

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 409  
3132138

BETWEEN	NILESH PRAKASH Applicant
AND	NEW ZEALAND DEFENCE FORCE Respondent

Member of Authority:	Marija Urlich
Representatives:	Rajendra Chaudhry, for the Applicant Channey Mao, for the Respondent
Investigation Meeting:	21 March, 6 April and 13 May 2022
Further information and submissions received:	27 May 2022 from Applicant 3 June 2022 from the Respondent
Determination:	24 August 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Prakash was employed by New Zealand Defence Force (NZDF) in a civilian position from May 2016 until 30 November 2020 when he was dismissed for serious misconduct following the investigation of a complaint about his conduct by a co-worker. Mr Prakash says his dismissal was unjustified and seeks remedies including reinstatement, reimbursement of lost wages and compensatory damages.

[2] NZDF denies Mr Prakash's dismissal was unjustified. It says following receipt of a serious allegation of sexual harassment and bullying it undertook a fair investigation process after which Mr Prakash was dismissed. It says the decision to

dismiss was a decision a fair and reasonable employer could make in all the circumstances.

### **The Authority's investigation**

[3] This investigation and determination follows Mr Prakash's unsuccessful claim for interim reinstatement.<sup>1</sup> In the course of investigating this employment relationship problem the Authority heard evidence from Mr Prakash, Mike Miller, a former co-worker of Mr Prakash, Shahana Khan, who at the relevant time was employed by NZDF as a human resource manager, Col Stephen Piercy, the decision-maker for disciplinary action taken against Mr Prakash and Lt Col Robert Gillies, who was involved in the disciplinary process.

[4] As permitted by s 174E of the Employment Relations Act 2000 (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. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions.

### **Non-publication order**

[5] NZDF seeks made permanent the interim non-publication order of the name and any information likely to identify the complainant.<sup>2</sup> Mr Prakash does not oppose the application. I am satisfied it is appropriate to grant the order in the terms sought because it concerns information for which there is no public interest in the publication.

[6] The interim non-publication order is made permanent: clause 10(1) of the second schedule of the Employment Relations Act 2000.

### **Issues**

[7] The issues identified for investigation and determination are:

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<sup>1</sup> *Nilesh Prakash v New Zealand Defence Force* [2021] NZERA 121.

<sup>2</sup> *Ibid* at [5].

- a) Was Mr Prakash unjustifiably dismissed from his employment with NZDF?
- b) If so, is Mr Prakash entitled to a consideration of remedies sought including:
  - i. Reinstatement?
  - ii. Reimbursement of monies lost pursuant to section 123(1)(b) of the Act?
  - iii. Compensation pursuant to section 123(1)(c)(i) of the Act?
- c) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Prakash which contributed to the circumstances which gave rise to his grievance?
- d) Is either party entitled to an award of costs?

## **The Law**

[8] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether NZDF's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Prakash being treated unfairly.<sup>3</sup> The Authority's task is to examine objectively NZDF's decision-making process and determine whether what NZDF did and how it was done were steps open to a fair and reasonable employer.

## **The employment agreement and relevant policies**

[9] Mr Prakash's terms of employment were set out in a number of documents including an individual employment agreement he signed when his employment with NZDF started, a collective employment agreement, a code of conduct and a policy document.

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<sup>3</sup> Section 103A Employment Relations Act 2000.

[10] On 10 May 2016 when Mr Prakash started employment with NZDF he signed an acceptance letter which included the following acknowledgement:

I, Nilesh Prakash acknowledge that I have received a copy of the NZDF Civil Staff Code of Conduct 2006. I have read the Code and understand that a breach of this Code may lead to disciplinary action up to and including summary dismissal.

[11] The civil staff code of conduct includes matters which may amount to serious misconduct including sexual harassment and bullying, processes relating to suspension and disciplinary processes including in circumstances which may involve serious misconduct and disciplinary outcomes of such processes including dismissal or alternative courses of action.

[12] On 10 May 2016 Mr Prakash also signed by way of acknowledgement a policy document which includes under the headings 'Develop Positive Culture' and 'Mission Focus':

...

- Assesses consequences and risks before acting
- Adapts to and supports the organisational culture
- Fosters good morale in the group

...

