

Note: This determination includes an order prohibiting publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 244
3078836

BETWEEN	CESLIN DAVIDS Applicant
AND	C & R PACKERS (1996) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Mohammad Shabani, counsel for the Applicant Ronelle Tomkinson, counsel for the Respondent
Investigation Meeting:	18 and 19 November 2020
Determination:	9 June 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] C & R Packers (1996) Ltd dismissed Cheslin Davids on 7 September 2018.
- [2] The company operates a factory in East Auckland where its employees blend and pack cleaning and cosmetic products. At the time of his dismissal Mr Davids had worked there, in the skilled role of a cosmetics blender, for three years.
- [3] On 31 August 2018 a quality controller, while carrying out a routine check along one of the packing lines in the factory, saw Mr Davids slap a worker on the buttock. The controller questioned Mr Davids about what he had done. Although Mr Davids later disputed saying so, the controller said he responded: “She likes it”. The controller’s account was that she then turned to the worker and asked if the worker did

“like it”. The controller said the worker replied “no” but that Mr Davids “always did it” even though the worker had asked him not to.

[4] The controller decided to report this incident and some other concerns she had about Mr Davids to her managers. This set off a chain of events which led to the company’s managing director Tod Ryan deciding to dismiss Mr Davids seven days later. The grounds given for dismissal were that Mr Davids had committed serious misconduct by sexually harassing an employee “on numerous occasions”.

[5] Mr Davids raised a personal grievance of unjustified dismissal. In his application to the Authority for an investigation of his grievance Mr Davids said the company’s disciplinary process was “very unfair and prejudicial”. It had relied on a complaint from the controller, who he said had a grudge against him. He said he was a close friend of the worker he was said to have harassed and the worker had not complained about his behaviour. He also said the company, in reaching its decision to dismiss him, relied on written statements signed by unnamed staff that he was not shown and was not given a proper opportunity to comment on. He also complained that the company “dug up an old identical allegation in December 2016” involving him and the same worker.

[6] In its reply to his claim the company said Mr Davids was justifiably dismissed for sexual harassment. However, if the Authority found the company had acted unjustifiably, it said any remedies should be reduced because of some similar previous conduct by Mr Davids not disclosed by other employees until after he was dismissed and because his behaviour had contributed to the situation giving rise to his grievance.

Order prohibiting publication of some information

[7] At the outset of the Authority’s investigation an order was made prohibiting publication of the name of the worker who was the subject of the incident on 31 August 2018. This order is now confirmed on a permanent, ongoing basis. The worker is referred to throughout the remainder of this determination as Witness A.

[8] Witness A was reluctant to give evidence but agreed to do so in an interview I held at the workplace shortly before the Authority’s investigation meeting. Counsel for both parties attended the interview. Witness A is a transgender person. From the demeanour of Witness A, the content of what was said in that interview and other

evidence, I was satisfied there was an element of vulnerability in the circumstances of Witness A, concerning interactions with Mr Davids and in the wider community that made the ongoing order appropriate.

[9] The company applied for similar orders prohibiting publication of the names of the controller who reported the 31 August incident and one other worker who gave evidence about interactions with Mr Davids she had found offensive. The grounds given for seeking those orders were that both would be embarrassed by public disclosure of some of their evidence about what Mr Davids said to them in various conversations. In the case of the controller, who is Muslim, this potential embarrassment was submitted to be increased by coming from what counsel described as a “very conservative” community. Mr Davids, through counsel, opposed the orders sought.

[10] Potential embarrassment for each witness, by association with information reported in their evidence, was not sufficient to displace the general principle of open justice. What they said about those interactions with Mr Davids revealed nothing which should diminish their standing in the eyes of any right-thinking person. Having considered the circumstances of the case, the content of their evidence and their respective roles in relevant events, the request in respect of publication of their names is declined.

The Authority’s investigation

[11] As already noted Witness A gave evidence in an interview held separately and prior to the Authority investigation meeting. The following five people attended the investigation meeting to answer questions, under oath or affirmation, about written statements they had provided in advance:

- Mr Davids;
- Mr Ryan;
- Chitra Reddy, the company’s operations manager;
- Naz Nisha, the quality controller who reported the 31 August incident; and
- Alison Maxwell, a worker who gave evidence about her interactions with and observations of Mr Davids on other occasions.

[12] A written witness statement from Mr Davids' wife, Renee Davids, was put aside as she was reportedly unwell on both days of the investigation and was unable to attend to answer questions.

[13] The investigation meeting ended with oral closing arguments from the parties' representatives, speaking to written submissions.

[14] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies any orders made. It has not recorded all evidence and submissions received.

[15] Findings on disputed facts are made on the balance of probabilities, that is an assessment of what was more likely than not to have occurred in relevant events. This assessment weighs what witnesses said and the extent to which points of difference may be reliably corroborated, both from the evidence of others and from documents created around the relevant time.

