

**This determination includes an
order prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 207
3108632

BETWEEN

KAWAA TE WIKI
Applicant

AND

BLUE SKY MEATS (N.Z.)
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Cindy Bragg, advocate for the Applicant

Janet Copeland, counsel for the Respondent

Investigation Meeting: 22 February 2022 at Invercargill

Date of Determination: 20 May 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Blue Sky Meats (N.Z.) Limited (BSM) operates a meatworks processing plant near Invercargill. BSM employed Kawaa Te Wiki there as a seasonal worker from January 2018 until the end of the 2019 season. Following an incident with a co-worker (GXP) on 10 May 2019, Ms Te Wiki made a formal written complaint. BSM appointed an external investigator. During that investigation, Ms Te Wiki also complained about GXP's conduct several weeks before the 10 May incident. The investigator later concluded that GXP's conduct on 10 May

did not amount to misconduct or sexual harassment and that there was insufficient evidence to corroborate the earlier incident. This was reported to Ms Te Wiki on 12 June 2019. By that time the season had ended. The new season commenced about November 2019. Ms Te Wiki did not return to work.

[2] The statement of problem as lodged had included claims against the co-worker (GXP) and the New Zealand Meat Workers and Related Trades Union Incorporated, but Ms Te Wiki withdrew those claims. I made an order prohibiting the publication of the name of the co-worker.¹ That order continues. Ms Te Wiki was offered but again expressly declined an order prohibiting the publication of her name.

[3] In the preliminary determination, I found that Ms Te Wiki's communications between 10 May and 21 May 2019 were sufficient to raise a personal grievance concerning the steps taken (or omitted) by BSM after Ms Te Wiki first reported the 10 May 2019 incident to her supervisor. I also found that no personal grievance claim in respect of the 12 June 2019 letter to Ms Te Wiki or her decision not to recommence work in the new season had been raised. This determination resolves personal grievance claims, to the extent they are properly before the Authority.

[4] I first set out more about events on and after 10 May. I then turn to assess whether the events give rise to a proven personal grievance.

Events - 10 May to 21 May 2019

[5] Early on 10 May, Ms Te Wiki was cleaning in an area called "Detain". While doing that, someone walked past behind her on the walkway. Ms Te Wiki thought that the person had touched her on her bottom with their hand. Soon after, the person returned on the walkway. Ms Te Wiki then realised it had been GXP who had passed her a moment earlier. Ms Te Wiki's evidence is that she was shocked, confused and perplexed about his behaviour. I accept Ms Te Wiki's evidence about her reaction. Ms Te Wiki said nothing to GXP.

[6] Soon after, Ms Te Wiki saw her supervisor (Paul Plank) and told him what she thought had just happened. Mr Plank said he would look at the CCTV footage. Mr Plank

¹ *Te Wiki v GPX and oths* [2021] NZERA 289.

viewed the footage, then called Ms Te Wiki into the office. Mr Plank told Ms Te Wiki that it was a bucket, not his hand that GXP had used. They viewed the CCTV footage. Ms Te Wiki's evidence is that Mr Plank said this to her in a dismissive manner "like it didn't matter". Ms Te Wiki told Mr Plank that it did matter, as "he still did that to me". This exchange with Mr Plank ended with him saying he would look for GXP. Later, Mr Plank reported that he had not been able to find GXP and told Ms Te Wiki that he would follow it up after the weekend.

[7] In her 14 May 2019 written complaint Ms Te Wiki described it as "applying a bucket to my bottom", making her feel "violated and robbed of my dignity and unsafe". Ms Te Wiki stated she was making the complaint for herself and for all the women employed at BSM. Notes made by BSM's HR manager (Brent Jenkins) during his 14 May exchanges with Ms Te Wiki record her saying GXP had "shoved the bucket up her arse" and "rammed the bucket into her behind". It was clear to BSM that Ms Te Wiki thought GXP had done it deliberately, with a measure of force and in a sexual way.² Ms Te Wiki used different words in evidence to describe GXP's actions, but nothing turns on that.

