

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 144  
3156201

BETWEEN OJI  
Applicant

AND MURRAY BOYD  
Respondent

Member of Authority: Lucia Vincent

Representatives: Ashleigh Fechney, advocate for the Applicant  
Mike Hardy-Jones, counsel for the Respondent

Investigation Meeting: 15 and 16 December 2022 at Kaikōura

Submissions received: 19 December 2022 from Applicant  
21 December 2022 from Respondent

Determination: 22 March 2023

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] The applicant (OJI) has sought to suppress her name, medical information and any details identifying her. She shared how vulnerable she felt telling her story to the Authority. She said she would feel like her privacy had been violated if her name was published. She feared being triggered due to a pre-existing medical condition.

[2] OJI's counsellor provided a letter supporting her application for non-publication, noting having OJI's private details in public would not help her mental health and recovery.

[3] The respondent's legal counsel did not express a preference on non-publication and left it to the Authority to decide.

[4] The Authority may order all or any part of evidence given or the name of any party not to be published subject to conditions the Authority thinks fit.<sup>1</sup> Although the public has an interest in legal cases and processes being transparent,<sup>2</sup> this must be balanced by any negative impact on a person supported by evidence. The Employment Court has confirmed that in most cases of sexual harassment, justice will require the name of a grievant to be protected so as not to discourage other victims coming forward.<sup>3</sup>

[5] I accept OJI could suffer adverse health consequences should her name, identifying details and medical information be published. I have also had regard to the sensitive nature of the complaint of sexual harassment and that naming OJI as a complainant could deter others from coming forward for fear of the negative consequences of being identified.

[6] I order OJI's name, medical information and identifying details be subject to a permanent non-publication order.

### **What is the employment relationship problem?**

[7] OJI came to Kaikōura to work for the respondent, Murray Boyd (Murray), in his Irish hotel, accommodation, restaurant and bar, Donegal House, in late January 2021. She stayed on site to save money and intended to tour New Zealand after a few months' work. She left a secure job at an Irish bar in Ōtautahi / Christchurch for the opportunity.

[8] OJI and Murray had met in early January 2021 after she attended a music gig in Kaikōura. Over breakfast the next day in the restaurant, she and Murray shared stories about their families and Irish heritage. Hitting it off, Murray offered OJI a role as a Barperson/Waitress with a good hourly rate and accommodation and food included. OJI eventually took the role and made the move.

[9] Although Murray and OJI got along amicably to begin with, the working relationship quickly deteriorated. OJI says she experienced inappropriate behaviour

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<sup>1</sup> Clause 10, Schedule 2, Employment Relations Act 2000 (Act).

<sup>2</sup> *Erceg v Erceg* [2017] NZSC 28.

<sup>3</sup> *Z v A* [1993] 2 ERNZ 469 at [495] – [496].

from Murray including him touching her on intimate areas of her body from her first day, causing her to feel unsafe. She also says she has inadequate breaks. She soon resigned and left Kaikōura within weeks.

[10] Murray says OJI fell out with other staff so left. His legal counsel described Donegal House as operating on the basis of informality, humour, good relationships, some hugging in appropriate circumstances and touching to move past other staff in a relatively confined space behind the bar – a culture OJI knew about before accepting the role.

[11] In legal terms, OJI says Murray sexually harassed her, failed to provide breaks, and created an unsafe work environment that caused her unjustified (constructive) dismissal. Murray rejects any sexual harassment occurred, says he provided breaks and that OJI voluntarily resigned.

### **What are the issues?**

[12] The issues requiring investigation and determination were:

- (a) Did Murray sexually harass OJI in her employment?<sup>4</sup>
- (b) Did Murray provide breaks?<sup>5</sup>
- (c) Did Murray unjustifiably (constructively) dismiss OJI?<sup>6</sup>
- (d) Alternatively, did Murray unjustifiably disadvantage OJI?<sup>7</sup>
- (e) If the answer to any of (a) to (d) above is yes, what remedies should I award?

### **How did the Authority investigate?<sup>8</sup>**

[13] The Authority has considered all the evidence including written witness statements from OJI, Murray and their witnesses (none of whom personally witnessed what OJI says Murray did). Witnesses who appeared in person or via zoom answered

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<sup>4</sup> Section 103(1)(d).

<sup>5</sup> Part 6D.

<sup>6</sup> Section 103(1)(a).

<sup>7</sup> Section 103(1)(b).

<sup>8</sup> As permitted by section 174E, 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 evidence and submissions received.

questions under oath or affirmation from the Authority and the parties' representatives. The representatives made written submissions following the investigation meeting.

