

**NOTE: This determination contains an order prohibiting publication of certain information at paragraph [192] and [193].**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 162  
3217839

BETWEEN JSC  
Applicant

AND LANDCORP FARMING  
LIMITED T/A PĀMU  
Respondent

Member of Authority: Natasha Szeto

Representatives: Barbara Buckett and Lucy Fisher, counsel for the  
Applicant  
Steph Dyhrberg and Paddy Miller, counsel for the  
Respondent

Investigation Meeting: 21 and 22 September 2023 in Wellington

Submissions and further information received: 11 October and 18 December 2023 from the Applicant  
11 October and 21 December 2023 from the Respondent

Date of Determination: 20 March 2024

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**DETERMINATION OF THE AUTHORITY**

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**The Employment Relationship Problem**

[1] JSC was employed by Landcorp Farming Limited (Pāmu) in 2016 and was responsible for managing projects and people.

[2] In October 2021, one of JSC's former direct reports (referred to in this determination as the complainant) complained to Pāmu about an incident that had occurred in July 2021 where JSC was alleged to have said something inappropriate of a sexual nature to her. JSC denied the allegations. An independent investigation found

that JSC had sexually harassed the complainant. Following a disciplinary investigation, JSC was summarily dismissed for serious misconduct on 12 September 2022.

[3] JSC says the findings of the investigation into the complaint were unjustified and disadvantaged him, Pāmu's adoption of the findings was unjustified and disadvantaged him, and he was unjustifiably dismissed. He seeks compensation for his personal grievances, lost wages, and damages for his legal costs. He also seeks penalties against Pāmu for breach of good faith, and costs and disbursements.

[4] Pāmu says the independent investigation was robust, impartial and fair and the final investigation report was balanced and well-reasoned. It says its disciplinary process was both warranted and fair, and the decision to summarily dismiss JSC was both procedurally and substantively justified.

### **The Authority's Investigation**

[5] Written witness statements were lodged from JSC and his partner, as well as three witnesses from Pāmu: Steve McJorrow, Chief Financial Officer; Bernadette Kelly, Chief People, Safety and Reputation Officer; and Leza Papps, Head of People. All witnesses attended the Investigation Meeting and answered questions from me under oath or affirmation.

[6] 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 the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been considered.

### **Issues**

[7] The issues the Authority is to investigate and determine are:

- (a) Whether the findings of the investigation unjustifiably disadvantaged JSC.
- (b) Whether Pāmu's actions in upholding and applying the findings were contrary to the actions of a fair and reasonable employer, and unjustifiably disadvantaged JSC.
- (c) Whether JSC was unjustifiably dismissed from his employment.

- (d) Whether the interim non-publication orders made on 8 May 2023 should be made permanent.

### **Relevant Background**

[8] JSC was employed by Pāmu in December 2016. His role evolved into managing projects and people. Chief Financial Officer Steve McJorrow encouraged JSC to apply for a vacant role in the Senior Leadership Team, reporting to him. Mr McJorrow had been in charge of the finance, procurement, legal and technology functions for nine years.

[9] JSC was promoted in June 2021. JSC and Mr McJorrow had a solid professional relationship. JSC was a valued employee and Mr McJorrow liked JSC professionally.

[10] In his new role, JSC managed a total of 17 Pāmu employees. One of JSC's direct reports was the complainant. JSC and the complainant had a friendly relationship where they occasionally socialised outside work, including with their partners.

[11] Throughout July 2021 there were significant operational and organisational structural changes at Pāmu. From 5 July 2021, the complainant's reporting line changed from JSC to a new Team Leader who was employed in a fixed-term role. On 7 July 2021, JSC provided a recommendation for the complainant's promotion.

### *The Incident*

[12] On 16 July 2021, an incident occurred between JSC and the complainant at her house, following a work event where alcohol was involved. The allegation was that JSC said something inappropriate to the complainant of a sexual nature. JSC fell asleep seated upright at the complainant's kitchen bench. When he woke up, the complainant asked him to leave her house and he did.

[13] The next day, the complainant texted JSC to check he made it home okay, and JSC apologised to the complainant via text message for "flaking" on her. JSC and the complainant continued to engage socially including on 25 July 2021. JSC has always denied, and continues to deny, he said anything of a sexual nature to the complainant.

### *The Complaint*

[14] On 11 October 2021, the complainant raised the incident with human resources (HR) at Pāmu via email. The complainant said that JSC had made inappropriate

comments about wanting to “make a move” on her, and she denied his advances. She referred to her work relationship with JSC changing “instantaneously”. She said she was worried every time she went into the office, and was left feeling extremely uncomfortable in meetings with JSC. The complainant met with Ms Papps, Head of People, on 21 October 2021 to give a statement after she returned from leave. The complainant told HR she was unsure she wanted to remain at Pāmu and “no longer wants to be in the same room” as JSC.

[15] Mr McJorrow first became aware of the complaint when Ms Papps showed him the complainant’s email of 11 October. Mr McJorrow considered the complaint was serious. Although he did not have specific experience with this type of complaint or process, Mr McJorrow read through Pāmu’s policies – specifically the Handling Misconduct and Bullying and Harassment policies - to see what was involved and what steps Pāmu needed to take. There were a number of allegations. Mr McJorrow decided that the most serious of the allegations made by the complainant would set the bar for the investigation process and the most serious allegation related to the incident on 16 July 2021. He decided that a meeting with JSC was the next logical step.

#### *The Investigation into the allegations*

[16] Mr McJorrow had a brief discussion with JSC via Zoom on 8 November 2021 following which he sent JSC an email saying he wanted to meet to discuss a “serious complaint we have received about your conduct”. A meeting was arranged for the next day and JSC was advised he could bring a support person or representative. JSC was not told anything about the complaint – specifically who it involved or what the subject matter of the complaint was. By this stage, Mr McJorrow had taken advice and looked at Pāmu’s policies. He determined that an independent investigation should be launched because of the seriousness of the allegations and given his close working relationship with JSC, Mr McJorrow realised it would be hard for him to be the investigator and remain independent.

[17] On 9 November 2021, JSC met with Mr McJorrow and Ms Papps. JSC did not take a support person with him to the meeting. JSC was in shock during the meeting and could not recall much of what was said.

[18] Pāmu gave JSC a letter dated 8 November 2021 which covered the following:

- (a) There was a formal complaint;

- (b) The name of the complainant;
- (c) The complaint alleges JSC harassed the complainant;
- (d) The allegations require independent investigation;
- (e) The Handling Misconduct and Bullying and Harassment policies;
- (f) A draft terms of reference for the investigation (attached);
- (g) The name of the suggested investigator;
- (h) A possible outcome of the process could be disciplinary action up to and including termination of employment;
- (i) Pāmu would be considering a safety plan.

[19] The next day on 10 November 2021, JSC sent Pāmu a full response to the allegations against him. He also agreed to a safety plan proposal by Pāmu and suggested that he could attend the office on Mondays, Thursdays and Fridays and the complainant could attend the office on Tuesdays and Wednesdays. The safety plan was only put into place on 10 November after both the complainant and JSC agreed to it. At that stage, neither JSC nor Pāmu had any expectations around how long the safety plan might need to be in place.

[20] On 26 November 2021 JSC wrote to Pāmu through his lawyer, stating – amongst other things – that he was willing to enter into a constructive and informal dialogue with the complainant (with or without Pāmu). Pāmu felt that an informal approach was not appropriate given the complainant’s allegations, and it communicated this to JSC on 7 December 2021.

[21] From that time, JSC and Pāmu corresponded through their lawyers to confirm the terms of reference for the independent external investigation into the complaints. JSC requested further information under the Privacy Act. The terms of reference were finalised despite JSC not agreeing to the final version, and Pāmu provided them to JSC on 21 December 2021.

[22] The complainant was interviewed by the external investigator on 28 January 2022. JSC was interviewed by the external investigator on 23 March 2022.

[23] On 28 April 2022, JSC received the draft report from the external investigator. He raised concerns about it with the investigator and Pāmu on 13 May 2022. The

complainant accepted and approved the draft report on 4 May 2022. The external investigator considered JSC's feedback and made some amendments to the draft report which was finalised on 26 May 2022. JSC continued to meet regularly with Mr McJorrow for one-to-one meetings while the investigation was ongoing.

[24] Relevant to the matters before the Authority, the external investigator found (in summary):

- (a) JSC behaved in the manner alleged by the complainant at her home on 16 July 2021. In particular, JSC was in a state of gross intoxication and told the complainant that he had "wanted to make a move on her in the past" and "thought about her romantically" or words to that effect.
- (b) The proximity of these comments to a conversation about JSC recommending the complainant for a promotion implied a threat of detrimental treatment in her employment.
- (c) JSC's behaviour on 16 July 2021 amounted to harassment as defined by Pāmu's Policy, specifically sexual harassment, and a breach of Pāmu's Code of Conduct.
- (d) The other six allegations are unsubstantiated on the evidence or do not amount to harassment or bullying under the Policy or a breach of the Code of Conduct.

#### *The Disciplinary Process*

[25] On 3 June 2022, JSC inadvertently came into the office when the complainant was working, contrary to the latest version of the agreed safety plan. Although all parties accepted this was a genuine mistake, HR raised it with JSC as a breach of the safety plan.

[26] On the same day, Mr McJorrow sent JSC a letter entitled "Final Investigation Report & Next Steps", attaching a copy of the external investigator's final report. Mr McJorrow said he had reviewed the report carefully as well as JSC's feedback on the draft report, and he accepted the report and findings. The letter goes on to state:

The finding of sexual harassment is a very serious one. It constitutes a breach of the Pāmu Bullying and Sexual Harassment Policy and Code of Conduct obligations to keep each other safe and maintain a high degree of personal integrity. The conduct has had a significant impact on [the complainant]. I consider the conduct potential serious

misconduct which could justify an outcome up to and including summary dismissal.

[27] Mr McJorrow advised JSC that he was initiating a disciplinary process in terms of the Handling Misconduct Policy:

I will invite your feedback on the report findings and the appropriate outcome of the disciplinary process. I will consider what you have to say before reaching a preliminary view about whether the conduct is misconduct or serious misconduct, and the appropriate outcome. You will get a chance to respond to a proposed outcome in writing before a final decision is made. I will also be consulting with [the complainant].

