

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 713  
3053136

BETWEEN                      MUF  
   Applicant  
  
AND                              SUNCREST ORCHARD  
   LIMITED  
   Respondent

Member of Authority:        Helen Doyle

Representatives:             John Mezger, counsel for the Applicant  
   Maxine Knowler, counsel for the Respondent

Investigation Meeting:       5 September 2019 at Queenstown

Submissions [and further    6 and 20 September 2019 from the Applicant  
Information] Received:       16 September 2019 from the Respondent  
   2 October 2019 memorandum from Applicant applying  
   for non-publication  
   9 October 2019 memorandum from Respondent in  
   response to application for non-publication

Date of Determination:       16 December 2019

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**DETERMINATION OF THE AUTHORITY**

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- A        The application for non-publication is declined but there is an interim order prohibiting from publication the name of the applicant for a period of 28 days from the date of this determination to enable a challenge period to the Employment Court. The applicant is referred to by three letters randomly selected in this determination.**
- B        MUF was unjustifiably dismissed from his employment with Suncrest Orchard Limited.**

- C Taking contribution into account Suncrest Orchard Limited is ordered to pay to MUF:**
- (a) The sum of \$2,635 gross being reimbursement of lost wages under section 123 (1)(b) of the Employment Relations Act 2000**
  - (b) The sum of \$12,750 without deduction being compensation under section 123(1)(c)(i) of the Employment Relations Act 2000.**
- D Costs are reserved and a timetable set for lodging submissions.**

### **Prohibition from Publication**

[1] The applicant has applied under clause 10(1) of the second schedule to the Employment Relations Act 2000 (the Act) that his name not be published on the basis that publication will have a significant and lasting adverse consequence.

[2] Clause 10(1) of the Act provides power to the Authority to prohibit publication as follows:

1. The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.
2. ..

[3] Mr Mezger refers the Authority to the Employment Court judgment in *XYZ v ABC*.<sup>1</sup> Judge Inglis as the Chief Judge of the Employment Court was then refers to the Supreme Court judgment in *Erceg v Erceg*<sup>2</sup> and the starting point that the principle is of open justice and that a high standard must be met before the principle can be appropriately departed from.

[4] In *Erceg*<sup>3</sup> the Supreme Court stated that a party seeking non-publication must show specific adverse consequences that are significant to justify an exception to the fundamental rule. There is agreement that the standard is a high one. Mr Mezger in the application for

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<sup>1</sup> *XYZ v ABC* [2017] NZEmpC 40 at 65.

<sup>2</sup> *Erceg v Erceg* [2016] NZSC 135 at 13.

<sup>3</sup> Above n 2.

non-publication states that if the Authority determines that the test of justification in s 103A of the Act is satisfied then the applicant's name should not be published.

[5] He submits that the matter before the Authority is unprecedented and he is unaware of any employment relations matter that involves remotely similar facts where the alleged victim:

- (a) Did not make the complaint;
- (b) Contradicted the allegation maintained by the respondent;
- (c) Supported the applicant during the employer's investigation process;
- (d) Was the applicant's support person during the disciplinary meeting;
- (e) Was the applicant's friend before, during and after the investigation, disciplinary meeting and dismissal;
- (f) Communicated to the respondent that she didn't want the matter to proceed;
- (g) Reiterated to the applicant's solicitor that there was no substance to the allegation; and
- (h) After dismissal of the applicant continued to communicate with him and maintained there was no substance to the allegation.

[6] Mr Mezger submits that in light of the above publication would have a significant specific adverse consequence. He submits that associating the applicant with a sexual harassment dismissal in isolation of the context of what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal may not provide a complete representation of the entire facts or the real relationship between the applicant and alleged victim.

[7] Further that the adverse consequences are to unfairly associate the applicant to an allegation that even the alleged victim does not believe he committed and that it is requested that his name be withheld from publication of the decision.

[8] The application for non-publication of the applicant's name is not supported by the respondent. Ms Knowler submits that the test enunciated in *Erceg* requires a high standard be met before an order under clause 10(1) can be granted by the Authority and that the applicant has not identified any specific adverse consequences that are significant, at least nothing different from any other case.

[9] Ms Knowler submits that the applicant seeks to rely on his evidence surrounding the dismissal to substantiate the application rather than evidence of any specific consequences.

She submits there is no specific consequence that justifies the applicant's name being withheld from publication.

[10] The starting point is the fundamental principle of open justice and the standard to justify a departure from this fundamental principle of open justice is a high one.

[11] In essence the applicant says that if there is publication of his name he will be associated with a sexual harassment allegation in unusual circumstances. That aside there are not, as Ms Knowler submits any specific adverse consequences referred to that distinguish this from other cases that come before the Authority where an applicant challenges the justification of a dismissal for sexual harassment.