### **Did Murray sexually harass OJI in her employment?**

*What is sexual harassment?*

[14] In reaching a conclusion on this issue, I must determine whether the conduct complained of meets the definition of sexual harassment. This materially requires the employee's employer:<sup>9</sup>

- (a) By the use of language (whether written or spoken) or physical behaviour of a sexual nature;
- (b) Directly or indirectly subjects that employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer); and
- (c) Either by its nature or through repetition has a detrimental effect on that employee's employment, job performance, or job satisfaction.

[15] The Court of Appeal has recently referred to relevant principles and definitions regarding sexual harassment as set out by the High Court.<sup>10</sup>

- (i) The ordinary and natural meaning of the term "sexual harassment" is intentional conduct or language of a sexual nature, in a workplace, professional or social setting, that is unwelcome, unwanted or offensive to the person who is subject to it at the time it occurs.
- (ii) Conduct or language of a "sexual" nature is that which relates to, or tends towards, or involves sexual intercourse or other forms of intimate physical contact.

[16] Assessing whether conduct is of a "sexual nature" requires an objective analysis. The remaining elements are subjective and do not require proof a person intended their conduct to be unwelcome or offensive. Nor does it require that the complainant objected to the conduct at the time.<sup>11</sup>

Accidental or inadvertent conduct, even though it may have a sexual connotation, would not amount to harassment in ordinary usage or in a statutory context. But proof of sexual harassment does not require proof that the perpetrator knew or intended that it would be unwanted or unwelcome and, in a statutory setting, that it would cause or

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<sup>9</sup> Elements set out in section 108 as they apply to this case.

<sup>10</sup> *Craig v Slater* [2020] NZCA 305 at [89] referring to *Craig v Slater* [2018] NZHC 2712 at [23] and elsewhere. Case also noted in Westlaw commentary on section 108.

<sup>11</sup> *Craig v Slater* [2018] NZHC 2712 at [402].

be likely to cause detriment. That is because, once intentional conduct or language of a sexual nature occurs, the remaining element or elements are concerned with the response 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.

[17] In the context of workplaces where one party holds a position of power or authority over another, a subordinate is at an inevitable disadvantage:<sup>12</sup>

...where a party to a work relationship who holds a position of power or authority or a senior position in the organisational hierarchy makes a sexually-oriented overture to a subordinate, the latter is necessarily at a disadvantage. The subordinate's ability to respond is inevitably compromised, whether an unwelcome approach is made in an aggressive or offensive matter or is merely flirtatious as a form of inquiry about the prospect of mutual attraction. If the subordinate is upset or offended, or simply not interested, how should they respond? Is the overture serious enough to warrant recourse to formal contractual or statutory procedures and, if not, what is the alternative? Will rejection of the advance – even if it is only a flirtatious suggestion politely declined – result in retaliation? And with what work-related consequences?

[18] Where conduct is not clearly sexual in nature, context and any repetition of behaviour becomes significant. The Employment Court has noted:<sup>13</sup>

... In such borderline cases, where the sexual nature is not immediately manifested by the manner of the physical behaviour or the nature of any accompanying words used, it may be helpful to take into account the context of the behaviour.

... Where there has been an element of repetition this can lead to a conclusion that words or acts, which individually were equivocal as to the sexuality of their nature, were indeed sexual. Where equivocal behaviour is not repeated it is not likely to be objectively viewed as sexual in nature.

[19] Applying these principles to the present case, I ask the following questions:

- (a) Did Murray use language or physical behaviour of a sexual nature?
- (b) Did OJI find that language or behaviour unwelcome or offensive (whether or not she conveyed that to Murray)?
- (c) Did that language or behaviour detrimentally affect OJI's employment, performance or satisfaction at work?

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<sup>12</sup> Above note 8, at [403].

<sup>13</sup> *Kumar v Icehouse (NZ Limited)* [2006] ERNZ 381 at [53].

*Did Murray use language or physical behaviour of a sexual nature?*

[20] To answer this question, I must decide what was more likely than not to have happened, then objectively assess whether the conduct was of a sexual nature.

*What happened?*

[21] To put the conduct in question in context, I found it helpful to start with when Murray and OJI first met. After visiting Murray at Donegal House as a guest, OJI considered the offer to work there. Following her return to Ōtautahi / Christchurch, she sent a text message to Murray enquiring about some of the details, expressing her interest in accepting the offer. Murray responded enthusiastically. After some toing and froing, the two settled on a start date at the end of January 2021.

[22] Aspects of Murray’s communication raised red flags early on. For example, he ended some of his text messages with an “x” (representing a kiss), called her “gorgeous,” “darling” and “my dear.” Murray also said things like “darling I would love you behind the bar,” and asked, “What will you be wearing 🍷” (*sic*). OJI gave Murray the benefit of the doubt but considered carefully how to respond to aspects of his communication she found unprofessional. For example, she responded with “My uniform?” to Murray’s question about attire with an emoji of a playful person cartwheeling, to which Murray replied, “Lol xx.”