[28] Mr McJorrow said he was concerned about the other behaviours described in respect of the other allegations where the behaviour was not found to have breached the Code of Conduct or constitute bullying or harassment, but he intended to address those behaviours through performance feedback and coaching in the first instance. The temporary arrangements to keep JSC and the complainant safe (outlined in the safety plan) were to continue. JSC was invited to attend a disciplinary meeting.

[29] On 10 June 2022 JSC formally raised personal grievances for unjustified disadvantage in relation to the investigation process, the findings contained in the draft and final reports, and the adoption of the report by Pāmu.

[30] This was primarily based on the following:

- (a) Reliance on an unjustified finding of fact and an alleged statement that JSC did not make.
- (b) The complainant's version of events was not factually correct or accurate, but in any event would not fit within the definition of sexual harassment.
- (c) It would be inappropriate for JSC to accept any misconduct in relation to attending another staff member's residence after drinking because of contextual circumstances the employer has failed to consider.

[31] On 16 June 2022, Pāmu responded that it was going to continue its process, and did not accept JSC had grounds for a personal grievance. The disciplinary meeting was delayed due to scheduling difficulties and illness, and was eventually held on 12 July 2022 via Teams with the agreement of both parties.

[32] In the meeting, Mr McJorrow expressed his view that the complainant had no reason and nothing to gain by making the complaint. He accepted the incident was, to the best of his knowledge, a one-off. However he also indicated that it was not too late to have a discussion if JSC was prepared to accept that he could not fully recall all the events of the evening, if he was prepared to accept the complainant had nothing to gain from making the approach, and if JSC was prepared to accept he had acted in a way that was probably not appropriate for a senior manager at Pāmu.

[33] At the conclusion of the meeting, Mr McJorrow said he would weigh up the factors outlined during the meeting, and read the material, the report, the transcripts and JSC's correspondence.

[34] On 15 July 2022, Pāmu sent JSC a letter entitled "Disciplinary Decision and Proposed Outcome". That day, JSC went on planned leave to visit his father. He would be away until 24 August 2022.

[35] The letter from Mr McJorrow as the decision-maker stated:

Because you emphatically denied the alleged sexual harassment and there was no one else present, it was your word against [the complainant's]. Like the investigator, I had to decide whose account I found more credible. [The complainant's] account of events seemed more credible to me. [Her] account of what you said to her in totality rang true and was supported by the texts she was sending [Team Leader] that night and the next day.

[36] The letter also categorised the incident as a serious one-off incident. The behaviour came within the definition of sexual harassment in the Policy by being "direct or indirect use of language...of a sexual nature that is unwelcome or offensive to a person" and the complainant had found the words both unwelcome and offensive. By its nature, Mr McJorrow found the incident had a detrimental effect on the complainant's employment or job satisfaction.

[37] Mr McJorrow was not convinced JSC's behaviour contained an overt or implied promise of preferential treatment, or a threat of detrimental treatment. He therefore found it did not meet this part of the policy definition of sexual harassment (contrary to what the external investigator had found), but still found that "sexual harassment is potential serious misconduct in most instances".

[38] Mr McJorrow disagreed with JSC that the report and sexual harassment finding was flawed or incapable of being justified. Mr McJorrow then stated:

I consider sexual harassment is potential serious misconduct in most instances. In this particular case, given the power imbalance and the impact on [the complainant] at the time and subsequently, I find your behaviour was serious misconduct.

[39] Mr McJorrow said that the complainant did not express a willingness to engage in an informal resolution process. Mr McJorrow concluded a disciplinary outcome was required and recorded that a final written warning would be warranted along with coaching and monitoring as an alternative to summary dismissal.

[40] Mr McJorrow also stated:

I have considered the health and safety implications, especially for [the complainant] but also for other staff. I would need to be certain I was taking all reasonably practicable steps to keep [the complainant] safe at work, ensure a healthy safe work environment for her, and prevent any repetition of the harassment that occurred. I have thought about whether a facilitated meeting could be arranged, safely and in a way that would be respectful and likely to rebuild trust. I am very dubious about the safety and appropriateness of this, particularly as [the complainant] has said she can't be in a room with you now. She was also very distressed when you turned up unexpectedly at work recently. If I thought a facilitated process was tenable, I would need to consult with [the complainant]. Your assurance you would avoid placing yourself in any situation again where such an allegation could be made did not reassure me. You made no acknowledgement of the conduct, or in the alternative, that you were very drunk and couldn't recall the behaviour, so couldn't challenge what [the complainant] said. We invited you to make such acknowledgements. You did not feel able to. Nothing in any of your initial written responses and feedback, interview notes or our meeting indicated remorse or particular concern for [the complainant]'s welfare. I have to take that into account. I have taken into account your work history as a trusted, capable employee of Pāmu. I have to say my trust and confidence in you as a manager is significantly affected by this finding. I therefore believe the appropriate outcome is summary dismissal.

[41] On 6 September 2022 JSC wrote to Pāmu in response to its disciplinary decision and proposed outcome letter. JSC made multiple allegations including that the record confirmed a "closed mind" and "brick wall" approach and because there had been no serious misconduct or sexual harassment, summary dismissal was not justified and far outweighed the circumstances.

[42] On 12 September 2022, Pāmu summarily dismissed JSC for serious misconduct. Among other things, it stated “not agreeing with you is not the same as not hearing you”. As the decision-maker, Mr McJorrow said:

I was genuinely open to the alternative to summary dismissal, as set out in my letter dated 15 July. I worked through what the alternative would look like and whether it was proportionate and would meet my health and safety obligations to [the complainant] and other staff. I am not convinced it is the right outcome.

You say you have been through a learning curve you won’t forget and you can be trusted not to put yourself in such a position again. That is not reassuring to me. It does not show any insight into your behaviour, nor the impact it had on [the complainant]. I no longer have the required trust and confidence in you as a Pāmu manager.

[43] On 12 October 2022 JSC raised a personal grievance for unjustifiable dismissal and disadvantage.

### **Analysis of the Issues**

#### *Unjustifiable disadvantage – legal framework*

[44] When the Authority considers justification for Pāmu’s actions, including the actions giving rise to the disadvantage claims, it does so by applying the test of justification in s 103A of the Act. It is required to consider on an objective basis whether the actions of Pāmu and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged disadvantage or dismissal.

[45] The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person’s employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made.<sup>1</sup>

[46] The Authority may take into account other factors as 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 the employee being treated unfairly.

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<sup>1</sup> Section 4 (1A) of the Employment Relations Act 2000.

[47] It is not the Authority's role to determine whether JSC sexually harassed the complainant. Rather the focus is on Pāmu's actions and whether it acted as a fair and reasonable employer in the circumstances.

[48] For a claim of unjustified disadvantage to succeed there are three things that must be established: that there was an action or actions by the employer, that the action(s) disadvantaged JSC, and that the action(s) were unjustified.

*Applicant's submissions*

[49] JSC says he was unjustifiably disadvantaged by the findings of Pāmu's investigation into the allegations against him, and by Pāmu's adoption of the findings. JSC claims that the way the investigation was conducted was unreasonable, and the finding that he had sexually harassed the complainant was not a conclusion that was open to a fair and reasonable employer.

[50] JSC raises a number of concerns which can be summarised as follows:

- (a) The investigation process including methodology and Terms of Reference was unfair. The findings of the investigation were unsafe, unsatisfactory, unreliable and unbalanced. The wrong standard of proof was applied to the investigation findings. Pāmu did not respond directly to JSC's concerns about the investigation and it should have.
- (b) There was a lack of transparency and JSC was not given the opportunity to feed into the process nor was he consulted about issues such as the choice of investigator, and the terms of the safety plan. The investigator held "off the record conversations" resulting in redactions being made to meeting notes. Not all the text messages from the complainant were provided to JSC, and he was not given notes of all meetings.
- (c) Credibility / reliability issues raised about the complainant were not investigated and this led to an erroneous finding that the alleged sexual harassment had in fact occurred.
- (d) Inconsistent allegations – the messages were inconsistent about whether the comment allegedly made by JSC was made in a past tense context.

- (e) Relevant information was not taken into account, such as the context of the restructure / reporting changes and the circumstances of JSC and the complainant having a social relationship outside work.
- (f) There were conflicts of interest with people involved in the investigation process, and particularly HR.
- (g) Delays in the investigation process disadvantaged JSC – it took 11 months for the investigation and disciplinary processes to be concluded.

[51] JSC says that his feedback in relation to the draft Terms of Reference for the investigation, the draft report from the external investigator, and subsequent communications resulting from the disciplinary process were ignored by Pāmu.

[52] JSC says that neither the investigator nor Pāmu had a sufficient and reliable evidential basis to meet the statutory requirements for sexual harassment. Given the deficiencies with the investigation, JSC says no reasonable employer could rely on the findings. In the context of a genuine friendship relationship and continued socialisation between JSC and the complainant after the alleged incident, JSC says that any comment he may have made, if not “benignly offensive”, was at lower end of the scale for any harassment. JSC also said that there was no direct connection between the comment allegedly made, and the detrimental effect on the complainant’s employment, job performance or job satisfaction. Consequently, JSC says no reasonable employer could have found he sexually harassed the complainant as it did not meet the criteria under the policy. JSC submits that the spectre of “MeToo” overshadowed a fair investigation into the allegations against him.

#### *Respondent’s Submissions*

[53] Pāmu takes responsibility for the investigation it commissioned and says the external investigator’s process was robust, impartial and fair. JSC was given multiple opportunities to provide feedback.

[54] Pāmu says its response to the complaint was consistent with its Bullying and Harassment policy and that its policies are complementary to each other. JSC was advised that the complaint alleged harassment, and no disadvantage was caused by Pāmu not immediately specifying the harassment was of a sexual nature. JSC ought to have been aware of what the complaint was about from the context, but Pāmu’s

choice not to specify the type of complaint demonstrates a lack of predetermination about the outcome of the investigation.

