

clinical oversight, interviewing new staff and managing them including staff coverage for shifts in the clinical care services.

[2] Ms Rickman claims she was unjustifiably summarily dismissed for serious misconduct when Qestral said it could not trust her to continue in its employment after it found she likely made 'racial and derogatory comments' 'about current and future employees' and about visitors to its facility. Ms Rickman says that Qestral could not reasonably have made findings that she had actually made the comments which were eventually narrowed down to two incidents:

- a. that she was reluctant to employ Pasifika people because they were 'fat and lazy' or words to that effect;
- b. that she said to herself out loud, but overheard by employees, that she was having to make cups of tea for 'these blacks,' a reference to visitors from the local runanga who were visiting the facility and were out of hearing.

[3] Ms Rickman says Qestral could not have made findings that she said these things because one complainant lacked credibility and was inconsistent with another in relation to the Pasifika comments; and that a witness's evidence was not corroborated as to the other comment.

[4] Ms Rickman further says that people she wanted interviewed were unreasonably not interviewed by Qestral which showed predetermination of the outcome. She says it then eliminated evidence that would have supported her.

[5] Ms Rickman says that her five years of loyalty to Qestral as an employee and that she front-footed, for Qestral, work towards establishing a relationship with mana whenua both countered any likelihood she could have made the above comments. Ms Rickman says she is affronted at being labelled a 'racist', something she considers is an effect of Qestral's decision.

[6] Ms Rickman seeks compensation, lost wages and costs for her claim that she was unjustifiably dismissed.

[7] Qestral denies the claims and says it conducted a ‘long and thorough’ investigation giving Ms Rickman the opportunity with her representative to comment across several meetings which involved issues wider than the comments Qestral found she had likely made. Qestral says it gave Ms Rickman time to feedback on its proposal to dismiss which also included two other findings of misconduct. The misconduct findings were for inappropriate interview questions and mismanaging a nut allergy incident with an employee who was a close relative of Ms Rickman. Qestral says that Ms Rickman declined to comment on the findings or the proposal to dismiss.

[8] Qestral says of those who Ms Rickman wanted to be interviewed it only interviewed those who could have been witnesses rather than those who were not present. It denies predetermining the matter and stands by the decision maker(s) who say that having genuinely considered what was before them they felt they had no option but to dismiss Rickman. Qestral through Mr O’Dowd its managing director acknowledges that the directors had previously viewed Ms Rickman as a senior employee with upward prospects in its company.

Nonpublication

[9] This matter is subject to a non-publication order given orally by me at the investigation meeting¹. I explained it would be referenced in this Determination. This order applied directly to those present on the second day of the investigation meeting in relation to a single oral reference made in front of those present about the end of the employment of the person I will call Employee A. To the extent of application to a wider audience, the end of Employee A’s employment is already subject to confidentiality irrespective of this order. Employee A did not play any part in these proceedings.

¹ Employment Relations Act 2000, schedule 2, clause 10 (1).

The Authority's Investigation process

[10] I held an investigation meeting over two days.

[11] Witness briefs were received prior to the investigation meeting. During the investigation meeting, I asked under oath and affirmation, questions of Ms Rickman; her then manager at Qestral, Ms Mary van der Veldt; and Ms Moana-O-Hinerangi. For Qestral, I heard from Mr Simon O'Dowd, managing director of Qestral; Ms Bria Scott, human resources co-ordinator for Qestral; and Ms Jemma Appleton, chief operating officer at Qestral and put forward by Qestral as the 'decision maker' in the process to dismiss Ms Rickman. During the investigation meeting, it was agreed that a statement provided from a manager at a subsequent place of employment for Ms Rickman was taken as read. Representatives had the opportunity to ask questions of all witnesses and give oral submissions after evidence was heard.

[12] I also asked for minutes of the final disciplinary meeting when it became apparent at the investigation meeting that typed notes did exist and had not been provided. Produced during the meeting I allowed time during a break for these notes to be considered. Ms Rickman was recalled to answer questions about this documentation.

[13] I further asked for medical certificates about when Ms Rickman took sick leave, something that was referred to in various briefs of evidence but apparently inconsistently. This material was provided at and just after the investigation meeting.