[23] After agreeing on a start date and beginning work, OJI and Murray documented their employment arrangements in an individual employment agreement (Agreement). Among other things, the Agreement:

- (a) Confirmed Murray personally employed OJI.<sup>14</sup>
- (b) Recorded the “totally unacceptable” nature of sexual harassment in the workplace and undertook where it occurred to take whatever steps practicable to prevent it reoccurring.<sup>15</sup>
- (c) Expressed a commitment to ensuring a “safe and healthy work environment.”<sup>16</sup>

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<sup>14</sup> Clauses 3.2.

<sup>15</sup> Clause 15.1.

<sup>16</sup> Clause 16.1.

- (d) Included a Dispute Resolution Procedure that encouraged OJI to let Murray know immediately if she thought she had a problem in her employment but left blank the space for writing someone else's name should she feel unable to approach him<sup>17</sup>.

[24] The ability to pass each other behind the bar without touching assumed some significance at the investigation meeting. Working behind any bar requires people to move past each other at times. Donegal House was no exception. Murray measured the space behind the bar and said it was less than a metre, at about 800cm. He provided pictures showing him standing in the middle of the space, indicating it would be difficult to pass someone standing there without touching, but possible should someone stand close to the bar. OJI said she would lean against the counter to leave ample room for other staff to get through, giving the example where she and another staff member never touched each other anywhere despite passing often. She said Murray did not need to touch her to get past her behind the bar.

[25] As will be clear by now, OJI and Murray materially differ in their recollections of if, and what, happened regarding the events subject of the allegations of sexual harassment, including how necessary it was to touch someone when walking behind them at the bar. I have found it useful to refer to the notes kept by OJI about what she says happened at work, supplemented by her written statement and answers under questioning. I have compared Murray's recollections and considered what other witnesses who could comment on working behind the bar at Donegal House or elsewhere have said, then made findings about what I consider most likely to have happened.

[26] In her notes, OJI says that on her first day of work, Murray:

- (a) Put his hand on her waist while he grabbed her hip with the other (whilst walking behind her at the bar).
- (b) Placed his hand on her upper stomach when walking to the bar.
- (c) Came over to where she was sitting down and folding napkins and kissed her forehead.
- (d) Asked her to stop working and have a drink (with him).

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<sup>17</sup> Schedule B.

- (e) Asked her to follow him to the chiller area (located out the back out of sight from others) to show her where to put Tui bottles. Once there, Murray placed his hands on both her arms, pulled her towards him saying, “give me a little kiss,” and leaned in with his face towards hers until she said no and pulled back. Murray reacted by pulling her towards him again and asking for “a kiss on the cheek?” OJI said no, resisted, and he eventually let her go. She left the area shaken and returned to work.

[27] Over the course of the next two to three weeks, OJI recorded other instances:

- (a) On her second day, Murray pinched her waist with his hand and would wink at her when he walked past her. A regular patron, a friend of Murray’s, also came over to OJI while she was kneeling, hoovering, and said, “I thought while you’re down there,” and laughed.
- (b) Day three, Murray winked twice when walking past, then when showing OJI how to do something on the till, put his arm around her waist and said, “I bet you think I’m incredible.” Murray placed his hand tightly on OJI’s side while she served a customer and gripped her more tightly when she pulled away. Later in the day Murray put his hand on OJI’s lower breast/ribcage.
- (c) On her fourth day, Murray continued to wink and placed his hand on her waist.
- (d) Day five, Murray winked, put his hand on OJI’s shoulder, then slid it down her back as he walked past.
- (e) After her return to work following a few days off, Murray put his hand on OJI’s waist behind the bar.
- (f) During week three, Murray put both his hands on either side of OJI’s waist behind the bar while she was serving. She could not remember everything but wrote down that Murray called OJI out to the chiller to show her how to change a keg. Once it was changed, Murray took OJI’s face in his hands and kissed her cheek.
- (g) A few days later, Murray placed his hand on OJI’s waist while she was behind the bar. This followed an entry about a customer who called OJI

a bitch, fucking lesbian and threatened the mongrel mob on her, while Murray, who was present, said nothing.

- (h) The following day, during a conversation about getting a function room ready, Murray told OJI “I’d like to have you in a little pair of shorts and nothing else,” to which she replied, “Well that’s not happening.” That same day, whilst OJI was backed up against the corner of the bar, Murray leaned close to her and placed his hand around the back/side of OJI’s neck. When she lent away with not much room to move, Murray slid his hand down OJI’s upper chest and off her, turned his head to the side and asked for a kiss on the cheek which she declined. He responded by leaning in closer and asking again. OJI said, “Na you’re alright.” He then left. Murray had also placed his hand on her lower back while serving a customer that day.

