

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 306
3232059

BETWEEN WFW
 Applicant

AND ZUW
 Respondent

Member of Authority: Helen Doyle

Representatives: Mary-Jane Thomas and Steven Jones, counsel for the
 Applicant
 Belinda Allen, advocate for the Respondent

Investigation Meetings: 6 March 2024 in Invercargill
 6 May 2024 by audio visual

Submissions Received: On the day and 22 March 2024 from the Applicant
 15 March 2024 from the Respondent

Determination: 23 May 2024

DETERMINATION OF THE AUTHORITY

Prohibition from publication

[1] Both parties have applied for non-publication orders.¹

¹ Employment Relations Act Schedule 2 clause 10(1).

[2] Ms Thomas submits that the names of the applicant and two witnesses should be prohibited from publication. The grounds relied on are:

- (a) The alleged sexual nature of the personal grievances.
- (b) The ages of the applicant and one witness who was a previous employee.
- (c) That a witness is the applicant's mother and identification of her could identify the applicant.
- (d) That publication of the applicant's name could be prejudicial to her future employment opportunities.

[3] The application was not opposed on the basis that non-publication orders also extend to the name of the respondent and its director. The application for non-publication lodged on behalf of the respondent is opposed.

[4] Ms Allen made an application for non-publication of the name of the respondent company and its sole director.

[5] The grounds relied on are:

- (a) Publication would have a devastating impact on the sole director's future career prospects and ongoing success of the business because of what is alleged and the fact that the business operates in a small town.
- (b) Reputational concerns, with a potential loss of customer trust and confidence.
- (c) Issues about attracting business partners in the future.
- (d) Nature of the allegations could have a negative impact on the director personally and on his child.

[6] The Authority's discretion to grant non-publication orders is contained in clause 10 of the second schedule of the Employment Relations Act 2000 (the Act). The discretion must be exercised on a principle basis, and the onus is on those applying, to show that a non-publication order should be made.

[7] The general principle that justice should be administered openly is a strong one. A party seeking to depart from the fundamental principle of open justice is required to provide evidence identifying specific adverse consequences that should result in a non-publication order being made.²

[8] A recent Employment Court judgment referred to non-publication applications involving allegations of sexual harassment. It was stated in that judgment that in such cases:

...the public interest in open justice is stronger, and the name of the alleged harasser and their employer should not usually be protected by a non-publication order while the name of the grievant should usually be protected.³ However, where sexual harassment is not established, the principle of open justice carries less weight.⁴

[9] The sexual nature of the grievances and the age of the applicant at the material time and the previous employee who gave evidence support a departure from principle of open justice and prohibition from publication of their names. Identification of the applicant's mother would risk identifying the applicant and defeating the non-publication order. It is appropriate that a non-publication order be made for that reason.

[10] In respect of the respondent and its director a specific adverse impact requires more than reputational concerns or embarrassment that impact on the business for the principle of open justice to be displaced and non-publication orders made.⁵ The director is the alleged harasser. I acknowledge that there could be potential for impact on the director's child if non-publication orders are not made. Nothing has been supplied in support of that to enable a conclusion there would be a specific adverse consequence. I contrast this with *KN v NZ Steel Limited* where publication was likely to have a significant adverse medical effect on the health of his wife and son from affidavit evidence supplied that included medical evidence.⁶ I am not satisfied that there are specific adverse consequences sufficient for the principle of open justice to be displaced in respect of the respondent company or its director.

² *Crimson Consulting Limited v Berry* [2017] ERNZ 511.

³ *KN v NZ Steel Limited* [2024] NZEmpC 65 at [7] with reference to *ZVA* [1993] 2 ERNZ 467 at [494–495], *Boyd v OJI* [2023] NZEmpC 231 at [4],

⁴ Above n 3 with reference to *C v Air Nelson Limited* [2011] ERNZ 207 at [78].

⁵ Above n 3 with reference to *Air New Zealand Ltd v V* [2009] ERNZ 185 at [9] and *H v A Ltd* [2014] ERNZ 38 at [90] and [97].

⁶ Above n 3.

[11] The Authority makes a permanent order prohibiting from publication the name of the applicant, the name of a previous employee who gave evidence and the name of the applicant's mother and any details that may identify them.

[12] There is an interim non-publication order for the respondent and the name of its director, to enable a challenge for a period of 28 days. At the end of the 28-day period, the interim non-publication order for the respondent and the director will lapse if there has not been a challenge to the Authority determination and/or a further order of the Authority or Court.

[13] I will refer to the applicant and respondent as WFW and ZUW. A random online letter selection tool has been used to select the letters in place of the parties' names and these three letters do not bear any relation to their real names. I shall refer to the witnesses, including the director of ZUW, by alphabetical letters that do not resemble their real name. This will also apply to the extent that it is necessary to refer to other previous employees.

