

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

I TE RATONGA AHUMANA TAIMAHI TĀMAKI MAKURAU ROHE

[2025] NZERA 520
3259300

BETWEEN QNZ
AND Applicant
AND RNV
Respondent

Member of Authority: Matthew Piper

Representatives: Hayley Johnson, advocate for the Applicant
AA, for the Respondent

Investigation Meeting: 12 May 2025 in Hamilton

Submissions and further information received: 21 May 2025 and 4 June 2025 from the Applicant
29 May 2025 from the Respondent

Determination: 26 August 2025

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] The Authority has broad discretion to order non-publication, including in relation to the name of any party or witness. Departure from the default principle of open justice, which generally means parties' names will be published, requires careful consideration of whether doing so would be appropriate in the circumstances.

[2] The Court has held that in the majority of cases involving a complaint of sexual harassment, the interests of justice will require that the name of a grievant be protected.¹

[3] During the Authority's investigation meeting regarding this matter, sensitive evidence was given regarding applicant's claims of sexual harassment. That the evidence was sensitive was reinforced by the fact relevant events took place when the applicant was 17 years old, and evidence was provided about her medical history.

[4] The events in question occurred in rural New Zealand in a relatively small industry. This means that publication of details of the respondent and of the witnesses would likely disclose the identity of the applicant.

[5] Accordingly, at the conclusion of the investigation meeting and after hearing from the parties on the issue, the Authority issued oral interim non-publication orders preventing publication of the parties' names and the applicant's medical information. On 13 May 2025, the day following the investigation meeting, these interim orders were recorded in writing.

[6] Each party made submissions on the issue of non-publication following the investigation meeting. The applicant made submissions in favour of orders preventing publication of the applicant's name, witnesses names and any identifying details that could lead to the identification of those individuals, largely for the reasons noted above. The respondent opposed a permanent non-publication order on the basis that a departure from the principle of open justice was not justified in the circumstances.

[7] The Authority is satisfied a non-publication order is appropriate given the sensitive content of the applicant's claims, her age and the adverse impact public disclosure may have on the applicant's mental wellbeing.

[8] Accordingly, the interim non-publication order made on 13 May 2025 is now made permanent. Pursuant to Clause 10(1) of Schedule 2 of the Employment Relations Act 2000 ("the Act"), the Authority orders that the applicant's name, the names of all witnesses and the name of the respondent are not to be published.

¹ *Z v A* [1993] 2 ERNZ 469

[9] Accordingly, three random letters have been selected to replace the parties' names and two letters have replaced the names of witnesses.

Employment relationship problem

[10] QNZ claimed that when she was 17 years old and employed by RNV, she was "groped" in a taxi by an older male a co-worker on the way home from a team dinner at which she had become intoxicated. QNZ further claimed that RNV was made aware of her concerns regarding what had happened in the taxi but it failed to take adequate steps to deal with it.

[11] QNZ said RNV's failure to address her concerns caused her significant emotional upset and resulted in her being unjustifiably disadvantaged and/ or unjustifiably dismissed from her employment.

[12] QNZ further said that by failing to deal properly with her sexual harassment concerns, RNV breached its good faith obligations to her, that penalties should be imposed on it for these breaches, and that costs should be awarded in her favour.

[13] RNV responded that any alleged sexual harassment happened outside of work and it was, therefore, not an employment issue for it to deal with. RNV said QNZ was not dismissed as she left her employment around the time she had earlier indicated she would but without communicating with it, so RNV took QNV to have resigned without giving notice.

[14] RNV denies breaching its duty of good faith to QNZ and says no penalties should be imposed on it.

The Authority's investigation

[15] For the Authority's investigation written witness statements were lodged by QNZ, her sister and coworker BB and another employee of RNV, CC.

[16] AA, RNV's sole director and shareholder and RNV's Foreman DD lodged witness statements in support of RNV. All witnesses answered questions under oath or affirmation from the Authority and the parties' representatives.

[17] Written submissions were timetabled at the end of the investigation meeting and were received from the applicant on 21 May 2025 and from the respondent on 29 May 2025. The applicant was afforded the opportunity to comment on the respondent's submissions, and did so by email on 4 June 2025.

[18] 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 made. It has not recorded all evidence and submissions received.

