

**NOTE: This determination contains orders prohibiting publication of certain information at [6]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2025] NZERA 29  
3258419

BETWEEN

FTT  
Applicant

AND

SINCLAIR PRYOR MOTORS  
LIMITED  
Respondent

Member of Authority: Shane Kinley

Representatives: David Oliver, counsel for the applicant  
Gary Tayler, advocate for the respondent

Investigation Meeting: 27 August 2024 in Napier

Submissions and further information: Up to 20 December 2024

Determination: 22 January 2025

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication orders**

[1] At the investigation meeting on 27 August 2024, I indicated I considered non-publication orders under cl 10(1) of sch 2 of the Employment Relations Act 2000 (the Act) were likely to be appropriate given the nature of the claims and evidence provided, and invited submissions to address the scope of potential non-publication orders. The respondent indicated at that time it was unlikely to oppose some form of orders.

[2] Counsel for the applicant sought non-publication of the applicant's name and identifying details, with reference to evidence which warranted a departure from open justice. The respondent's advocate suggested both parties' names and sensitive

evidence be subject to non-publication orders so the applicant could not be identified via the employer and so sensitive evidence was not in the public domain.

[3] In response, counsel for the applicant objected to the respondent's details being subject to non-publication, saying this would be inconsistent with the Court's approach in *MW v Spiga Ltd*<sup>1</sup> and was not necessary given the scale of the respondent's operation. To protect the applicant's privacy non-publication of their name and the names of any other individuals, which could serve to directly identify the applicant, and any documents which directly identify the applicant was proposed.

[4] The respondent's advocate said if the respondent was named, people who worked in the same branch as the applicant would know who the applicant was. No objection was made to sensitive information being subject to non-publication orders.

[5] I am satisfied non-publication orders are appropriate taking into account the Court's judgments in *MW v Spiga Ltd* and *KN v New Zealand Steel Ltd*.<sup>2</sup>

[6] I order under cl 10(1) of sch 2 of the Act the applicant's name and those of other individuals who provided witness statements or were referred to in evidence are not to be published. Any documents which directly identify the applicant are subject to this non-publication order, as is any reference to sensitive information which was referred to in evidence or at the investigation meeting.

[7] I decline to issue a non-publication order in relation to Sinclair Pryor Motors Limited's (SPM) name, as I do not accept this will directly identify the applicant given the scale and nature of SPM's operations.

[8] The applicant is referred to by the anonymised letter sequence FTT, which bears no resemblance to their real name. No reference is made to the applicant's job title. Other witnesses and employees of SPM are also referred to by anonymised letter sequences IOT, DLW, HWZ, FHX and EUU, with no reference to their job titles, in order to preserve the confidentiality of the identity of FTT.

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<sup>1</sup> *MW v Spiga Ltd* [2024] NZEmpC 147.

<sup>2</sup> *KN v New Zealand Steel Ltd* [2024] NZEmpC 65.

## **Employment relationship problem**

[9] FTT raises claims of sexual harassment and unjustifiable disadvantage in relation to an incident involving another employee of SPM and how SPM responded to the incident.

[10] SPM denied FTT's claims and said its investigation process was fair and reasonable.

## **The Authority's investigation**

[11] For the Authority's investigation written witness statements were lodged by FTT and a family member, IOT, who supported FTT during engagements with SPM following the incident. Written witness statements were provided for SPM by DLW. FTT, IOT and DLW answered questions, under oath or affirmation, from me and from the representatives. Preliminary submissions were presented orally by the representatives.

[12] Documents labelled witness statements were provided by SPM from HWZ, FHX and EUU, however these employees of SPM did not appear at the investigation meeting and their witness statements were evidence collected by DLW as they investigated the incident. I have placed limited weight on these witness statements.

[13] At the conclusion of the investigation meeting I timetabled for evidence discussed during the investigation meeting to be provided and identified a number of points I considered it would be helpful for written submissions to address. The representatives provided the directed information and written submissions following the investigation meeting, although the application for non-publication orders was not substantively addressed. As I considered it was likely a non-publication order remained appropriate, I instructed the Authority Officer request the representatives provide comment on the scope of such orders which may be sought, with reference to the Court's judgment in *MW v Spiga Ltd*. Additional submissions on this point were received in December 2024.