Parties and witnesses identified in the following way:

[14] WFW – applicant

ZUW – respondent

S – director of the respondent

Z – previous employee who gave evidence

X – applicant's mother

D – employee who worked at ZUW but did not give evidence to the Authority

E – employee who worked at ZUW, did not give evidence and is no longer living in New Zealand

Employment relationship problem

[15] WFW was employed by ZUW in an after-school role from 5 April 2022 as a takeaway food assistant when she was in year 10 at high school. She was 14 years of age and excited to commence work with ZUW. It had been her family's favourite takeaway business. WFW said

that she enjoyed the independence of having a job and earning money to buy her own things. The other workers were the same gender and a similar age to her. She developed close friendships with two of the employees,

[16] I shall refer to the sole director and shareholder of ZUW as S. WFW said in her evidence that her family had come to know S and that he was always friendly.

[17] WFW and ZUW were parties to an individual employment agreement (the employment agreement).

[18] WFW says in the first few months of employment the relationship was friendly with S.

[19] WFW said things changed a few months into her employment when S started talking to her inappropriately in a sexual manner when they were alone. She said that she became anxious and nervous about working with him, particularly when she knew she was going to be working alone with S.

[20] WFW said that she called in sick on a few occasions and then told her mother on 14 October 2022 what had been said to her by S.

[21] On 20 October 2022 she formally resigned from her employment due she says to the sexual harassment she was experiencing. WFW says that her resignation was in the nature of a constructive dismissal because she was subjected to sexual harassment by S. She also alleges that she was unjustifiably disadvantaged in her employment in that she was sexually harassed by the employer during her employment.

[22] WFW seeks by way of remedy compensation of \$20,000.00, lost wages and costs.

[23] S denies sexually harassing LFW.

[24] ZUW says that it has always treated its staff with respect, paid adult hourly rates, and not taken advantages. It denies that it is liable for any remedy.

The investigation process

[25] The parties attended mediation but the matter did not resolve.

[26] The Authority held an investigation meeting on 6 March 2024 in Invercargill. WFW and the witnesses she wanted the Authority to hear from provided written statements of evidence in accordance with a written notice of direction from the Authority dated 7 September 2023. The respondent did not. An Authority officer attempted to convey to the respondent the importance of complying with the notice of direction. On 1 March 2024 a short email was received from S that set out the sexual harassment was denied.

[27] The Authority was then advised on 4 March 2024 that Ms Allen was representing the respondent and a number of documents were provided.

[28] The Authority heard sworn or affirmed evidence from WFW, X, a previous employee who I shall call Z and S.

[29] Ms Thomas provided an oral submission on the day and some further information shortly thereafter including a statement from Z's Aunt and a suggestion that the Authority may like to hear from her as part of its investigation. Submissions were then received on behalf of ZUW and there were reply submissions.

[30] The Authority considered whether it wanted to hear evidence from Z's Aunt and decided it would be helpful as part of its investigation. A Teams meeting was arranged for 6 May 2024. Z's Aunt was affirmed and answered questions from the Authority and the representatives. Ms Thomas and Ms Allen did not wish to make further submissions.

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

The issues

[32] The Authority needs to determine the following issues in this matter:

- (a) What was the nature of the relationship?

- (b) What is the legal framework for assessing alleged sexual harassment/disadvantage and constructive dismissal?
- (c) Was WFW sexually harassed in the employment of ZUW?
- (d) Was WFW unjustifiably disadvantaged in her employment?
- (e) Was WFW unjustifiably constructively dismissed?
- (f) Is WFW entitled to consideration of remedies for compensation and reimbursement of lost wages?
- (g) Should either party contribute to the costs of representation for the other party?

What was the nature of the employment relationship?

[33] The focus of the investigation and evidence was the alleged sexual harassment.

[34] The nature of the relationship may become important if the Authority gets to the point of remedies.

[35] Some aspects of the employment agreement could indicate a casual relationship. Under a heading “Type of employment agreement” it provides that the employee will work part-time (2-10 hrs/week). It then states that the employer will give reasonable notice when asking the employee to work and the employee may choose to accept or decline the work. If the offer of work is accepted then the employee must complete it. It also states that each time the employee accepts an offer of work it is considered a new period of employment. The employment agreement also provided for pay-as-you-go holiday pay.

[36] There are other clauses in the employment agreement that would not normally be found in an employment agreement for a casual employee. There is a requirement to give two weeks’ notice if the relationship ends. There is also an abandonment clause and a restructuring provision. There is a sick leave provision with a requirement that the employee tell their manager if they are going to be on sick leave as soon as they can. There is also a requirement for the provision of medical certificates if requested or if the employee has been sick or injured for more than three days.