Background

Relevant context

[19] RNV operates a racing stable in a rural context. It usually has between five and ten employees, made up of stable-hands, jockeys and management. AA is experienced in running a business and employing people.

[20] QNZ and her sister BB both worked for RNV part-time as teenagers when they were at high school.

[21] After a break of a couple of years, QNZ recommenced working for RNV in February 2022 as a stable-hand, pursuant to an employment agreement dated 23 February 2022.

[22] AA was aware that during the time prior to QNZ's re-employment with RNV, she had experienced some difficulties with her mental health, including issues with suicidal ideation.

[23] QNZ's role as a stable-hand involved working with horses to ensure they were fed, cleaned and otherwise prepared for trackwork. Stable-hands and jockeys would overlap in their day-to-day work (in that they often worked near or alongside one another) but there was no reporting relationship between them.

[24] XX, the person said to have sexually harassed QNZ, was a jockey employed by RNV. QNZ says she and XX had a friendly working relationship and she had known him for some time because he was employed by RNV when she had first worked for it when she was still in high school.

[25] Although QNZ said that at times XX spoke to her with a suggestive undertone, she never talked about it with RNV, nor did she consider it particularly serious. They did not see each other outside of their work for RNV. XX was older than QNZ by around 6 or 7 years.

[26] Although QNZ's employment agreement recorded the employment relationship as being of indefinite duration, both QNZ and RNV were aware that QNZ would be finishing employment in around June or July 2022 to start work elsewhere.

[27] At all relevant times, DD was the foreperson of RNV. DD had worked closely with AA for more than a decade and she was considered his right-hand person at RNV. Where any operational or personnel issues arose that AA was not in a position to deal with, DD could manage them. DD was recognised by employees as having AA's delegated authority and ability to make decisions for RNV, although DD would generally refer contentious or problematic issues back to AA to address.

[28] For example, if an employee was sick they would generally contact AA. However, if he was not available they could contact DD and it would have the same effect. AA described DD as having responsibility for human resources issues.

[29] DD and QNZ had a cordial working relationship and got on well.

AA's management style

[30] AA had a robust management style and was a tough boss. He was described by QNZ, BB and CC as someone who was volatile and likely to shout or lose his cool if he considered things were not being done the right way.

[31] AA said he had strict standards for the care of his horses. A self-described perfectionist, AA felt a burden for ensuring the welfare of the stable's horses and ensuring the business was profitable.

[32] Irrespective of whether AA shouted or was otherwise volatile, QNZ, BB and CC each experienced him as a person with whom they had reasonably low psychological safety. Most relevantly, they were concerned about how he would respond if they brought a problem to him.

The company dinner and taxi ride home

[33] On or about 26 April 2022 AA hosted a dinner for RNV's employees, including XX and QNZ at a local restaurant. Dinner progressed from approximately 6:30PM through until about 11:00PM.

[34] QNZ, BB and CC told the Authority that over the course of the evening a number of participants in the dinner, including QNZ, became intoxicated. AA, who was not drinking alcohol at the dinner, told the Authority that QNZ was not intoxicated. Rather, he said, everyone was enjoying the effects of the alcohol and were "happy".

[35] AA accepted that he was the person responsible at the dinner and for QNZ at the time, given her young age. There had been no discussion with QNZ's parents regarding whether she would consume alcohol that evening and it appears AA simply facilitated the provision of alcohol to QNZ on the basis she worked in a team with adults and should be therefore "treated as an equal".

[36] AA gave evidence that at the time of the dinner he did not give any thought to the fact he was facilitating the supply of alcohol to a 17 year old and that everyone was ordering their own drinks. He further confirmed he was aware he was responsible for ensuring his employees were safe at work, but had formed the view that the event was not "at work".

[37] AA said nothing that he saw at the dinner worried him because everyone was laughing and having a good time, and he did not see any inappropriate interactions between XX and QNZ.

[38] Having considered the evidence provided to the Authority, it is more likely than not that RNV employees attending the dinner, including QNZ, became intoxicated, at least by the end of the evening.

[39] Reflective of QNZ's relatively good personal relationship with DD, at one point in the evening when DD brushed against QNZ's legs she commented that they were smooth. QNZ was not concerned about this, but said that after this comment was made by DD, XX attempted to rub his face against her leg. She noted that others at the dinner may not have seen or noticed when this happened. XX's actions were unwelcome to QNZ and made her uncomfortable.