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

## **The issues**

[15] The issues requiring investigation and determination are:

- (a) Was FTT sexually harassed in their employment with SPM, with reference to s 117 of the Act related to sexual harassment by a person other than the employer or the employer's representative?
- (b) Was FTT unjustifiably disadvantaged in their employment with SPM?
- (c) If FTT was sexually harassed or SPM's actions were not justified (in respect of disadvantage) what remedies should be awarded, considering:
  - (i) Lost wages under s 123(1)(b) of the Act (subject to evidence of reasonable endeavours to mitigate FTT's losses);
  - (ii) Compensation under s123(1)(c)(i) of the Act; and
  - (iii) Whether recommendations should be made to SPM under s 123(1)(ca) or (d)?
- (d) Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by FTT that contributed to the situation giving rise to their grievances?
- (e) Should either party contribute to the costs of representation of the other party?

[16] Submissions for FTT also referred to s 118 of the Act in relation to the claim of sexual harassment and to the ability of the Authority to find a grievance to be other than the type alleged under s 122 of the Act. These points are addressed at the appropriate points in this determination.

[17] In light of the approach adopted in submissions for FTT and the evidence I have chosen to address FTT's claim to have been unjustifiably disadvantaged first.

### **Was FTT unjustifiably disadvantaged in their employment with SPM?**

#### *Relevant law*

[18] For FTT's unjustified disadvantage claims under s 103(1)(b) of the Act to be successful requires:

- a. FTT's employment, or one or more conditions of their employment, was (in this case, as FTT's employment has since ended) affected to their disadvantage; and
- b. This was due to some unjustifiable action by SPM.

[19] In assessing this, I must apply the test of justification under s 103A of the Act, being whether SPM's actions, and how SPM acted, were objectively what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[20] In reaching my conclusions about FTT's unjustified disadvantage claims, s 103A(3) requires I consider:

- a. having regard to the resources available to it, did SPM sufficiently investigate before taking action?
- b. did SPM raise concerns it had with FTT before taking action?
- c. did FTT have a reasonable opportunity to respond? and
- d. did SPM genuinely consider FTT's explanation or comments?

[21] I may also take into account any other factors I think are appropriate under s 103A(4). I must not determine an action to be unjustifiable where defects in SPM's process were minor and did not result in FTT being treated unfairly under s 103A(5).

*Basis for FTT's claims and submissions of the parties*

[22] The basis for FTT's claim they were unjustifiably disadvantaged in their employment with SPM was an incident involving a co-worker HWZ, which is also the basis of FTT's claim to have been sexually harassed in their employment. The alleged incident involved HWZ's behaviour in SPM's workplace and was reported by FTT to DLW. The investigation into the incident by DLW was said to be deficient, with a meeting between FTT, IOT, DLW and SPM's advocate on 12 May 2022 being described as an "epic flop" leading to no written complaint being taken from FTT, said to be a fundamental omission, and findings from the investigation were reached on the basis only of evidence from HWZ, FHX and EUU.

[23] The failures in the investigation process were said to mean there was a defective investigation where "A critical error, which lead to an improper inquiry into the facts and therefore could only lead to erroneous, incomplete findings and a wrong outcome". This was said to mean SPM's actions were not what a fair and reasonable employer could have done in all the circumstances at the time the actions occurred, including whether SPM sufficiently investigated before taking action.

[24] Submissions for FTT also acknowledged FTT's former advocate had not raised an unjustified dismissal claim however said:

the Authority in exercising its power to consider alternate grievances by virtue of section 122 of the Act, could make a finding that by establishing the disadvantage grievance, [SPM] has in effect repudiated the employment agreement and accordingly [FTT] cancelled the employment agreement by way of [their] resignation dated 29 June 2024, or by the date [FTT's former representative] provided a copy of the resignation to [SPM's] representative, being 16 August 2024.

[25] SPM said it was entitled to investigate FTT's complaint "as it saw fit having regard to its statutory obligations not just to [FTT] but to [HWZ] as well". SPM said it needed, prior to commencing a disciplinary investigation, to "interview all potential witnesses, and then decide on the evidence collected at the time, whether there is sufficient evidence to conduct disciplinary investigation". SPM said it was endeavouring to obtain FTT's full statement but was unable to do so as FTT walked out of the meeting on 12 May 2022 and this meant FTT "took with [them] the right to complain that [SPM] made the wrong decision".