[28] Although not recorded in her notes, in her statement of evidence and during our investigation meeting, OJI also described the following:

- (a) Murray placed his hand on her lower breast while talking to her on the restaurant floor.
- (b) While sitting at the same table as Murray and his friends or other staff during lunch, Murray tried to sit near OJI and touch her arm, hand or upper leg / thigh under the table. On the occasion when Murray touched OJI on her upper leg, another staff member saw and said to Murray “no touching!” This staff member and a customer each told OJI not to be left alone with Murray. Other customers indicated OJI should be careful around Murray.

[29] Murray denied all allegations of sexual harassment and said none of his actions and interactions with OJI were sexual in nature nor inappropriate in any way. His legal counsel referred to OJI having a sensitivity relating to preferring not to have any physical touch that was not relayed to Murray, and that her health issues were a stressor and/or explained a change in perception. I understood the submission to be that this then caused OJI to misinterpret Murray’s behaviour as being sexual in nature when it was not.

[30] Despite denying most of OJI’s account, Murray admitted aspects:

- (a) He admitted winking at OJI but denied it was suggestive and said it was stupid and intended as a joke.
- (b) He said an “x” in text messages meant a kiss.
- (c) He recalled he hugged OJI to indicate she had done a good job. However, he said it was not inappropriate nor sexual and he had his hands well up around the tops of OJI’s arms and not in any way near the more personal parts of her body. By contrast he said he would shake hands with guys or pat them on the back.
- (d) Murray said he heard someone else say, “I’d like to have you in a little pair of shorts and nothing else” (little shorts comment), which he described as fun/humour.

[31] Murray described as necessary touching OJI on the arm and/or shoulder (or to brush past) whilst moving past each other in the bar. Despite that, Murray’s own witness (also a bar owner) noted you could get past, but it would be difficult in Murray’s bar which was smaller. That witness went on to say that if he needed to pass someone, he would tap them on their foot or shoulder. This same witness described Murray as “touchy feely.” Notably, this witness (and others who had worked in bars) did not describe touching the parts of the body OJI complained about, such as the waist or hip, to signal going past. Murray also said OJI deliberately stood in the way making it difficult to get past.

[32] Given the different accounts of what did or did not happen, and in the absence of any other witnesses who saw what OJI says happened, I must make a finding about what was more likely, requiring me to assess the credibility of both OJI and Murray’s evidence. I have preferred OJI’s account for the following reasons:

- (a) OJI’s notes, made relatively soon after events occurred,<sup>18</sup> are more likely to be reliable than recollections based solely on memories many months later.<sup>19</sup> Her notes describe what happened factually without exaggeration, even recording when nothing happened.<sup>20</sup>

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<sup>18</sup> OJI said she started taking notes about a week after she started when she noticed Murray behaving inappropriately towards her, writing briefly what happened either after her shift or a couple of days after it happened (except for the first week which she recorded at the end of).

<sup>19</sup> The events complained of occurred in January and February of 2021. The investigation meeting occurred in December 2022.

<sup>20</sup> On day six when nothing happened, OJI recorded “*nothing today thank fuck.*”

- (b) OJI's other evidence was largely consistent with what her notes said. How OJI recalled events in her statement of evidence, at the investigation meeting (including under cross examination), and an email from OJI's advocate raising her personal grievance sent soon after events<sup>21</sup> (said to contain paragraphs in OJI's own words), were materially consistent.
- (c) Murray at times was mistaken. For example, he said he suspected OJI was under the influence of something based on what he observed about OJI and her room after she left. After OJI's witnesses said she abstained completely from alcohol and drugs for as long as they had known her before and after working in Kaikōura, Murray conceded he could be mistaken, and I find he was.
- (d) Murray admitted taking a more physical approach to females than males (like hugs for women and handshakes for men to show appreciation). His witness agreed Murray was a "touchy feely" person. The self-described informality at Donegal House combined with the degree of familiarity Murray assumed in his communication by using kisses and terms like gorgeous and darling with OJI are all indicative of a general lack of professional boundaries by Murray with females and OJI who was a new employee and much younger.
- (e) It is plausible Murray behaved in the way described by OJI in her notes, and he subsequently understated his physical contact towards OJI after she made a complaint. Similarly, I find it more likely than not that Murray made the little shorts comment which was not unlike his suggestive question asking what OJI would be wearing to work via text.
- (f) Murray admitted he drank at work, potentially affecting his recall of events. OJI remained sober. Although Murray says he started with zero alcohol sauvignon blanc, then would have two to three alcohol beverages in the afternoon, OJI recalled pouring sauvignon blanc containing alcohol multiple times. She also observed behaviour she described as drunk. Although Murray denied this, even moderate levels of drinking

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<sup>21</sup> On 22 February 2021.

could compromise one's ability to recall events clearly many months later.

*Sexual in nature?*

[33] Having made the factual findings above, I must now consider whether the language or behaviour can objectively be considered of a sexual nature.