The issues

[16] The issues for determination in this determination were:

- (a) Was the decision Mr Ryan made on the company's behalf to dismiss Mr Davids for serious misconduct on 7 September 2018, and how Mr Ryan reached that decision what a fair and reasonable employer could have done in all the circumstances at the time, including whether:
 - the company's concerns were fully and fairly investigated;
 - the decision was made without predetermination;
 - Mr Davids was provided with the relevant information and an adequate opportunity to respond to it before a decision was made; and
 - alternatives to dismissal were adequately considered?
- (b) If the company acted unjustifiably (in dismissing Mr Davids or disadvantaging him in how that decision was reached) what remedies should be awarded, considering:
 - lost wages;
 - compensation under s123(1)(c)(i) of the Act; and

- whether, applying the principle expressed in *Salt v Fell* [2008] NZCA 128 at [83], there was misconduct by Mr Davids of a truly significant nature not discovered by the company until after his dismissal that should now be taken into account when determining any remedies to be awarded under s 123 of the Act?
- (c) If any remedies are awarded, was any reduction required under s 124 of the Act for any blameworthy conduct by Mr Davids that contributed to the situation giving rise to his grievance?
- (d) Should either party contribute to the costs of representation of the other party?

The employer's inquiry and decision to dismiss

[17] Ms Nisha talked to Mr Ryan on Friday 31 August about a number of concerns she had about Mr Davids. He asked her to put those concerns in writing. Ms Nisha did so in a written complaint addressed to Mr Ryan and Ms Reddy and dated Monday, 3 September 2018. She described three issues of concern:

- (1) [Mr Davids] has been asking me questions about my religion in a critical manner. At times he would ask me why Muslims have to be doing certain things that is not accepted in the modern world.
- (2) [Mr Davids] has also made critical comparisons between me and [Ms Reddy]. This he did twice, once when there was no one around and second time in front of other factory staff. This really upset me affecting my work. I would really appreciate if this could stop.
- (3) I saw [Mr David's] smacking [Witness A's] backside. I told him to stop because it was inappropriate behaviour. [Mr David's] said to me "She likes it".

[18] From having talked with Ms Nisha on 31 August Mr Ryan also knew she had a concern about another event that had also occurred that day where she considered Mr Davids had acted unsafely while moving pallets with a forklift hoist in the factory. This concern was added to a list of four issues Mr Ryan then told Mr Davids about on 4 September. He advised Mr Davids he would be suspended on full pay while those complaints were investigated and asked him to come to a meeting on Friday 7 September 2018. He gave Mr Davids a letter setting out those arrangements. The letter advised Mr Davids he could bring a support person to the meeting and cautioned him that the complaints were "of a serious nature and if any of these is proven then it may result in termination of your employment".

[19] The personal grievance Mr Davids raised following his dismissal did not raise any issue regarding the justifiability of his suspension or how it was imposed.

[20] The letter Mr Ryan gave him on 4 September summarised the complaints as:

- Health and Safety breach of company policy in relation to number of pallets moved at one time
- Questioning staff about their religious beliefs and commenting on their religions in a negative way
- Comparing staff to management in way that is offensive to the staff member and also the Manager concerned and doing so in front of other staff members
- Sexual harassment of staff

[21] The letter did not specify which staff member was said to have been sexually harassed but Mr David's evidence confirmed he asked Mr Ryan on 4 September who that complaint was about and Mr Ryan had told him that complaint referred to slapping Witness A on the backside.

[22] On 5 September Ms Reddy interviewed Ms Nisha, Witness A and three other workers seeking information in relation to those complaints. Following those interviews she prepared a brief typewritten statement for each employee and arranged for each person to check and sign their statement. As established from her evidence to the Authority investigation, some of those statements included more than she had recorded in hand written notes she took during those interviews. Rather, each statement was Ms Reddy's summary of what each worker said. She also told each person who signed a statement that their identity would not be disclosed to Mr Davids.

[23] At the scheduled disciplinary meeting held on 7 September Mr Davids was asked about his response to each complaint. He gave a different account from Ms Nisha about what happened when he moved some pallets. He said she had shouted at him about dropping a pallet and he had responded by comparing her, unfavourably, to Ms Reddy. He said he had talked only once to Ms Nisha about religious matters, asking her why arrangements for daily prayers by Muslims in New Zealand seemed to him to be different than those made in South Africa, his country of origin.

[24] On the topic of sexual harassment, Mr Davids was not given copies of the statements taken from the five employees. Instead Mr Ryan read out parts of those

statements, without saying who had made each statement, and asked for Mr Davids' response. It was not clear from the subsequent evidence of Mr Ryan, Ms Reddy or Mr Davids exactly what he read to him but Ms Reddy's notes taken during their 7 September meeting recorded the following description:

We told him we had interviewed a few staff (individually) and they all had quite shocking things to say about him.

[25] Ms Nisha's statement summarised her written complaint, neither of which Mr Davids was shown.