[26] SPM also said its conclusion based on the evidence it had from HWZ, FHX and EEU "no misconduct warranted a disciplinary investigation [in relation to HWZ] would be justified [sic]". HWZ was said to have been:

shocked that a compliant had been received and agreed not to engage in that type of behaviour again. [SPM] took [their] assurances and explanation at face value and concluded that no improper misconduct was present and that [they] would desist in this type of conduct as it was upsetting for [FTT].

[27] SPM also said it sent FTT its investigation decision and received no response, not knowing the email it used, which it claimed was provided by FTT, was wrong. While SPM accepted contact was made by FTT's former representative three weeks after this, seeking to know the outcome of the investigation, it says when it resent the investigation report no further response was received until a personal grievance was raised almost seven weeks later, including new allegations. FTT said these allegations did not play any part in the outcome of its investigation, it should not be blamed for not taking into account information it did not have at the time and it would not have been right to reopen its investigation as HWZ was entitled to have the investigation into their alleged conduct completed.

[28] Submissions for SPM also acknowledged FTT "was entitled to view the behaviour of [HWZ] subjectively and did so having regards to [matters disclosed at the

investigation meeting which SPM] had no knowledge of. ... But [SPM's] actions must be viewed objectively as with any personal grievance claim”.

### *Analysis*

[29] It was clear some incident occurred involving FTT and HWZ on 6 May 2022, although there were starkly different views of what HWZ's actions were presented by FTT in their witness statement and at the investigation meeting, and HWZ's witness statement collected as part of DLW's investigation. There were also differences between what FTT said EUU saw and EUU's witness statement collected as part of DLW's investigation.

[30] There is no doubt FTT complained to DLW, who took prompt action to alert senior managers at SPM, with DLW's witness statement acknowledging the complaint was what FTT viewed as sexual harassment.

[31] Neither is there any doubt the meeting on 12 May 2022 between FTT, IOT, DLW and SPM's advocate went poorly. DLW agreed in their evidence at the investigation meeting with IOT's characterisation of the meeting as a “complete flop”. DLW said while their intention was to collect FTT's statement so DLW could continue their investigation, the meeting went nowhere and quickly concluded. Following the meeting DLW interviewed HWZ, FHX and EUU, reached their conclusions and emailed FTT at an email address which I find was on SPM's employee payroll form for FTT. I consider there is insufficient evidence to support a finding of whether this email address was provided by FTT or recorded by someone else, with the handwriting on the payroll form being in small case letters rather than the capital letters FTT used in signing their *Employee declaration*.

[32] I find more likely than not DLW was asked by FTT to liaise with IOT as their support person and representative for the purposes of the early stages of the investigation process including arranging the meeting on 12 May 2022. I consider it is likely FTT and IOT considered this remained the case after this meeting, although given the meeting was accepted by all parties to have gone poorly, it is not clear this was expressly raised or agreed at the meeting.

[33] A clear procedural mismatch occurred in relation to what should happen with the investigation of FTT's complaint and HWZ's actions, and there was no agreement what should happen following the meeting.

[34] In these circumstances, I consider it was reasonable for DLW to send the request they did to FTT to advise of any witnesses who should be interviewed, which DLW did by email at 12.27pm on 12 May 2022. This email referred to having met with FTT, HWZ, FHX and EUU. DLW did not however provide copies of the witness statements which they had collected from HWZ, FHX and EUU. Neither did DLW send this email to IOT, despite referring to them in the email as FTT's "support person/advocate".

[35] I do not consider however it was fair and reasonable for DLW to conclude their investigation into FTT's complaint the following day, which they did by sending FTT an email at 4.21pm on 13 May 2022, with an outcome letter which was headed "Allegation of sexual harassment" and included the following comments:

After analysing the witness statements, we have concluded that whilst [HWZ's] behaviour and actions have caused upset to you, they are not of a nature and do not meet the criteria to be considered sexual harassment or any other misconduct, and whilst no misconduct has been identified [HWZ] has advised that [they] will not engage in any kind of banter with you of this nature going forward.