[8] Ms Te Wiki returned to work after the weekend on Monday 13 May. GXP was also at work but she did not speak to him. Ms Te Wiki was called into Mr Plank's office. Also present were the operations manager (Billy Wells) and a union delegate (Tracey Kumeroa). Ms Te Wiki's evidence is that Mr Wells asked if she wanted to proceed with her complaint against GXP, she confirmed she did, and Mr Wells said that they had seen the video and that "there was nothing in it". Ms Te Wiki repeated that she would never accept that anyone could do that to her and insisted that her complaint be continued. Ms Te Wiki's evidence is that Mr Wells asked why she had not reacted "violently" to GXP and she said she was in shock. Mr Wells said she would have to provide a detailed letter of complaint. Ms Kumeroa said "no swearing" in the letter. Ms Te Wiki's evidence is that Mr Wells then said "send her back to the board, they'll be fine to work together" and waved his hand in a dismissive gesture. Ms Te Wiki returned to the slaughter board.

[9] Mr Wells' evidence is that they met on 13 May and discussed the CCTV footage. He says he explained that it appeared the touching was with a bucket not GXP's hand. Mr Wells

² In the later interview with the investigator, Ms Te Wiki confirmed this.

asked if Ms Te Wiki still wished BSM to investigate the matter. Ms Te Wiki confirmed she did. Mr Wells asked Ms Te Wiki to put the complaint in writing. His evidence is that he reassured Ms Te Wiki that BSM was taking the complaint seriously. Mr Wells disputes that he was dismissive of or attempted to dissuade Ms Te Wiki from pursuing the complaint.

[10] Before Ms Te Wiki reported for work on 14 May, Ms Kumeroa phoned her. Ms Te Wiki confirmed that she had written out her complaint. Ms Kumeroa stopped her from reading out the letter, saying that she would be representing GXP. Ms Kumeroa told Ms Te Wiki that another union delegate would represent her and would meet her later that day.

[11] Sometime after Ms Te Wiki had started work on 14 May, she attended at the place and time given to her by Ms Kumeroa. Ms Te Wiki is critical of the other union delegate, but it is not necessary to canvass those points. They are not relevant to Ms Te Wiki's personal grievance claims against BSM.

[12] There was then a meeting. Present were the HR manager Mr Jenkins, Mr Wells, Ms Te Wiki and the union delegate.

[13] Ms Te Wiki says that her complaint letter was given to Mr Jenkins, who read it and then asked Mr Wells if he had read it. Mr Wells said "no", read it and "slings it back down on the table". Mr Jenkins asked Mr Wells if he "really" thought that Ms Te Wiki and GXP should be working together. No clear answer was given. Mr Jenkins asked Ms Te Wiki if she felt safe working with GXP, Ms Te Wiki said "no", Mr Jenkins asked her if she was happy to return to the slaughterboard and Ms Te Wiki said "yes". The meeting ended.

[14] There are some differences between Mr Jenkins' evidence (based on his notes) and Ms Te Wiki's recollection now (as above) about the meeting. Although Mr Jenkins is a BSM manager so not independent, he documented the exchange shortly after the meeting. At that point, Mr Jenkins did not know what the outcome would be and Ms Te Wiki was represented by the union. It is not likely that his notes would mis-describe the substance of the meeting. The notes convey a reasonably standard HR response to the sort of complaint presented by Ms Te Wiki. For these reasons, I prefer Mr Jenkins' evidence about the meeting, to the extent it differs from Ms Te Wiki's evidence.

[15] I find that Mr Jenkins told Ms Te Wiki that he would ensure that she was in a safe working environment. Mr Jenkins asked if Ms Te Wiki felt safe returning to the slaughterboard. Ms Te Wiki confirmed she did. Mr Jenkins asked Ms Te Wiki if she felt safe working there if GXP was there also. Ms Te Wiki said “Yes”, if he kept away from her as she had done the previous night. Mr Jenkins told Ms Te Wiki that if she felt unsafe or uncomfortable, she should talk to Mr Plank and he would rectify the situation. Mr Jenkins’ note reads “Kawaa was happy with this and left for work”. I return to this point below.

