

**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.

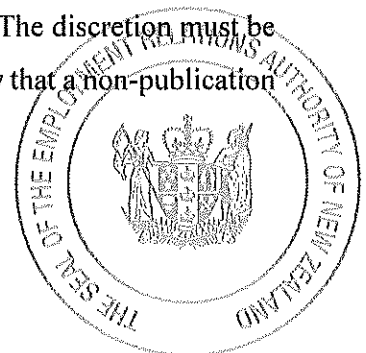
[3] The application was not opposed on the basis that non-publication orders also extend to the name of the respondent and its director. The application for non-publication lodged on behalf of the respondent is opposed.

[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 OJJ* [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

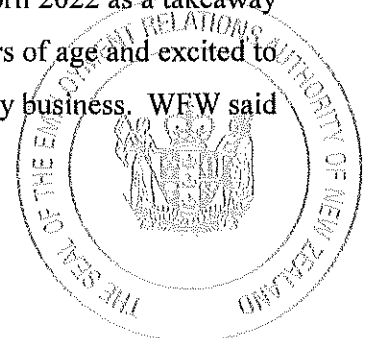
X – applicant's mother

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.

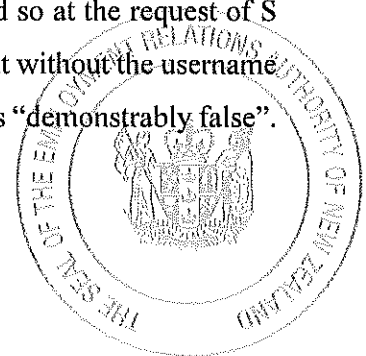
How WFW came to be employed

[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.