[26] The statement Witness A had signed on 5 September read, in full:

[Mr Davids] has touched me on various occasions. I have told him to stop, it is not ok. He said he was only joking. He has sometimes hit my butt and I have told him to stop.

He has touched me in the factory and in the lunchroom.

I am not happy about this. It makes me very uncomfortable.

[27] The statements of the three other workers included the following comments about Mr Davids:

[He] is always talking to Asian staff ... he is very annoying, comes up close and is very persistent. He has asked girls about their sex life. I have heard him telling one of the Asian couples that they should have a baby.

[He] is a sick man. He is always touching staff, especially [Witness A] and the Asian staff. [Witness A] pushes him away and tells him to stop.

[He] used to touch staff when talking to them. He did it to me once and I told him to stop, I didn't like it. He has not touched me since ... I have seen him touching [Witness A] on the line. He did it quite often. [Witness A] told him to stop and pushed him away.

[28] Although it was not clear how much of this was read out to Mr Davids, Ms Reddy's notes of the meeting recorded the following responses from him:

Couldn't recall making comments
Might have happened once or twice
Only hit [Witness A] on the bum once
[Witness A] and [he] have a special friendship and that [Witness A] was at his place three weeks ago.

[29] The note about Witness A being at Mr David's residence referred, as confirmed by the evidence they both gave, to Witness A visiting Mr David's house to pick up a table for a new house Witness A had moved to. During that visit Witness A

spoke with both Mr Davids and Mrs Davids. The Davids had, on another occasion, called in to a garage sale at Witness A's house. Witness A had also, along with another co-worker, sometimes got a lift to and from work with Mr Davids, contributing to petrol costs, rather than taking the bus.

[30] After listening to Mr Davids' responses Mr Ryan and Ms Reddy adjourned the meeting to consider them. Returning 18 minutes later Mr Ryan told Mr Davids no action would be taken on the first three issues. He accepted Mr Davids' explanation of what happened while moving pallets. He said he could not take the complaint about religious discussions any further as there were no witnesses, other than Mr Davids and Ms Nisha. On the third complaint, about negative comments about managers, he said the comments Mr Davids made about Ms Reddy were inappropriate but may have been mitigated by what Ms Nisha had first said to Mr Davids.

[31] However, on the allegation of sexual harassment, Mr Ryan said Mr Davids' employment would be terminated immediately. He said this was because Mr Davids had committed serious misconduct and had not changed his behaviour after previous written and verbal warnings. Mr Ryan said Mr Davids would be paid four weeks' notice.

[32] There was nothing to indicate the topic of previous warnings had been discussed earlier in the meeting. A letter of dismissal sent later to Mr Davids gave the following summary of what Mr Ryan said at that point in the meeting:

As I pointed out to you, you had already received a written warning in regards to touching of staff inappropriately on 1st of December 2016 and we had had 2 further meetings on the 16th of February 2018 and the 18 of May 2018 in relation to making inappropriate comments and the fact that a number of staff felt uncomfortable around you because of your inappropriate behaviour.

[33] Mr Davids then asked if he could be given a last chance, with a final warning, and start again. However, according again to Ms Reddy's notes, Mr Davids was told there were five or six staff who were not happy with his behaviour and questions and were uncomfortable around him so the decision was final.

[34] Ms Reddy's notes recorded the meeting had begun at 10.30am, adjourned for 18 minutes between 10.45am and 11.03am, and Mr Davids was dismissed and had left the premises by 11.12am.

Flaws in the employer's actions

[35] Under s 103A of the Act the Authority must consider whether the company's actions in investigating its concerns about Mr Davids' conduct and deciding to dismiss him for serious misconduct met the statutory test of justification. To be justified, what the company did and how it did so must have been within the range of responses that a fair and reasonable employer could have made in all the circumstances at the time of its actions and decision.

[36] The emphasis on the circumstances *at the time* is of particular importance in this case. It considers the state of the employer's inquiry and assessment up to and including 7 September 2018 and whether it fairly reached its decisions on that day. Other information, subsequently discovered and considered later in this determination, could have been relevant to the conclusions reached and actions taken by the company on 7 September. However, at this point in the determination, that information is not weighed in the justification test applied to the employer's actions.

[37] Factors in that test include the obligations imposed on the employer by s 103(3) of the Act. These require the employer to sufficiently investigate any allegations, raise all concerns with the worker, provide a reasonable opportunity to respond to those concerns and genuinely consider any explanations given before deciding to dismiss the worker. Only defects in this process which are more than minor and result in the worker being treated unfairly can be taken as reasons for determining a dismissal was unjustified.¹

[38] Close scrutiny of the evidence has not established three of the flaws that Mr David's claim, evidence and closing submissions suggested had occurred in the company's process and decision.