[40] As the dinner wound to a close, AA arranged for a taxi to take everyone home. The taxi was to first take one group home before looping back and picking up others.

[41] QNZ remained behind at the restaurant with XX and BB while the taxi made a delivery of the first group to their homes. The taxi then came back and picked up QNZ, XX and BB to take them home. At the time QNZ lived in a property adjacent to BB's home and the two were to be dropped off together. Although each party had a different view on how it came to be that QNZ was in the taxi with XX, no material issue turns on this factual question.

[42] QNZ said that her intoxication meant that she fell asleep during the relatively short ride home. She said she awoke to XX leaning on her and holding or grabbing her breast. QNZ says she received a significant fright as a result and punched XX in the head. Very soon thereafter the taxi stopped short of where they had intended to be dropped off so QNZ could get away from XX. QNZ and BB jumped from the taxi and walked a short distance home.

[43] QNZ had difficulty talking to BB about the interaction with XX immediately after it had occurred because she felt shocked and was intoxicated. QNZ told the Authority she felt overwhelmed and cried for a while, before falling asleep.

The days after the company dinner

[44] On the way to work early the following morning, QNZ asked BB to tell AA and DD what had happened. From this conversation and her experience the evening prior, BB was aware that something had happened in the back of the taxi which was upsetting for QNZ, however at this stage the two had not discussed exactly what had occurred.

[45] Toward the start of the day, XX arrived at work with coffees. QNZ and XX had a tense exchange which escalated into a shouting match about the taxi incident. QNZ said XX tried to give her a coffee, which she refused, instead saying "fuck you". QNZ said XX responded that she "wanted it" last night which QNZ says she immediately denied.

[46] As requested by QNZ, BB approached AA and said QNZ had punched XX in the head the previous night because he had touched her inappropriately in the taxi. AA told the Authority he responded by saying “good on her”.

[47] Later that day AA asked XX whether anything happened in the taxi as BB had raised concerns about it with him. XX denied being punched or inappropriately touching QNZ in the taxi. AA gave evidence that he had accepted XX’s word because he had known XX for a long time and had not previously had problems with him.

[48] When the sisters got home that day they spoke further about the detail of what had happened in the taxi and BB agreed to talk to DD about it because she thought she may take the matter more seriously than AA had.

[49] Accordingly, the following day BB spoke with DD and provided her with a more detailed version of what QNZ said had happened in the taxi. BB told DD that QNZ had woken up to being touched in an unwelcome sexual manner and had punched XX before jumping out of the taxi. BB told DD that it was not a good idea for XX and QNZ to work together any longer. BB said DD responded by laughing the situation off and did not ask any further questions.

[50] Through these interactions with AA and DD, BB had made RNV aware on QNZ’s behalf that there was an allegation of sexually inappropriate behaviour (consisting of unwelcome touching) by XX in the taxi.

[51] After each of the relevant discussions BB told QNZ about the responses she had received from AA and DD. She told QNZ that neither was taking the concerns seriously and they had both brushed off the concerns about XX that had been raised with them. QNZ, who had an acute sense of vulnerability about talking about the incident, gave evidence that this was how she had anticipated AA may respond and said that was why she had not felt comfortable speaking to him about it herself.

[52] When asked by the Authority why she did not take further steps to raise the issues with AA, QNZ said she did not feel comfortable doing so both because it was a difficult topic to discuss and because of the disinterest BB had reported AA and DD had shown in what had taken place or whether any steps were needed to deal with it.

[53] A couple of days later, BB approached DD and said she was disappointed that AA had not done anything about the incident in the taxi. DD replied that if QNZ thought she had been sexually assaulted, which was the phrase BB had used when talking about it, she could take the matter to the Police because “that is a serious offence”.

[54] Both AA and DD failed to have any kind of discussion with QNZ about the alleged incident.

[55] AA said he did not approach QNZ about the incident because he had accepted XX’s account and he did not want to “stir up trouble” or make an issue where there was not one. He also considered QNZ was not credible, and he doubted anything had happened in the taxi.

[56] AA gave evidence that as an employer the issue was “out of his league” and, that it was not his place to look into something as serious as this. AA also said he had not seen any different behaviour from anyone at work, so a conversation was unnecessary.