- Accepts accountability and responsibility for actions outputs and behaviours

[13] The individual employment agreement applicable when Mr Prakash's employment with NZDF commenced included:

#### Policies

...you agree to stay familiar with, and comply with, all Defence Force administrative instructions, rules, manuals, policies and procedures relevant to your employment that are in force or may be introduced from time to time

#### Dismissal for serious misconduct

In the event of serious misconduct, gross negligence, or any other conduct that destroys or significantly undermines the trust and confidence that the defence Force has in you, the Defence Force may end your employment in writing without notice. Dismissal will only occur after due process. No compensation shall be paid for dismissal for serious misconduct.

[14] Mr Prakash, as a union member, was covered by the relevant collective employment agreement which included:<sup>4</sup>

#### Well-being

93 The NZDF will support a holistic approach to a healthy lifestyle for Civil Staff by facilitating access to services, facilities, initiatives or programmes that promote health and well-being in the workplace. Current examples of facilities, initiatives or programmes that promote health and well-being can be viewed at:

DFO 3 Part 12 – Welfare and Well-being (Policy Manual)

#### Discrimination, Harassment and Bullying

94 The NZDF is committed to providing an environment free from discrimination, harassment and bullying which the NZDF recognises as having negative effects on both individuals and groups. The NZDF recognises the right of all members of the NZDF to enjoy a workplace free of discrimination, harassment and bullying and has a zero tolerance to this sort of behaviour.

[15] Part of the relevant policies referred to in the individual employment agreement and collective agreement includes Defence Force Orders. The DFOs cover a full range of matters including NZDF policy for discrimination harassment and bullying:

#### 5.3.16

NZDF is committed to providing an environment free from discrimination, harassment and bullying which NZDF recognises as having negative effects on both individuals and groups. The NZDF recognises the right of all members of the NZDF to enjoy a workplace free from discrimination, harassment and bullying and has a zero tolerance to this sort of behaviour.

All members of the NZDF have a right to expect that a genuine formal complaint of harassment, discrimination, bullying or other inappropriate behaviour will be dealt with in a timely, sensitive, impartial and thorough manner.

#### 5.3.32

It is possible that some cases of discrimination, harassment or bullying may occur because the respondent does not recognise the impact of their actions on others. Often these cases can be successfully rectified by the behaviour being pointed out to the respondent. Formal processes are unnecessary in these cases and may unsettle the workplace more than is necessary. NZDF policy is to address issues at the lowest possible level.

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<sup>4</sup> NZ Public Service Association Inc and Chief of Defence Force Collective Employment Agreement 1 December 2017 – 20 June 2019.

[16] Also provided in DFOs were how such issues may be resolved including, if possible, at the lowest level:

Resolution strategies

5.3.32

The resolution of discrimination, harassment and bullying issues should be at the lowest level possible so as not to create issues that are disproportionate to the gravity of the complaint. There are a number of informal resolution strategies available including seeking assistance from the command chain or an AHA [Anti-Harassment Advisor].

## **Background**

[17] On 23 July 2020 NZDF received a written complaint from a junior co-worker raising concerns that Mr Prakash had subjected them to inappropriate and harmful behaviour over the period of their employment in the relevant unit (which at that point had been about eight months). The complaint included specific examples of the allegedly concerning behaviour. The complainant stated in the letter they had tried to raise the concerns in the past but they had been trivialised and ignored, they did not feel the work place was safe, they had to watch what they said for fear of it being taken out of context, they had been warned the unit they worked in was a 'rotten unit' but it went beyond that and there needed to be an investigation because the behaviour described was not uncommon and went unchallenged. The complainant asked for time away from the workplace due to these experiences.

[18] On receiving the complaint NZDF commenced an investigation. Mr Prakash was suspended on full pay on 31 July following an opportunity to comment on whether suspension was appropriate. He remained on suspension on full pay throughout the subsequent complaint investigation and disciplinary investigation processes. He does not challenge the lawfulness of his suspension which I am satisfied was fair and reasonable.

[19] NZDF appointed an external consultant to investigate the complaint. The written terms of reference included the purpose of the appointment was "...investigating, collecting, recording and reporting on allegations made by the complainant against Mr Prakash" and that following the investigation they were to report on whether the allegations may breach the NZDF civilian staff code of conduct. The terms of reference expressly excluded from the scope of the investigation whether

the conduct amounted to misconduct or serious misconduct, the appropriateness of a penalty, if any or the complainant's conduct except as relevant to the investigation. Mr Prakash was provided with a copy of the terms of reference.