[37] The employment agreement on its own is unclear as to the nature of the relationship. It is necessary to determine how the relationship worked in practice.

[38] The Authority was provided with some text messages for the month of October that showed shifts and times were fixed in that way by S. Rosters/time sheets have been provided from the start of August 2022.

[39] If the Authority gets to the point of considering a remedy for lost wages it is appropriate to give both parties a further opportunity for submissions about the nature of the relationship. The Authority considers it has sufficient evidence for this issue but is open to persuasion otherwise.

Legal framework for sexual harassment/ unjustified disadvantage and unjustified constructive dismissal

Sexual harassment/unjustified disadvantage

[40] An employee may have a personal grievance that they have been sexually harassed in the employer's employment.⁷ The Authority has been asked in this matter to consider a claim of unjustified disadvantage flowing from the alleged sexual harassment. A claim of unjustified disadvantage requires the Authority consider whether sexual harassment occurred and, if so, did it cause disadvantage to WFW's employment.

[41] The definition of sexual harassment is found at s 108 of the Act and includes the use of language of a sexual nature that is unwelcome or offensive to the person subjected to it and has a detrimental effect on the employee's employment, job satisfaction or job performance.

⁷ Employment Relations Act 2000 section 103(1)(d).

Constructive dismissal

[42] In some circumstances a resignation may amount to a dismissal. The Court of Appeal stated in *Wellington Clerical Union v Greenwich*:

There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.⁸

[43] Three situations were listed by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:⁹

- (a) Where the employee is given a choice of resignation or dismissal:
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

[44] In this matter the third situation is relied on that there was a breach of duty in subjecting the applicant to sexual harassment.

[45] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. because the applicant Conduct complained of must amount to a repudiation of the contract rather than just be unreasonable. Conduct can also be a breach of an express or an implied term not to act in a manner calculated to destroy or damage the relationship of trust and confidence between an employer and an employee. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.¹⁰

⁸ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

⁹ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

¹⁰ *Auckland Electric Power Board v Auckland Provincial District Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

[46] WFW has the burden of establishing that the resignation was actually a dismissal.

Was WFW sexually harassed in her employment with ZUW by S?

[47] It will be clear from the legal framework that whether WFW was sexually harassed in her employment is the fundamental issue for resolution by the Authority.

[48] WFW said in her evidence the employment relationship that commenced in April 2022 was initially appropriate and she described the relationship with S as him coming across as more of a friend than a manager. He was the only person to whom she reported to in the business.

How WFW came to be employed

[49] WFW accepted in her evidence when questioned that her father had spoken to S about the possibility of her being employed. She agreed that her father wanted her to have employment and that there were some concerns about her “running with the wrong crowd”. Ms Allen submitted that S’s good intention in employing WFW may have been exploited. I do not draw a connection between the basis for WFW’s father approaching S about employment for his daughter and the reliability of her evidence about alleged sexual harassment. I did not hear from WFW’s father.

Snapchat and Instagram

[50] A matter that attracted some attention in the evidence and submissions was who requested S be added on Snapchat. WFW said that she added S on Snapchat a few months into her employment. WFW said that she thought it was a bit strange but other workers had also added S so she agreed.

[51] In a letter dated 6 December 2022 from Ms Thomas and Mr Jones to ZUW it was stated that a few months into her employment S initiated a request to add WFW on Snapchat. This was corrected in a letter dated 17 February 2023 from Ms Thomas and Mr Jones to ZUW’s then legal representative. It was acknowledged that WFW did add S but did so at the request of S who provided his username so he could be added. The evidence was that without the username S could not be added. That is denied by S. Ms Allen submits that that is “demonstrably false”.

The evidence did not enable the Authority to conclude one way or other about that matter. The significance of doing so also needs to be considered in respect of responses about Snapchat.

[52] WFW when questioned at the Authority investigation said that Snapchat with S was limited and there were no communications of a sexual nature. Ms Allen submitted that there was inconsistencies about the evidence and written statements about alleged Snapchat use for inappropriate messages. A perusal of the written statement of evidence does not show any evident inconsistencies about that with WFW's evidence. The focus for the alleged sexual harassment was spoken statements.

[53] A previous employee Z did refer to one inappropriate exchange by Snapchat with S. Z said in her evidence that S had also asked her to add him on Snapchat and other social media near the start of the employment. S did not accept that he did make that request.

What sexual harassment is alleged by WFW?