[55] Pāmu says HR did not have any undue influence over the process. HR advisors were not decision-makers and were not in a position to influence the outcome of the investigation into the allegations, or Pāmu's disciplinary investigation. Pāmu says any brief interactions between HR and the decision-maker were not unfair to JSC and did not need to be disclosed.

[56] In relation to escalation, Pāmu says all reports of harassment are serious and should be confidential, with concerns investigated promptly. Pāmu says it was clear from the complainant's emails, her preliminary statement, her interviews with the investigator and communications she had with colleagues that she did not want an informal resolution process because she could not stand to be in the same room as JSC.

[57] Pāmu says it decided to accept some, but not all, of JSC's suggested changes to the draft terms of reference. These were explained to JSC in a letter. Pāmu said it did not need to address JSC's concerns about the external investigator's practice because the external investigator addressed these herself (including in the final report).

[58] Pāmu accepts there were delays but says the process needed to run its course. To the extent that there were any undue delays, Pāmu says these were caused by JSC. Ultimately, Pāmu says the final investigation report was balanced and well-reasoned with only one out of seven allegations upheld.

#### *Analysis of alleged disadvantages*

[59] JSC has claimed two separate disadvantages relating to the findings of the investigation, and Pāmu's adoption of the findings. Pāmu is responsible and accountable for both the external investigator's investigation, and its own adoption of the findings. There is a significant amount of contextual overlap between the findings of the investigation and Pāmu's adoption of the findings such that attempting to distil the employer's actions out under each of these heads of disadvantage is unhelpful. Instead, it is a useful framework to consider all actions taken by Pāmu leading up to the disciplinary process to be part of JSC's unjustifiable disadvantage grievances. Using this approach, I analyse Pāmu's actions below.

*Process*

[60] Pāmu’s investigation into the allegations was conducted under its Bullying and Harassment Policy, and its Handling Misconduct Policy. JSC says Pāmu’s use of the Bullying and Harassment policy in conjunction with the Handling Misconduct policy was “confusing and misguided”. JSC alleges that Pāmu’s process was flawed as it had not adhered strictly to either one of the policies. Ms Papps confirmed that the Handling Misconduct Policy would generally be relied on for process, but Pāmu would look at both policies to determine which one was appropriate.

[61] Having read the policies in detail, I find Pāmu did substantively follow its policies, and to the extent that there were any minor deviations from the process set out in the policies these were not unreasonable and JSC was not disadvantaged. One example is that while the Handling Misconduct Policy provides for the possibility that a preliminary report may be completed, whether one is done is at the discretion of those conducting the investigation. JSC was not disadvantaged by this, as he had a full opportunity to provide feedback on the draft report.

[62] I find it was appropriate for the complainant’s initial complaint to be dealt with under the Bullying and Harassment policy because the policy clearly states that it will “detail the process that Pāmu will undertake to deal with a complaint about bullying or harassment”. Under the policy, an employee has the right to raise a formal report or complaint about the behaviour, including with a member of the Human Resources team.<sup>2</sup> This is what the complainant did when she emailed HR on 11 October 2021.

[63] The policy also requires Pāmu managers to treat any allegation of inappropriate behaviour seriously, set clear terms of reference, investigate the allegations thoroughly and promptly, for “low-level behaviour” attempt to resolve the issue by informal discussion and to discuss with a member of the HR team who will follow formal investigation processes.<sup>3</sup> The policy notes that an appropriate investigator may be external. Although JSC says that informal resolution was available as a first response to the complaint, I find it was reasonable for Pāmu to decide that both the nature and subject of the complaint warranted engaging an external investigator to make findings

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<sup>2</sup> Paragraph 25, page 4 of the Bullying and Harassment Policy approved 20 Aug 2018.

<sup>3</sup> Above n2, paragraph 38, page 6.

of fact. I find Pāmu followed its policies fairly and reasonably and there was no disadvantage to JSC.

[64] JSC has not provided any basis for a disadvantage caused by the terms of the safety plan. While a safety plan may have been Pāmu's idea, JSC proposed the terms of the original plan and agreed to a subsequent amendment to it. He cannot now say that the safety plan has caused him a separate disadvantage.

[65] Based on the evidence before the Authority, JSC was fully and fairly consulted during the external investigator's process. There are records of interviews and correspondence between the parties that support this conclusion. One example of this is that the final Terms of Reference for the external investigator were altered in response to JSC's feedback on the draft Terms of Reference.

#### *Transparency*

[66] JSC says Pāmu was not transparent with him because, among other reasons, it did not state at the outset that the complaint related to sexual harassment. Although I accept JSC genuinely could not recall when he first understood the allegation was of sexual harassment, it is clear on the facts that the complainant was raising a formal written complaint in terms of Pāmu's Bullying and Harassment policy. It was also clear that aspects of the complaint relating to the 16 July incident were in the nature of sexual harassment allegations. JSC must have known this was what was being alleged given the reference in the draft terms of reference to the complainant being harassed "at her home" and the use of a reporting line change to "further a possible relationship". Ultimately, there was no disadvantage to JSC because he recognised the seriousness (or potential seriousness) of the complaint and realised that Pāmu was treating the conduct as potential misconduct or serious misconduct, and he acted promptly to engage legal representation.

[67] JSC takes issue with what he says was an unnecessary escalation by Pāmu HR from the concerns into a complaint because the complainant had raised the behaviour in line with the informal resolution process and the Bullying and Harassment policy allows for low-level informal discussion. JSC says because of the unnecessary escalation, low-level resolution options such as facilitation or a letter of expectation were not properly explored. On this matter, I find that there was no action by individuals within Pāmu to escalate the complaint – the nature of the complaint was

inherently serious under Pāmu's policies. It was fair and reasonable for Pāmu to decide that there should be an investigation to establish the facts as an initial step.

[68] I also find it was reasonable and appropriate for Pāmu to engage an external investigator to conduct an independent investigation, given JSC's seniority at Pāmu. While ordinarily it would have been appropriate for senior leadership to carry out a fact-finding investigation, there was a risk of actual or perceived conflict in another member of the senior leadership team investigating the complaint. JSC's allegation that he was not given an opportunity to comment on who the external investigator was is not supported by the evidence - he was advised of her identity. I am satisfied on the evidence that launching an independent investigation was a decision a fair and reasonable employer could make and that Pāmu acted to preserve the integrity of the process for all parties involved.

[69] JSC says he was not given all information in the investigation and refers to the redacted portions of the Team Leader's interview as an example. JSC was clearly entitled to have all information that was relevant to the external investigator's (and later Mr McJorrow's) investigations. However, as was apparent when the redacted material was provided to the parties and the Authority, the redactions were made to protect the privacy of another person unrelated to JSC's investigation and the material was not relevant. It was reasonable for the external investigator to have redacted the information at the time, and given the material was not relevant, I find that JSC was not unjustifiably disadvantaged by not being provided with it.

[70] There was also no general unfairness or unjustified disadvantage caused to JSC by Pāmu failing to record and disclose records of brief interactions between Mr McJorrow and HR. Based on the evidence before the Authority, the updating discussions were brief and part of routine interactions (such as one to one catchups), and they are to be expected in an office situation. However, there is an exception relating to when JSC entered the office on 3 June 2022, which I expand on further below, as it coincided with the beginning of the disciplinary process leading to JSC's dismissal.

*Credibility / reliability led to erroneous finding*

[71] A key issue for JSC is credibility. He says Pāmu accepted the complainant's version of events – that he had made inappropriate comments of a sexual nature - over

his denials, despite the credibility concerns he had raised. JSC says his concerns were not adequately addressed in the final report.

[72] Having read the external investigator's report in detail, I am satisfied that relevant credibility and reliability issues were investigated. In particular, in relation to the incident on 16 July, the external investigator preferred the complainant's evidence of what took place on the evening of 16 July because her recollection of events was supported by contemporaneous messages she sent to the Team Leader.

[73] The simple fact is that only two people know what occurred on the night of 16 July 2021, being the complainant and JSC. The external investigator reached conclusions as a result of a fair and reasonable investigation and the report is very clear on the reasons for findings, and the limitations of those findings. The investigator was entitled to find the complainant more credible, and prefer her version of events over JSC's provided those views were reached based on a fair and reasonable investigation.

[74] JSC's allegation seems to be that because the external investigator did not uphold six of the seven allegations against JSC, that had some bearing on the complainant's credibility and therefore a fair and reasonable employer could not have relied on her account over his. I am not persuaded there is a factual or legal basis for this submission. The external investigator is clear in her report that some of the allegations were unsubstantiated, and some were substantiated on the evidence but did not amount to harassment or bullying under the policy or a breach of the Code of Conduct.

[75] Although JSC says he should have specifically been invited to comment on whether there had been a detrimental effect on the complainant, I am not persuaded this was an issue he could usefully provide feedback to Pāmu about, because he had no first-hand knowledge of the impact of the incident on the complainant. JSC was given the opportunity, and did respond to, whether the alleged conduct was sexual harassment which included detrimental effect by definition. It was reasonable for Pāmu to conclude, based on the complainant's evidence given to the external investigator, that there was a detrimental effect on the complainant. I do not find that Pāmu has acted to JSC's disadvantage in relation to this issue.

[76] In relation to JSC's allegation that he raised issues with Pāmu about the draft investigation report that were not addressed by Pāmu, Mr McJorrow said the

investigator had read and considered the feedback from JSC and this was addressed in her final report. A consistent theme from Pāmu is that there is a difference between not hearing someone, and not agreeing with them. Pāmu did not agree with JSC's feedback. It was entitled to do so. There was no unjustifiable action by Pāmu in relation to this ground.

#### *Inconsistent Allegations*

[77] Related to the above, JSC says the past tense context of the alleged inappropriate comments – about wanting to make a move on the complainant in the past – should have been considered by Pāmu. Because JSC denies the incident happened, and denies he said anything about wanting to make a move on the complainant at all, I do not accept that the tense of the disputed comment has any relevance. I do not find there was any material inconsistency in the way that the complaint was put to JSC, or that it led to any disadvantage to him.