[12] The facts that provide a background to the allegation are set out in the determination and reduce a risk of the nature of the allegation being considered in isolation without reference to the necessary context and background.

[13] There is furthermore a risk that the Authority needs to weigh in these types of cases that non-publication creates a suspicion over previous employees of the respondent.

[14] Ultimately I am not persuaded that the standard to justify a departure from the fundamental principle of open justice has been met in this application for permanent non-publication of the applicant's name.

[15] The application is therefore declined.

[16] In the circumstances where non publication is an important issue for the applicant I will make an interim order prohibiting from publication his name for a period of 28 days from the date of this determination. This will enable a challenge to the Employment Court if the applicant wishes. At the end of 28 days, unless there is a further order of the Authority or Employment Court this interim order will lapse and there will be no restriction on publication.

[17] I shall refer to the applicant as MUF which are three letters randomly selected.

### **Employment Relationship Problem**

[18] MUF was employed by Suncrest Orchard Limited (Suncrest Orchard) in 2010 until 7 November 2017.

[19] Suncrest Orchard operates a large family owned orchard at Cromwell on the Kawarau George Road heading to Queenstown known as Jones Family Fruit Store. The fruit store offers a large selection of fresh and dried fruits and nuts, snacks, honey products and fruit ice cream. There are also park like gardens adjoining the shop that are free of charge to visit.

[20] As a consequence of extensive parking spaces adjacent to the State Highway with bathroom facilities Suncrest Orchard receives busloads of tourists on a daily basis who purchase produce and other stock and some do orchard tours. The tours consist largely of Asian tourists with a significant proportion of visitors from Japan.

[21] During the peak season up to 20 employees are employed on the shop floor, 125 in the orchard and 60 in the pack house with the staff demographic characterised by large numbers of young foreign itinerant workers.

[22] MUF was employed by Suncrest Orchard from 2010 until November 2017 as liaison manager. He was a valued employee earning at the time of his dismissal \$19 per hour. Part of his role was to enhance the customer's experience whilst visiting the fruit store by assisting the New Zealand staff and other seasonal staff with their interactions with the Japanese tourists. MUF initially held a visa allowing him to work in New Zealand from 2010 with Suncrest Orchard although at the material time his visa did not restrict him to working for Suncrest Orchard.

[23] On 25 October 2017 the office manager of Suncrest Orchard, Carolyn Roughan known as Merle, was alerted to an incident witnessed by a staff member. I shall call her staff member one. Staff member one told Ms Roughan that she had seen MUF touching another employee A and that A had brushed MUF's hand away. Staff member one said when talking to A at a later point A had said that he keeps doing it and she had asked him not to and that she would message him again. Ms Roughan took a note which she later had typed about what was said to her by staff member one.

[24] A is Chinese and was employed at that stage by Suncrest Orchard on a working holiday visa. It was clarified after the investigation meeting that A was employed on a three month fixed term agreement between August and November 2017.

[25] Ms Roughan spoke to the director of Suncrest Orchard Michael Jones about what staff member one had told her. They decided to review the CCTV footage of the shop floor to see

if the alleged incident had been captured on camera. The incident was located on the footage of the relevant day and it was viewed by them.

### *Preliminary investigation*

[26] Ms Roughan carried out some preliminary investigations between 25 and 31 October 2017.

[27] This included talking to A, MUF and other staff members about the matter. Notes were also taken of these additional various discussions and then Ms Roughan said that she typed them up. At the time of the investigation meeting she no longer had her handwritten notes but the Authority was provided with the typed notes.

[28] On 26 October 2017 Ms Roughan received a text message from “A” about MUF:

I know he’s only joking. We are alright. So I don’t want to get him in trouble and I don’t want this to go any further.

[29] MUF was advised that Ms Roughan would be referring her findings to management who would consider the matter and advise MUF of the outcome.

### *Invitation to a disciplinary meeting*

#### *First letter of invitation*

[30] On 1 November 2017 Ms Roughan sent a letter to MUF. The letter recorded that there had been an investigation into the inappropriate touching of another staff member on 22 October 2017. The letter stated that after considering MUF’s explanation it was considered that serious misconduct may have occurred and MUF was invited to a disciplinary meeting on 3 November at 9:00 pm. He was advised he may bring a representative or support person with him and that the matter was serious and may result in disciplinary action. Potential actions up to dismissal were set out as they appeared in the employment agreement.

[31] MUF acknowledged receipt by email of the same date and confirmed he would attend the meeting without a support person. Later in another email MUF advised Ms Roughan that A was offering to come to the meeting as a support person and asked if that was all right.