[39] Firstly, Ms Nisha's so-called 'grudge' against Mr Davids did not make the company's inquiry into her complaint inherently faulty. Ms Nisha clearly did have a low opinion of Mr Davids because, in her view, he asked intrusive questions about her religious practice and was not suitably respectful of her role in the factory or of their managers. However Ms Nisha's role as a quality controller included responsibilities for health and safety. The pallet safety incident, seeing Mr Davids slap Witness A and the answer Witness A gave her about that incident were all matters properly

¹ Employment Relations Act 2000, s 103A(5).

reported to the company, whatever other views Ms Nisha may have had of Mr Davids. It was appropriate for her to report those matters whether she was on good terms or bad terms with him.

[40] Secondly, the evidence overall did not support a conclusion that Mr Ryan's conclusions were pre-determined. Rather, as became clear from his oral evidence, Mr Ryan had been reluctant to discipline or dismiss Mr Davids because skilled blenders were in short supply in the labour market and it was difficult to find and recruit a replacement.

[41] Thirdly, Mr Davids submitted there was no complaint about him from the person he was said to have harassed, that is Witness A. If that were true it was not necessarily a bar to an employer investigating a concern legitimately reported by someone else and then taking action on it, if reasonable cause were found to do so. However, in fact, the company did have information amounting to a complaint from Witness A. The statement Witness A signed after being interviewed by Ms Reddy on 5 September said that Mr Davids "sometimes hit my butt", that Witness A had asked him to stop and that Witness A was "not happy about this" and "very uncomfortable". It was a concern that an employer, taking the health and safety of its workers seriously, could and should have investigated.

[42] There were, however, other clear flaws in how the company then went about its inquiry and reached its decision. Some were defects in the sufficiency and fairness of what it did, but one flaw, concerning the company's conclusion that Mr Davids' behaviour amounted to harassment of a sexual nature, went to the heart of whether its decision was reached reasonably.

[43] Firstly, the failure to disclose to Mr Davids the full content of the five signed statements that Mr Ryan referred to and relied on was unfair. The closing submissions of both parties cited what the Employment Court said in its decision in *Porter v Board of Trustees of Westlake Girls High* on the issue of withholding relevant information, including the identity of informants, from an accused worker. The Court summarised the relevant case law and principles in this way:²

What can be said of these cases is that an analysis of the particular circumstances of each dictates whether, in them, the deliberate and

² *Porter v The Board of Trustees of Westlake Girls High School* [1998] 1 ERNZ 377, 388

considered withholding of relevant information including the identity of complainants amounts to an unfairness going to determination of whether the resulting dismissal was unjustified.

In general a fair inquiry into serious allegations against an employee will require full and fair disclosure to the employee of material evidence. Generally also, the identity of the person or persons making the complaint of serious misconduct will be a very material fact without which an employee will be at an unfair disadvantage in, first, knowing of the allegation and, second, in having an opportunity to respond to it. There may, however, be circumstances in which, although unfair to the employee, an employer is nevertheless justified in then withholding details of identity for good reason. ... But the question is not simply one of disclosure or non-disclosure per se. If the identities of the complainants are justifiably to be withheld, it was incumbent on the employer, acting fairly and reasonably as it was obliged to, to have ensured that the process was fair in other respects. ... In addition to refusing to disclose the names of the ... complainants or other particular details as might have identified them, the [employer] unfairly deprived [the worker] of the opportunity to know of the allegations against her.

[44] Having withheld the statements from Mr Davids, not even giving him copies with the names redacted, the company could not establish that it had disclosed to him the full extent of all the allegations made against him. And, even if it had, the references in the statements of the three employers other than Ms Nisha and Witness A to “talking to Asian staff”, asking “about their sex life” and “always touching staff” lacked detail about times, places or circumstances needed to give him a fair opportunity to respond to or refute those allegations.

[45] Withholding the identities of who made the statements compounded the unfairness. This was illustrated in the example of the worker who referred to Mr Davids touching her once and her telling him to stop. He did not find out the identity of that worker until an unredacted statement was required to be disclosed for the Authority investigation. In his evidence Mr Davids confirmed that part of the worker’s account but was able to explain he had touched her shoulder in passing in the factory and, he said, by accident. His confirmation that he, as she said, had not done so again was relevant to the implication in that statement and others that he repeatedly made physical contact with staff members who indicated that was unwelcome.

[46] The company said it was necessary to protect the identity of the workers because of an incident two years earlier when a complaint was made about Mr Davids’ behaviour towards several staff members. This resulted in a disciplinary warning, referred to further below.

[47] Mr Davids was said to have later aggressively questioned a co-worker who he, wrongly, believed was the person who had made the complaint. According to Ms Reddy, the workers who were making statements two years later were aware of that incident and were concerned that Mr Davids not be told who had made any statements about him. She accepted, in questioning at the Authority investigation, that the use of secret statements created suspicions that such statements could be made up and did not necessarily protect individual informants from possible reprisal over whether they had provided such secret information.