[36] I consider this reflects a hasty and insufficient investigation process on behalf of SPM, where a fair and reasonable employer would have taken further steps to investigate the sexual harassment allegation. At a minimum I consider DLW should have followed up with FTT in person, either by phone or by contacting IOT, who had been referred to the day before as FTT's "support person/advocate".

[37] For completeness I note DLW said they had access to advice in relation to the investigation process from SPM's advocate who was present during the meeting with FTT on 12 May 2022 and was involved with DLW in collecting witness statements from HWZ, FHX and EUU. In the circumstances, I consider having regard to the resources available to it, SPM did not sufficiently investigate before concluding its investigation process into FTT's complaint they had been sexually harassed. This was not a minor procedural defect and resulted in FTT being treated unfairly.

*Conclusion: FTT was unjustifiably disadvantaged*

[38] I find FTT was unjustifiably disadvantaged by SPM's failure to sufficiently investigate FTT's complaint they had been sexually harassed. It follows FTT is entitled to consideration of remedies in relation to this claim, which I return to at paragraphs [60] to [72] below.

*Should a finding of unjustified dismissal be made under s 122 of the Act?*

[39] Submissions for FTT invited me to find they had been unjustifiably constructively dismissed by virtue of their resignation should I find they had been unjustifiably disadvantaged.

[40] A constructive dismissal occurs where an employee appears to have resigned but the situation is such the resignation has been forced or initiated by an action of the employer. The Court of Appeal in *Wellington Clerical Union v Greenwich* stated:<sup>3</sup>

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. ...

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[41] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:<sup>4</sup>

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

[42] In this matter I consider FTT's claim is based on the third situation described by the Court of Appeal in *Woolworths*, being breaches of duty by SPM led them to resign.

[43] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* set out the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.<sup>5</sup> In determining that all the circumstances of the resignation must be examined not simply the communication of the resignation. The Authority needs to assess whether the breach

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<sup>3</sup> *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

<sup>4</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

<sup>5</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[44] FTT has the burden of establishing their resignation was a dismissal.

[45] I do not consider FTT has met this burden, as I do not consider it was reasonably foreseeable FTT would resign in the circumstances described below.

[46] FTT's resignation email of 29 June 2022 followed contact from IOT to DLW on 27 May 2022 seeking an update on what was happening with the investigation into FTT's complaint they had been sexually harassed. DLW had promptly replied to IOT on 28 May 2022 advising SPM had concluded its investigation in the absence of a reply from FTT to DLW's email of 12 May 2022. Copies of DLW's emails to FTT of 12 and 13 May 2022 were provided to IOT. It appears more likely than not at this time no one realised FTT had not previously received those emails.

[47] FTT had then raised a personal grievance through their then representative on 21 June 2022 alleging sexual harassment and unjustified disadvantage. FTT was seeking remedies including compensation under s 123(1)(c)(i) of the Act and "Genuine safeguards to ensure [FTT's] safe return to work". Correspondence between FTT's then representative and SPM's advocate over the following week concluded with SPM denying all allegations and rejecting all remedies. I can find no suggestion in this correspondence FTT was considering resigning, rather the correspondence suggested FTT wished to discuss how a safe workplace could be provided for them to return to work.

*Conclusion: FTT was not unjustifiably constructively dismissed*

[48] I find FTT has not established their resignation was an unjustified constructive dismissal, as I do not consider it was reasonably foreseeable FTT would resign in the circumstances.

## Was FTT sexually harassed in their employment with SPM?

### *Relevant law*

[49] The basis for FTT's claims to have been sexually harassed in their employment was initially ss 108 and 117 of the Act, relevant provisions of which state:

#### **108 Sexual harassment**

- (1) For the purposes of sections 103(1)(d) and 123(d), an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer—
  - (b) by—
    - (i) the use of language (whether written or spoken) of a sexual nature; or ...
    - (iii) physical behaviour of a sexual nature,—  
directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.
- (2) For the purposes of sections 103(1)(d) and 123(d), an employee is also sexually harassed in that employee's employment (whether by a co-employee or by a client or customer of the employer), if the circumstances described in section 117 have occurred.