[57] DD said her failure to seek a conversation about the incident with QNZ was because QNZ had never made a formal complaint, so she said she was not aware that QNZ felt affected by the situation. DD also felt the team communicated openly, and that QNZ could have come to her about it. DD also said that given the apparent sensitivity of the situation, she did not feel confident to approach QNZ about it herself.

[58] A few days later, DD brought up with AA what BB had said to her. DD told AA that her reply to BB was that it could be a police matter. AA told the Authority he did not consider asking DD to discuss the matter with QNZ. He said it “didn’t seem like a major, but if it was she should go to the Police”.

[59] On 26 May 2022 AA had another opportunity to engage with the seriousness of what was said to have occurred when CC gave as the reason for her resignation that she was uncomfortable with his not dealing with what she described as a “sexual assault”.

[60] CC and AA exchanged text messages on the topic and AA said that BB had provided two different stories. He also denied responsibility on the basis he considered the incident was outside work and went on to say “Remember 3 sides to every story. His, hers and the truth. We have heard only one”.

[61] AA's response to the situation occurred in the context of his being aware of QNZ's emotional vulnerabilities in recent years. AA appears to have taken this into account only as part of his disregarding the concerns she had raised.

The end of QNZ's employment

[62] QNZ continued working for the balance of May, although she said that doing so was difficult. QNZ said she ignored XX throughout this time and tried to avoid talking to him wherever possible.

[63] During these subsequent weeks, QNZ took no further steps to raise the issue with RNV. When asked why this was so, she said she had understood from BB's report back from her conversations with AA and DD that the company's attitude was dismissive of her concerns. As above, this appears to be supported on the facts.

[64] Late in May, QNZ made a complaint to the Police and went to the doctor because she said she was struggling with the after effects of the incident in the taxi. The doctor said she was not fit to work and the Police also told QNZ that it was better for her not to attend work.

[65] On 30 May 2022 QNZ sent AA a text message saying she would be unwell and not coming to work the next day because she needed to attend a doctor's appointment. He responded saying "Again!! You had the afternoon off today so if unwell why didn't you go today".

[66] From this point onwards QNZ heard nothing further from RNV, apart from when her final pay arrived in her account on 9 June 2022.

[67] At some point between 30 May 2022 and 9 June 2022 BB told AA that QNZ was feeling suicidal and the doctor had advised her not to come back to work. AA decided not to ring QNZ to find out where she was because he had never rung her before and she was only part-time. AA also said she decided not to contact QNZ because she was going to be finished within the month anyway. He said he and DD "weren't too stressed about it".

[68] AA further said that knowing QNZ's history of mental illness her saying that she may commit suicide may have just meant "she didn't want to come back to work". In other words, he did not take her wellbeing seriously and instead opted to pay out her final pay with her holiday pay, but not her notice.

[69] The only efforts RNV made to contact QNZ around this time were when DD attempted to contact her via SnapChat. DD said this was because this was the way they normally communicated, but admitted she could have tried to telephone QNZ or contact her through some other means. DD said she asked other employees what they knew about what was happening with QNZ but they did not provide her with any information.

[70] Sometime after this AA was contacted by the Police regarding QNZ's complaint about XX inappropriately touching her on 26 April 2022. AA said XX told him he was also contacted by the Police.

[71] About a week and half after her employment with RNV had ended, QNZ commenced another role.

The issues

[72] The issues requiring investigation and determination were:

- (a) Were QNZ's personal grievances raised in time?
- (b) Was QNZ sexually harassed in her employment?
- (c) Was QNZ unjustifiably disadvantaged by RNV's actions/ inactions in response to her concerns about XX touching her inappropriately?
- (d) Did RNV breach its duty of good faith to QNZ?
- (e) If so should a penalty be imposed on RNV for breach of good faith?
- (f) Was QNZ unjustifiably dismissed from her employment with RNV?
- (g) If any of QNZ's personal grievance claims succeed, what remedies should be awarded?
- (h) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by QNZ that contributed to the situation giving rise to her grievance?
- (i) What, if any, costs should be awarded?

Was QNZ's grievance raised in time?

[73] RNV claimed that QNZ failed to raise her personal grievance within 90 days of the date on which the action alleged to amount to a personal grievance occurred, as required by s 114 of the Act, and that it did not consent to it being raised out of time.