[48] An alternative was available to the company. It could have provided Mr Davids with the full statements but also set strict guidelines, with disciplinary consequences for any breach, about not talking to or retaliating against any worker who provided a statement.

[49] The second significant flaw concerned how the written warning issued in 2016 and two meetings held with Mr Davids earlier in 2018 were relied on in making the decision to dismiss him. He was not given a fair opportunity to comment on how the warning and those two early meetings related to the complaint in September 2018. On the evidence available about the 7 September disciplinary meeting they were not mentioned until after Mr Ryan told Mr Davids he was to be dismissed.

[50] Ms Reddy had issued a written warning to Mr Davids in December 2016 following a complaint to her by a male staff member. The following extract from the warning sets out the complaint and outcome:

The staff member complained that you have been grabbing male staff members and a transgender staff member's backside while they are working on the line. This has caused the complainant discomfort and he feels quite angry and annoyed about it.

He has mentioned that other staff members are feeling uncomfortable as well but have not said anything about this before.

I have interviewed 3 staff members regarding this issue and they have all mentioned that they do not like your idea of a joke.

This is something that the company cannot take lightly and hence the decision to issue you with a written warning. I have enclosed with this warning letter the C&R Packers Harassment Brochure for your reference.

Please note that any other complaint will result in further Disciplinary Action and may result in dismissal.

[51] In his evidence to the Authority investigation Mr Davids said the incident referred to in the December 2016 written warning has arisen from a game being played outside the factory canteen. He said he slapped a co-worker who had thrown a traffic cone near him. He accepted his behaviour was inappropriate on that occasion but said it was a situation where he and other workers were “kidding and having fun”. He considered it should not have been held against him in 2018 because he had “paid for that at the time it happened”.

[52] Ms Reddy’s work notebook included notes of a meeting with Mr Davids on 19 February 2018 where she recorded she had spoken to him “about acting maturely and being mindful of what he says to staff and how he says it”. In her evidence for the Authority investigation Ms Reddy could not satisfactorily detail or explain what sparked that conversation or comment. Her other notes from that same discussion record talking to Mr Davids about the possible redundancy of one staff member, a proposal to recruit a junior blender for Mr Davids to train and involving Mr Davids in the recruitment process. In the absence of sufficient supporting detail for that expressed concern about what Mr Davids had said or done at that time, it was difficult to see how it could have fairly weighed against him in September 2018.

[53] In May 2018 Ms Reddy called Mr Davids to a meeting in Mr Ryan’s office to discuss a report from a factory supervisor that Mr Davids “sometimes gets too close physically” to some workers on the packing line in the factory. Those workers were young Chinese women working on temporary visas. The supervisor’s concern was that Mr Davids should have been at work in the manufacturing area of the factory and not talking to workers on the packing lines in a different area of the factory. Ms Reddy said the supervisor told her Mr Davids had touched the legs of some workers and they called him “the creepy man”. Ms Reddy’s notes recorded that Mr Davids said he “always joked with” those workers and was surprised by that nickname. She wrote that she and Mr Ryan had told Mr Davids “to back off”.

[54] There was no evidence that any further inquiry was made directly with the workers who were, according to their supervisor, said to be concerned about Mr Davids’ behaviour or to check that whatever he had done to cause those concerns had not continued or been repeated. In that light it could not fairly be said that the concern expressed had been sufficiently investigated at the time and could have then

fairly weighed against him on the basis of what was known to the company and disclosed to him in September 2018.

[55] A third flaw in the process followed concerned the failure to discuss with Mr Davids, before making the decision to dismiss him, whether there might be any viable alternative to terminating his employment. He raised it himself only after Mr Ryan told him he was to be dismissed. By that time the dye was cast and there was no realistic prospect some alternative corrective action or performance management process could have been discussed with an open mind. The time to allow for an opportunity to at least canvas the prospect was before and not after the dismissal decision was made.

[56] The fourth observed flaw in the company's decision-making concerned its characterisation of Mr David's conduct towards Witness A as sexual harassment. It was a serious accusation and one on which an employer must act reasonably and fairly in making, investigating and deciding.

[57] The allegation notified to Mr Davids referred to "sexual harassment of staff" and the letter of dismissal from Mr Ryan said he was satisfied Mr Davids had "committed a serious misconduct in relation to sexual harassment of an employee on numerous occasions".

[58] Two categories of sexual harassment are defined in s 108 of the Act. The first concerns coercive harassment, that is where requests for sexual activity are made with some form of threat or promise. It was not the relevant category for the allegation put to Mr Davids in September 2018.

[59] The second category concerns what has been called sexual annoyance or annoying conduct. This refers to situations where the use of language, visual material or physical behaviour of a sexual nature is unwelcome or offensive to the person subjected to it. In this case the allegation of sexual harassment put to Mr Davids must be taken to have referred to what is described in the Act as "physical behaviour of a sexual nature".