#### *Second letter of invitation*

[32] On 2 November 2017 Ms Roughan emailed MUF to advise there had been an error with the meeting time which should have been 9am and not 9pm as stated in the letter. She advised that in light of the error she would send a new letter and the meeting would be rescheduled for early the following week.

[33] The new letter which was emailed from Ms Roughan suggested a disciplinary meeting date of 6 or 7 November 2017 at 9am. It was recorded in the letter that if MUF wished his support person could be A. The notes from the preliminary investigation were attached to the letter and there was advice the camera footage from the afternoon of 22 October 2017 was too big to email but that it could be viewed the following day at the office if MUF wished. MUF said that was the first time he was aware that there had been camera footage. In the letter there was acknowledgement of MUF's advice that A would be attending. There was also reference to the fact that there had been a previous incident of a similar nature involving MUF in 2015.

[34] Ms Roughan said she included this information because she didn't think MUF was treating the matter seriously as he kept referring to the matter as joking around. She had only become aware of the previous incident on 27 October 2017.

[35] Another aspect of the second letter about which there was some focus was the change to the allegation from inappropriate touching in the letter of 1 November 2017 to sexual harassment in the letter the following day.

#### *Disciplinary meeting*

[36] A disciplinary meeting was held on 6 November 2017 which MUF attended with A as support person and Mr Jones attended with Ms Roughan. Mr Jones was the decision maker. Minutes were taken of the meeting. MUF was asked whether he wanted to look at the camera footage of the relevant incident but he declined to view it.

[37] A written account of the footage was outlined during the meeting as set out below:

At approximately 15.29 on Sunday 22 October 2017 A can be seen walking in front of the counter. MUF is seen walking over to A and touching her on the arm.

A pushes MUF's hand away.

A puts her hands behind her back and walks away from MUF to behind the counter turning her back on him.

MUF follows her and again touches her. A again pushes MUF's hand away.

At that point they were both behind the counter.

MUF then knelt down behind the counter and placed his right hand on her leg. MUF did not place anything under the counter nor did he retrieve anything from under the counter or from the floor behind the counter.

A then motioned towards another staff member, it appears she was beckoning the other staff member to come closer. She then interacted with another staff member.

[38] MUF at the disciplinary meeting provided an explanation for the incident in 2015 and explained by way of explanation to the incident on 22 October 2017 that he was "just joking" and that he did not think he had done anything wrong. A also stated that MUF was joking and that he did not mean to sexually harass her and that he had apologised and it was all right.

[39] Following the meeting there was some time taken in which Mr Jones says that he considered with Ms Roughan the information and explanations.

#### *Preliminary decision and dismissal*

[40] On 7 November Mr Jones emailed MUF advising of a preliminary decision that the allegation of serious misconduct had been upheld and that there was a proposal to terminate MUF's employment but he was given a further opportunity to be heard on the matter before management gave a final decision.

[41] MUF provided a further response dated 7 November but Mr Jones did not consider what was contained in that response sufficient to change the view on the disciplinary outcome and there was termination of MUF's employment by letter dated 7 November.

[42] MUF says that his dismissal was unjustified, substantively and procedurally and he seeks reimbursement of lost wages in the sum of \$3,100, compensation in the sum of \$15,000 together with reimbursement of costs.

[43] Suncrest Orchard says that the dismissal was justified.

#### **The Issues**

[44] The Authority needs to consider the following issues in this matter:

- (a) What does the test of justification require the Authority to consider whether there is a claim of unjustified dismissal?
- (b) What was the reason for dismissal?
- (c) What are the material documents?
- (d) What are the relevant sections in the Act about sexual harassment?
- (e) What could a fair and reasonable employer have done in the absence of a complaint from A and then advice she did not want the matter to go further?
- (f) Was there a full and fair investigation undertaken at the conclusion of which a fair and reasonable employer could have concluded that serious misconduct had occurred?
- (g) Could a fair and reasonable employer have reached the decision to dismiss?
- (h) If the dismissal was unjustified then what remedies should be awarded and are there issues of contribution?

**What does the test of justification require the Authority to consider in determining whether there is a claim of unjustified dismissal?**

[45] The Authority is asked to consider whether MUF was justifiably dismissed. In doing so it is required to apply the justification test in s 103A of the Act. The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of Suncrest Orchard and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[46] The Authority must assess under this test whether there was substantive justification for dismissal. That means that it must consider whether any conduct could be concluded fairly and reasonably by Suncrest Orchard to be misconduct of a sufficiently serious nature that could justify summary dismissal in all the circumstances.