[34] I accept a hug, wink or shoulder tap on its own could be considered friendly and not sexual in nature. However, Murray did not simply hug OJI once, wink occasionally or only touch her on the shoulder or arm as he walked past her behind the bar. These actions were repeated over the course of the employment relationship and accompanied by behaviour and language that I consider clearly sexual in nature.

[35] Language and behaviour I consider clearly of a sexual nature is as follows:

- (a) Murray pulling OJI towards him in a confined space out of sight of others, asking for a kiss, whilst leaning his face in towards hers. Pulling someone else's body towards yours and leaning your face in asking for a kiss physically and verbally expresses a strong desire to be physically (and I find sexually) intimate. Embracing someone in this way and requesting a "little kiss" which when declined results in pulling the person closer then asking for a "kiss on the cheek" as a consolation prize shows an inappropriate insistence for physical intimacy.
- (b) On another occasion after the example above, Murray took OJI's face in his hands and kissed her on the cheek after he had taken her to the chiller out of sight of others. This is despite OJI having clearly said no on a prior occasion to kissing him on the cheek.
- (c) Touching OJI's breast: Unless accidental or carried out for another purpose like in the course of a medical examination involving that area, touching a woman's breast is a sexually intimate form of physical contact.
- (d) Touching OJI's upper leg / thigh under the table at lunch: A reasonable person would not view touching someone's leg in this way as being appropriate in a workplace outside of an intimate relationship like that of a romantic partner. That someone who saw it intervened indicates it was obviously inappropriate.

- (e) The little shorts comment: Saying you want to see someone in a little pair of shorts and nothing else is an indirect way of saying you want to see them topless. Such language was sexually suggestive because it expressed a desire to see OJI partially naked.

[36] Even accounting for the informal and friendly culture Murray described at Donegal House, I cannot accept that the above behaviour and language can be reasonably explained as innocent humour or a friendly interaction between workmates.

[37] I have also concluded the following instances described by OJI are of a sexual nature when considered in context and due to their repetition:

- (a) Murray placing or pinching his hand(s) on OJI's waist or hip(s) as he walked past her behind the bar or when she served a customer: I find it was unnecessary to touch OJI in these areas that I consider a reasonable person would view as intimate. Murray denied touching OJI in these areas perhaps recognising in hindsight that it was inappropriate. I find on the limited occasions when Murray may have needed to signal he was going past OJI behind the bar with physical contact, rather than touch OJI's shoulder, he touched her in these inappropriately intimate areas instead, at times lingering and on other occasions pulling OJI closer when she resisted.
- (b) Touching OJI's neck, upper chest, upper stomach or sliding his hand down her back as he walked past: Again, alternatives existed to touching OJI in this way even if it was necessary to signal going past. These areas are all intimate and overly familiar places to touch someone you are not in a romantic relationship with.
- (c) Winking at OJI: Although explained as humour and stupid by Murray, I find combined with his other physical behaviour, winking at OJI was suggestive and not innocent.

[38] I am reinforced in my conclusion the conduct and language was of a sexual nature given Murray's communication and behaviour could at times be gendered. For example, he said he only hugged females (vs handshakes for males).

[39] I have had regard to the reporting relationship between Murray and OJI that created a power imbalance between them. Murray employed OJI and she potentially

risked adverse consequences should she object, especially in front of a customer. OJI described attempts to do so, including removing Murray's hand from hers when sitting at lunch with other staff present. Some instances occurred whilst OJI served a customer when there would be difficulty for OJI to resist whilst distracted by her work.

[40] It was put to OJI that as Murray is a "touchy feely" person, OJI's perception of his actions was coloured by her sensitivity to physical touch and Murray was unaware of this. I do not need to decide if that was the case, because I consider a reasonable person would have viewed Murray's behaviour and language in context, and in some instances on its own, was of a sexual nature.

[41] Standing back, considering context and assessing what a reasonable person would consider of a sexual nature, I conclude Murray's language and behaviour towards OJI was.

[42] For completeness I note two instances described by OJI involved customers. Given my findings on Murray's behaviour and language, I do not consider it necessary to decide whether these examples were of a sexual nature.<sup>22</sup>

*Did OJI find that language or behaviour unwelcome or offensive (whether or not she conveyed that to Murray)?*

[43] OJI described feeling startled by Murray's suggestive behaviour given he was her boss and much older than she was. OJI expressed feeling extremely uncomfortable and violated. She recalled freezing when he touched her and replaying the incident afterwards, beating herself up for not being able to stop the behaviour.

[44] I find OJI found Murray's behaviour unwelcome and offensive. She did not need to convey that to Murray, although on some occasions she did.

*Did that language or behaviour detrimentally affect OJI's employment, her performance or satisfaction at work?*

[45] Having experienced language and behaviour of a sexual nature she found to be unwelcome and offensive, OJI gave evidence about how she was impacted at work, which ultimately led her to resign.