[60] This accords with the definition of sexual harassment in a company brochure given to Mr Davids in 2016. It said sexual harassment "involves

unwanted/unwelcome words, actions, gestures, symbols, [and/or] behaviour of a sexual nature that makes a person uncomfortable”.

[61] The legal test of whether physical behaviour is found to be “of a sexual nature” is an objective one. This considers how the behaviour would be seen an external observer rather relying solely on the description of it by the person who has been subjected to the behaviour in question.³ If the behaviour is established on that objective test to be of a sexual nature, the question of whether the behaviour is unwelcome or offensive is then determined subjectively, that is from the point of view of the person at whom the behaviour is directed.

[62] In this case the information available to Mr Ryan on 7 September 2018 from Ms Nisha, Witness A and Mr Davids himself established that Mr Davids had slapped Witness A on at least two occasions. However the act of hitting Witness A did not, in the context it occurred, indicate it was part of any sexual proposition or expression of sexual interest.⁴ Hitting Witness A, with a slap on the backside, was clearly inappropriate and unwelcome. It was a form of physical harassment, but it was not an act “of a sexual nature” and was, therefore, not sexual harassment.

[63] This conclusion is supported, in part, by considering the complaint which was the subject of the 2016 written warning given to Mr Davids. In that instance Mr Davids was reprimanded for slapping the backsides of three men and one transgender person, who was Witness A. In that earlier instance there was no description of the inappropriate physical behaviour being sexual in nature and the company has not established it could have reasonably concluded that the same sort of behaviour was of a sexual nature in respect of the 2018 complaint involving Witness A.

[64] For the reasons given, the decision to dismiss Mr Davids for sexual harassment, and how that decision was reached, was not what a fair and reasonable employer could have done in all the circumstances at the time. The company’s actions did not pass the test of justification and Mr Davids established he had a personal grievance for unjustified dismissal.

³ *Lenart v Massey University* [1997] ERNZ 253 at 267.

⁴ *Proceedings Commissioner v H* (1996) 3 HRNZ 239, at 247.

Remedies

[65] Mr Davids was entitled to an assessment of remedies for his personal grievance. This assessment requires a balancing of the wrong done to Mr Davids in the reason given for his dismissal and how it was carried out with the wrong done by him in slapping a co-worker.

[66] In this case the assessment also includes considering whether there was some subsequently discovered conduct by him that should be taken account of in setting any remedies to be awarded. Part of that assessment includes whether all of the alleged conduct said to be subsequently discovered was sufficiently reliable to be taken into account.

Subsequently discovered conduct may be taken into account

[67] Section 123 of the Act authorises the Authority to order that a worker found to have a personal grievance be paid remedies by their former employer to reimburse the worker for wages or other money lost due to the grievance and to compensate the worker for humiliation, loss of dignity and injury to their feelings.

[68] Where some blameworthy conduct by the worker contributed significantly to the situation giving rise to the grievance, s 124 of the Act requires the Authority to consider whether to reduce remedies that would otherwise have been awarded.

[69] This assessment of remedies may also take account of misconduct by the worker of “a truly significant nature” is discovered only after their employment was terminated. Accounting for this subsequently discovered misconduct may be part of determining remedies at the first stage, under s 123 of the Act, rather than by way of reduction for contributing behaviour under s 124 of the Act.⁵

[70] In its decision in *Salt v Fell* the majority decision of the Court of Appeal explained that subsequently misconduct of a truly significant nature referred only to misconduct, that if known by the employer earlier, would have justified dismissal.⁶

We are not referring to isolated acts of minor misconduct which may come to light subsequently. We are not encouraging employers to conduct witch-hunts following every dismissal.

⁵ *Salt v Fell* [2008] NZCA 128 at [83].

⁶ *Salt*, above n 5, at [84].

[71] The Court also explained that taking account of such misconduct did not necessarily mean no remedies would be awarded at all to the worker found to have committed some wrong not known to the employer at the time of dismissal:⁷

[96] Whichever approach is adopted, the result should be that the employee does not benefit from his or her wrong. At times, the subsequently discovered conduct may be so egregious that no remedy at all should be given, notwithstanding the dismissal being technically unjustifiable. But that will not often be the outcome. After all, the employer has also committed a wrong, namely an unjustified dismissal based on what he or she knew at the time. He or she did not act as a fair and reasonable employer would have acted in all the circumstances at the time.

[72] In this case there were three elements to the alleged misconduct by Mr Davids said to have been discovered by the company after his dismissal and which the company submitted should be taken into account to deny any remedies to Mr Davids under s 123 of the Act.

(i) *A further allegation made 18 months later by Witness A*

[73] The first concerned a further allegation not made by Witness A until April 2020 when preparations for an Authority investigation was underway. The second and third elements concerned the contents of some further written statements from factory workers gathered by the company in January 2019.

[74] In April 2020 Ms Reddy called Witness A to a meeting to discuss a concern she had about use of a ‘perk’ which allowed staff to buy products at a discount for their personal use. Ms Reddy said Witness A was buying more than other workers and might be making private sales of the product.

