I find that the investigation and disciplinary process was so fundamentally unfair and substantially deficient that a fair and reasonable employer could not have been in a position to have formed a view on the substantive merits of the disciplinary allegations.

[51] This is not a case where a fair process would have resulted in the same outcome. I consider it more likely than not (based on the information produced to the Authority) that a fair and proper process could not have resulted in Mr Key's dismissal.

[52] Accordingly I consider Mr Key's dismissal was substantively unjustified.

Section 103A(5) of the Act

[53] I find these process defects cannot be described as minor and they did result in significant unfairness to Mr Key. I therefore find that s.103A(5) of the Act does not preclude a finding of unjustified dismissal.

Outcome

[54] I find that PFM has breached all of its statutory obligations to Mr Key. It is unable to meet any of the specific tests under the s103A justification test and it also breached its good faith requirements to Mr Key.

[55] I find that Mr Key's dismissal was procedurally or substantively unjustified so his dismissal grievance succeeds.

What if any remedies should be awarded?

Mitigation

[56] Mr Key has a legal obligation to mitigate his loss. On 28 September 2015 Mr Key was offered employment by another company doing the same sort of work he did for PFM. Mr Key declined that offer on the basis that this company provided services to PFM and PFM had banned Mr Key from any of its worksites.

[57] Mr Key says that this made the new job offer unsatisfactory because it would limit the work that he could do for this potential new employer and it would make him stand out amongst his colleagues who would want to know why he was not allowed on PFM premises.

[58] I accept that explanation. I am satisfied that it was reasonable in these particular circumstances for Mr Key to have declined to accept that offer.

Lost remuneration

[59] PFM is ordered to pay Mr Key six months' lost remuneration under s.128(3) of the Act. PFM is entitled to receive credit for the pay in lieu of notice it paid him upon termination so that amount is to be reduced from the amount to be paid. The Authority has not been provided with that amount but the parties appear to agree that it amounts to six weeks' pay.

Distress compensation

[60] Mr Key gave evidence of considerable distress as a result of his unjustified dismissal. Mr Key says his family relationships and standing in the community have been significantly adversely affected, which he feels very deeply.

[61] Mr Key (and his medical evidence) describes him as being so ashamed at being dismissed that he did not tell his family for some time, instead pretending he was going to work. This created its own set of problems which Mr Key disclosed to the Authority.

[62] Mr Key did not share his dismissal with his daughters out of a desire to protect them. However when Mr Key's daughters found out about his dismissal from others at the family's church they became very upset and distrustful of him for what they believed was hiding such serious information from them. This caused Mr Key additional distress and angst.

[63] Mr Key required medical treatment and has experienced psychological issues as a result of his dismissal. Mr Key told the Authority he had not experienced these difficulties prior to his dismissal.

[64] Mr Key explained how his distress and humiliation has led him to withdraw from charitable and community activities that he and his wife were involved in. Mr Key spoke of his extreme shame at being linked to allegations of sexual harassment which he strongly refutes.

[65] Mr Key says his distress was increased as a result of information that PFM filed shortly before the Authority's investigation which suggested that there had been previous concerns regarding Mr Key's interaction with females. Mr Key strongly refutes such allegations and was shocked and humiliated that these issues (which he denies) had been put before the Authority.

[66] Mr Key gave evidence that he had been suffering physically, mentally and emotionally. He feels extreme embarrassment, shame and humiliation and describes feeling very belittled. Mr Key's evidence was that these matters have led him to feel close to a breakdown. I find that Mr Key has been seriously and significantly adversely affected by his unjustified dismissal.

[67] PFM is ordered to pay Mr Key \$20,000 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he has suffered as a result of his unjustified dismissal.

Contribution

[68] Having determined that Mr Key has a dismissal grievance, the Authority is required under s.124 of the Act to assess the extent to which Mr Key contributed to the situation which gave rise to his grievance and if appropriate to reduce remedies accordingly. Contribution denotes blameworthy conduct by Mr Key which must be established on the balance of probabilities.

[69] I find that the evidence produced by PFM in support of its concerns simply did not reach the required evidential standard required to establish contribution. I am therefore not in a position to find that Mr Key engaged in blameworthy conduct such which requires a reduction in remedies.

What if any costs should be awarded?

[70] The parties asked that costs be reserved.

[71] Mr Key as the successful party is entitled to a contribution towards his actual costs. Mr Key has 14 days from the date of this determination within which to file a costs application. PFM then has 14 days within which to respond with Mr Key having a further seven working days within which to file any reply costs submissions.

[72] This timetable will be strictly enforced so any departure from it requires the prior leave of the Authority.

[73] The Authority is likely to adopt its usual notional daily tariff based approach to costs which is currently \$3,500 per day. The parties are invited to identify any factors which they say should result in adjustments being made to the notional daily tariff.

Rachel Larmer
Member of the Employment Relations Authority