[47] Fairness factors are set out in s 103A (3) of the Act. These are whether the allegations against MUF were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them and whether such response was

considered genuinely before dismissal. The Authority may take into account other factors as appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[48] Suncrest Orchard could be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

**What was the reason for dismissal?**

[49] MUF was dismissed for his conduct on 22 October 2017 that was concluded to be sexual harassment. It was further stated in the letter of termination that MUF's unwillingness to accept the inappropriateness of his actions is contrary to acceptable behaviour in the workplace and that Mr Jones needed to ensure the safety and wellbeing of present and future staff in the workplace.

**What are the material documents and statutory provisions?**

[50] The employment agreement provided to the Authority between MUF and Suncrest Orchard is dated 31 October 2016. For current purposes I will set out the material provisions.

[51] There is a code of conduct contained in the employment agreement. The code of conduct refers to examples of behaviour which are considered to be serious misconduct which could lead to instant dismissal. There is an example of serious misconduct of assaulting or harassing another person on Suncrest Orchard premises (including sexual harassment).

[52] There is also a disciplinary process as part of the employment agreement if misconduct is suspected. The employee is to be advised that alleged misconduct/serious misconduct is being investigated with a provision for suspension if the conduct was serious misconduct. If the investigation reveals that misconduct may have occurred then the employee is to be invited to an interview about the matter and is entitled to have a support person or representative of their choice present at the interview with a possible outcome of the meeting be dismissal or other penalty.

[53] The disciplinary process provides that the person investigating the alleged serious misconduct must ensure the matter is not prejudiced or the outcome prejudiced. There is a note that provides as follows:

Before undertaking any disciplinary action Suncrest Orchard will put their decision to the staff member to allow them a final opportunity for comment. Where the staff member fails to convince Suncrest Orchard to take some alternative action they shall then be formally disciplined accordingly.

[54] There are a number of actions in the event of serious misconduct that could be taken including instant dismissal, a reduction in remuneration, rearrangement of responsibilities and duties, demotion to a lesser position, suspension without pay or a final written warning.

[55] In the employment agreement MUF also agreed that he would be bound by the code of conduct, and policies including specifically the sexual harassment policy.

*Sexual Harassment Policy*

[56] Suncrest Orchard had a sexual harassment policy. It is a straightforward document that at the outset states:

The very clear policy of Suncrest Orchard Ltd is that any form of sexual harassment is totally unacceptable. Staff must immediately report any incident to their Supervisor/Manager or any other person in charge, as soon as is practicable.

And Staff must ensure they never engage in any actions that may be interpreted as sexual harassment.

[57] The policy provided that:

- (a) Any approach to us will remain strictly confidential;
- (b) We are there just to talk to Staff; to advise Staff of their rights, and to inform Staff of what can be done to stop any harassment; and
- (c) No one will coerce or instruct staff in what to do. The final decision will always remain with the Staff member. One of the most important steps is to decide what outcome is desired, and we will help with this decision.

[58] The policy concluded with the right of staff to take action under the provisions of the Employment Relations Act or the Human Rights Act. It stated that Suncrest Orchard prefers to proceed under the Employment Relations Act in our own grievance procedure as detailed in all employment agreements, because the matter can be dealt with much more quickly.

[59] At the end of the policy as it was then there is the following in bold “**Remember always the final decision rests with the Staff member concerned.**”

**Provisions relating to sexual harassment in the Act**

[60] MUF was dismissed for serious misconduct in relation to an allegation that his physical behaviour amounted to sexual harassment. Sexual harassment is not defined in the employment agreement or the harassment policy. Mr Mezger submits that one of the relevant circumstances under s 103A of the Act is the meaning of sexual harassment as defined in s 108 of the Act.

[61] A fair and reasonable employer could be expected to consider in the first instance the employment agreement and the policy on sexual harassment. The employment agreement provides that sexual harassment is a behaviour considered to be serious misconduct. The policy provides that any form of sexual harassment is unacceptable and recognises a right for an employee who considers they have been sexually harassed to take action either under the Act or the Human Rights Act. The relevant provisions of the Act therefore are a part of the sexual harassment policy with respect to the rights to action by an employee who complains of harassment.

[62] Ms Knowler in her submissions agreed that Suncrest Orchard would when the allegation changed from inappropriate touching to sexual harassment need to establish whether sexual harassment had occurred. She submits that Suncrest Orchard was unaware of the provisions of the Act about sexual harassment and they obtained advice from a government website instead.

[63] A did not complain to Suncrest Orchard that she had been sexually harassed or inappropriately touched by MUF. Instead a staff member expressed concern on A's behalf about what she had seen. I could not be satisfied from the evidence whether staff member one had seen the touching of A's leg or just the earlier brushing away of MUF's hand by A. On further viewing of the camera footage I find it more likely that only the brushing away of MUF's hand touching A's hand was observed because no brushing away of MUF's hand by A from her leg can be seen on the footage.