#### *Other relevant contextual information not taken into account*

[78] JSC says the context of the restructure and changes in reporting line should have been taken into account by the external investigator. The scope of the external investigator's brief was to make findings about whether the incident happened, and (if so) whether it constituted sexual harassment. I am not persuaded the context of what was happening at the workplace at the time was relevant to her investigation. However, I do find it was relevant to Mr McJorow's investigation as the decision-maker on the disciplinary outcome, including in relation to whether JSC posed any ongoing risk to the complainant or others. This is discussed further below.

#### *Conflicts of interest*

[79] JSC says that HR's involvement created a conflict of interest whereby he was disadvantaged compared to the treatment and support the complainant received. HR's main role during the independent investigation was to be the point of contact for the investigator and the witnesses. That was appropriate. HR provided documents and contact details for the witnesses, and kept those involved apprised of timelines. HR also managed and coordinated the safety plan. Based on the evidence before the Authority, I am not persuaded that the complainant received more support than JSC did. Although Ms Papps met with the complainant at the beginning of the complaint process, HR also met with JSC. Both the complainant and JSC were invited to utilise the

Employee Assistance Programme (EAP). I find the suggestion that HR influenced or escalated the complainant's complaint is unfounded on the evidence.

[80] JSC also alleges that the escalation of the complaint essentially ruled out the possibility of resolving the issues through informal discussion. Ms Kelly told the Authority that because this was a complaint under the Bullying and Harassment policy, it required a formal response and Pāmu was not confident that it could be resolved informally based on the emails from the complainant, the follow-up phone call and information received from the complainant on 21 October 2021 suggesting the complainant did not want to sit down in a room with JSC and have a discussion. It was Pāmu's decision whether there should be a formal investigation, but any low-level facilitation would have required the consent of both JSC and the complainant to proceed. Pāmu said that even if JSC had wanted an informal process, Pāmu would not necessarily have agreed that an informal process was appropriate to keep the complainant safe.

[81] This was not an unreasonable view for Pāmu to take at the outset of the investigation, given the complainant had told the external investigator in her interview that JSC's behaviour toward her and around her had changed since the incident, that she felt 'unsafe' and was not enjoying going to work. I find that there were no conflicts of interest or escalation of the complaint amounting to unjustifiable action by Pāmu.

#### *Delays*

[82] JSC alleges that delays in the investigation and disciplinary process disadvantaged him. On the evidence before the Authority, I find that both parties were responsible for delays. I find there was no unjustifiable action by Pāmu relating to the delays, or specific disadvantage to JSC created by the delays and I agree with Pāmu that the process had to run its course. However, the delays did impact the investigation in terms of the overall fairness and reasonableness of disciplinary process and decision to dismiss, and this is discussed further below.

#### *Conclusion on disadvantage claims*

[83] JSC claims two disadvantage grievances: that the findings of the external investigator's investigation were unjustified and disadvantaged him, and that Pāmu did not act as a fair and reasonable employer in upholding and applying the findings of the investigation to his disadvantage.

[84] I find that it was open to the external investigator to conclude that JSC had sexually harassed the complainant. That is, the finding was based on a fair and reasonable investigation and did not unjustifiably disadvantage JSC.

[85] Secondly, I find that Pāmu was justified in adopting and applying the findings of the report as it did, leading to the disciplinary process it initiated with JSC. The external investigator reached a conclusion on the facts that JSC had sexually harassed the complainant. It was then Mr McJorrow's role as the decision-maker for Pāmu to determine whether there was misconduct or serious misconduct, whether a disciplinary outcome was required, and if so, what that should be. Mr McJorrow clearly set out his expectations of next steps in his letter of 3 June 2022.

[86] I find that JSC was not unjustifiably disadvantaged by either the findings of the investigation, or Pāmu's adoption of the findings.

### **Unjustifiable dismissal**

[87] In determining whether a dismissal was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether the actions of Pāmu and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[88] The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment.<sup>4</sup>

[89] I need to assess whether the decision that Mr McJorrow made on Pāmu's behalf to dismiss JSC for serious misconduct, and how Mr McJorrow reached that decision were what a fair and reasonable employer could have done in all the circumstances at the time including whether:

- (a) Pāmu's concerns were fully and fairly investigated;
- (b) The decision was made without predetermination;

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<sup>4</sup> Section 4(1A) of the Employment Relations Act 2000.

- (c) JSC was provided with the relevant information and given an adequate opportunity to respond to it before a decision was made; and
- (d) Alternatives to dismissal were adequately considered.

[90] The Authority is not required to decide whether JSC sexually harassed the complainant, but rather whether Pāmu's actions were fair and reasonable in the circumstances including the decision to dismiss. The standard to be applied to the Authority's assessment in this case, is the reasonableness of Pāmu's actions, and not whether the sexual harassment occurred to a "balance of probabilities" standard.

*Applicant's submissions*

[91] JSC says the finding that he had sexually harassed the complainant was not a conclusion that was open to a fair and reasonable employer, and that Pāmu should have applied a "balance of probabilities" standard to its findings, given the nature of the allegations.

[92] JSC says it follows that Pāmu was not entitled to find there had been serious misconduct and Pāmu unfairly conflated the investigative and disciplinary processes. The decision-maker could not make a fresh assessment of "stale untested material" and a fair and reasonable employer would have made its own truly independent enquiry including interviewing the complainant. JSC says this was particularly important given he had put the complainant's credibility squarely in issue and Mr McJorow could not correct the defects in the investigator's process without speaking to the complainant. Faced with - what JSC says were - inconsistent accounts from the only two people present at the time of the alleged incident, it was incumbent on Pāmu to enquire into the full range of reasonable alternatives and explanations about what happened.

[93] JSC also says that summary dismissal was a disproportionately harsh outcome in the circumstances and therefore unjustifiable. He submits a warning would have been appropriate under Pāmu's Handling Misconduct policy as there was no evidential basis for Pāmu to conclude he could not be trusted not to put himself in a similar situation again. JSC says no alternatives to dismissal were reasonably considered by Pāmu. JSC's summary dismissal was weighted heavily towards addressing alleged health and safety considerations, but there was no evidence that JSC was a health and safety risk to the complainant or other staff. To the extent that Pāmu had any health and safety concerns about JSC's behaviour, these should have been limited to the

complainant and not expanded to the whole workplace. The consequential conclusion that JSC might be a risk to others in the workplace must be untenable because it is not supported by the evidence.

[94] JSC refers to the disciplinary process as a “Hobson’s Choice”. Effectively Pāmu would only consider maintaining JSC’s employment if he admitted to, and showed remorse for, something he says he did not do. JSC said in that situation, there was effectively no choice, and the only option Pāmu was genuinely considering was his dismissal.

#### *Respondent’s submissions*

[95] Pāmu says initiating the disciplinary investigation was warranted. It says the investigative and disciplinary processes were not conflated, but even if they had been, Pāmu is not required by either its policies or the law to separate its investigation findings from proposed disciplinary outcomes. There was some urgency to progressing and completing the investigation in a timely fashion as Pāmu was conscious of trying to avoid JSC’s upcoming period of leave. Pāmu accepts the more serious the allegation, the higher the standard of proof should be but says in any case, it applied a higher standard than “balance of probabilities” to its investigation.

[96] Procedurally, Pāmu says it was open to Mr McJorrow to conclude he did not need to speak to the complainant personally because he had read all the available information and material including feedback from JSC. The disciplinary meeting held on 12 July gave JSC a full opportunity to discuss the findings of the investigation.

[97] In terms of the substantive justification for the dismissal, Pāmu says it was open to it to conclude that JSC should be dismissed – principally because it had lost trust and confidence in him as a Senior Leader. Pāmu says the organisation had an open mind, was transparent, and not biased. There was no predetermination and the process it followed demonstrates this. The preliminary decision issued on 15 July 2022 involved a fresh assessment by Mr McJorrow of relevant information. Pāmu says the fact that Mr McJorrow did not uphold the investigator’s finding in relation to the threat of detriment or promise of gain demonstrates the independent thought applied to the disciplinary process. It was open to Mr McJorrow to conclude the complainant’s account of events was more credible on the evidence, because her account was

supported by independent evidence and she had nothing to gain and everything to lose by making the complaint.

[98] The power imbalance between JSC and the complainant raised the incident to the level of potential serious misconduct. Pāmu says it did consider alternatives including the health and safety implications of different options. Pāmu determined that a low-level outcome would not be appropriate. JSC's conduct in totality was such that Pāmu could no longer have trust and confidence in him, partly because JSC had not indicated remorse or insight into the impact of his actions on the complainant.

*Analysis of the disciplinary process and dismissal*

[99] The starting point for the disciplinary process that led to JSC's dismissal was that an independent external investigator had made a finding that JSC had sexually harassed the complainant. Mr McJorrow says that the independent investigation was just one piece of data that was required to feed into his considerations of the next appropriate steps. Pāmu received the final report on 26 May 2022 and Mr McJorrow formally started a disciplinary process with JSC on 3 June 2022 when he provided JSC with the report.

[100] In terms of the process that Mr McJorrow followed as decision-maker, when he received the final report from the external investigator, he read it more than once. He had a conversation with Ms Kelly to clarify Pāmu's policies and how these related to the next steps in the process. Mr McJorrow was the sole decision-maker, and he did not want to have any discussions about the substance of his decisions as he did not want his objectivity to be influenced. He read through the transcripts of the interviews.<sup>5</sup> He used whiteboarding to help him work through the issues. His primary focus was trying to determine whether he agreed with the external investigator's conclusions. Mr McJorrow said his initial conclusion was that he agreed with the findings of the report. He also looked at JSC's 13 May feedback, as he considered it helpful to have it in the context of the final report.

[101] Mr McJorrow said he was comfortable with the external investigator's report including that the complainant's credibility was tested. Mr McJorrow reiterated his view that there was evidence, including text messages between the complainant and her

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<sup>5</sup> Mr McJorrow only had the redacted version of the Team Leader's interview transcript.

colleague, that corroborated the complainant's version of events. Mr McJorrow said questions of recall and levels of impairment were adequately addressed in the external investigator's report, and ultimately he did not agree that the level of impairment of either the complainant or JSC was relevant to their credibility.