[16] Ms Te Wiki in her statement of evidence said that she was instructed by the slaughterboard 2IC that she was “in offal for the rest of the night” as she was preparing to go to the slaughterboard. In giving evidence Ms Te Wiki said that the 2IC was in the meeting, but I find that she is mistaken about that. I find that the instruction to her to work in Offal had not been discussed during but happened after the meeting.

[17] Ms Te Wiki’s evidence is that she felt like she was being punished for making the complaint as she was being moved, not GXP. Ms Te Wiki also gave evidence describing the production difficulties she encountered working in Offal. Ms Te Wiki had the skills and experience necessary for her to work in offal and ended up having to take a leading hand role over the following days. Ms Te Wiki was also directed to clean in Detain at one point. That aside, Ms Te Wiki continued to work in offal.

[18] BSM decided to appoint an independent investigator (Bayley Orr) to investigate Ms Te Wiki’s complaint. Mr Jenkins wrote to Ms Orr on 17 May setting out terms of reference. He then wrote (by email) to Ms Te Wiki on 20 May to advise her of these arrangements. Mr Jenkins attached a copy of the terms of reference for “consideration and comment”. He explained that the investigation would be confidential and told Ms Te Wiki not to discuss it with others but encouraged her to bring a support person and a representative when being interviewed by Ms Orr. Mr Jenkins also enclosed information about BSM’s employee assistance programme (EAP). In evidence, Ms Te Wiki’s is critical of the emphasis about confidentiality in Mr Jenkin’s letter and says she did not understand its reference to EAP.

[19] Mr Jenkins sent Ms Te Wiki a second email on 20 May. It referenced the 14 May exchange. Mr Jenkins stated that while Ms Te Wiki's written complaint expressed concern about her safety working around GXP, at the meeting she had she was "happy" with him remaining on the slaughterboard and did not think it was necessary for him to work in a different area of the plant. Mr Jenkins repeated that they had both been asked not to interact with each other while the investigation continued. He also reminded Ms Te Wiki to report to her supervisor if she felt unsafe or uncomfortable for any reason.

[20] When Ms Te Wiki read the email she took exception to the claim that she had said she was "happy" working on the slaughterboard with GXP. Ms Te Wiki phoned Mr Jenkins but had to leave a message. Mr Jenkins phoned back. His notes are timed at 2.25pm. Again, I accept the notes convey a substantially accurate account of the discussion that day between Ms Te Wiki and Mr Jenkins. To summarise, Ms Te Wiki acknowledged that she had said she felt safe returning to the slaughterboard and that she had said it was okay for GXP to work there if he kept his distance as he had on 13 May. However, Ms Te Wiki disputed that she had said she was "happy". Mr Jenkins apologised for the wording of his email.

[21] Ms Te Wiki's evidence now is that Mr Jenkins when apologising told her that the "lawyer" had worded the email that way. Mr Jenkins disputes having said that. His evidence is that he wrote the email without legal advice. It is not likely that an experienced HR manager would require legal advice to draft the email in the circumstances at the time. It is not likely that an experienced HR manager would mention a lawyer's involvement if advice had been sought, in the circumstances. I prefer Mr Jenkins' evidence on the point.

[22] It is not likely that Ms Te Wiki would have taken exception as she did, if she had actually said she was "happy" working on the slaughterboard with GXP. I find that Ms Te Wiki agreed to work on the slaughterboard if GXP kept away from her as he had done the previous night. Mr Jenkins' notes reflect this agreement by his use of the phrase "Kawaa was happy with this".

[23] Ms Te Wiki was interviewed by Ms Orr on 21 May. In evidence, Ms Te Wiki is critical about union representation arrangements, but it is not necessary to deal with this. Ms Te Wiki was supported by a friend at the interview. The interview was taped (with consent)

and there is a transcript. It is unnecessary at this point to set out the content, except to note that Ms Te Wiki also described an earlier incident with GXP. Ms Te Wiki had not previously complained about the earlier incident. No concern arises about the manner in which Ms Orr conducted the interview.