[64] Section 117 applies where there is sexual or racial harassment by a person other than the employer. It provides amongst other matter in subsections 117(1)(b) and (2) that this section applies where an employee is subject to behaviour of the kind described in s

108(1)(b)<sup>4</sup> of the Act by a person who is in the employment of the employer. The employee may make a complaint about the behaviour to their employer. The employer under s 117(3) on receiving a complaint under subsection (2) must inquire into the facts and under s 117(4) if satisfied that the behaviour took place must take whatever steps are practicable to prevent any repetition of such behaviour.

**In the absence of a complaint from A what could a fair and reasonable employer have done?**

[65] Mr Mezger submits that as A did not make a complaint to Suncrest Orchard and then was adamant that she did not wish to progress the matter at the time of the initial investigation there was no obligation on the employer to proceed as required in s117 with inquiring into the facts and taking step to prevent a repetition.

[66] A fair and reasonable employer could have been expected to have investigated staff member one's concerns. I find that Suncrest Orchard could have been expected in the circumstances of this matter to have undertaken a fuller preliminary investigation before proceeding to a finding that there may have been serious misconduct and a disciplinary process. I agree with Mr Mezger's submission to that effect.

[67] I also accept Ms Knowler's submission that the work place involved many young workers with English as a second language and some who spoke little English. Some employees may not have been aware of what was and what was not appropriate in the workplace.

[68] Staff member one raised broader concerns about MUF at the preliminary investigation stage that "he tries to get close to the young girls and had tried to with her as well." This was recorded in the preliminary investigation notes. There was no evidence to support that those concerns were investigated before MUF's employment was terminated. In his evidence MUF denied that matter and suggested there were historical issues in his relationship with staff member one that may have influenced what was said about him. The disciplinary process focussed on allegations about the incident of 22 October 2017 although there was a question that may suggest there were broader concerns asked of MUF at the disciplinary meeting on 6

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<sup>4</sup> Section 108(1)(b)(iii) of the Act provides for current purposes that an employee is sexually harassed in their employment by physical behaviour of a sexual nature that is unwelcome or offensive to that employee and that it has a detrimental effect on that employees employment, job performance or job satisfaction.

November 2017 about whether there had been any other incidents in the past and MUF responded no.

[69] I find that the broad concerns raised by staff member one should have been investigated further by a fair and reasonable employer at the preliminary stage. It is also important for an employee to have a chance to answer a potentially serious concern which has the possibility of influencing decisions made at a later stage if there is any basis to the concern.

[70] Unusually in this case sexual harassment was alleged after the preliminary investigation although A was saying quite clearly at that time that she did not want the matter to go any further and that it had been dealt with to her satisfaction. In light of that whilst a fair and reasonable employer could still proceed to carry out a disciplinary process some careful consideration would be required about the nature of the allegation and then if substantiated an appropriate outcome.

**Was there a full and fair investigation undertaken at the conclusion of which a fair and reasonable employer could have concluded that serious misconduct had occurred?**

*Preliminary investigation*

[71] Mr Mezger submits that on 27 October 2017 there was procedural unfairness at the preliminary investigation stage when MUF was advised about the complaint at an informal meeting and asked to respond. He submits that MUF was not invited to the meeting with Ms Roughan with the knowledge that it was to discuss a complaint and with an opportunity to bring a support person.

[72] Ms Knowler does not agree in her submissions that there was procedural unfairness. She submits that MUF understood the purpose of the meeting and that his explanation did not change from that given at the investigation stage of the process and the disciplinary meeting.

[73] The disciplinary process in the employment agreement did not envisage a more formal approach until an investigation revealed that misconduct may have occurred. MUF understood the nature of the complaint that he had touched A inappropriately and he knew that A had not complained. He understood that there was an investigation by Ms Roughan into whether misconduct or serious misconduct may have occurred and that if there was

misconduct then there would be a formal meeting. He knew A and others had been spoken to. To that extent I do not find unfairness.

[74] At the time of the meeting with MUF on 27 October Ms Roughan had spoken to A twice and to two staff members. MUF was not shown what they had said although he was provided with a written account of that before the disciplinary meeting on 6 November 2017. The preliminary investigation was important because it determined whether the matter went any further. What was said therefore by MUF by way of explanation was important. MUF was not told about the camera footage or encouraged to view it to respond. Both Ms Roughan and Mr Jones had seen the footage. I find the failure to disclose the complaint by staff member one, and the statements by the other staff member and A and the failure to disclose that there was camera footage of the incident was unfair and not in accordance with good faith obligations. This was not a minor procedural matter.