[74] RNV said that it had not received the letter dated 29 August 2022 from QNV's representative and that even if it had, the letter arrived outside of the time limit because QNV's employment had ended on 29 May 2022.

[75] The Authority was provided with correspondence from AA dated 11 September 2022 in which he refers to the applicant's "case" being "structure around lies". On balance, it is likely he is referring to the 29 August 2022 email by which QNZ's representative raised the personal grievance on her behalf. The Authority therefore finds that the 29 August 2022 letter was received by AA on behalf of RNV.

[76] Secondly, RNV said that the events potentially giving rise to a personal grievance occurred or came to the notice of QNZ on or before 29 May 2022 when her employment ended, and her representative's letter was dated 92 days after this.

[77] RNV's argument in this regard cannot be correct because QNZ called in sick in respect of 31 May 2022 and AA responded to her expressing his dissatisfaction she would be away. QNZ was therefore still employed at that point. The Authority also found that despite the lack of communication around the time from both parties, QNZ's employment ended on or around when her final pay was made on 9 June 2022. QNZ had not resigned and RNV had not informed her that her employment had ended. The payment of her final pay was therefore the ending of the employment relationship.

[78] This means the 29 August 2022 letter raised QNZ's personal grievance in time in respect of both her unjustified dismissal claim and any unjustified disadvantage that occurred between 30 May 2022 and 8 June 2022.

[79] Although most of the events underpinning QNZ's personal grievance occurred at the end of April and beginning of May 2022, the steps taken, or not taken, by RNV to respond to the situation are all relevant context to whether she was constructively dismissed and to whether she was unjustifiably disadvantaged during her final week of

employment. All of these matters are therefore in time in terms of being able to be pursued or part of her personal grievance claims.

[80] A number of earlier comments allegedly made to QNZ during her employment were also raised by her as being potential sexual harassment. These comments were not raised with RNV at the time and no specific date was provided on which these earlier comments were said to have occurred. The Authority is satisfied they were not substantively connected to the sexual harassment incident discussed in this determination and were not raised within the statutory timeframe. The Authority therefore could not investigate and determine any issues associated with those alleged earlier comments.

Was QNZ sexually harassed in her employment?

Relevant law

[81] Section 103(1)(d) of the Act says a person may have a personal grievance against their employer because of a claim they were sexually harassed in their employment. The Act anticipates two different categories of the source of the alleged harassment being either i) the employer (or a representative of the employer) or ii) a co-worker, client or customer. These two categories are dealt with by ss 108 and 117 of the Act respectively.

[82] QNZ submitted the conduct by XX meant that she was sexually harassed under s 117 of the Act, that is by someone other than a representative of their employer. The definitions of sexual harassment for the purposes of s 117 are the same as those found in s 108 of the Act and includes physical behaviour of a sexual nature that is unwelcome or offensive to the employee and by its nature has a detrimental effect on the employee's employment, job performance or job satisfaction².

[83] Where sexual harassment is reported to an employer of the kind contemplated by s 117 of the Act, the employer is bound to investigate it and, if the complaint has substance, to take whatever steps are practicable to prevent any repetition of the behaviour.

² Section 108(1)(b) of the Act.

Was XX's behaviour toward QNZ sexual harassment?

[84] QNZ provided credible evidence regarding what happened at and after the dinner. It is more likely than not that XX inappropriately touched her in the taxi in a way that was of a sexual nature. QNZ said XX's behaviour was unwelcome and offensive to her and the actions had a detrimental effect on her employment, job performance and job satisfaction. Therefore, the elements of s 108(1)(b) of the Act are satisfied.

[85] Where the elements in s 117 of the Act are made out, a person is deemed to have been sexually harassed in their employment³. Accordingly, QNZ was sexually harassed in the course of her employment.

Did the sexual harassment take place in the course of QNZ's employment?

[86] RNV argued that the events in the taxi were not work-related so QNZ could not have been sexually harassed in the course of her employment. Rather, RNV's position was that anything which took place in the taxi was a personal matter between QNZ and XX.