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<sup>22</sup> Which would require an examination under section 117 as to whether someone other than Murray had subjected OJI to sexual harassment.

[46] I accept Murray's language or behaviour that was of a sexual nature detrimentally affected OJI's employment and satisfaction at work.

*Conclusion on whether Murray sexually harassed OJI*

[47] Having concluded the above, it follows that the definition of sexual harassment has been met and OJI has a personal grievance in terms of section 103(1)(d).

**Did Murray provide breaks?**

[48] OJI expressed concern she did not have breaks. However, she acknowledged she had a half hour paid break for lunch most days, which could be shorter or longer depending on the nature of the work that day. She also described sitting at the end of the bar away from Murray when it was quiet after her first week.

[49] OJI consistently completed timesheets the first of which recorded she had taken ten-minute breaks every day worked in her first week. She said she did not take these breaks and thought she had to tick that she had. Every timesheet included a statement requiring staff to record all breaks. Despite this, OJI did not record consistently lunch breaks she accepted she took on most if not all days during her employment, when staff sat at a table together to eat. Murray paid OJI for this break which typically lasted up to half an hour.

[50] OJI kept notes about a conversation between her and Murray regarding breaks. This included what appeared to be Murray's misunderstanding OJI had requested a paid half hour break to leave the premises (in addition to her paid lunch break). Murray described an informal approach to taking breaks when questioned, including that he paid all staff for taking a lunch break and that taking breaks if asked was no problem, provided staff didn't go off for an hour and expect to be paid.

[51] The Agreement provided for paid rest breaks of ten minutes each four-hour period, and an unpaid half hour meal break when working five hours or more.<sup>23</sup> This met minimum requirements for rest and meal breaks that at least allow for (when working between six hours and eight hours), two ten-minute paid rest breaks and one thirty-minute unpaid meal break, with additional breaks should a work period extend

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<sup>23</sup> Clause 6.5.

beyond eight hours. Timing of breaks is as agreed between the parties and in the absence of agreement, so far as is possible in the middle of a work period.<sup>24</sup>

[52] The point about breaks was not pursued in submissions. Nor did there appear to be any remedy claimed for a lack of breaks. It appeared to be a claim relating to the broader allegation of an unsafe working environment.

[53] Taking into account the informal way breaks were managed, OJI's acknowledgement she largely had lunch breaks (paid), timesheets and inconsistent practices for recording breaks, I find that OJI took breaks that met minimum requirements. Even if I am wrong in that finding, I am satisfied Murray paid OJI for her lunch break which would have met or exceeded the equivalent remuneration for time taken for rest breaks for between two to three paid ten-minute breaks.

### **Did Murray unjustifiably (constructively) dismiss OJI?**

[54] An employer can constructively dismiss an employee if they breach a duty that causes them to resign. This may include a resignation resulting from an employer breaching the implied term an employer should not (without good reason), conduct themselves in a way likely to undermine the relationship of trust and confidence critical to every employment relationship.<sup>25</sup>

[55] An employer who creates an unsafe workplace can constructively dismiss an employee if it has caused the resignation, is sufficiently serious, and results in resignation as a reasonably foreseeable consequence.<sup>26</sup> In the context of sexual harassment, the Employment Court has referred to the "but for" test for constructive dismissal i.e. would an employee have resigned, but for being subjected to sexual harassment?<sup>27</sup>

[56] I do not accept OJI resigned because of any conflict with other staff nor that she independently of her work at Donegal House, wished to leave the hospitality sector. Although OJI agreed she had some conflict with some members of staff, she said this was a stressor but not why she left. I find any such conflict that occurred was immaterial

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<sup>24</sup> Part 6D of the Act sets out minimum requirements for breaks.

<sup>25</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (1985) ERNZ Sel Cas 136, referring to *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84.

<sup>26</sup> See for example, *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union Of Workers (Inc)*[1994] 1 ERNZ 168.

<sup>27</sup> *Z v A* [1993] 2 ERNZ 469 at [483].

for OJI when deciding whether she should stay or go. OJI remained clear her reason for leaving was the sexual harassment she experienced.

[57] The evidence of OJI's prior employer, established OJI had previously worked successfully in hospitality in Ōtautahi / Christchurch, then after returning from Kaikōura, could not. The inevitable power imbalance in an employment relationship where OJI reported directly to and was employed by Murray, made a material difference in why she resigned due to the sexual harassment. But for the sexual harassment, OJI would have remained working at Donegal House for longer than she did.

[58] OJI was unjustifiably (constructively) dismissed due to Murray's unfair and unreasonable sexual harassment of her. I am satisfied she has a personal grievance for unjustified dismissal in terms of section 103(1)(a).