[102] There were six allegations in the report that were not upheld by the external investigator. Mr McJorrow considered these allegations to be at the lower end of the scale and to the extent that he was concerned about the behaviours described in respect of other allegations, Mr McJorrow thought that JSC would be "on notice" given these allegations formed part of the formal report.

[103] At this point, Mr McJorrow says he had not concluded the conduct was serious misconduct. The purpose of reviewing the final report was to look at the findings of fact, and then consider next steps.

[104] On 3 June 2022, JSC was advised that Pāmu accepted the findings of the report and he was invited to a disciplinary meeting. Pāmu's policies allowed for a process transition from the Bullying and Harassment policy into the Handling Misconduct policy. It was Mr McJorrow's role as decision-maker to decide whether a disciplinary process should be initiated and he says there was a separation between the investigation and disciplinary processes. The Handling Misconduct policy states:

The process followed should be appropriate for the specific circumstances (and in some cases it will be necessary or appropriate to depart from the general process outlined here with advice from the People team)...

[105] Under the Handling Misconduct Policy, among the findings a decision-maker is permitted to consider are:

- (a) If the allegations / concerns have substance;
- (b) The impact of the employee's actions on others or the organisation;
- (c) If Pāmu's values, policies or Code of Conduct appear to have been breached;
- (d) Whether trust and confidence may have been affected and to what degrees;
- (e) How serious the issue is and what outcomes might be appropriate;

- (f) What actions could a reasonable employer take in similar circumstances; and
- (g) Advice from the HR team, senior managers and/or legal advisors.

[106] Possible outcomes include dismissal when the breach of expected conduct by the employee is sufficiently serious that dismissal is warranted and where the decision-maker has concluded, following appropriate investigation, that the employee's actions have deeply impaired or destroyed Pāmu's trust and confidence in the employee. Examples of serious misconduct include "unacceptable conduct including harassment".

[107] On 12 July 2022, a disciplinary meeting was held between JSC and Pāmu by Zoom to accommodate all the parties attending, as an in-person meeting had not been able to be scheduled prior. This was more than a month after the external investigator's final report had been received by both parties.

[108] On 15 July 2022, Pāmu gave JSC a "Disciplinary Decision and Proposed Outcome" letter, before he left on an extended holiday to visit his father. JSC was invited to provide further feedback in writing within a week of his return. Pāmu also said it was prepared to meet with JSC again, but he declined. JSC's view at that time was that there had been no movement through the whole process and he did not wish to drag the matter out any further.

#### *Concerns of Pāmu*

[109] Based on the evidence before the Authority, I find there was a requirement for Mr McJorrow, as Pāmu's decision-maker, to conduct his own independent assessment of the information available to him at the disciplinary stage. Mr McJorrow had a different role to that of the external investigator: he would need to decide whether Pāmu should adopt the external investigator's findings, consider whether any established conduct amounted to misconduct or serious misconduct, consider whether a disciplinary outcome was warranted, and then consider what an appropriate disciplinary outcome should be. JSC knew a disciplinary process was a possible outcome of the complaint and investigation process but says Pāmu was required to reassess the evidence and to conduct a truly independent enquiry. I agree. This is not tantamount to re-running the whole independent investigation process which would not have been fair or reasonable for any of the parties involved. But Mr McJorrow did have an obligation to review the information with an open mind, and to fill any gaps in the

information he needed to make a fair decision on the appropriate disciplinary outcome. An employer is entitled to prefer one person's version of events over another's where there is a conflict, but there has to be a reasonable basis for doing so.<sup>6</sup>

[110] I consider a fair and reasonable employer could conclude that JSC had sexually harassed the complainant based on the information available to Mr McJorrow. In the letter of 15 July 2022, Mr McJorrow sets out the reasons he agrees with the external investigator's finding of sexual harassment on two grounds under Pāmu's policy. He says that he finds the complainant's account more convincing than JSC's "by a significant margin" and considers the words used were of a sexual nature, and that the complainant found the words both unwelcome and offensive.

[111] I am not persuaded that Pāmu "slavishly" adopted the external investigator's findings. There was evidence of independent thought and assessment applied by Mr McJorrow to the findings of the external investigator because Pāmu did not uphold all aspects of the investigator's conclusions and in particular, did not find JSC's conduct contained the elements of a threat of detriment or promise of favour in the workplace.

[112] Mr McJorrow then determined that because of the power imbalance and impact on the complainant (at the time of the incident and subsequently), the sexual harassment was serious misconduct. Harassment can be serious misconduct under Pāmu's Bullying and Harassment Policy<sup>7</sup> and disciplinary action may be warranted depending on the level of behaviour. Although Mr McJorrow's analysis was light as to why he considered the conduct to be serious misconduct, his reasoning was sound, and it was a conclusion open to him to make. However, I find that Mr McJorrow's mind was narrowed as to the range of disciplinary outcomes that would be acceptable to Pāmu based on the external investigator's finding that JSC had sexually harassed the complainant, and Mr McJorrow's own assessment that JSC's behaviour amounted to serious misconduct: JSC would have to overcome a significant hurdle in order to retain his employment.

[113] I find that the decision Mr McJorrow made on Pāmu's behalf to summarily dismiss JSC for serious misconduct and how Mr McJorrow reached that decision were not what a fair and reasonable employer could have done in the following respects.

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<sup>6</sup> *Ritchies Transport Holdings Ltd v Merennage* [2015] ERNZ 361 at [108].

<sup>7</sup> Paragraph 49.

Firstly, throughout the external investigation, and even after receiving the external investigator's final report concluding that there had been sexual harassment, Pāmu permitted JSC to continue working in the office while the complainant also continued to work in the office (albeit under the terms of a safety plan designed to separate them). JSC remained in the workplace for another six weeks after the sexual harassment finding had been made by the external investigator, until he went on leave (26 May to 15 July). He was then in the office for a further period of almost three weeks after he returned from leave until he was summarily dismissed (24 August to 12 September 2022). Pāmu's actions in permitting JSC to continue working in the office were inconsistent with reasons it later gave for JSC's summary dismissal: namely that its trust and confidence in JSC as a manager had been significantly affected, that alternatives to summary dismissal (such as a written warning) were not practicable due to Pāmu's concerns about "health and safety implications" for the complainant and other staff, and that it needed to prevent any repetition of the harassment.

[114] Based on the evidence before the Authority, even at the disciplinary stage JSC was hopeful of a low-level resolution to the complaint potentially involving a facilitated discussion with the complainant. Instead, he was summarily dismissed after being allowed to continue to work in the office during two investigation processes which continued for almost a year from the time of the complaint (21 October 2021) until his summary dismissal (12 September 2022). In the intervening time, on 3 June 2022 there was an incident when JSC came into the office on a 'working from home' day and the complainant was allegedly "very distressed" (to which I return below) but even this breach of the safety plan and the purported impact of it on the complainant did not prompt Pāmu to consider excluding JSC from the office. The inconsistency in its actions casts doubt on the genuineness of the reasons it later gave for JSC's dismissal.

[115] Secondly, Pāmu did not investigate the context of the restructure and reporting line changes. The external investigator noted there was additional evidence provided about JSC's change in behaviour towards the complainant after the incident, and that JSC felt the complainant "held him responsible for the restructure and for colleagues losing their jobs and that this was a source of tension".<sup>8</sup> The external investigator noted that further investigation of these matters was outside the scope of the Terms of

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<sup>8</sup> Paragraph 12 of the "Report of Independent Investigation into Allegations of Bullying and Harassment."

Reference although she did not think this evidence would have changed the conclusions of the report. However, this was potentially relevant information for the disciplinary investigation because JSC had provided an alternative explanation for the change in relationship between himself and the complainant after July, and cast some doubt on the detrimental effect on the complainant.

[116] In relation to the changed behaviours after the incident, Mr McJorrow stated:

There is no suggestion [the complainant] fabricated her complaint or it was malicious. Nor do I accept it is reasonable to say [the complainant] was just disgruntled because of a restructuring...

...I do not accept that [the complainant's] behaviour after the event in continuing to meet when necessary and socialise with you and your partner proved nothing happened. I consider [the complainant] was trying to keep things friendly and normalise the situation. That is not an unusual behaviour for someone in [the complainant's] position.

[117] Mr McJorrow did not investigate JSC's alternative explanations as part of the disciplinary investigation, which would have been the appropriate time given the external investigator had noted the additional evidence as being outside the scope of her investigation. This has resulted in Mr McJorrow making findings and relying on untested matters which was not what a fair and reasonable employer could have done given the credibility and reliability issues raised by JSC.

[118] Thirdly, Pāmu did not sufficiently investigate the impact on the complainant. Mr McJorrow concluded that JSC's behaviour was serious misconduct "*given the power imbalance and the impact on [the complainant] at the time and subsequently*".<sup>9</sup> Impact on the complainant was relevant both to the definition of sexual harassment (detrimental effect), and to Mr McJorrow's finding that serious misconduct had occurred. It was also relevant to whether a facilitated meeting was an acceptable alternative to dismissal.

[119] JSC had raised with Pāmu that he had a personal relationship with the complainant outside work. He was confused by the complainant's actions after the 16 July incident which he found inconsistent with the nature of the allegations against him and the alleged impact on her. An example was that JSC said he and the complainant attended a social event on 25 July 2021 with their partners, mere days after the 16 July

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<sup>9</sup> Paragraph 24, Disciplinary Process and Proposed Outcome Letter, 15 July 2022.

2021 incident. In the office, the complainant appears to have deliberately sat next to JSC after recognising his bag.<sup>10</sup>

[120] However, the impact on the complainant is not a static concept, and could have changed over time. Mr McJorrow did not speak directly to the complainant as part of the disciplinary investigation. The information he relied on in assessing the impact on the complainant (being the complainant's original statements to Pāmu in October 2021, and her statement to the external investigator on 28 January 2022) was between six and nine months old at the time Mr McJorrow came to his disciplinary decision and proposed outcome on 15 July 2022. By the time the final dismissal decision was made, the information as to impact was nine to 11 months old.