[24] Mr Jenkins rang Ms Te Wiki about two hours after the interview, before she was due at work. Again, Mr Jenkins made notes of the exchange which I accept as accurate regarding the substance of the call. To summarise, Ms Te Wiki was upset, following the interview. Ms Te Wiki told Mr Jenkins that she had seen her doctor and was to talk with a counsellor. Mr Jenkins asked about EAP, but Ms Te Wiki said she sought something more private. Mr Jenkins reassured her about confidentiality. He also said that as Ms Te Wiki was so upset, he was unsure if she was in a fit state for work and would arrange for her to take special paid leave if that would help. That arrangement was agreed.

[25] Ms Te Wiki remained on this leave until the season ended.

[26] On 12 June 2019, Mr Jenkins wrote to Ms Te Wiki to advise that Ms Orr had completed her investigation as follows:

In summary, the Orr Report concludes that:

- There is insufficient evidence to corroborate your allegation that [GXP] pushed a sheep carcass into your breast;
- [GXP] did tap you on the backside with a bucket but that [GXP's] actions were an attempt to notify you of his desire to pass you in a narrow walkway and was not of a sexual nature.
- Ms Orr concluded that [GXP's] conduct was not capable of being characterised as misconduct or serious misconduct as it occurred in circumstances where there is a general acceptance that staff need to physically touch one another when in close proximity to prevent potential accidents.

[27] Mr Jenkins advised that BSM considered that, based on these findings, it would take no further action on Ms Te Wiki's complaint. He quoted and responded to several comments made by Ms Te Wiki during her interview with Ms Orr. He also asked to meet with Ms Te Wiki before the start of the next season (likely to be in November 2019).

[28] There was no contact by or for Ms Te Wiki with BSM after 21 May 2019 until September 2019 when BSM received a request from Ministry of Business, Innovation and Employment to attend mediation with Ms Te Wiki. The request did not include any

description of the problem. Next, in June 2020, a statement of problem was lodged with the Authority. As explained above, Ms Te Wiki's personal grievance properly before the Authority for determination is limited to actions by BSM on and before 21 May in relation to the 10 May incident and Ms Te Wiki's 14 May complaint.

Did BSM discriminate against Ms Te Wiki?

[29] One type of personal grievance is discrimination. To paraphrase for present circumstances, Ms Te Wiki would have a personal grievance if BSM, by reason directly or indirectly of her sex, did not afford her the same terms and conditions of employment as it made available to other similarly experienced workers in similar circumstances; or if BSM by reason of her sex subjected Ms Te Wiki to any detriment in circumstances where others would not be.

[30] There is a submission that BSM discriminated against Ms Te Wiki by assigning her to work in Offal. I am referred to the 12 June 2019 letter in which Mr Jenkins says:

...we asked that you work in Offal and [GXP] continued to work for a period in the Slaughterboard where you would not cross paths until both parties took a period of special leave. We asked you to work in Offal as you are experienced and specialised in this area and meant you would be working with female rather than male colleagues, the steps taken by the company were for your own safety and was by no means a way of punishing you.

[31] Mr Jenkins commented that the assignment was not a way of "punishing" Ms Te Wiki, because Ms Te Wiki had told Ms Orr that she thought BSM was punishing her by putting her in Offal. Ms Te Wiki had said to Ms Orr:

I believe they did that to try and keep things at bay on the board, that's their job, make sure I feel that, I just feel that they've just shoved me to the offal because, and allowed him to do, carry on working as normal on the slaughter board, I don't feel that they've considered my safety at all, because at the end of the day he gets to roam around the place

[32] Ms Te Wiki also gave evidence about the work difficulties she experienced in Offal. It resulted in her being "absolutely buggered" by the end of the day. Her evidence is that she did not want to return to work after the first day, but was persuaded to by her friend. The next shift in Offal was easier, but it was also short-staffed. Although assigned to Offal, Ms Te Wiki was directed to clean in Detain.