[87] An employer is entitled to consider conduct by an employee outside of the workplace, where it has a clear relationship with the employment of those involved. The analysis required is less about literally where the alleged conduct occurs and more about its impact or potential impact on the employer's business. The Court of Appeal has said sufficient connection to an event may be established because it may impact on the proper discharge of the employee's duties or because it impacts upon the employer's obligations to other employees.⁴

[88] In this case, QNZ was sexually harassed by a work colleague, with whom she did not otherwise have a friendship or personal relationship, after a work event and after consuming alcohol paid for by her employer. The two employees involved were then expected to work together the following day.

³ Section 108(2) of the Act.

⁴ See *Smith v Christchurch Press Company Ltd* [2001] NZLR 407 (CA)

[89] Therefore, there was sufficient connection between the inappropriate touching of QNZ by XX in the taxi and the workplace such that an obligation was created for RNV upon becoming aware that it may have occurred to deal with it. At the very least, this was because the working relationship between XX and QNZ should have been properly managed in light of her complaints to ensure her safety around XX.

[90] In reality, the interaction in the back of the taxi occurred within the context of a work event between two of RNV's employees. The fact it was during the ride home does not change this or mean RNV had no obligation to deal with it as an employment matter.

[91] For the above reasons QNZ was sexually harassed in the course of her employment with RNV.

Was QNZ unjustifiably disadvantaged by RNV's actions in response to her concerns?

Did RNV know enough about the incident to trigger an obligation to deal with it?

[92] QNZ asked BB to raise what had happened in the taxi with RNV because she felt uncomfortable raising the issue herself. QNZ was in a vulnerable position disclosing an allegation of sexual harassment involving unwelcome touching of her breast to AA, particularly given the low levels of psychological safety in their relationship.

[93] It was therefore reasonable for her to ask BB to raise the issues on her behalf.

[94] For completeness, RNV was aware of QNZ's concerns. This is because:

- a. AA acknowledges saying "good on her" upon hearing that QNZ had allegedly punched XX. In order for him to have said this he must have understood that something inappropriate occurred which resulted in her taking this action.
- b. DD's knowledge of the issue and her evidence that she suggested that QNZ go to the Police if she considered that she has been sexually assaulted.
- c. CC again raised QNZ's concerns about the incident with AA as being a matter which had not been satisfactorily addressed.

What was RNV obliged to do when it was aware QNZ may have been sexually harassed, and did it do those things?

[95] RNV's knowledge QNZ may have been sexually harassed by an older male co-worker triggered a duty to investigate the incident as part of ensuring it was taking reasonable steps to maintain a safe workplace for QNZ and in order to comply with s 117 of the Act.

[96] That RNV had a duty to take reasonable steps to maintain a safe workplace is settled law. A term requiring such is implied into all employment agreements⁵. In addition to this implied term, QNZ's employment agreement said "The employer shall take all practicable steps to ensure the safety of the employee while at work.".

[97] A minimum first step toward maintaining a safe workplace would have been for either AA or DD to have a discussion with QNZ to find out her views on what had happened, and whether any measures were necessary to ensure her safety at work. RNV failed to do this.

[98] The very limited steps RNV did take were insufficient. Speaking informally to XX and advising QNZ (through BB) to go to the Police did not discharge its obligation as her employer to address XX's conduct as a workplace concern.

[99] RNV therefore failed to take reasonable steps to maintain a safe workplace for QNZ, including taking reasonable steps to manage the risk of psychological harm flowing from unaddressed issues associated with her working alongside XX.

[100] It is also relevant to the question of providing a safe workplace that QNZ was 17 years old and RNV had supervised and paid for the provision of alcohol to her immediately prior to the events she complained of. RNV had also paid for the taxi she was in with an older male colleague, and QNZ was then obliged to work in the same relatively small workplace as XX following the incident.

[101] RNV should have been aware of the need to manage QNZ's concerns about XX's conduct toward her after the dinner event.

⁵ *Attorney-General v Gilbert* [2002] 2 NZLR 342

Was QNZ disadvantaged by RNV's failure to properly investigate?

[102] RNV's failure to take appropriate steps to investigate QNZ's concerns was, as set out above, in breach of its obligation to take reasonable steps to maintain a safe workplace and to comply with s 117 of the Act. RNV's lack of action was not what a fair and reasonable employer could have done in all the circumstances and was therefore unjustified.