#### **117 Sexual or racial harassment by person other than employer**

- (1) This section applies where— ...
  - (b) an employee is subjected to behaviour of the kind described in section 108(1)(b) by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer; or ...
- (2) If this section applies, the employee may make a complaint about that request or behaviour to the employee's employer or to a representative of the employer.
- (3) The employer or representative, on receiving a complaint under subsection (2), must inquire into the facts.
- (4) If the employer or representative is satisfied that the request was made or that the behaviour took place, the employer or representative must take whatever steps are practicable to prevent any repetition of such a request or of such behaviour.

[50] Submissions on behalf of FTT also referred to s 118 of the Act, which in this matter would apply if I were to find SPM had not taken, after a complaint under s 117(2) of the Act, whatever steps are practicable to prevent the repetition of behaviour described under s 108(1)(b) of the Act.

*Submissions of the parties*

[51] Submissions for FTT said they were sexually harassed in their employment with SPM in relation to the incident involving a co-worker, HWZ, discussed in relation to the claim of unjustified disadvantage above. The requirement for SPM to inquire into the facts under s 117(3) of the Act was said to have been met as:

- a. HWZ was FTT's co-worker and FTT alleged HWZ's actions involved language and physical behaviour of a sexual nature in terms of the requirements of s 108(1)(b) – combined this met the requirements of s 117(1)(b); and
- b. FTT had complained to DLW as required under s 117(2).

[52] In terms of s 117(4) of the Act SPM's conclusion it was not satisfied behaviour which constituted sexual harassment was said to be defective as SPM had failed to gather all relevant facts and had failed to apply the limited facts to the statutory definition of sexual harassment in s 108(1)(b) of the Act. SPM were said to have inappropriately applied an:

objective test in company policy – “Sexual Harassment is any unwelcome sexual attention that a “reasonable person” would consider to be offensive, humiliating or intimidating”.

[53] As a consequence, FTT said SPM “prevented itself from satisfying itself that the behaviour took place and taking whatever steps practicable to prevent repetition of the behaviour required by subsection 117(4)” and under s 118(1)(b) of the Act “failed to take the necessary prevention steps potentially leaving itself and other employees open to a repeat behaviour in the future”. Submissions for FTT then said as they “never returned to work for fear of repetition” s118 could not apply and their “recourse therefore reverts to the disadvantage grievance and the unjustifiable dismissal grievance”.

[54] Submissions for SPM said s 117 of the Act did not apply as SPM had found no sexual harassment however if it had then there had been no repeated behaviour by HWZ of the kind described under s 108(1)(b) of the Act and SPM “had taken practical steps to prevent a repetition of the behaviour albeit in a non disciplinary” way. SPM also said as FTT did not return to work, SPM's actions could not be put to test. SPM acknowledged “[FTT] was entitled to view the behaviour of [HWZ] subjectively”, including taking into account contextual information which SPM did not know of. SPM

said however its actions need to be viewed objectively as with any personal grievance claim, applying s 103A of the Act.

### *Analysis*

[55] I find FTT was subjected to behaviour covered by s 117(1)(b) of the Act and made a complaint under s 117(2) of the Act. DLW then undertook an investigation on behalf of SPM, as required under s 117(3) of the Act.

[56] As discussed in paragraphs [29] to [38] above, I have found FTT was unjustifiably disadvantaged by SPM's failure to sufficiently investigate FTT's complaint they had been sexually harassed. The requirements of s 117(4) of the Act differ and relate to situations where an employer finds unwelcome behaviour occurred. These requirements are linked to s 118 of the Act in relation to repeated behaviour.

[57] In this case, I consider SPM's investigation was deficient and SPM misdirected itself in relation to what behaviour could be sexual harassment and in downplaying the subjective significance of HWZ's actions and their impact on FTT. SPM did however inquire into the matter as required by s 117(3) of the Act and while potentially erroneously concluding the behaviour did not meet the definition of sexual harassment, SPM did take steps to prevent the repetition of HWZ's unwelcome behaviour as required by s 117(4) of the Act.

[58] Submissions for FTT acknowledged s 118 of the Act could not apply due to FTT not returning to work, meaning recourse lies elsewhere. I agree and consider FTT's complaints have been adequately addressed by consideration of their unjustified disadvantage and unjustified dismissal grievances.