[121] Although Mr McJorrow had no expectations around the duration of the investigation and disciplinary process at the outset, he told the Authority he was surprised that the process took so long and acknowledged it had been a very long time for all the parties involved to have the matter "hanging over them". There were several delays, which Mr McJorrow said were not due to Pāmu - deadlines were set with JSC but not always met. It is clear from the timeline that once the external investigation was complete, Pāmu attempted to progress matters as quickly as possible and Pāmu said in the end, there was not an unreasonable amount of time to conclude the disciplinary process.

[122] While I accept that the whole process of investigating the complaint was delayed, the effect of the delays was that information Mr McJorrow relied on to make his decision became stale and potentially unreliable. When Mr McJorrow received the external investigator's report and commenced a disciplinary process, he stated in his 3 June 2022 letter that he intended to consult with the complainant. There is no evidence before the Authority as to why he did not do this. A fair and reasonable employer could have satisfied itself that its concerns about impact on the complainant remained current and relevant. Without doing so, the result was that Mr McJorrow made findings about matters that were not properly tested.

[123] Fourthly, to the extent that Pāmu did have updated information about impact on the complainant, this relevant information was not provided to JSC at the time. In the 15 July 2022 letter, Mr McJorrow concludes that a facilitated meeting could not be

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<sup>10</sup> Complainant interview, Common Bundle (document 28 at p99).

arranged between the complainant and JSC because she was “very distressed” when JSC turned up unexpectedly at work. The email that Ms Papps sent to JSC at the time relatively benignly records that JSC came into the office on one of his working from home days, and “*this is not in keeping with the safety plan that we have in place*”. Impact on the complainant was a relevant factor in the finding of serious misconduct and it also factored into other reasons for JSC’s dismissal. Accordingly, failing to provide this information to JSC and give him an opportunity to respond to it at the time were not the actions of a fair and reasonable employer.

[124] Fifthly: I find that Pāmu did not fully consider alternatives to dismissal. I have referred earlier to the finding of sexual harassment resulting in a narrowing of options. While an employer is not required to consider alternatives to dismissal, a finding that an employer has considered alternatives may support the fairness and reasonableness of their substantive decision. Conversely, a failure to consider alternatives may suggest predetermination or a closed mind.

[125] In late November 2021, JSC had proposed a “*constructive and informal dialogue with [the complainant] and/or the employer*”<sup>11</sup> as a way to move forward. Based on the evidence before the Authority, this option appears not to have been revisited until the 15 July 2021 letter when Mr McJorrow says:

[The complainant] was advised of the options under our policies. She did not express a willingness to engage in an informal resolution process with you. Nor did you suggest this in your initial response on 10 November.

[126] Mr McJorrow goes on to say that he is “*very dubious about the safety and appropriateness*” of a facilitated meeting, “*particularly as [the complainant] has said she can’t be in a room with you now. She was also very distressed when you turned up unexpectedly at work recently*”. At the investigation meeting, Mr McJorrow said Pāmu was open to facilitation, but whether it was appropriate would depend entirely on the context. In this case, the process had to begin with an independent investigation and given the amount of documentation and the formality of the complaints, he did not think an informal resolution process would be appropriate. However, Pāmu was basing its assessment on information the complainant had first provided in October 2021, and more recent information that was not shared with JSC until the proposed outcome letter.

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<sup>11</sup> Paragraph 14, Letter to Pāmu dated 26 November 2021.

Further, while Mr McJorrow stated he was not aware of any change in the complainant's willingness to sit down and have a facilitated discussion, nor did he make these enquiries. That Pāmu did not fully consider this option suggests it had closed its mind to this alternative to dismissal.

[127] Related to this, and under the umbrella discussion of alternatives to summary dismissal, Mr McJorrow says:

I have considered the health and safety implications, especially for [the complainant] but also for other staff. I would need to be very certain I was taking all reasonably practicable steps to keep [the complainant] safe at work, ensure a healthy and safe work environment for her, and prevent any repetition of the harassment that occurred.<sup>12</sup>

[128] Mr McJorrow told the Authority that without remorse, there could be no guarantee that the incident would not be repeated. Pāmu said its trust and confidence in JSC had been significantly affected by the finding, and the lack of acknowledgment of the conduct or lack of recollection was not reassuring.

[129] Mr McJorrow repeated the health and safety concern in the "Outcome of Disciplinary Process" letter:<sup>13</sup>

I was genuinely open to the alternative to summary dismissal...I worked through what the alternative would look like and whether it was proportionate and would meet my health and safety obligations to [the complainant] and other staff. I am not convinced it is the right outcome.

[130] However, based on the evidence before the Authority, it appears that the perceived health and safety risk to the complainant (and others) assumed greater significance in the decision to dismiss than was reasonable in the circumstances, given that JSC had worked in the office without incident for almost 11 months from the time the complaint was made, to when he was dismissed.

[131] I accept that Mr McJorrow did not deliberately pre-determine the appropriate outcome at the start of the disciplinary process, but the lack of an open mind is evident from the failure to fully consider alternatives to summary dismissal that objectively should have been considered.

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<sup>12</sup> Paragraph 30, Disciplinary Decision and Proposed Outcome letter dated 15 July 2022.

<sup>13</sup> Dated 12 September 2022.

[132] In terms of process, JSC said the timing of delivering the “Disciplinary Decision and Proposed Outcome” was unreasonable because Mr McJorrow knew that JSC had planned a holiday for approximately five weeks to visit his elderly father and given his age, it would probably be the last time JSC would see him. Pāmu denies JSC said anything about his father being terminally ill or that Mr McJorrow knew anything more specific about the situation. There is no evidence before the Authority that Pāmu deliberately acted in an unfair and unreasonable way to deliver the decision to JSC at a time when it knew – or ought to have known - he was not well-equipped to respond. Pāmu recognised that JSC was going to be on leave. It gave him the opportunity to provide feedback after his return and Mr McJorrow offered to meet with him again if he wished. JSC took the opportunity to give further feedback on 6 September. I find that the timing of delivering the Disciplinary Decision and Proposed Outcome letter to JSC was regrettable and this should be addressed in terms of appropriate remedies, but there is no evidence of bad faith on the part of Pāmu – I accept it genuinely wanted to progress matters for the sake of all parties involved.

*Analysis – was the dismissal justified?*

[133] At the initial stage of the disciplinary investigation process, Pāmu assessed the available evidence and found that JSC had sexually harassed the complainant. In doing so, it was entitled to resolve the conflicting versions of events, and prefer the complainant’s version of events over JSC’s, and I found it did so on a reasonable basis. In the disciplinary decision and proposed outcome letter, Mr McJorrow said he found the complainant’s account “*more convincing than [JSC’s] by a significant margin. I believe the events occurred, to more than a balance of probabilities standard*”. That was a finding that was open to Mr McJorrow to make as the decision-maker.

[134] However, the disciplinary process that Pāmu then followed and the outcome it reached was not, on an objective basis, fair and reasonable. Its actions in allowing JSC to continue working in the office – particularly after the external investigator had found the allegation of sexual harassment to be proven - were inconsistent with the reasons it later gave for JSC’s dismissal. From JSC’s perspective, the employment relationship “*continued unabated and uneventful throughout the considerable length of time and was productively operating at the time of the dismissal*”. Pāmu’s actions were inconsistent with its assertions that by September 2022, it had lost trust and confidence in JSC and that JSC’s continued employment presented potential health and safety risks

such that there were no reasonable alternatives to summary dismissal. The inconsistency casts doubt on the genuineness of the reasons Pāmu gave for JSC's dismissal.

[135] There were contextual gaps that were not fully investigated and the significant delays in the process meant that without further investigation, Mr McJorrow relied on stale and untested material. This was not what a fair and reasonable employer could have done. Pāmu initially intended to consult with the complainant as part of the disciplinary process. It did not do this. Pāmu should have given JSC relevant information about the impact of the 3 June breach of safety plan on the complainant. Pāmu did not adequately consider alternatives to dismissal, which suggests it had closed its mind to options other than summary dismissal.

[136] Mr McJorrow said he was aware of the climate at the time of the "MeToo" Movement. This gave insight into his decision-making. Mr McJorrow placed weight on the fact that Pāmu staff deserve a safe environment and in particular, to ensure that they are safe from adverse actions of the Senior Leadership. Mr McJorrow told the Authority that not imposing any sanction, or imposing a minor sanction, on JSC would not result in staff feeling safe because they would feel that Pāmu did not take allegations seriously. Ultimately, I am persuaded that after Pāmu received the external investigator's report and accepted the finding that sexual harassment had occurred, it unreasonably narrowed its mind as to whether JSC's conduct was serious misconduct, and closed its mind to any outcomes other than summary dismissal. These were not the actions of a fair and reasonable employer and I find JSC was unjustifiably dismissed.

### **Remedies – personal grievance**

[137] I have found JSC's dismissal to be unjustifiable and he is therefore entitled to an assessment of remedies.

[138] JSC seeks:

- (a) Compensation under s123(1)(c) of the Act.
- (b) Reimbursement under s 123(1)(b) for lost wages including KiwiSaver.
- (c) Loss of monetary benefits under s 123(1)(c)(ii) including legal fees, being the cost associated with the preparation and engagement with the investigation as a work-related event.

## (d) Costs.

*Compensation*

[139] JSC seeks separate awards of compensation for each of the two disadvantage claims, and the unjustifiable dismissal claim under section 123(1)(c)(i) of the Act in the mid-high position of band 2 (\$25,000 - \$50,000) set by the Employment Court<sup>14</sup> of \$12,000 to \$50,000 for the disadvantages, and in the upper mid to high position of band 2 for the summary dismissal (\$35,000 - \$50,000). The Employment Court has recently confirmed that s 123(1)(c)(i) of the Act does not contain an express or implied requirement for medical evidence to be produced to award anything other than modest loss.<sup>15</sup>

[140] JSC gave extensive evidence about the impact of his dismissal. Initially, he says he went through all sorts of emotions in relation to the complaint. He was struggling and was disappointed he was not supported throughout the investigative and disciplinary process and that Pāmu did not respond how he had expected and in line with its values. He says he was not offered any HR support, and certainly not the same level of support offered to the complainant. He said nobody from Pāmu had looked him in the eye and asked whether he was doing okay.