[75] The explanation by MUF was reasonably consistent throughout the process. MUF said by way of explanation at the preliminary investigation that he had touched A playfully at times – sometimes punching and play fighting with her. He said that some New Zealand people don't see it as a joke. He said that staff members had touched him in the past in various ways and he thought his touching of A was the same. He acknowledged that he was aware of the sexual harassment policy on the wall in the tearoom. He said that A had phoned him about the matter on Wednesday [25 October 2017].

[76] Whilst aspects of the preliminary investigation were not unfair, objectively assessed, the failure to disclose that camera footage was available and what had been said by staff member one and the other staff member and A was not fair. As earlier stated the preliminary investigation was not as extensive as one that a fair and reasonable employer could have been expected to have carried out in all the circumstances before moving to the next stage.

*Not following sexual harassment policy*

[77] Mr Mezger submits that Suncrest Orchard did not follow its own sexual harassment policy. In particular the part that the final decision will always remain with the staff member, a statement recorded twice, once in bold, in the short policy.

[78] A made her wishes clear. When she was first spoken to by Ms Roughan on 25 October and advised that there had been incidents of MUF touching her inappropriately she stated:

..he had touched her sometimes and she had asked him not to do it. He continued doing it. She asked him why he was doing it and he said it was because she was cool. She told him that it was not right. She asked him again to stop and then he stopped and apologised to her and said he would not do it again. She accepted his apology and said that he hasn't done it again. She doesn't want to get him into trouble and feels that she has accepted his apology and that should be the end of the matter.

[79] Additionally there was the text message on 26 October 2017 from A as set out earlier and a statement in the notes that A said that "she did not really mind MUF touching her." In response to that the notes record Ms Roughan saying that it was not A that had raised the issue, but someone else. Further it was written in the notes that "I [Ms Roughan] said that the matter had to be investigated, as if it was true, we would not want that happening to anybody else." I record that A was only going to be employed by Suncrest Orchard for a few weeks after 6 November 2017.

[80] There is no dispute that Suncrest Orchard did not follow its own policy to leave the final decision for the staff member (the alleged victim of harassment). I accept that a fair and reasonable employer could be expected to follow their own policies as Mr Mezger submits particularly where it expected MUF to adhere to the policy. I will examine this matter further and Ms Knowler's submissions about this in terms of fairness in the overall process after assessing what followed the preliminary investigation.

#### *Allegation changes*

[81] The initial allegation put to MUF in letter of 1 November 2017 was inappropriate touching of another staff member. On 2 November 2017 the allegation was referred to as sexual harassment of a staff member. Mr Jones, the decision maker did not accept when he was questioned that the change in the allegation was an elevation of its seriousness. Rather he saw the two allegations as interchangeable. I accept Ms Knowler's submission that the behaviour however described was captured on camera in its entirety and the focus for fairness should properly fall on the investigation and what a fair and reasonable employer could conclude.

[82] A attended as a support person for MUF. MUF explained in his email to Ms Roughan that A offered to do so and asked if that was all right. Mr Jones and Ms Roughan did not consider they could refuse this request because it was MUF's right to choose his support person. There was evidence that Suncrest Orchard employed a human resource manager.

[83] I questioned at the Authority investigation meeting the appropriateness of A as a support person. A was the person it was alleged that MUF had sexually harassed. There was a real likelihood that she would feel quite uncomfortable at a disciplinary meeting in those circumstances. The evidence supports that she appeared to be uncomfortable. There was also a possibility that after explanations had been provided A would need to be questioned further about the incident in question or other concerns. This being particularly so where A did not maintain she had been sexually harassed. A fair and reasonable employer could, I find, have declined the request for A to attend in support of MUF and could not have been criticised for doing so.

*Earlier incident in 2015*

[84] Ms Roughan said that the earlier incident was only included in the 2 November 2017 letter to emphasize the seriousness of the matter to MUF. Mr Jones said that it was not given any consideration in the decision to dismiss. I find the way the earlier incident was referred to in the letter of 2 November 2017 that invited MUF to the disciplinary meeting was that the fact of that incident increased the seriousness of the current matter.

[85] A fair and reasonable employer could find an earlier incident of similar conduct concerning to the extent that it could suggest a pattern or a lack of understanding about appropriateness of certain behaviour. Mr Mezger submits that the earlier matter was not investigated fairly from MUF's perspective. A written complaint was received in 2015 from a female employee about unwelcome touching and hugging by MUF making her uncomfortable. That was discussed with MUF by his manager, Mrs Jones, who is Mr Jones' mother. No other documentation was available other than the letter of complaint. There was no disciplinary outcome in 2015 aside from the letter of complaint being kept on the record. It appeared there was no escalation to Mr Jones or human resources of the matter. I am not persuaded that a lack of procedural fairness in those circumstances meant that no regard could be had to the earlier letter of complaint. Suncrest Orchard had obligations to keep its

employees safe and MUF had an opportunity to explain at the 6 November 2017 disciplinary meeting.