[54] WFW said that a few months into her employment, in or about August 2022, S started talking to her inappropriately when they were alone. She provided the following examples:

- (a) S would call her "hot", "beautiful" and "attractive".
- (b) S would ask her who "what age a man would be too old for her to date", if she had a boyfriend and when she would tell him that she did not he would tell her she should get a boyfriend. S would ask her if she was having or had sex.
- (c) S invited her to a nightclub and before she could say no, said "oh wait you're too young aren't you".
- (d) S told her that "sometimes he and his friends would share naughty things and jokes on Snapchat." He would ask her "if I would mind if he did this with her too".
- (e) S asked if WFW had sent "nudes" before.¹¹

¹¹ Nudes are sensitive photos/images.

(f) S would discuss his sex life with her and ask her for relationship advice.

Evidence from X

[55] X said that she thought the job was going well for WFW and then WFW started saying that she did not want to go to work. X said that she was insistent that WFW go to work and thought she was just being lazy. WFW told X on 14 October 2022 why she was not comfortable going to work giving the examples of statements set out earlier under WFW's evidence.

[56] X said that she did not know what to do and reached out to Ms Thomas and Mr Jones to talk about the matter. She also said that she carried out her own investigation contacting Z on the phone after obtaining parental permission to talk to her. X said that Z told her she had written a list down of statements made to her by S and provided that to her. X said that in her discussion with Z she did not talk about what WFW had told her but wanted to hear from Z about her own experiences.

[57] WFW's mother said that her daughter "loved money" and after 14 October she tried to get her to obtain other employment but she did not have the same drive.

Evidence from Z

[58] The Authority heard evidence from Z. Z was 16 years of age when she was employed by ZUW in June 2021. She commenced work with ZUW earlier than WFW and said in her evidence that at that time there were three young female employees working. For the first few months of work she found S to be pleasant and she enjoyed going to work. After a time she said that the friendship with S started to become inappropriate and she took notes of some situations that made her uncomfortable as advised by her Aunt to do.

[59] The Authority was provided with a screen shot of the notes that Z said she took on her phone at the time statements were made.

[60] Her evidence was that S:

- (a) Called her “baby”, “hot”, babe” and “honey”.
- (b) Asked Z if she wanted to “smell his hands” and he told her that his fingers had “p---- j---- on them”.
- (c) When replying to one of S’s snapchat with a photo of a drink with a pink straw in the drink asked if she had a “vibrator”.
- (d) On another occasion while at work told her that she had “no tits”.
- (e) Made a comment at work “you look like you would be a dirty little bitch”.
- (f) When she came to work with glasses on he said “you look like Mia Khalifa when you wear glasses”.
- (g) Would tell Z that she had a crush on him.
- (g) When she showed up to work without an earring S said she must have lost it because she had been f----- by her boyfriend too hard and it must have fallen out.

[61] Z said in her evidence that S would turn every conversation into something sexual even the food that they were cooking. She said that the sexualised behaviour became worse when S’s girlfriend who also worked occasionally at ZUW was away. Z said that S would talk about his relationship with his girlfriend and his sex life and she did not want to hear about this.

[62] Z said that she talked to another employee D. They felt that the sexualised behaviour was getting too much and that it had gone past a joke.

[63] The oral evidence as to what happened then differed from the written statement of evidence and an early grievance letter. The written evidence was that Z and D contacted a sexual harassment expert together. The oral evidence was that D made contact. Z said that she understood from D that the expert could come to where they worked and talk to S. The other alternative was that Z and D could talk to S directly about how his behaviour was affecting their employment.

[64] Z said that they decided to talk to S directly and both of them raised issues of concerns with S. Z put the timing of this about two weeks after D had spoken to the expert in or about February 2022 so it would have been February or March 2022.

[65] Z said in her evidence that S denied ever being sexual toward her or D and said he would call everyone “baby”, “babe” and “honey” and that was normal for him.

[66] After the discussion, Z said S’s behaviour improved. Although suggested in her written statement that she left because of his behaviour she accepted that was not the case.

[67] The Authority asked Ms Thomas whether she could establish the name of the sexual harassment expert to enable the Authority to communicate with this person as part of its investigation. Ms Thomas advised in an email was that whilst D had said when asked that she had rung a “hotline” and had spoken to a person it was not able to be confirmed with certainty who the person spoken to was. The Authority was unable therefore to make further enquiries about this aspect.

[68] Z also referred to an incident when S slapped her arm whilst she was working at the fryers. She said that one day at work D talked back to S in relation to a request that he had made and she saw him grab her around the throat a menacing way.

Z’s Aunt

[69] Z’s Aunt said in her evidence that whilst Z was working at ZUW she would often come to her house after school and before work because her home was closer to ZUW than Z’s parents’ home. She said that she had a close relationship with Z.