[141] JSC says that even in November 2021 when he was first notified of the complaint, he thought that he would be able to resolve things with the complainant, and everyone would move on. Pāmu offered JSC paid time away off work, access to EAP and the ability to speak to someone independent should he need advice. But JSC said he had a lot of people relying on him at that stage and it would have been detrimental to his team for him to take time out of the office.

[142] Based on the information before the Authority, I find JSC was distressed and suffered a loss of dignity following his dismissal. The parties had a solid and constructive working relationship in the lead up to the investigative and disciplinary process. JSC's reaction to the events was characterised by disbelief that events had unfolded in the way they had.

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<sup>14</sup> *Waikato District Health Board v Archibald* [2017] NZEmpC 132, and *Richora Group Limited v Cheng* [2018] NZEmpC 132 as adjusted in *GF Comptroller of the New Zealand Customs Services* [2023] NZEmpC 101.

<sup>15</sup> *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190.

[143] The impact on JSC of his dismissal has been enormous. He says it has been “severe” and “life changing”. JSC said he suffered significantly and felt unsupported through what was an 11-month process. The timing of receiving the Disciplinary Decision and Proposed Outcome letter just before he went on leave to visit his father clearly had a significant impact on him also. JSC says that any compensation awarded to him needs to reflect that the level of humiliation and distress was substantial, severe and sustained.

[144] JSC feels embarrassed. He refers to the stigma of being “labelled permanently as a sexual harasser” which is “career and reputationally destructive”. He has ongoing concerns around his employability given the stigma of the allegations.

[145] JSC says the experience has had a major impact on his health and psychological wellbeing. He feels like he now has to walk away from any social situation. JSC feels he will never be a people manager again. JSC was able to secure contract work two weeks after leaving Pāmu and as at the time of the Authority’s investigation was contracting to a government department in a non-people manager role. He was expecting a dry period of work to be coming up for contracting.

[146] JSC’s partner gave evidence to the Authority of the huge impact on both herself and JSC. She said that trust is a huge issue for JSC now and he feels like he had been thrown to the side and not believed. She says JSC is not the same person as before the incident, and he deserved better from Pāmu.

[147] I have considered the general range of compensation awards in other cases. Standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider that an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$25,000.

#### *Lost wages*

[148] Under section 128(2) of the Act, the Authority must order the employer to pay the employee the lesser of 3 months’ ordinary time remuneration, or a sum equal to the actual lost remuneration. This is the default position if the employee has lost remuneration as a result of the personal grievance. Awards of compensation are discretionary and moderation is appropriate. Section 128(2) clarifies that reimbursement will normally be limited to “the lesser of a sum equal to that lost remuneration or to 3 months’ ordinary time remuneration”. However, s128(3) allows

that the Authority “in its discretion” may award a greater sum where appropriate. There is no automatic entitlement to full loss. Whether I award more than three months ordinary time remuneration, and if so how much more (bearing in mind actual loss merely represents the upper award) this should be assessed based on the circumstances of the case, allowing for any contingencies that might have resulted in termination of the employee’s employment such that they would not have earned the total amount of the claimed loss.<sup>16</sup> I need to ask and answer the hypothetical question as to how the employee would have been placed in the absence of the legal wrong in issue (counter-factual analysis).<sup>17</sup> JSC has the onus of showing that he has lost income as a result of the personal grievance, which is subject to a duty to mitigate his loss.

[149] JSC says he earned \$209,000 (gross) per year at Pāmu. He seeks reimbursement of lost wages (ongoing) as follows:

- (a) September 2022 – October 2022, \$17,416 (for one month)
- (b) October 2022 – June 2023 - \$48,744 (being \$5,416 per month)
- (c) July 2023 – September 2023 - \$37,248 (being \$12,416 per month)
- (d) From September 2023 - \$17,416 per month.

[150] The amount JSC claims per month from October 2022 to June 2023 is reduced to reflect that JSC undertook a 9-month contract in this period worth \$108,000 (gross), and he claims the difference between his actual earnings, and what he would have earned at Pāmu. If the Authority orders 3 months’ ordinary time remuneration, JSC says the amount should not be offset by deducting the wages he earned from October to November 2022. In all, JSC seeks lost wages without offsetting his contracting income. He says from September 2022 to September 2023, his net lost wages amounted to \$103,408.

[151] JSC calculates his lost KiwiSaver (employer and government contributions) as being \$21,426.95 per annum (gross) which equates to \$1,785.58 per month (gross).

[152] In terms of mitigation, JSC accepts that he has not applied for public sector employment roles and says he would not have the confidence to do so. He says that he has not applied for private sector roles as he would not be willing to disclose that he

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<sup>16</sup> *Sam’s Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

<sup>17</sup> *Telecom New Zealand Ltd v Nutter* [2004] NZCA 127/03, 2 NZELR 83 at 73.

was the subject of a sexual harassment allegation that led to his dismissal. He says he would rather not be working at all, but he has to because of the impact of losing his retirement “nest egg”.

[153] Pāmu submits that if JSC is awarded any lost wages, it should not be more than the starting point in s 128(2) of the Act because beyond the 3-month period, JSC’s lost wages are not as a result of his personal grievance, but because he has chosen not to apply for jobs in the public sector.

[154] Mitigation of loss in the context of awarding the remedy of reimbursement is about mitigating loss of income that is as a result of the personal grievance. If the employee has not attempted to mitigate the extent of their loss this will be a relevant factor for the Authority to consider when exercising its discretion to reimburse the employee for loss.

[155] JSC has lost remuneration as a result of the personal grievance. However, he acted promptly to obtain paid work and was able to start contracting the month after his dismissal. Based on the evidence before the Authority, I find that JSC did not apply for jobs in the public sector because he did not want to disclose the reasons his employment at Pāmu ended. That was a choice that was open to JSC to make, but I consider after the three-month period, any shortfall in remuneration was a result of JSC’s decision not to apply for public sector roles, rather than as a direct result of the personal grievance. Stepping back to look at the matter objectively, I see no reason to depart from the default position of 3 months’ ordinary time remuneration, with actual earnings offset against the total.

[156] JSC had an annual salary of \$209,000 with Pāmu. For the first month following his dismissal, JSC should receive the full amount he would have earned at Pāmu being \$17,416 (gross). For the following two months, JSC would have expected to earn an additional \$10,832 (because he was earning \$5,416 less per month contracting than he would have at Pāmu).<sup>18</sup> The total amount that JSC has lost in remuneration for the three month period following his dismissal is therefore \$28,248 (gross).

[157] In relation to KiwiSaver, Pāmu says that this sum cannot be relevant to lost wages because JSC has elected to do contracting work. Looking at KiwiSaver purely

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<sup>18</sup> The total value of the 9-month contract was \$108,000, which equates to \$12,000 (gross) per month.

from a loss perspective, I am satisfied that it was a benefit to which JSC would have been entitled but for the unjustifiable dismissal, and therefore a loss that I am able to order. JSC lost his KiwiSaver employer and government contributions, which amounts to \$5,356.74 (gross) total for three months and I find that should be ordered.<sup>19</sup>

[158] The total amount of lost remuneration is \$33,604.74 (gross). That is an appropriate amount to order, and I make that award.

*Loss of monetary benefits*

[159] JSC claims loss of monetary benefits pursuant to s 123(1)(c)(ii) including legal fees, being the cost associated with preparation for, and engagement with, the investigation as a work-related event. JSC has provided invoices for his legal fees that total in excess of \$66,000. Some of the fees relate directly to the Authority's process, rather than Pāmu's investigations.

[160] JSC says the purpose of special damages is to compensate for loss, damage or harm suffered. He relies on the Court of Appeal judgment in *Binnie v Pacific Health Limited*<sup>20</sup> and the Employment Court in *Stormont v Peddle Thorp Aitken*<sup>21</sup> as establishing the principle that legal expenses incurred prior to the issuing of proceedings can be treated as special damages rather than costs. JSC says the legal fees incurred were a direct result of his personal grievances and would not have been incurred but for the default of Pāmu.

[161] Pāmu says that case law shows employees may recover damages for legal costs under s123(1)(c)(ii) of the Act only in exceptional circumstances. It says the legal costs in the present case are causally connected to JSC's dismissal, and the process was substantively and procedurally fair, and cannot be considered to be disingenuous or unwarranted. Pāmu also says that although the claim has not been quantified, the total amount of the invoices would be an excessive amount to award, noting that in *Stormont*, the sum was just under \$11,000.

[162] The purpose of special damages is not punitive. The Court of Appeal in *Binnie v Pacific Health Limited* held:

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<sup>19</sup> \$1,785.58 per month for three months.

<sup>20</sup> [2002] 1 ERNZ 438 (CA).

<sup>21</sup> [2017] NZEmpC 71.

Legal expenses properly incurred in relation to issues such as wrongful suspension of employees and investigations into their conduct might well be classified as special damages rather than as party and party costs. The latter generally have as their focus the issue of proceedings, preparation for the hearing, and the hearing itself.<sup>22</sup>

[163] The Employment Court has since confirmed legal costs may be recovered as special damages where such a line can be drawn and where the costs were reasonable and necessary in light of the defendant's actions.

[164] I am not persuaded that exceptional circumstances have been made out in this case, sufficient to warrant an award of special damages. The legal costs were not incurred as a result of unreasonable actions by Pāmu. I consider Pāmu's investigation and processes arose out of a need to respond to genuine concerns and were therefore not entirely baseless, or otherwise comparable to the "disingenuous" circumstances that warranted special damages in *Stormont*. I therefore decline to award special damages. As costs are reserved on the substantive matter, it remains open for the parties to make submissions on an appropriate award of costs in terms of the Authority's investigation.