**Alternatively, did Murray unjustifiably disadvantage OJI?**

[59] Having found OJI was unjustifiably (constructively) dismissed, I do not address the alternative argument of unjustified disadvantage. This claim arises out of the same set of facts and does not require additional consideration.

**What remedies should I award?**

[60] Having concluded OJI has personal grievances for sexual harassment and unjustified (constructive) dismissal, I must now determine what remedies I should award. This includes consideration of any:

- (a) Compensation for any humiliation, loss of dignity, and injury to OJI's feelings?<sup>28</sup>
- (b) Reimbursement of wages or other money lost because of any personal grievance (subject to evidence of reasonable endeavours to mitigate loss)?<sup>29</sup>
- (c) Recommendation(s) to Murray concerning any action he should take to prevent further harassment?<sup>30</sup>

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<sup>28</sup> Section 123(1)(c)(i).

<sup>29</sup> Sections 123(1)(b) and 128.

<sup>30</sup> Section 123(1)(d)(ii).

- (d) Reduction for any conduct by OJI that contributed to the situation giving rise to her personal grievance?<sup>31</sup>

*Should I award OJI compensation?*

[61] Although wanting to escape the sexual harassment, OJI described feeling stressed and stuck in a role she had left her home, a secure job, support systems and friends from Ōtautahi / Christchurch for. Initially hoping to handle the situation herself, she said she cried with relief when she realised she could resign and leave.

[62] When OJI finally packed her bags, she left Kaikōura - it was too confronting to stay. She said could barely leave her room and the house. She felt exhausted, depressed with extremely low energy - like she had crashed after living on adrenaline for weeks.

[63] In the days that followed, OJI felt lost, destabilised and got upset talking about what had happened. With no accommodation, she slept on friends couches or in her car while working in her old hospitality job. But she struggled returning to hospitality without feeling stressed and triggered by male customers exhibiting similar behaviour to Murray. Eventually OJI could not cope with working in hospitality any longer. She unsuccessfully sought work in other industries after swearing she would never work in hospitality again.

[64] OJI then moved in with a friend's family for a few months. She sought help from medical professionals to help with her anxiety, anger and sadness. Her close relationships suffered.

[65] OJI described the overall impact of the sexual harassment on her as immense - emotionally, socially, financially, and domestically. She suddenly had nowhere to live, no income, and no support systems. She spent months following her time in Kaikōura withdrawing from her friends and social life. She called it a turbulent and dark time.

[66] I have considered the extent of the harm OJI suffered, where it sits when compared with other cases, then stepped back and assessed what I consider a fair and just amount in the circumstances.<sup>32</sup> I consider a total award of \$35,000 appropriate.

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<sup>31</sup> Section 124.

<sup>32</sup> Relevant factors considered in *Mikes Transport Warehouse & Anor v Vermuelen* [2021] NZEmpC 197 at [72]. See for example, average awards in the Authority rarely being above \$25,000 <https://www.employment.govt.nz/about/employment-law/compensation-and-cost-award->

*Should I reimburse OJI's wages or other money lost?*

[67] OJI has asked for reimbursement of a sum equal to the whole of the wages she has lost as a result of her personal grievance over a 61-week period, totalling \$67,637.35. She has asked the Authority to exercise its discretion to pay a sum greater than three months due to her future earning potential being limited due to being unable to earn because of the trauma caused by experiencing sexual harassment at Donegal House.

[68] The Court of Appeal discussed how the Authority's discretion ought to be exercised when considering a claim for an increased award:<sup>33</sup>

It is axiomatic that the full financial losses suffered by the respondent as a result of the unjustifiable dismissal merely set the upper limit on an award of compensation. But there is no automatic entitlement to full compensation. As the decision of this Court in *Nutter* makes clear, moderation is required in setting awards for lost remuneration. Any award of compensation in a particular case must have regard to the individual circumstances of the particular case. Having said that, as with any awards of compensation which involve a discretionary element, precision is difficult and the award will inevitably involve a broad brush approach.

[69] OJI described being unable to stay working in hospitality after she left Kaikōura. Her former employer worked with OJI before and afterwards, observed OJI being badly affected by what happened to the point she could not continue working successfully in their hospitality establishment. Other witnesses for OJI described that impact at work too. OJI also provided a letter from a Professor of Clinical Psychology she saw and who reported OJI found working in the hospitality industry untenable due to feeling hyper vigilant to any situation involving men (especially in bars), vulnerable to harassment and humiliation, and experiencing heightened anxiety, fear of further harassment and low mood. This array of symptoms made it difficult for her to comfortably sustain work.

[70] Balanced against this evidence, I must consider the counterfactual analysis of how long OJI would have worked for Murray but for her personal grievances. During her evidence, OJI accepted she only intended to work for a couple of months for Murray before using that money to travel.