[70] Z’s Aunt said that Z told her on occasion that her boss had said things that made her feel uncomfortable. She recalled Z saying that he talked about his sex life but there was not a lot of detail about the concerns provided to her. Z’s Aunt said that she advised Z to write down the concerns and had also suggested that Z could go to the Police.

[71] In answer to a question, Z’s Aunt, said that she was clear about recalling that there were discussions but did not have exact dates when this occurred. She did not accept that her recollection was influenced by a desire to support Z. She said that she did not press Z for details

because she was concerned that if she did Z may close down. She said that she did not tell Z's mother because she wanted to maintain trust. Z's Aunt said that when Z discussed her concerns she was teary, confused and upset. Z's Aunt said that she had not met WFW until shortly before she gave her evidence.

S's evidence

[72] In his evidence S denied that he talked inappropriately with WFW and made the statements that she alleged that he did. The only exception to that was that he accepted he had asked WFW if she had "nudes" of D because that employee had raised concerns with him that she did. WFW agreed that conversation had taken place about D's "nudes" however she said that there was a second conversation with S about whether she had sent nudes before and that is what she was referring to as inappropriate. S provided an audio recording of a conversation with D to show that he does not communicate with employees in an inappropriate manner and that he is professional and supportive. He also provided a number of text to show that interactions he had with his employees were appropriate and positive.

[73] S denied that he had had a meeting with Z and D about what he had been saying to them and denied that he had made the comments alleged by Z. He denied the physical contact alleged of a slap and throat grab.

[74] His evidence was that both Z and WFW were not telling the truth.

Reliability of the evidence

[75] WFW is required to establish on the balance of probabilities that inappropriate statements of a sexual nature were made to her by S. Z's evidence is that she was subjected to similar inappropriate statements. Ms Thomas in final submission refers to the evidence of Z establishing that S had a propensity for making those types of comments.

[76] Ms Allen submits that the claims should be dismissed because of inconsistencies, lack of evidence and questionable motives. She correctly submits there were no witnesses to the alleged inappropriate statements alleged to have been made to WFW. With claims of sexual harassment that is not unusual. Reliability of the evidence is assessed in a principled way to

establish whether or not the sexual harassment allegations are established to the required standard of proof which is the balance of probabilities.

[77] Ms Thomas in her submission stated that the claim is not based on a workplace culture that was always inappropriate or unprofessional. Rather it is the case that on occasion there was inappropriateness by S.

[78] Ms Allen provided a comprehensive submission directed to what she says is the unreliability of evidence about sexual harassment.

Social media

[79] Reliance is placed by Ms Allen on the social media exchanges and inconsistency as set out above. WFW in her oral evidence accepted that there were no inappropriate Snapchat exchanges with S. She readily accepted matters on several occasions that were not necessarily helpful to her claim. This being one of them. It will be apparent as I work through the challenges to reliability that there are other instances. What WFW was adamant and unshaken about in questioning was that the inappropriate comments were made by S as outlined earlier.

[80] There was also a suggestion on behalf of WFW that the deletion by S of WFW from Snapchat coincided with her resignation. When WFW was asked about that at the Authority investigation meeting she accepted that it could have been earlier. S said it was on or about September 2022. As Ms Allen indicates there is no evidence to satisfy the Authority about when this occurred.

[81] To the extent that there was reference to S never following WFW on Instagram I accept Ms Thomas's submission that the Authority has inadequate evidence about this. WFW accepted that she had followed S because he had a "music video thing."

Two conversations about "nudes" or one?

[82] Ms Allen submits that the evidence about the "nudes" is misconstrued. WFW accepted that there was a discussion with S about D's "nudes". D thought that WFW had sent them on because of the way that WFW looked at her. WFW told S she had not. Having heard the evidence the discussion about D's nudes likely took place before August 2022 which is when

WFW recalled the inappropriate statements first commenced. WFW's evidence was that there was another discussion about her own "nudes." I accept that S was able to put a conversation about "nudes" in a particular context involving D but I am not satisfied that this supports a lack of credibility about a subsequent conversation that WFW recalls about being asked whether she sent "nudes".

3 October SMS message from WFW to S about one of her friends

[83] WFW asked S about ZUW hiring a male teenage friend on 3 October 2022. Ms Allen submits that this points away from a hostile work environment and sexual harassment fears. WFW said it was just an enquiry about a job for her friend. I do not find it is a matter by itself that impacts the reliability of evidence particularly given the gender of the teenager and the age of those involved.

Was WFW ever rostered alone with S?