[20] The consultant then undertook an investigation into the complaint which included interviewing the complainant and Mr Prakash along with a number of witnesses, including unit members and management. Mr Prakash was provided a copy of the draft report for comment. His comments included that a formal disciplinary process following the investigation report was not appropriate. I am satisfied his comments on the draft report were fairly considered by the consultant because they are summarised and assessed in the final report.<sup>5</sup>

[21] After receipt of the final report on 7 October, on 16 October NZDF notified Mr Prakash that given the investigation had found "...all of the allegations in the complaint were able to be substantiated" a formal disciplinary process would commence "to determine whether the incident amounts to misconduct or serious misconduct under the Civil Staff Code of Conduct, and if so, what further action needs to be taken".<sup>6</sup> Mr Prakash was provided with a final copy of the report.

[22] The complaint investigation findings referred to in the 16 October letter were Mr Prakash had:

- a. Been witnessed behaving in an inappropriate manner, harmful and sexually harassing manner;
- b. Been witnessed accessing and also exposing the complainant to sexually explicit and objectionable material while on duty; and
- c. Been witnessed using abusive and inappropriate language when referring to female colleagues, contractors and members of the public including school aged female students.

[23] These findings formed the basis of the allegations of serious misconduct NZDF were then investigating in a disciplinary context. The 16 October letter acknowledged the situation was sensitive and may be difficult for Mr Prakash and referred him to a confidential support service.

[24] I am satisfied this letter made it clear to Mr Prakash that based on the 7 October report and having considered his submission that the matter should not proceed to a

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<sup>5</sup> Including why a witness Mr Prakash suggested had not been interviewed. There is insufficient information before the Authority to suggest the reason given was not fair and reasonable.

<sup>6</sup> Letter Lt Col Gillies to Mr Prakash 16 October 2020.

formal disciplinary investigation that NZDF had a reasonable basis to commence such a disciplinary investigation given the seriousness of the allegations and their subject matter as set out in [22] above.

[25] On 6 November Mr Prakash, through his representative, wrote to NZDF making detailed submissions in response to the 16 October letter. In summary the issues raised by Mr Prakash were:

- the allegations of misconduct were serious and so required a higher level of proof;
- the report showed there were longstanding issues of workplace culture which underlined the complaint;
- he admitted his actions for the report findings (a) and (b) and that the actions were offensive to the complainant for which he was apologetic but that much of the behaviour was attributable to the workplace culture;
- he denied having the video as found at (c) on his phone;
- he offered “as a way forward” to undertake counselling to address his behaviour, attend fortnightly meetings with human resources to review progress for a period of six months; and
- that he was sincerely apologetic for his behaviour, he had a sick mother and young family to support and was grateful to NZDF for his job.

[26] On 16 November a disciplinary meeting took place. In attendance were Mr Prakash represented by counsel, Lt Col Gillies and Ms Khan. Col Piercy, the delegated decision-maker, was unable to attend at short notice given COVID-19 pandemic response matters for which he was required. I have reviewed the detailed notes of the meeting taken by Ms Khan. They show Mr Prakash through counsel, spoke in detail to the allegations elaborating on the issues raised in the 6 November letter. A copy of Ms Khan’s notes were provided to Mr Prakash after the meeting.

[27] With respect to the delegation matter - NZDF delegations require where possible disciplinary action could include dismissal (which was the situation here as

notified to Mr Prakash) the decision-maker must hold a delegation above the immediate manager and no lower than Colonel (or the equivalent).<sup>7</sup>

[28] On 20 November a letter setting out a preliminary decision to dismiss had been reached with reasons was provided to Mr Prakash for comment. The letter was under Col Piercy's name. Mr Prakash provided such comment at a disciplinary meeting held on 25 November which he attended with his legal representative, Col Piercy, Lt Col Gillies and Ms Khan. Ms Khan's detailed notes of the meeting have been made available to the Authority. They show Mr Prakash, through his representative, spoke to his response to the proposal to dismiss which was summarised, accurately, by Col Piercy in the meeting. There is no doubt Mr Prakash expressed his sincere regret that any actions of his may have offended the complainant and that was never his intention.

[29] On 30 November NZDF communicated to Mr Prakash its decision that he was summarily dismissed with immediate effect. The reasons the decision to dismiss was made are summarised in Col Piercy's written witness statement:<sup>8</sup>

[17] Ultimately I was not able to agree with Mr Prakash that his actions were not serious. His explanations were also unsatisfactory and continued to deny responsibility. The behaviour could not be tolerated in the workplace and contrary to the NZDF's efforts to eradicate this type of behaviour. Returning to the workplace presented as a risk to other employees in circumstances where Mr Prakash considered his actions to be justified, even though counter to the NZDF Op RESPECT SERR training and on going reinforcement of the Op RESPECT requirements and importance through internal means.

