

[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 snapchats 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.

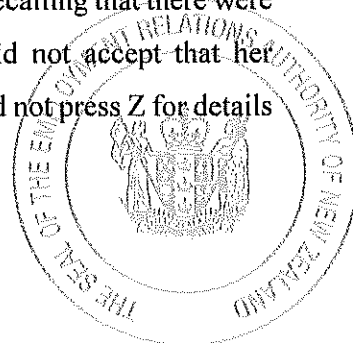
[68] Z also referred to an incident when S slapped her arm whilst she was working at the fryers. She said that one day at work D talked back to S in relation to a request that he had made and she saw him grab her around the throat a menacing way.

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.

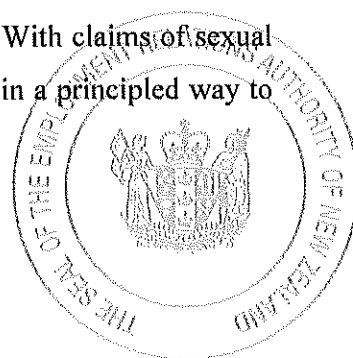
[73] S denied that he had had a meeting with Z and D about what he had been saying to them and denied that he had made the comments alleged by Z. He denied the physical contact alleged of a slap and throat grab.

[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

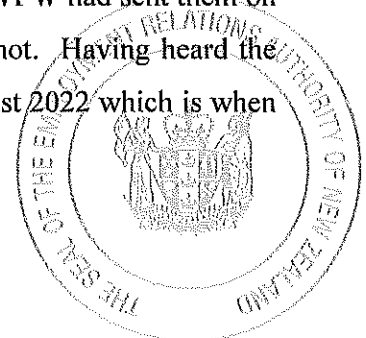
[79] Reliance is placed by Ms Allen on the social media exchanges and inconsistency as set out above. WFW in her oral evidence accepted that there were no inappropriate Snapchat exchanges with S. She readily accepted matters on several occasions that were not necessarily helpful to her claim. This being 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.

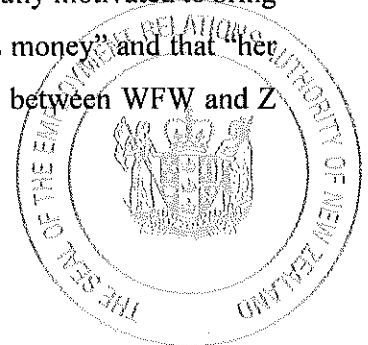
Contested text messaging

[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.

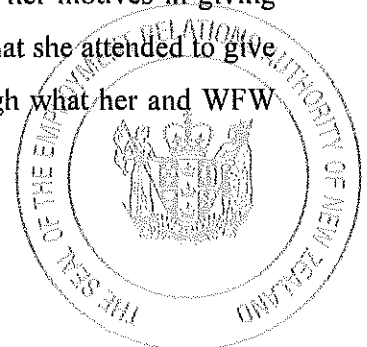
[92] The next message is on 10 February 2023 from WFW to Z:

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.

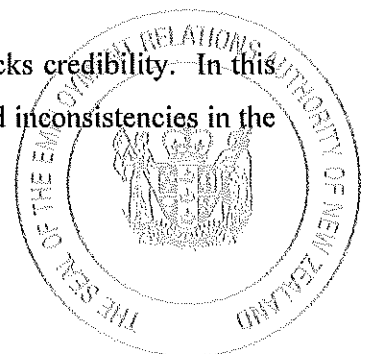
[98] I agree that text messages with D are appropriate. Exchanges with another previous employee E likewise reflect a friendly relationship.

[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.

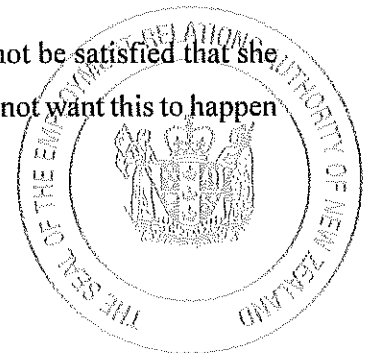
[103] Ms Allen says that Z's evidence that she and D met with S and told him that some of his comments were inappropriate in February or March 2022 without a record kept of the date or time is implausible. I do not share that view. I conclude that it is less likely that Z would have made up that she 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 grievance 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