*Conclusion: FTT has not established breaches by SPM of ss 117 or 118 of the Act*

[59] I find FTT has not established SPM breached its obligations under ss 117 or 118 of the Act.

### **What remedies should be awarded to FTT in relation to unjustified disadvantage?**

[60] Having determined FTT was unjustifiably disadvantaged, I need to consider what remedies should follow. FTT sought lost wages under s 123(1)(b) of the Act for two periods, first for the unjustified disadvantage claim from when they left work on 6 May 2022 until when SPM became aware of their resignation on 16 August 2022, and then for the unjustified constructive dismissal claim for a further three months. FTT

also sought compensation of between \$10,000 and \$40,000 for hurt and humiliation under s 123(1)(c)(i) of the Act. Finally FTT sought recommendations be made to SPM under s 123(1)(ca) and (d) of the Act.

[61] As I have found only FTT's unjustified disadvantage claim to have been established, remedies for lost wages are limited to those connected to this claim. FTT said this claim inclusive of lost holiday pay and employer's Kiwisaver contributions if applicable were "estimated circa \$12,000". FTT said compensation under s 123(1)(c)(i) of the Act should take into account:

the sensitivity (sexual nature) of the matter, the respondent's lack of regard for the complainant throughout, the respondent's defective investigatory response to its own policy and its section 117 duty under the Act, its low level of investigatory acumen by substandard investigatory knowledge and skills, a substandard understanding of sexual harassment under the Act, no evidence of staff training or provision of staff awareness, failure to in good faith communicate adequately with the applicant throughout.

[62] SPM said FTT was not entitled to remedies for lost wages as they "did not lose wages as a result of ... walking out on 6 May" as FTT:

left and took sick leave until it was exhausted and never returned to work. [Their] departure had nothing to do with the employers conduct and doesn't entitle [them] to claim remedies for unjustified action.

[63] SPM also said FTT was not entitled to remedies under s 123(1)(c)(i) of the Act "just because [they] didn't agree with the outcome of the employers investigation".

[64] I find FTT is entitled to lost wages for the period from when they left work on 6 May 2022 until when they actually resigned, which email evidence shows occurred on 29 June 2022. While there was some confusion over whether this email from FTT to a representative of SPM was received, it appears clear to me FTT was unsatisfied with discussions between their then representative and SPM's advocate, and acted to end their employment on this date, which I consider breaks the causation of loss. FTT's employment agreement required notice but provided payment may be forfeited if notice was not worked out, which occurred here and I consider disqualifies them for additional losses for the notice period.

[65] There appears also to be a period when FTT was on sick leave until at least 14 May 2022, based on a letter dated 13 May 2022 from DLW communicating the outcome of their investigation and expressing the expectation SPM would be returning to work on 23 May 2022. To the extent SPM provided FTT with paid sick leave, there would

have been no loss, so any paid sick leave should be taken into account when calculating the lost wages due.

[66] As I do not have sufficient evidence to calculate lost wages, I order SPM to calculate and pay to FTT an amount for lost wages under s 123(1)(b) of the Act equivalent to their pay due from 6 May 2022 until 29 June 2022, less any amounts of paid sick leave provided during this period, including any additional holiday pay and employer Kiwisaver contributions applicable. If the parties cannot agree on this amount, they may revert to the Authority for further orders.

[67] FTT is also entitled to compensation under s 123(1)(c)(i) of the Act in relation to the deficiencies in SPM's investigation process which led to the finding FTT was unjustifiably disadvantaged. FTT said they had "really bad anger issues" over what had occurred including the incident with HWZ but also were impacted by how SPM's investigation was conducted and ultimately concluded they could not safely return to work. They said this "made me feel like shit" and referred to contextual information which related to the impacts on them. FTT said they would still be working at SPM if the matter was handled better.

[68] I acknowledge FTT's evidence was of significant impacts on them however this evidence was mixed as to the causes of those impacts, referring to the actions of HWZ, the inadequate investigation by SPM, the ending of FTT's employment in a job they said they were really good at and appeared to have enjoyed. FTT's evidence also referred to the impact of contextual information which SPM was not aware of until the investigation meeting, which while traumatic, SPM could not be responsible for.