[18] I also considered the health and safety obligation to provide a safe workplace and the general lack of remorse by Mr Prakash. This led me to believe that his actions had undermined my trust and confidence in him as an employee, which would be irreparable.

[30] Mr Prakash subsequently raised a personal grievance for unjustified dismissal.

## **Discussion**

[31] Mr Prakash says his dismissal was unjustified including:

- (i) the conduct complained of was not so severe or serious enough to warrant summary dismissal;

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<sup>7</sup> DFO 16 Chapter 2 Managing, Section 1 Civil Staff Management Delegations, table 2-1 delegations.

<sup>8</sup> Witness statement Stephen Piercy 13 August 2021.

- (ii) the conduct complained of was prevalent in the workplace and was seen as part of the culture of the workplace;
- (iii) NZDF failed to use its own the internal processes to resolve the matter as provided for in the code of conduct;
- (iv) NZDF failed to deal with the matter at the lowest possible level; and
- (v) the dismissal was unjustified.

*Was the conduct complained of not so severe or serious and properly seen as prevalent and part of the workplace culture?*

[32] In support of this criticism Mr Prakash says weight should be given to the fact no other co-worker complained about him during his employment including any female colleague or any third party (including as described in the complaint). He says he accepts asking the complainant personal questions of a sexual nature but that this kind of talk was normal and every day and given the complainant said in the complaint investigation that they ignored this talk or tried to ignore it “most of the time” this indicated a degree of tolerance on their part. Mr Prakash says further banter including use of vulgar language was part of the workplace culture in the unit in which he was employed and the complained of conduct was within the usual scope of tolerated behaviour.

[33] Part of the complaint against Mr Prakash concerned a video containing objectionable material he viewed in the workplace and which he offered to the complainant to view twice in a day. Mr Prakash submits it is significant that the complainant did not actually view the video – he did not force the complainant to view the video merely offered to show it to them having, he accepts described its content in a way which would have made its objectionable nature clear. Mr Prakash accepts he repeated the offer to the complainant and later that day offered to show it to another co-worker who declined.

[34] I am satisfied the disciplinary investigation did not unfairly or unreasonably single out Mr Prakash resulting in a disciplinary sanction disproportionate to his actions within the known workplace tolerances as established by the third-party investigation and before the decision-maker at the time the decision to dismiss was made. The issues raised in the complaint were serious, the investigation gathered and assessed the

relevant information and found the allegations were established. The disciplinary process further assessed the allegations in the context of misconduct or serious misconduct allegations. At all stages Mr Prakash was provided the relevant information and given an opportunity to comment and his comments were, I am satisfied solemnly considered and weighed.

*Did NZDF fail to use its own internal processes and fail to resolve the complaint at the lowest level?*

*(i) Was it unfair or unreasonable to engage a third-party to conduct the initial investigation?*

[35] Mr Prakash submits it was unfair and unreasonable for NZDF to engage a third party to investigate the complaint. He says this was not agreed to at the time the parties entered the employment agreement and it was NZDF's obligation to conduct its own investigation.

[36] The appointment of the third-party was not a contracting-out of the disciplinary investigation or decision-making. The terms of reference are clear that the complaint investigation was to conduct the necessary interviews and make an assessment whether the complaint of bullying and sexual harassment had been made out. The terms of reference were provided to Mr Prakash and I am satisfied, he fully participated in that investigation. There is no term of the parties' employment agreement which prevents such a process being followed. Given the nature of the complaint including the broader issues raised about the kind of conduct which was tolerated in the workplace and the number of unit members interviewed, NZDF's decision to engage a third party to conduct the complaint investigation could be seen as prudent. The disciplinary investigation was a different inquiry conducted by NZDF again with Mr Prakash's full and fair involvement.

*(ii) Did NZDF unreasonably fail to resolve the complaint at the lowest level?*

[37] Mr Prakash says the complainant's failure to raise concerns about his conduct directly with him – to tell him to cease conduct which the complainant found offensive – was a factor which weighs in favour of low-level resolution because, it is understood, this failure on the part of the complainant denied Mr Prakash the opportunity to recalibrate his conduct because he did not appreciate the impact of his actions.