[33] The 14 May meeting had ended on the basis that Ms Te Wiki would continue on the slaughterboard, but suddenly she was re-assigned to Offal. I need to consider whether the re-assignment to Offal amounted to discrimination. I find, based on Mr Jennings' letter, that Ms Te Wiki was re-assigned to work with other women. Ms Te Wiki's sex was a material factor or ingredient³ in the re-assignment. Sex is a prohibited ground of discrimination.

[34] When questioned, Ms Te Wiki agreed that the Offal work was not necessarily only performed by women. However, that does not detract from the clear statement in Mr Jennings' letter and Ms Te Wiki's evidence that only women were working in Offal at the time.

[35] There is a submission that Ms Te Wiki agreed to the assignment to Offal. However, the evidence is that Ms Te Wiki acted in effect as lead hand only being reassigned there and finding that the work was not well organised.

[36] The Offal assignment still afforded Ms Te Wiki the same terms of employment, conditions of work, fringe benefits and opportunities for training, promotion and transfer as would have been available to her if she had remained on the slaughterboard. However, the statutory definition of discrimination is engaged if the employer subjects the employee to any detriment. Detriment includes anything that has a detrimental effect on the employee's employment, job performance or job satisfaction.⁴ I accept Ms Te Wiki's evidence about the effect on her from working in Offal. The assignment to Offal had a detrimental effect of Ms Te Wiki's job satisfaction.

[37] To summarise, BSM by reason of Ms Te Wiki's sex assigned her to work in Offal where she was subjected to the detriment described above.

[38] I next need to assess whether this was in circumstances in which other employees employed on work of that description would not be subject to that detriment. An obvious comparator is GXP. He was not reassigned to work elsewhere such as in Offal (with women). The same would apply to other men.

³ *McAllister v Air New Zealand Ltd* [2009] NZSC 78.

⁴ Employment Relations Act 2000 s 104(1)(c).

[39] I find that BSM discriminated against Ms Te Wiki by reason of her sex when she was assigned to work in Offal, despite the arrangement during the 14 May meeting that she would work on the slaughterboard.

Other personal grievance claims

[40] The statement of problem identified other personal grievance claims.

[41] There was a constructive dismissal claim. There was a claim that BSM discriminated against Ms Te Wiki by referring to the transcript of her interview with Ms Orr in the 12 June 2019 letter advising the outcome of the investigation, despite Ms Te Wiki being told that the interview was confidential. Reference in the letter to the cost of the investigation was also said to be discrimination. The request to meet with Ms Te Wiki before the start of the new season was said to be discrimination. I have already found that Ms Te Wiki did not raise grievance claims about these matters within time.⁵

[42] Several matters are characterised as amounting to discrimination or a failure by BSM to ensure Ms Te Wiki's health and safety at work. It is said that BSM pre-determined the investigation by stating that the 10 May incident was not sexual harassment. That is a reference to supervisor and manager exchanges with Ms Te Wiki before Ms Orr was engaged to investigate the complaint, particularly their mention that GXP had used a bucket not his hand as he went past Ms Te Wiki. It is also said that BSM was in breach by telling Ms Te Wiki to inform her supervisor if she felt unsafe.

[43] There was no failure by BSM in respect of its health and safety obligations to Ms Te Wiki. BSM had a policy prohibiting sexual harassment in its workplace. Ms Te Wiki reported the 10 May incident, BSM checked CCTV footage, reported what it showed, attempted but was unable to locate GXP, confirmed it would follow up after the weekend and did so on 13 May. I accept Mr Wells' evidence that he reassured Ms Te Wiki, was not dismissive of her complaint and did not attempt to dissuade her. At that point Ms Te Wiki was represented by her union, so Mr Wells was unlikely to be dismissive of or obstructive

⁵ *Te Wiki v GPX and oths* [2021] NZERA 289.

towards the complaint. I also prefer Mr Jenkins' account of the 14 May meeting, as explained earlier.