[103] QNZ's employment was affected to her disadvantage by RNV's unjustified inaction because she experienced emotional upset, stress and serious discomfort at work as a result of her concerns about XX's conduct not being addressed. QNZ described trying to avoid XX at work, but had panic attacks at the thought of seeing him. Some of her former colleagues gave evidence of observing this distress.

[104] During the final weeks she worked for RNV, QNZ felt stressed and uncomfortable. There is little doubt her enjoyment of her role was adversely impacted and she experienced serious emotional distress and upset during this time owing to the fact her concerns were dismissed by AA and DD without any investigation.

[105] The level of insult to QNZ's emotional wellbeing at work could have been managed if RNV had not breached its duty to take steps to ensure she had a safe workplace. Had RNV inquired with her about what had happened and taken some form of action in response, QNZ may not have been unjustifiably disadvantaged.

[106] The unjustified disadvantage experienced by QNZ regarding RNV's lack of adequate response to the incident with XX accumulated late in her employment as she suffered significant upset from the unmanaged issues and went to the doctor on 30 May 2022. The earlier factual matters were considered as the material context for a cause of action which occurred within the 90 day period for raising a grievance.

[107] QNZ's concerns should have been adequately investigated and steps should have been taken to ensure a safe workplace was maintained for QNZ while she remained employed. RNV's failure to comply with its duties in this regard and the adverse impact this had on QNZ means she has a personal grievance for unjustified disadvantage in her employment.

Did RNV breach its good faith obligations to QNZ?

[108] Section 4 of the Act provides that parties to an employment relationship are to be “active and constructive” in maintaining a productive employment relationship and that they are required to be “responsive and communicative.”

[109] These good faith obligations underpin the scheme of the Act and should be at the heart of all employment relationships. They require the parties to genuinely engage with the other regarding issues that may impact on the employment relationship. It is not enough to claim an issue was too serious for an employer to deal with (as AA claimed here).

[110] RNV’s good faith duty to QNZ was wider than merely complying with its contractual obligations regarding maintaining a safe workplace and complying with s 117 of the Act. It was obliged to actively engage with her to ensure the maintenance of a productive employment relationship.

[111] Through her sister, QNZ raised the issue with RNV. It is difficult to fault her for not following up further given her age, health issues and the less than sympathetic response she received to her concerns about a serious inappropriate touching incident. It was for RNV through AA or DD to communicate with its employee, QNZ, regarding the issue, but that did not occur.

[112] Being responsive and communicative in the circumstances would have involved checking in with QNZ regarding what happened and whether there was anything further she needed to talk about. This would have clearly been the best thing in terms of ensuring the relationship remained productive.

[113] RNV’s failure to communicate with QNZ regarding an issue that could (and as a matter of fact did) seriously impact on the employment environment, given she continued to work alongside XX, was in breach of its good faith obligations to her.

[114] RNV’s very limited steps to communicate with QNZ at the end of her employment while knowing she was unwell but supposed to be at work also failed to meet its good faith obligations.

Was QNZ unjustifiably dismissed?

[115] An unjustified constructive dismissal may occur where a fundamental breach of duty has caused the employee to resign⁶. The breach of duty needs to be sufficiently serious as to be capable of being interpreted as a repudiation of the employment agreement and the employee ending the relationship also had to be a reasonably foreseeable result of the employer's breach.

[116] As set out above, RNV breached its duty to provide QNV with a safe workplace, to comply with s 117 of the Act to investigate her concerns and with its duty of good faith. These breaches of duty adversely impacted QNV and her confidence that RNV would take concerns about her safety at work and working relationship with XX seriously enough to keep her safe in future.

[117] Although QNZ had intended to leave her employment around this time to take another role, RNV's breaches of duty were causative of the employment relationship ending how and when it did. It was also reasonably foreseeable that by RNV not discussing QNZ's concerns with her while she continued to work near or around XX, she may feel forced to leave her employment in order to avoid him.

[118] The evidence therefore supports a claim that RNV's breaches caused the employment relationship to end. The end of QNZ's employment was, therefore, at RNV's initiation by its omissions.

[119] Accordingly, QNV was unjustifiably constructively dismissed by RNV.

What remedies should be awarded?

[120] QNZ has established personal grievances for unjustified disadvantage in her employment and unjustified constructive dismissal. The Authority may therefore provide appropriate remedies, including compensation for humiliation and injury to feelings, and lost remuneration.