[84] The rosters that were provided satisfy me that WFW was rostered alone for shifts on 1, 3, 8, 30 August 2022. Further for shifts on 13, 24 and 27 September and for shifts on 10 and 11 October 2022. 11 October 2022 was the last day WFW attended work. I accept Ms Allen's submission that solo shifts were not assigned only to WFW and WFW accepted that in her evidence when asked. There was opportunity for inappropriate statements to be made without others in the shop hearing.

Why did WFW not raise her concerns with other she worked with?

[85] WFW in her evidence said that she felt vulnerable and alone at work because some of the other girls had recently resigned. She said that she had no-one to confide in. Ms Allen in submissions says WFW had close friendships with others working and some knowledge that they were experiencing the same issues. The evidence supported some knowledge by WFW that there may have been similar issues experienced by others. Z for example said in her evidence she had a chat to WFW when at work and said if S did anything to tell her parents. I

took from the evidence that it was a general discussion. I am not satisfied that WFW knew what Z disclosed to X before 14 October 2022 as set out in her notes.

[86] Ms Allen submits that doubt is placed on WFW's reference to recent resignations because D had not resigned and Z resigned in September 2022. Ms Thomas submits that D and WFW were not rostered on for shifts together from 1 August 2022. The rosters/time sheets support that. I do not conclude that one month in a part time role could not be fairly categorised by WFW as a recent resignation in the case of Z. WFW would need to feel safe in talking about such concerns with her colleagues. I do not conclude the failure to confide in colleagues indicates the evidence is unreliable in the circumstances. Although submitted by Ms Allen I do not find that WFW was required to raise concerns directly with S.

Contested text messaging

[87] WFW said that she received multiple text messages from S on 14 October 2022. WFW agreed when questioned that an undated text message attached to her statement of problem as "C" had been taken out of sequence and in fact appear to have been sent on 19 October 2022. Initially from 14 October to 18 October 2022 WFW had advised she was sick. She then stopped communicating at all to S and there were 6 further text messages from S with the last one on 20 October 2022 wanting to know WFW's whereabouts. In one text message S queried why she had been at school and was not attending at work. Ms Thomas and Mr Jones sent a letter dated 20 October 2022 advising of WFW's resignation immediately and asking that contact with WFW cease immediately.

[88] The volume of text messages does not assist me in determining the reliability of the evidence overall or enable a conclusion to be reached that they were unreasonable. As Ms Allen submits they are in the main about rostering, sick leave and availability to work in the future.

Financial motives

[89] Ms Allen submits that the evidence points to WFW being financially motivated to bring a claim. Ms Allen relies on WFW's mother's evidence that she "loves money" and that "her saving are now depleted." Further reliance is placed on text messages between WFW and Z

that were provided by Ms Thomas following the end of the March Authority investigation meeting when the content became an issue. Ms Allen also relies on the oral submission from Ms Thomas to be implying that financial gain is the sole reason for claims in the Authority.

[90] I'll start with the text messages. I have replaced actual names. On 18 October 2022 WFW sent Z the following message:

Hey [Z] just wondering if u wanna take [S] thru court like thru this employment thing and idnk we might get money from him but it's algs if u don't want to u don't have to idek if I want to yet.

[91] Z responded

I will have to sit down with my parents and have a chat to them.
I'll let you know what I think about it.

[92] The next message is on 10 February 2023 from WFW to Z:

Hey [Z] [S] answered my personal grievance and its full of shit and we gonna taken it further so I was wondering if u could put in a statement u don't have to be there tho u would just have to write one it would help a lot but no pressure at all.

[93] Ms Allen submits that the messages infer a motivation to financially exploit S and an opportunity for collusion. Most applicants in the Authority seek monetary remedies as Ms Thomas stated in submissions however would usually take it for granted that someone such as a witness would know that and that it was unnecessary for that to be set out. WFW was likely relaying what her mother may have been told when she reached out to Ms Thomas and Mr Jones. I conclude it more likely that the message about the possibility of money is reflective of WFW's youth and lack of maturity.

[94] It is less likely had there been collusion to make up allegations that Z would have responded that she needed to talk with her parents. There is then a sense of some annoyance about S's response in the text message dated 10 February 2023 from WFW to Z that is less consistent with a fabrication.

[95] When questioned at the Authority investigation meeting about her motives in giving evidence, Z said that she didn't want to be at the Authority. She said that she attended to give evidence because she didn't want S to hire young girls who go through what her and WFW

went through. She said that she did not hang out with WFW and that they do not have a similar friend group and that she had not been given anything financially for a half day off work.

[96] I am not persuaded that a “love of money” makes it more likely than not that WFW would resign, make up with Z that there were inappropriate statements of a sexual nature and take a claim.

Communications with D and E are appropriate.

[97] S said in his evidence that if D had concerns about any inappropriateness as alleged then the exchanges both by text messages and as recorded in an audio recording would not show the measure of comfortableness in the employment relationship that they do including if a physical assault had taken place.