[44] BSM then engaged an independent investigator. Appropriate terms of reference were set. Ms Orr investigated as provided by these terms. On 12 June Mr Jenkins set out "a summary of the findings", but did not provide or seek comment on Ms Orr's report. I note that the personal grievance claims properly before the Authority for investigation and determination are limited to BSM's actions (or omissions) on or before 21 May, so I make no findings with respect to Ms Orr's conclusions and BSM's response.

[45] I do not accept that BSM predetermined the outcome of the investigation. The supervisor, Mr Wells and Mr Jenkins took the complaint seriously. The appointment of Ms Orr demonstrates that BSM acted without predetermining the outcome of the complaint. There was nothing improper in BSM telling Ms Te Wiki to inform her supervisor if she felt unsafe.

[46] It is not necessary to separately assess whether the assignment of Ms Te Wiki to work in Offal despite the arrangement for her to continue working on the slaughterboard would give rise to a personal grievance under s 103(1)(b) of the Employment Relations Act 2000. That and ensuing matters have already been found to give rise to a personal grievance under s 103(1)(c) of the Act.

What remedies are appropriate?

[47] Ms Te Wiki in her statement of problem claimed compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. The claim was not quantified.

[48] Ms Te Wiki's evidence is that she was very upset by the whole process which was "a nightmare". She felt pressured, disbelieved and powerless. Ms Te Wiki considered that BSM tried to make light of the incident and to minimise it "as a joke". Ms Te Wiki felt that there was "no outcome". Ms Te Wiki was unable to tell her co-workers about the incident, given the instruction to keep the investigation confidential. However, her managers and union delegates were able to talk about it. The 10 May incident made her feel "sick to her stomach" and brought back the pain of the earlier incident. Ms Te Wiki felt "let down" by BSM as she

felt she was coming up against a “brick wall of managers” who had already made up their minds.

[49] It will be apparent that much of Ms Te Wiki’s evidence in support of the claim for compensation is directed at actions that have not given rise to liability for BSM. BSM is not responsible for or legally liable for GXP’s actions on 10 May or earlier. I accept that Ms Te Wiki felt “pressured, disbelieved and powerless”, but the discrimination by her being reassigned to work in Offal was a limited cause of that. BSM did not try to make light of the incident or minimise it as a joke. BSM managers had not already made up their minds. There was nothing improper about the instruction to Ms Te Wiki to treat the matter as confidential within the workplace. That accorded with BSM’s policy and was appropriate given the potential for a disciplinary process faced by GXP.

[50] Although BSM thought it was protecting Ms Te Wiki by assigning her to work in Offal where her co-workers were women, Ms Te Wiki did not seek or support that assignment. The assignment was a material factor in Ms Te Wiki’s distress, to some extent. There is no professional or medical evidence of significant or long-lasting harm. I conclude that Ms Te Wiki can establish a low level of loss or harm attributable to her personal grievance against BSM. Compensation of \$8,000.00 would restore Ms Te Wiki’s sense of dignity and injured feelings.

[51] No lost benefits and remuneration are attributable to the established personal grievance. Ms Te Wiki was paid until the end of the season through the agreed special leave and no grievance was raised within time regarding Ms Te Wiki not returning to work at BSM the following season.

[52] There is a claim for a recommendation under s 123(1)(ca) of the Employment Relations Act 2000. The evidence does not establish “workplace conduct or practices” as a significant factor in the personal grievance. There is no basis for the Authority to make recommendations to BSM about future action to prevent a recurrence.

[53] Ms Te Wiki did not contribute to the situation giving rise to the personal grievance.

Orders

[54] Blue Sky Meats (N.Z.) Limited is to pay Kawaa Te Wiki compensation of \$8,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[55] Costs are reserved. If there is a claim for costs, the party claiming is to lodge and serve a submission within 14 days and the other party may lodge and serve a submission in reply within a further 14 days. I will then determine costs taking of the Authority's usual practice and the submissions.

Philip Cheyne
Member of the Employment Relations Authority