[86] MUF did not deny the touching and hugging of the complainant in 2015 but rather he said that he was not clear his actions were unwelcome saying that “he didn’t notice that she didn’t like it and she had been a friend on Facebook. The notes of the disciplinary meeting with which MUF did not take issue support him saying that it was dealt with at the time by an apology.

[87] It is difficult to see how Suncrest Orchard, having raised the earlier complaint in the context of a disciplinary process could then have put it to one side as Mr Jones says he did. I accept Mr Mezger’s submission that the earlier complaint in all likelihood coloured the outcome even if Mr Jones said that he disregarded it. For the reasons set out above I am not persuaded that it would have been unfair to have had regard to it but it was not the action of a fair and reasonable employer to fail to acknowledge that it did.

#### *Investigation inadequate*

[88] Objectively assessed the main concern about the process is that the investigation of the 22 October 2017 incident was inadequate and findings were made about matters that were not properly tested.

[89] There was a view that A’s response to the 22 October incident at the 6 November disciplinary meeting had changed and did not appear to make sense in light of the camera footage. A explained at the disciplinary meeting that MUF was joking and did not mean to sexually harass her. Concerns that her story had changed were not investigated further and should have been as part of a fair process. That is because Mr Jones concluded that it was clear at the time of the incident and when first questioned that the behaviour by MUF was not wanted by A and that there was a change in her response to the behaviour.

[90] Objectively assessed a fair and reasonable employer could and should have shown A the camera footage and asked her to explain what was happening during the 22 October 2017 incident and her reactions at various times. This should have taken place at the preliminary investigation stage but never happened. MUF did not want to see the footage at the disciplinary meeting so it was never shown to either MUF or A. The footage shows when MUF touches her hand on one occasion A does not seem happy however after he crouches

and touches her leg she appears at one point to be pointing down and then seems to smile. The benefit of A's input into the footage was not available as part of the investigation and would have been invaluable in the circumstances where conclusions about the conduct needed to be reached. MUF in his explanation did not deny touching A although he did not think he had done anything wrong. Mr Jones reached views on the footage without input from A about what was occurring and her views of the same.

[91] A fair and reasonable employer could be concerned that pressure was being applied to A about the incident. That was never investigated further although there was a conclusion reached that she had changed her story potentially as a result of either real or perceived pressure from MUF to support his response.

[92] A fair and reasonable employer could also have been expected to investigate further whether A had asked MUF to stop the touching on more than one occasion and if so when. MUF in his explanation said that she only requested this on one occasion after being spoken to by staff number one.

[93] It was further not properly investigated whether any significance could be placed on the fact that MUF apologised to A but weight seemed to have been placed on that to the extent that there was something he felt that he should apologise for. MUF was never asked why he apologised.

[94] It appeared that after the incident on 22 October 2017 A had gone to talk to another employee, who I shall refer to as M. During the preliminary investigation Ms Roughan spoke to that employee on 31 October 2017. The notes record that M said that she did not know anything about it but after everyone heard about it she was told by A that she told MUF "don't do that." She said that she was told MUF had then apologised and said he would not do it again. She also said that A and MUF are quite friendly and that he was just playing with her and that A is worried that she has made trouble for MUF.

[95] Further investigation could have been carried out with M as to whether she could recall A's state of mind on that day after the incident and other questions to better understand the nature of the relationship between A and MUF in light of the explanations and any concern about pressure.

[96] A did not wish to pursue a complaint of sexual harassment against MUF. She referred to the conduct as being of a joking type and that there had been an apology. That did create very real challenges for Suncrest Orchard notwithstanding that the incident was captured in its entirety on camera footage. I am not satisfied on an objective assessment that the investigation was adequate for the reasons set out above in all the circumstances.

#### *Pre-determination*

[97] Mr Mezger submits that there was pre-determination. He refers to the way Ms Roughan dealt with the information provided by A and that Mr Jones essentially closed his mind after viewing the camera footage to any explanation the conduct was not sexual harassment. Further that A was not listened to and assumptions were made about the apology and the 2015 incident.

[98] Ms Knowler does not accept that there was any evidence of pre-determination.

[99] Mr Jones did not I accept deliberately pre-determine what had taken place but it seems likely that after he viewed the camera footage and was advised of a similar earlier incident he was not as open minded to A's responses to the conduct and the need to question her further about his own concerns from the footage. I find that lack of an open mind is evident from the failure to conduct further investigations that objectively should have been undertaken.

#### *Conclusion on full and fair investigation*

[100] For the reasons set out above I find that the inquiry by Suncrest Orchard into the actions of MUF that were found to be sexual harassment was not carried out in a reasonable and fair manner. The procedural unfairness was not of a minor nature and it did result in unfairness.