⁶ *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

Distress compensation

[121] During the investigation meeting, QNZ described her upset at feeling as though she was not taken seriously and the difficulty involved in attending work in the circumstances. She described struggling, having anxious break downs and panic attacks around the time. Some of these were in front of her work colleagues, which was particularly humiliating for her.

[122] QNZ required medical support and her medical certificate recorded her as having being diagnosed with moderate adjustment disorder with anxious mood in relation to unwanted touching by XX in the taxi. QNZ also said she was adversely impacted after her employment had ended by fears of seeing people from RNV out in public.

[123] It also bears emphasis, that QNV was young at the time of the events and that RNV was aware she had experienced mental health difficulties.

[124] There was substantial overlap between QNZ's disadvantage claim and her unjustified dismissal claim, with the two arising from essentially the same concerns and conduct. In these circumstances it would be artificial to make separate awards of distress compensation for each personal grievance she has established. Accordingly a single award of distress compensation under s 123(1)(c)(i) of the Act has been made to cover all of her successful grievances.

[125] Taking into account the impact RNV's unjustified actions had on QNZ in relation to both her personal grievances for unjustified disadvantage and unjustified dismissal, an award of \$20,000 in compensation is appropriate.

Lost remuneration

[126] QNZ was not paid her two weeks' notice, but obtained other work about a week and a half after her employment with RNV had ended.

[127] QNZ is entitled to an award of lost remuneration consisting of 8 working days' pay totalling \$1,280 (gross) representing the gap between the end of her employment with RNV and the start of her new role.

Contribution

[128] Given the Authority has determined QNZ has a personal grievance and that a compensatory award is appropriate in the circumstances, it is obliged by s 124 of the Act to consider the extent to which QNZ's actions contributed to the situation that gave rise to her grievances and whether those actions mean a reduction in remedies is appropriate.

[129] Contribution in this context denotes blameworthy conduct that has been proven on the balance of probabilities. QNZ did not engage in any such blameworthy conduct.

[130] Accordingly, no reduction for contribution is appropriate in the circumstances.

Should a penalty be imposed on RNV for its breach of good faith?

[131] The Authority has a broad discretion under s 4A of the Act to impose penalties for breaches of good faith in circumstances where the breach was deliberate, serious and sustained⁷.

[132] RNV's breaches of good faith were serious in that they involved a failure to engage with QNZ regarding sensitive subject matter and because they related to a vulnerable individual.

[133] However, there is a high bar for imposition of penalties under s 4A of the Act. In addition to being serious, the breach must be deliberate and sustained. RNV argued that it did attempt to investigate the concerns QNZ raised by asking XX about them. It further said it considered they were out of work conduct and that if they were serious were more properly a Police matter.

[134] Given these considerations, although RNV breached its duty of good faith to QNZ, it did not do so in a manner which was sufficiently deliberate so as to justify the imposition of a penalty. RNV's breaches of good faith occurred as part of the facts related to QNZ's successful personal grievance claim, so the conduct has already been covered in the remedies she was awarded.

⁷ Section 4A of the Act.

[135] It is also arguable that RNV's breaches of good faith did not occur over a sufficiently long period so as to amount to their having been "sustained", which the Court has said means the failure must be "maintained continuously or without flagging over a long period".⁸

[136] For these reasons, although RNV breached its duty of good faith to QNZ, the Authority is not satisfied that it would be appropriate to impose a penalty against it for this breach.

Outcome and orders

[137] QNZ has successfully established personal grievances for unjustified disadvantage and unjustified constructive dismissal.

[138] Within 28 days of the date of this determination RNV is ordered to pay QNZ:

- a. Lost remuneration under s 128(2) of the Act of \$1,280 (gross); and
- b. Distress compensation for hurt and humiliation of \$20,000 under s 123(1)(c)(i) of the Act.

Costs

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

[140] If they are not able to do so and an Authority determination on costs is needed QNZ may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum RNV would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

⁸ *Wiles v Vice-Chancellor of the University of Auckland* (2024) 20 NZELR 584

[141] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹ Accordingly, the parties are invited to address such factors in any costs memorandum they lodge.

Matthew Piper
Member of the Employment Relations Authority

⁹ See www.era.govt.nz/determinations/awarding-costs-remedies.