[69] Based on FTT's evidence of the impacts of SPM's unjustified actions on them, related to FTT's unjustified disadvantage claim, taking into account comparable cases, I consider an award of compensation of \$15,000 under s 123(1)(c)(i) of the Act is appropriate, before considering contribution.

[70] FTT sought recommendations under s 123(1)(ca) and (d) of the Act that SPM:

- a. revise its Discrimination and Sexual Harassment policy to update the definition of sexual harassment to be consistent with the Act and to set out investigation steps;
- b. update employment agreements; and

- c. train employees on investigating sexual harassment and provide “general training for all staff to raise awareness that behaviour of a sexual nature is wholly inappropriate in the workplace”.

[71] SPM did not directly address whether recommendations were appropriate, although its submissions implied no recommendations were appropriate. In DLW’s letter dated 13 May 2022 communicating the outcome of their investigation they said “Whilst we have not found any evidence of sexual harassment occurring, we have taken this opportunity to review our company policies and procedures and have found that they are up to date and do not require any updates”.

[72] I recommend under s 123(1)(ca) of the Act that SPM review its Discrimination and Sexual Harassment policy to update the definition of sexual harassment to be consistent with s 108 of the Act and in particular to reflect sexual harassment includes under s 108(1)(b) of the Act actions which “directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee”, which is a subjective test. I consider SPM’s Discrimination and Sexual Harassment policy, quoted in submissions at paragraph [52] above, is more consistent with an objective test of whether behaviour constitutes sexual harassment.

[73] I decline to make the other recommendations sought by FTT, as I am not satisfied they are required. SPM may wish to consider however in communicating with its staff about any changes to its Discrimination and Sexual Harassment policy that these are being made to reinforce awareness that behaviour of a sexual nature is wholly inappropriate in SPM’s workplace.

**Should remedies be reduced (under s 124 of the Act) for blameworthy conduct by FTT that contributed to the situation giving rise to their grievance?**

[74] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by FTT that contributed to the situation giving rise to their grievance.

[75] While FTT and IOT could have followed up on the meeting with DWL and SPM’s advocate on 12 May 2022 differently, which may have created an opportunity to mitigate in part FTT’s lost wages, I do not consider this meets the requirements of blameworthy conduct by FTT that contributed to the situation giving rise to their grievance. The basis for FTT’s unjustified disadvantage grievance was SPM’s failure

to sufficiently investigate FTT's complaint they had been sexually harassed and I do not consider FTT contributed in a blameworthy manner to the shortcomings in SPM's investigation process.

[76] No reduction is made for contribution accordingly.

### **Summary of outcome**

[77] I have found:

- a. FTT was unjustifiably disadvantaged by Sinclair Pryor Motors Limited's (SPM) failure to sufficiently investigate FTT's complaint they had been sexually harassed;
- b. FTT has not established their resignation was an unjustified constructive dismissal, as I do not consider it was reasonably foreseeable FTT would resign in the circumstances; and
- c. FTT has not established SPM breached its obligations under ss 117 or 118 of the Employment Relations Act 2000 (the Act) in relation to sexual harassment by a person other than their employer.

### **Orders**

[78] For the above reasons I order SPM to within 28 days of the date of this determination:

- a. calculate and pay FTT an amount for lost wages under s 123(1)(b) of the Act equivalent to their pay due from 6 May 2022 until 29 June 2022, less any amounts of paid sick leave provided during this period, including any additional holiday pay and employer Kiwisaver contributions applicable. If the parties cannot agree on this amount, they may revert to the Authority for further orders; and
- b. compensation of \$15,000 under s 123(1)(c)(i) of the Act without deduction.

[79] I also recommend under s 123(1)(ca) of the Act SPM review its Discrimination and Sexual Harassment policy to update the definition of sexual harassment to be consistent with s 108 of the Act.

## Costs

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

[81] If the parties are unable to resolve costs, and an Authority determination on costs is needed, FTT may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum SPM will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[82] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.<sup>6</sup>

[83] As the investigation meeting for this matter took most of one day, concluding mid-afternoon, my preliminary view is the notional daily rate for one day is the appropriate starting point for a determination of costs.

Shane Kinley  
Member of the Employment Relations Authority

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<sup>6</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)