[98] I agree that text messages with D are appropriate. Exchanges with another previous employee E likewise reflect a friendly relationship.

[99] The audio recording of a conversation between S and D is appropriate in the main. There are references in a general way during the discussion to S having some relationship difficulties. I accept Ms Allen’s submissions that these are not enlarged on to any degree. I have however considered those references with a text message from S to Z provided to the Authority after the investigation meeting. The text message to Z refers to relationship difficulties for S to the extent that S says the relationship may be ending but he hopes he can get it back on track.

[100] Ms Allen submits that the test provided a necessary context for asking Z to work on a day she was having off and that Z knew S’s partner. If a context was required simply stating that there were personal issues that required dealing with could have sufficed. Discussions about issues in a relationship could support some boundary issues on the part of S about what is and what is not appropriate to talk about with young employees.

Credibility of Z’s evidence

[101] Ms Allen submits that Z’s evidence is unsubstantiated and lacks credibility. In this respect she refers to a lack of specific dates, corroborating evidence and inconsistencies in the

evidence. Some weight is placed on the undated notes, no screenshot of the inappropriate message alleged to have been sent by Snapchat and no mention in the notes of the throat grab and arm slap.

[102] Z's evidence that only D approached an expert was different to that in her written statement of evidence which was they both had approached an expert. On its own that is not persuasive that her evidence is otherwise unreliable.

[103] Ms Allen says that Z's evidence that she and D met with S and told him that some of his comments were inappropriate in February or March 2022 without a record kept of the date or time is implausible. I do not share that view. I conclude that it is less likely that Z would have made up that she had a meeting with S and that his behaviour improved if it was not true and there was some collusion with WFW to make up allegations.

[104] Z said that she took her Aunt's advice and wrote notes at the time the comments that she thought inappropriate occurred not simply on 14 October 2022 when she spoke to WFW's mother. The level of recording is not inconsistent with Z's aunt's advice to record inappropriate conversations. Dates and times of conversations were not recorded. There was no screenshot of the Snapchat preserved. There is however nothing to suggest that Z intended to pursue litigation herself. Z said in her evidence that she did not like what S was saying and she wanted it to stop as it wasn't appropriate. She said that she wanted S to stop and act like a normal boss who did not treat her in a sexual way and after D talked to a sexual harassment expert and they both spoke to S his behaviour improved.

[105] Z's evidence that she did not notice anything in respect of inappropriateness from S with WFW also points away from collusion and fabrication of a false story.

[106] There is no mention in the notes taken by Z of the alleged physical contact by S of a slap on Z's arm and a throat grab of D. The notes were about inappropriate statements which may explain the omission of the two physical contact aspects raised. The alleged throat grab occurred with another employee D rather than to Z.

[107] I found Z to be a credible and straightforward witness. I could not be satisfied that she had anything to gain from giving evidence except as she said that she did not want this to happen

to any other young female employees. Her Aunt's evidence was consistent with her own that she had been subjected to conduct by S that made her feel uncomfortable including S talking about his sex life and that she had been told to record the conduct in writing.

X's evidence

[108] X's evidence was about what her daughter told her and the impact on her. Ms Allen submits that X alleges she had a conversation with a previous employee E about the same time as she talked to Z who said she had a similar experience to WFW. This was not in the written statement of evidence. Ms Thomas submits this was because it was recognised to be hearsay evidence. The conversation with E was disclosed as the result of a question from Ms Allen during the Authority investigation meeting. No weight can be placed on it.

[109] Ms Allen has produced SMS messages that portray a friendly relationship in final submissions between E and S. I don't disagree that the messages are friendly but I have not heard from E and they do not advance matters.

Conclusion about sexual harassment

[110] I am not persuaded that the evidence of WFW and Z is not reliable and credible. For reasons I have set out above both described an initial period of employment without incident and then the commencement of inappropriate statements by S. They had similar experiences with S.

[111] WFW readily accepted matters not necessarily helpful to her claim and was a straightforward witness. Neither WFW nor Z embellished their evidence or as Ms Thomas put it they did not "put the boot in." The evidence did not support the two had colluded to provide evidence to the Authority that was false.

[112] I am satisfied on the balance of probabilities that S who is much older than Z used language of a sexual nature with WFW. WFW said that made her feel embarrassed and uncomfortable and she became anxious about working with S particularly the prospect of working with him alone. I am satisfied WFW was subjected to behaviour that was unwelcome and offensive to her and it had a detrimental effect on her employment, performance of her role and job satisfaction.

[113] That there was sexual harassment by S of WFW in her employment is established.

Was WFW unjustifiably disadvantaged in her employment?