#### *Contribution*

[165] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which JSC may have acted in a way that contributed to the situation that gave rise to his grievance.<sup>23</sup> The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:<sup>24</sup>

- (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- (b) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[166] The Court also stated:

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.<sup>25</sup>

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<sup>22</sup> [2002] 1 ERNZ 438 (CA) at [17].

<sup>23</sup> Section 124 of the Employment Relations Act 2000.

<sup>24</sup> *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

<sup>25</sup> Above n24 at [41].

[167] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[168] Pāmu submits that any award should be reduced to reflect JSC's "significant contribution" to the circumstances, in particular, by drinking to excess and going to an employee's home. Pāmu says JSC has not shown insight into his conduct and the impact of it on the complainant.

[169] However Pāmu has overlooked that JSC had a "hybrid relationship" with the complainant in which they occasionally socialised outside of work. JSC's non-acceptance of responsibility is also a fundamental issue that remains in dispute – he says the allegation that he said something inappropriate to the complainant simply did not happen. Based on the evidence before the Authority, I do not ascribe any responsibility to JSC for the personal grievance, and I do not find any evidence of contribution such that any appropriate remedies are required to be reduced.

### **Penalties**

[170] JSC seeks penalties for breaches of the Act, namely good faith breaches including confidentiality. JSC says that under sections 3 and 4 of the Act, Pāmu has an obligation to constructively engage, act in good faith and build productive employment relationships. He says that delays have undermined the parties' ability to constructively engage and further that Pāmu did not genuinely consider alternatives to dismissal.

[171] JSC alleges that Pāmu's failure to disclose the unredacted interview transcript of the Team Leader was a deliberate decision by Pāmu made in the knowledge that the withholding was wrong and unlawful. He says the breach was serious as JSC did not have all the information the investigator had and the withholding continued for a lengthy period until the Authority determined it was relevant and JSC was entitled to it. In the alternative, JSC says the failure to disclose the transcript was intended to undermine the trust and confidence JSC ought to have had in the employment relationship.

[172] Pāmu distinguishes the case of *Morgan v Tranzit Coachlines Wairarapa Ltd*<sup>26</sup> on which JSC seeks to rely. It says the employer in that case completely failed to communicate with its employee in a timely fashion, when it did respond the response

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<sup>26</sup> [2021] NZEmpC 106, [2021] ERNZ 451.

was problematic and arguably misleading. Pāmu says the present facts concern disclosure of an unredacted document which was ultimately provided in full. No staff at Pāmu or its counsel had ever seen the fully unredacted transcript until the Authority directed it to be provided. Pāmu says it had not requested the full unredacted transcript from the external investigator and this was reasonable in the circumstances based on her reasons for not disclosing it.<sup>27</sup> Even having seen the unredacted transcript, Pāmu says the non-disclosure was a reasonable action and did not cause JSC any material disadvantage.

[173] Even if there is a breach of good faith, which Pāmu denies, it submits there is no basis to order a penalty given the high threshold of proving the breach was ‘deliberate, serious and sustained’ as established in *Morgan* or intended to undermine the employment relationship.<sup>28</sup>

[174] Based on the evidence and information before the Authority, I find that Pāmu did not breach its duty of good faith. I accept Pāmu’s evidence that it did not know the content of the redacted material from the Team Leader’s evidence and had not considered it as part of its disciplinary investigation or findings. So while this part of the Team Leader’s transcript was not put to JSC for comment, nor was it taken into account by Mr McJorrow in making the decision to dismiss. Pāmu was not required to provide information to JSC that it did not hold itself and the failure to provide information that it did not hold was not a breach of good faith. In terms of the claims that delays were not in good faith, and alternatives to dismissal were not explored – I have considered these as context for the finding of unjustifiable dismissal and in terms of remedies. It would be a duplication to also consider these factors as part of a breach of good faith claim.

[175] In conclusion, I find there was no breach of good faith by Pāmu. Based on the actions claimed as breaches by JSC, I record that I also accept Pāmu’s submissions that these breaches would not have met the threshold for attracting a penalty given that the actions relied on were not “deliberate, serious and sustained” or intended to undermine the employment relationship.

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<sup>27</sup> These are recorded at paragraphs 3.8 – 3.12 of the “Report of Independent Investigation into Allegations of Bullying and Harassment”.

<sup>28</sup> Section 4A(b)(iii) of the Employment Relations Act 2000.

### **Compliance Order for withdrawal of investigation findings**

[176] JSC initially sought a compliance order for withdrawal of the investigation findings under s 137(2), however this claim was confirmed as withdrawn on 19 December 2023.

### **Non-publication**

[177] The Authority's power to prohibit publication is found in Clause 10, Schedule 2 of the Act:<sup>29</sup>

#### **10 Power to prohibit publication**

- (1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[178] The test to be applied is whether there is a material risk of adverse consequences.<sup>30</sup> The starting point is the principle of open justice and a high standard must be met before the principle can be appropriately departed from.<sup>31</sup> The Supreme Court stated that a party seeking non-publication must show specific adverse consequences that are significant, to justify an exception to the fundamental rule.

[179] JSC has applied for a permanent non-publication order in relation to his name, identity and any identifying details. This is on the basis that identifying him is not in the public interest and it may permanently damage his ability to gain employment in another public sector role. JSC says if his name is identified publicly, it will likely cause unreasonable and irreparable damage and harm to his reputation, future employment prospects and career. More specifically, JSC submits that naming him will significantly adversely impact his ability to obtain comparable alternative employment in his field in the future and affect his relationships with other public sector organisations who are potential future employers. He refers to the stigma attached to misconduct matters concerning sexual harassment – which remains even where the employer's actions are found to be unjustifiable – and says that his right to privacy over details of his employment outweighs any public interest in naming him.

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<sup>29</sup> Clause 10, Schedule 2 of the Employment Relations Act 2000.

<sup>30</sup> *JKL v Stirling Andersen Limited* [2022] NZEMPC 107, at [41].

<sup>31</sup> *Erceg v Erceg* [2016] NZSC 135 at [13].

[180] Pāmu takes a neutral position in relation to JSC's application for non-publication. It says it is in the Authority's hands as to whether JSC has met the threshold for non-publication orders to be granted. Pāmu has, however, made a cross application for non-publication of its name, and the names of those staff involved in its investigation process if the Authority grants the non-publication order for JSC's name, location of employment and identifying details. This is on the basis that publishing these details would render a non-publication order made in favour of JSC, nugatory.

[181] Separately, Pāmu also applied for a non-publication order specifically in relation to the complainant and the Team Leader – neither of whom were witnesses at the Authority's investigation meeting.

[182] In the absence of an objection from either party, the non-publication orders sought by both parties were initially granted on an interim basis until final disposition of this matter. I now need to consider whether to make any permanent non-publication orders.

[183] JSC consents to the complainant's name and the name of the Team Leader being subject to a permanent non-publication order. Neither of these individuals were witnesses in the Authority's investigation and I consider the risk of adverse consequences on them of having their names published would outweigh the public interest in naming them. I make orders accordingly.

[184] JSC consents to permanent non-publication of the Team Leader's full and unredacted transcript of interview with the external investigator. While aspects of this transcript were referred to during the Authority's investigation, the Team Leader was not a witness and the content of his interview was not material to the Authority's investigation. By consent, I make orders accordingly.

[185] Pāmu makes the same submissions in support of the non-publication order being made permanent. It says publishing its name, and the names of staff involved in its investigation process would render a non-publication order made in favour of JSC, nugatory.

[186] JSC says that the cross-application should not be granted because Pāmu is a large organisation and identifying members of the senior leadership team would not identify him. Secondly, the purpose of the non-publication order is to keep JSC's

identity from the wider public and not from those who could identify him from the facts of this matter. JSC submits Pāmu, and the names of its staff (other than the complainant and Team Leader) should not be subject to a permanent non-publication order.

[187] I deal first with the application in respect of JSC's name, location and identifying details. JSC says that if there is publication of his name, he will be associated with a sexual harassment allegation. Other cases have come before the Authority where an applicant challenges the justification of a dismissal for sexual harassment. However, if JSC was to be named, it is likely that the complainant would also be identifiable. As will be apparent from this determination, the complainant's actions have not been the focus of the Authority's investigation, and she was not a witness. Ultimately I am persuaded that the standard to justify a departure from the fundamental principle of open justice has been met in JSC's application for permanent non-publication of his name and identifying details in order to mitigate the material risk of adverse consequences for the complainant.

[188] The same material risk of adverse consequences does not apply to Pāmu in respect of its cross-application. I therefore decline to make permanent non-publication orders in respect of Pāmu's name, or the names and job titles of Mr McJorrow, Ms Kelly and Ms Papps, each of whom gave evidence before the Authority.

[189] I will, however, continue the interim order prohibiting the name of Pāmu and the names and job titles of Mr McJorrow, Ms Kelly and Ms Papps for a period of 28 days from the date of this determination. That will enable a challenge to the Employment Court if Pāmu wishes. At the end of the 28 days, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication.

### **Orders**

[190] JSC's claim that he was unjustifiably dismissed from his employment with Pāmu has been successful and remedies are appropriate.

[191] I order that within 28 days of the date of this determination:

- (a) Pāmu is to pay JSC compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of \$25,000.

- (b) Pāmu is to pay JSC his actual lost wages and KiwiSaver for a period of three months following his dismissal under s123(1)(b) of the Act in the amount of \$33,604.74 (gross).

[192] I order that pursuant to clause 10 of Schedule 2 of the Act, there is a permanent non-publication order over the names and any information that may tend to identify the Applicant, the complainant and Team Leader. I also order permanent non-publication of the Team Leader's full and unredacted transcript of interview with the external investigator.

[193] The interim non-publication order over the name of the Respondent and the names and job titles of Mr McJorrow, Ms Kelly and Ms Papps will continue for a period of 28 days from the date of this determination. At the end of the 28 days, unless there is a further order of the Authority or Employment Court, this interim order will lapse and there will be no restriction on publication.

### **Costs**

[194] 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 of costs is needed, any party seeking costs 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, the other party will 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.

[195] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>32</sup>

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>32</sup> Practice Direction of the Authority Te Ratonga Ahumana Taimahi (February 2024) at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>