[38] While the relevant policy recognises there may be some cases of bullying and sexual harassment which are able to be resolved at a low level it is also clear from the policy there will be cases which are not.

[39] There are factors which demonstrate NZDF's formal response to the complaint was entirely reasonable including the nature of the issues raised in the complaint, the age of the complainant who Mr Prakash supervised and the harm the complainant said they had suffered consequent to the complained of conduct. NZDF had an obligation to ensure the workplace was safe and in treating the complaint seriously and instigating a formal investigation process it was taking reasonable and proportionate steps to ensure the workplace was safe. With respect to the allegations Mr Prakash faced – as he has argued - given their seriousness they must be supported by concomitant evidence. A low-level resolution process may not have resulted in such a level of evidence being established which may risk failing to adequately address the issues raised.

[40] Mr Prakash suggests in his evidence that the complaint was improperly motivated because he and the complainant had been in conflict and he perceived the complainant wanted his job. This was an issue he raised during the investigation and I am satisfied it was a factor weighed and considered by the decision maker Col Piercy. At the investigation meeting I asked Mr Prakash, if this was the case and he was suspicious of the complainant why he had engaged with the complainant in the manner which became the subject of the complainant. He said he could not explain his actions. This may have left open to the decision-maker a reasonable conclusion that Mr Prakash's actions were motivated by other than the workplace banter he describes.

[41] Mr Prakash also seeks to draw a distinction between himself and his unit co-workers who, the third party investigation established, had a general tolerance of the use of explicit language and pornography in the workplace and the complainant, who as a new member of that unit and their alleged failure to make it clear that they (the complainant) found such conduct unacceptable and offensive. He says this was not fairly considered by NZDF and has resulted in an unfair and unreasonable outcome being his dismissal for serious misconduct.

[42] The difficulty with the distinction is two-fold – firstly, there is insufficient evidence before the Authority that Mr Prakash was treated more harshly than other workers in the unit for the same conduct and secondly, the evidence of his co-workers in the investigation did not establish conduct towards the complainant which was

equivalent to that alleged, and ultimately upheld against Mr Prakash. Further, Mr Millar, who gave evidence in support of Mr Prakash, was not employed by NZDF at the relevant time and the newspaper article filed with closing submissions appears to describe a different situation where an employee resigned in the face of a harassment allegation.

[43] A further difficulty with this criticism of the process and the outcome is this issue was squarely before and carefully considered by the decision maker, Col Piercy. The conclusion of the 7 October 2020 report articulated this issue, Mr Prakash made submissions on this issue through the disciplinary process and the dismissal letter dated 30 November 2020 shows the issue was considered by the decision-maker having weighed the evidence and found the allegations upheld based on the following findings:

- NZDF's expectations around appropriate conduct had been made clear and were agreed with Mr Prakash in the employment agreement, code of conduct and relevant policies;
- Mr Prakash had attended relevant training and the anti-harassment and anti-bullying architecture was in place and accessible;
- Mr Prakash had not raised concerns about the workplace culture with NZDF;
- he had admitted viewing the objectionable material in the workplace and describing it to the complainant, offering it to them to view twice and then making a similar offer to another co-worker who rebuffed him;
- other unit members corroborated his having made sexually explicit comments about female co-workers and women and school aged girls passed on the street; and
- other team members had not conducted themselves in a sexually harassing or harmful way towards the complainant.

[44] These findings were open to NZDF on the information before it at that time that the disciplinary allegations were made out. The decision to dismiss in these circumstances was one a fair and reasonable employer could have made.

## **In the alternative**

[45] If I am wrong and there was some aspect or aspects of NZDF's decision making which could make this dismissal unjustified in all the circumstances, given Mr Prakash's admitted actions towards the complainant in light of his knowledge of the obligations owed under the employment agreement not to engage in such conduct in the work place and the negative impact of the conduct on the complainant, it is likely I would have found Mr Prakash's contribution to the circumstances giving rise to any such personal grievance to be such as to render any remedies nugatory.

## **Outcome**

[46] It is clear to the Authority that Mr Prakash has found his dismissal devastating and that it has had a profoundly negative impact on his life. However, the decision to dismiss, I find, was one a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred. Mr Prakash's application is unsuccessful.

## **Costs**

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, NZDF may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Prakash would then have 14 days to lodge any reply memorandum.

[48] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>9</sup>

Marija Urlich  
Member of the Employment Relations Authority

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<sup>9</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)