[114] As a result of the finding above WFW has made out her claim that she suffered sexual harassment by a representative of her employer. This caused her disadvantage and the sexual harassment was an unjustified action by her employer.

Was WFW unjustifiably constructively dismissed?

[115] The resignation was caused by the sexual harassment of WFW. The sexual harassment was a serious breach of duty that made the workplace unsafe for WFW who became anxious and uncomfortable. It was foreseeable in the circumstances that WFW would resign to protect herself from further sexual harassment.

[116] WFW was constructively dismissed and the constructive dismissal was unjustified.

[117] WFW has made out both her claims of personal grievance of unjustified action causing disadvantage and unjustified constructive dismissal and is entitled to consideration of remedies.

Remedies

Lost wages

[118] I intend to timetable submissions about the nature of employment and whether it was permanent part time or casual. That is because having got to the point of remedies this may impact on any award under this head of a claim for lost wages.

[119] It is sensible to timetable for submissions about this to come in at the same time as any cost submissions. If either party considers there needs to be evidence, then this can be arranged.

Compensation

[120] In the statement of problem compensation of \$20,000 is claimed as a global remedy. I conclude it is appropriate to make a global award of compensation because the sexual harassment is inextricably linked to each personal grievances established.

[121] The evidence supported that the sexual harassment made WFW feel very anxious and uncomfortable and she got to the point where she could not bear working with S again. X confirmed the conduct resulted in a loss of confidence for WFW and a loss of trust in future employers. At the time of the investigation meeting WFW had not obtained other employment but was undertaking some training as she had left school. WFW's mother said that the sexual harassment had some impact on attendance at school and she struggled to get WFW to go to school. WFW did not continue with her schooling beyond year 11. I do not conclude the poor school attendance is due entirely to the sexual harassment as there appeared to be some historical issues but I accept it in all likelihood contributed.

[122] WFW was prescribed some medication for her anxiety and depression. I cannot conclude that the sexual harassment was the only cause for the anxiety and depression in the absence of medical evidence. I am however satisfied the sexual harassment was a reasonably significant contributing factor to an increase in anxiety levels requiring medication.

[123] There is also some evidence to support humiliation and loss of dignity for WFW when she sees S in the small town where she lives and has to take steps to avoid him. There has also been a financial impact on her that sets her apart from her friends who are in part time employment earning money.

[124] I conclude WFW suffered under all three heads in s 123(1)(c)(i) of the Act.

[125] I have considered where the evidence about the impact of the sexual harassment and dismissal sits with other cases and the nature and quantum of any award.¹² Ms Thomas and Mr Jones provided two Authority decisions in which there was an award between \$20,000 to

¹² *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

\$30,000 for compensation for not dissimilar conduct found to be in the nature of sexual harassment where. There was a finding in each of disadvantage and constructive dismissal.¹³

[126] The claim is for \$20,000 and I conclude it appropriate that there be an award of that sum for compensation for humiliation, loss of dignity and injury to feelings subject to any findings about contribution.

Contribution

[127] The Authority is required to consider whether WFW contributed to the situation that gave rise to her dismissal in a blameworthy manner.

[128] I do not conclude that there is any evidence that she did.

[129] There is no reduction to the award made above for compensation.

Summary of findings and orders made

[130] The Authority has found personal grievances of unjustified disadvantage and unjustified constructive dismissal because of sexual harassment established.

[131] Further submissions and/or evidence is to be provided about the nature of the relationship and whether it was casual or permanent part time to enable an assessment of the lost wage claim. Submissions will be timetabled to be lodged at the same time as costs submissions with a view to dealing with these in the same determination.

[132] If a party thinks further evidence is required about the nature of the relationship they are to advise the Authority Officer within 15 working days of the date of this determination so arrangements can be made.

[133] ZUW is ordered to pay to WFW the sum of \$20,000 without deduction being compensation under s 123(1)(c)(i) of the Act.

¹³ *AKD v Clarence Street Warehouse Limited* [2022] NZERA 255 and *Wilson v Restruct Construction Limited* [2019] NZERA 316.

Costs and reimbursement of lost wages

[134] Costs and the quantum of lost wages to be reimbursed are reserved.

[135] The parties are encouraged to resolve any issue of costs and/or lost wages between themselves.

[136] If the parties are unable to resolve these issues, and an Authority determination is needed, WFW may lodge, and then should serve, a memorandum on costs and a submission about the nature of the relationship so lost wages can be determined within 28 days of the date of this determination.

[137] From the date of service of that memorandum the respondent will then have 14 days to lodge any reply memorandum including submissions about the nature of the relationship. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[138] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁴

Helen Doyle
Member of the Employment Relations Authority

¹⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1