[75] In that discussion Witness A disclosed that Mr Davids and Mrs David had both recently be in touch to discuss Mr Davids personal grievance and a further statement Witness A had signed in November 2019. The statement referred to Mr Davids behaviour and denied they were friends.

[76] Witness A also revealed telling Ms Davids that Witness A had not read the statement before signing it. When Ms Reddy asked why Witness A said that Witness A referred to being scared and just telling Mrs Davids what she wanted to hear. Ms Reddy then suggested Witness A not speak with the Davids again.

⁷ *Salt*, above n 5, at [96].

[77] Witness A then made a further allegation about an incident involving Mr Davids during his employment. This determination does not include any detail of that allegation because I am not satisfied it would be fair to do so given the context in which it was made and the time at which it was made.

[78] At the time of making that further allegation in April 2020, some 18 months after Mr Davids was dismissed, Witness A was worried about being in trouble over the use of a staff discounts and feeling under personal pressure due to communication from both parties about the evidence from Witness A that would form part of the Authority's investigation. What Mr Davids and Ms Reddy both said in their evidence to the Authority about conversations with Witness A around that time referred to Witness A talking about being scared that whatever was said might affect the future of Witness A's employment at the factory. This concern was also clearly a source of distress to Witness A in the interview attended as part of the Authority investigation. And, unlike other evidence about interactions between Witness A and Mr Davids, there were no other witnesses to what was said to have been said or done. I have put that allegation aside as an unproven element of what was said to be subsequently discovered misconduct.

(ii) Later statements by other workers

[79] In January 2019 six workers signed statements setting out their views on Mr Davids and his behaviour at work. These were different workers from the five who had provided the statements relied on by the company in September 2018. The additional statements were prepared after Mr Ryan held a staff meeting to remind workers of the company's policy on bullying and harassment.

[80] Two of those statements referred to seeing Mr Davids touch or smack Witness A. One said that, from the way Mr Davids was acting, "he made it seem like he was joking". One repeated the allegation that "Asian staff" were "uncomfortable around him" and another, a supervisor, said had touched her legs. Another recounted an incident where Mr Davids had pulled off a hairnet worn by Witness A and Witness A had reacted angrily, pushing Mr Davids away.

[81] Those statements had limited detail about the context or time of those interactions and could be given only limited weight. They were also, to some extent, evidence of the failure of the company to conduct a full and fair investigation at the

time of making its decision to dismiss Mr Davids. If information of that sort was available from those staff, it could have been gathered, tested and commented on at the time rather than be presented belatedly as subsequently discovered information.

(iii) Three relevant instances of subsequently discovered misconduct

[82] One of those six statements made in January 2019 was of greater weight because it contained some new information and its maker, Ms Maxell, provided a written witness statement and attended the Authority investigation meeting to answer questions about it. She gave credible evidence of a further instance of Mr Davids' physical behaviour towards Witness A and two instances of comments Mr Davids made to Ms Maxwell which she found offensive.

[83] Ms Maxwell, who worked as a supervisor of one of three packing lines in the factory, said she had often seen Mr Davids smack Witness A on the butt while Witness A was working on a packing line. She said it occurred on a packing line she was not supervising. She had not spoken to Witness A about this behaviour because "it happened so often it seemed to normalise it" but she had heard Witness A tell Mr Davids to stop it.

[84] Ms Maxwell also recounted an incident where she said she saw Mr Davids "dry humping" Witness A. She said this occurred in the staff canteen in front of other workers. She heard Witness A say "ouch, stop it". Mr Davids denied that account but believed it might refer to a time he had squeezed past Witness A in a narrow part of the canteen. Witness A's account of the incident was that "I was like pushing him and saying get off me".

[85] The accounts given by Ms Maxwell and Witness A were more credible than that given by Mr Davids. What happened in the staff canteen that day was, at least, a further instance of physical behaviour by Mr Davids that involved unwelcome touching of Witness A. Given Ms Maxwell's description of what she saw as being "dry humping", Mr Davids behaviour appeared to be of a simulated sexual nature. While Mr Davids may have regarded whatever he did that day as a joke, the behaviour occurred in front of other worker and it was humiliating for Witness A. If known to the company at the time of the 7 September 2019 disciplinary meeting, it was behaviour that would have supported its grounds for dismissing him for harassment of another employee.

[86] Ms Maxwell also gave evidence about what Mr Davids said to her in various conversations in the workplace, two of which included comments from him that Mr Davids conceded in the Authority investigation amounted to sexual harassment.

[87] The category of sexual harassment being referred to here is use of language of a sexual nature which is unwelcome or offensive to the person subjected to it.