#### **Substantive justification**

[101] The procedural unfairness in this case overlaps to a significant extent with the finding that A was sexually harassed and there was serious misconduct that could justify dismissal.

[102] Touching on the leg could be physical behaviour of a sexual nature but the absence of further investigation into A's statement that MUF was joking overlaps with the fairness and reasonableness of such a conclusion.

[103] Equally there is an overlap between procedural unfairness and any conclusion about the contact being offensive and unwelcome to A and that it caused her detriment in the workplace.

[104] I do not find given the extent of the procedural unfairness substantive justification for the dismissal.

**Could a fair and reasonable employer have reached the decision to dismiss?**

[105] I have found that the investigation by Suncrest Orchard into the allegation of sexual harassment was not carried out in a fair and reasonable manner and this procedural unfairness overlapped with the conclusion that there was substantive justification.

[106] Suncrest Orchard said that they were concerned about the explanation from MUF that he was not doing anything wrong with a responsibility to keep their present and future staff safe and they could not be assured he would not do that again. A fair and reasonable employer in all the circumstances could and should have dealt with that concern with an outcome other than dismissal. There could have been an instruction to MUF that there be no touching of anyone else in the workplace even in a joking way. There needed to be a very clear discussion about why it was important that instruction be followed.

[107] The decision to dismiss was not one that a fair and reasonable employer could have reached in all the circumstances.

[108] MUF has a personal grievance that he was unjustifiably dismissed and he is entitled to consideration of remedies.

**Remedies**

*Lost wages*

[109] MUF obtained further employment on late November 2017 and seeks lost wages in the sum of \$3,100 gross.

[110] MUF attempted to mitigate any loss appropriately.

[111] Subject to any issues of contribution he is entitled to be reimbursed for lost wages in the sum of \$3,100 gross.

### *Compensation*

[112] I accept MUF felt humiliated to be dismissed from his role for sexual harassment when A supported his view of the interactions on 22 October 2017 and continued to do so after his dismissal. He spoke of his pride being hurt and his character defamed because of why he was dismissed. Although he obtained other employment it was not as conveniently located for him as his employment with Suncrest Orchard and he was concerned about his ability to retain a work visa in New Zealand in light of the nature of the allegation.

[113] The sum of \$15,000 is claimed under this head and subject to any issue of contribution I find the sum claimed is consistent with the evidence about humiliation, loss of dignity and injury to feelings.

### *Contribution*

[114] The Authority is required under s 124 of the Act where it determines a personal grievance to consider the extent to which the actions of MUF contributed towards the situation that gave rise to the personal grievance. If those actions require then the Authority is to reduce remedies that should otherwise have been awarded.

[115] It is not until this stage that the Authority needs to consider on the balance of probabilities whether what was alleged occurred. I cannot be satisfied on the balance of probabilities that MUF sexually harassed A. That aspect of the footage where MUF crouched down and touched A's leg was particularly concerning for Suncrest Orchard but there was insufficient questioning of A about that. MUF did not say he was crouching down to talk at the disciplinary meeting but did in his evidence. I could not be satisfied that a question was clearly asked why he crouched down at the disciplinary meeting. It does look at one stage of the footage as if the A and MUF are talking whilst MUF is crouched down.

[116] I do find that MUF's actions in touching A's hand twice and then her leg were very unwise. Staff member one was concerned enough to raise the issue with Ms Roughan. It was inappropriate behaviour for the workplace even if A did not wish to pursue a complaint about it. On one occasion when A's hand was touched I am satisfied from the camera footage she did not appear to welcome that and looked disapproving. I could not be satisfied from my viewing that MUF looked around before crouching down but he did not seem to have a purpose for being behind the counter.

[117] MUF is quite a bit older than A and had worked for many years at Suncrest Orchard and she may have seen him as more senior. MUF should have known better than to have engaged in the behaviour in the workplace particularly after the 2015 incident with another employee who found his hugs and touching unwelcome.

[118] I find there was some blameworthy conduct on the part of MUF and the above awards should be reduced by 15%.

### **Orders made**

[119] Taking contribution into account I order Suncrest Orchard Limited to pay to MUF the sum of \$2,635 gross being reimbursement of lost wages under s 123(1)(b) of the Act.

[120] Taking contribution into account I order Suncrest Orchard Limited to pay to MUF the sum of \$12,750 without deduction being compensation under s 123(c)(i) of the Act.

### **Costs**

[121] I reserve the issue of costs. As the holiday season is rapidly approaching Mr Mezger has until 27 January 2020 to lodge and serve submission as to costs and Ms Knowler has until 10 February to lodge and serve submission in reply.

**Helen Doyle**  
**Member of the Employment Relations Authority**