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[tables/compensation-for-personal-grievance-claims-jan-jun-2022/](#) and \$35,000 awarded in *Ashby v Niwa Vessel Management Ltd* [2020] NZ EmpC 174.

<sup>33</sup> *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [36].

[71] I am not satisfied an award of 61 weeks would be appropriate given that even if OJI had stayed as long as she intended working at Donegal House, she would have stayed no more than a further two months. I accept OJI was significantly impacted and unable to work successfully in the hospitality industry after working at Donegal House. However, given how long OJI's employment would have lasted but for her personal grievances, eight weeks wages is reasonable and I award on that basis.

*Recommendation(s)?*

[72] If the Authority finds sexual harassment occurred in a workplace, then it may make a recommendation to an employer to take action to prevent further harassment.<sup>34</sup>

[73] Although OJI and Murray signed an Agreement containing a clause about sexual harassment, supported by a general dispute resolution procedure in a schedule, OJI did not approach anyone in the workplace about her concerns, nor did she feel able to approach Murray, who appeared to lack an understanding of appropriate professional boundaries and what could constitute sexual harassment.

[74] Commentary on sexual harassment complaints suggests policies ought to provide a range of ways an employee can raise concerns, recognising the rarity of a complainant adopting a "low level" approach to the perpetrator directly to attempt to resolve issues.<sup>35</sup> This can be exacerbated by a perpetrator also being someone in a senior position and fearing negative consequences should they complain.<sup>36</sup> Useful tools to support workers experiencing bullying or harassment may include an independent review of workplace culture / policies and training for everyone in a workplace.<sup>37</sup>

[75] I consider a lack of clear policy guidelines on how to identify and handle a complaint of sexual harassment contributed to the circumstances giving rise to OJI's personal grievances. I recommend Murray engage an independent person with expertise in policy development and dealing with complaints of sexual harassment to undertake a policy review together with training to address this and prevent further instances. Any policy should include range of options for resolving complaints of sexual harassment

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<sup>34</sup> Section 123(1)(d)(i)-(ii).

<sup>35</sup> Black and Townsend, "Sexual harassment complaints," Conference: Employment Law Kei Te Mahi! Stepping up to 2022 and beyond, NZLS CLE Ltd, at [463].

<sup>36</sup> See some of the barriers for workers seeking support and/or raising a complaint, including no clear or adequate reporting procedure in place, Te Kahui Tika Tangata / Human Rights Commission, "Experiences of Workplace Bullying and Harassment in Aotearoa New Zealand," published August 2022, at 8 and 58.

<sup>37</sup> Above note 36, at [60].

including an alternative contact person should an employee feel unable to approach the primary person responsible for the policy.

*Should I reduce any remedies?*

[76] Nothing OJI did contributed to the situation giving rise to her personal grievance – she cannot be blamed for being sexually harassed nor for failing to submit her complaint to Murray before resigning, given the difficult position she found herself in as an employee being harassed by her employer. No reduction in remedies is warranted.

[77] For completeness I address a point made by Murray’s legal counsel in written submissions. During the investigation meeting, one of OJI’s witnesses appeared to be speaking from a differently formatted statement of evidence. The witness agreed to send a copy of what she spoke to so it could be compared with a copy of the statement sent to the Authority and respondent. Upon inspection, the statement was almost identical in content, aside from one paragraph containing a text message sent by OJI to the witness in April 2022 saying her health was “*so much better! Since stopping hospo and having the time to cultivate a slower less stressful lifestyle, my symptoms have really reduced.*”

[78] The significance of this statement was described as raising issues of credibility among other things and a lost opportunity for Murray’s legal counsel to cross examine on it and seek full disclosure of text messages between OJI and her former employer. The reasons given for not asking to reopen evidence included inconvenience, expense and counsel’s retirement.

[79] I have considered the text message. I do not share counsel’s view of its significance and relevance to credibility. It’s relevance (if any) goes to how OJI felt over a year after events occurred. This makes no difference to the awards above. I do not agree its omission has any bearing on credibility of the witness given the remainder of the statement was almost identical and in the words of the witness. It did not affect my views of credibility for OJI and Murray.

### *Summary of orders*

[80] I order Murray pay OJI within 28 days of this determination:

- (a) Eight weeks wages totalling \$9,476 (gross);<sup>38</sup> and
- (b) Compensation of \$35,000.

[81] I recommend Murray undertake a policy review together with training as noted above.

[82] I prohibit from publication any identifying details and reference to OJI's name and medical information on a permanent basis.

### *Costs*

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

[84] If they are not able to do so and an Authority determination on costs is needed OJI may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Murray would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[85] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>39</sup>

**Lucia Vincent**  
**Member of the Employment Relations Authority**

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<sup>38</sup> Based on average weekly earnings of \$1,184.50 calculated from pay slips provided showing four weeks work totaling \$4,738 (excluding holiday pay paid of \$515.75).

<sup>39</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).