[88] Ms Maxwell said there were occasions where Mr Davids helped her with various tasks around the factory. She said when the task was finished Mr Davids would often say to her “drop your pants, nothing in life is free”. Mr Davids did not deny making that comment. Asked in the Authority investigation meeting to explain what it meant Mr Davids said he was referring “to someone who was working on the street as a prostitute or call girl or whatever, it was my way of talking nonsense at work”. Objectively it was a demeaning comment to make to a female co-worker and, subjectively, Ms Maxwell was offended by it.

[89] Ms Maxwell said there was another occasion when Mr Davids said to her he “had not tried white meat”. Mr Davids is a person of colour from the Cape region of South Africa who migrated to New Zealand in 2008, followed soon after by his wife and children. The expression refers to sexual relations with a white person.

[90] Ms Maxwell said she had responded to the comment by saying: “Fuck off, you never will”. Mr Davids denied using the expression or that Ms Maxwell had made that comment to him. He said he recalled a conversation where Ms Maxwell referred to her personal relationship with a Pacific Island person. He said he told her that personal relationships between people of different racial backgrounds were not permitted during the apartheid era in South Africa that he “had not made love to a white person yet”. He said the only time Ms Maxwell told him to “fuck off” was when he walked through the packing line area and was joking with the workers while they were busy with their work. He said Ms Maxwell would tell him: “Leave the girls, fuck off”.

[91] On the balance of probabilities Ms Maxwell’s account of Mr David’s reference to “white meat” was more credible.

[92] Both the “white meat” and “drop your pants” comments used language of a sexual nature and subjected Ms Maxwell to behaviour that was unwelcome and offensive to her and had a detrimental effect on her job satisfaction. The behaviour therefore met the definition for sexual harassment of that type in the Act.

[93] Ms Maxwell’s witness statement included some other examples of comments made by Mr Davids while talking to her at work that also made her uncomfortable but he considered were part of friendly banter or jokes. They do not need to be repeated here but were instances of a poor understanding of appropriate boundaries in such conversations.

[94] In the context of other allegations made about Mr Davids behaviour, his comments to Ms Maxwell about “white meat” and “drop your pants” was conduct that could have justified his dismissal if known to the company at the time of its disciplinary meeting with him in September 2019.

Remedies adjusted under s 123

[95] Conduct of Mr Davids discovered subsequent to his dismissal was of a truly significant nature and warranted an adjustment of the remedies that would otherwise have been awarded under s 123 of the Act. This was not, however, a situation where that conduct was so outstanding bad that no remedy at all should be given. As explained by the Court of Appeal in *Salt v Fell*, denying any remedy would not often be the outcome because, as in this situation, the employer has also committed a wrong, namely the technically unjustified dismissal based on what the company knew at the time of its decision.⁸

[96] The subsequently discovered conduct, in respect of physical behaviour towards Witness A and the sexual harassment of Ms Maxwell, was such that the company could have justifiably dismissed Mr Davids if it was known to the company at the time.

[97] In that light, an award of lost remuneration need not be made in this case. As it happened the company had paid him four weeks’ notice, although not required to do so, and Mr Davids found another job within that period, albeit at a lower rate of pay.

⁸ *Salt*, above n 5, at [96].

[98] However Mr Davids remained due an award of some compensation for humiliation, loss of dignity and injury to feelings he experienced at the time of his dismissal. This distress was caused by the faulty disciplinary process and the sting of dismissal for sexual harassment of Witness A. Dismissal on that specific ground was not reasonably open to a fair and reasonable employer at the time or in the way it was made. The award is however, appropriately, a relatively low amount because Mr David's conduct did amount to physical harassment of Witness A on a number of occasions and the result should not be, as the Court in *Salt v Fell* said, that he benefited from his wrong in that respect. The amount of the award of compensation is also limited because, absent the technical failures of the company's investigation and decision, it could have legitimately dismissed Mr Davids for sexual harassment of Ms Maxwell if it had known of those events at the time.

[99] Balancing the respective wrongs done by him and the company, and considering both the particular circumstances of the case and the range of awards in similar cases, the sum of \$6,000 was the appropriate amount to order the company to pay Mr Davids as compensation under s 123(1)(c)(i) of the Act.

[100] The adjustments made to remedies under s 123 effectively account for contributory conduct by Mr Davids, both in respect of physical harassment of Witness A known at the time of the dismissal and of sexual harassment of Ms Maxwell discovered subsequently. This incorporated the consideration that would otherwise have been made under s 124 for any actions by Mr Davids that contributed to the situation that gave rise to his personal grievance. No further adjustment was required.

Order

[101] For the reasons given, the company must pay Mr Davids \$6,000 as compensation for humiliation, loss of dignity and injury to his feelings. The payment must be made within 28 days of the date of this determination.

Costs

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

[103] If they are not able to do so and an Authority determination on costs is needed Mr Davids may lodge, and then should serve, a memorandum on costs within 14 days

of the date of issue of the written determination in this matter. From the date of service of that memorandum C & R Packers (1996) Limited 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.

[104] 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

Robin Arthur
Member of the Employment Relations Authority

⁹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].