[14] At the point of finalising this Determination I identified that I was unclear, because of the way the document was positioned in the Authority file with respondent evidence, about who to attribute a 17 September 2023 handwritten diary note to. I asked the parties to promptly respond. This was done very helpfully by Mr Goldwater who on his client's behalf confirmed that the note was from Ms Rickman. I was then able to correct my file reference and finalise my determination.

[15] This determination states findings and makes conclusions as necessary to bring an end to the employment relationship problem before me and make appropriate orders. It has not recorded all evidence and submissions received.²

Disadvantage grievance

[16] In oral submissions on behalf of Ms Rickman, I was presented for the first time with a submission that the actions of the employer when first raising issues with Ms Rickman when it provided little detail to her amounted to unjustified disadvantage in employment³. I have not determined this matter as a separate disadvantage grievance because this was (as I accept the submission for Qestral) the first time it was brought forward. I note further it was likely not raised as a grievance within the requisite time.⁴

The issues to determine

[17] The issues for me to determine are:

- i. Did Qestral carry out sufficient inquiry about whether Ms Rickman more likely than not made 'racial and derogatory comments' to other employees about Pasifika people straight after an interview with a prospective Pasifika employee when the interviewee's suitability for the role was being discussed?
- ii. Did Qestral carry out sufficient inquiry about whether Ms Rickman more likely than not made 'racial and derogatory comments' to herself by the use of a racially inappropriate name (overheard by two other employees) about visitors to the workplace from the local runanga?
- iii. If so, was it within scope for Qestral to have found more likely than not that the alleged comments were made?
- iv. If so, was Qestral justified to have decided that Ms Rickman's comments were serious misconduct?

² As permitted by s 174E of the Employment Relations Act 2000 (the Act).

³ Employment Relations Act 2000, s103(1)(b).

⁴ Employment Relations Act 2000, s114.

- v. If so, was Qestral justified to summarily dismiss Ms Rickman for serious misconduct for making these comments?
- vi. If Qestral was not justified to have dismissed Ms Rickman what if any remedies are to be awarded to her for compensation and lost wages?
- vii. Under s 124 of the Act are any remedies awarded for unjustified dismissal to be reduced for employee contribution to the grievance?
- viii. Are costs to be ordered?

Determining a claim of unjustified dismissal

[18] The New Zealand Court of Appeal⁵ has said the employer in justifying a decision to dismiss needs to have had ‘clear evidence upon which any reasonable employer could safely rely or having carried out reasonable inquiries’ to make a finding that on the balance of probabilities there were ‘grounds for believing ... the employee was at fault.’

[19] Section 103A of the Act sets out the test for justification based on what a fair and reasonable employer could have done in all the circumstances at the time. It is not for the Authority to re-run the employer’s investigation and decide what it thinks the outcome should have been but rather to examine whether the decision was one that was within the range of the justification test. With this in mind I continue.

Did Qestral carry out sufficient inquiry about whether Ms Rickman more likely than not made ‘racial and derogatory comments’ to other employees about Pasifika people straight after an interview for a prospective Pasifika employee when the interviewee’s suitability for the role was being discussed?

[20] In relation to Qestral concluding that Ms Rickman referred to not being keen to employ Pasifika people because they are ‘fat and lazy’ or words to this effect, this related to a

⁵ *Airline Stewards & Hostesses of New Zealand Union v Air New Zealand Limited* (1990) 3 NZLR 549 (CA) at 556.

discussion after an interview with a job applicant sometime in April 2023. It is clear from the parties' evidence that it is known who this job applicant was and that they were employed by Ms Rickman for Qestral. I accept Ms Rickman's evidence that she later supported that employee to further her career. The person no longer works for Qestral and took no part in Qestral's investigation. They were not present when the comments were made after the interview. I accept as reasonable that Qestral did not interview this person as part of their investigation out of respect in relation to what they may have discovered was being investigated about what Mr Rickman had said about them.

Witnesses to the incident about comment regarding employing Pasifika people

[21] Ms Rickman says that two of the witnesses present at the above incident who were spoken to by Qestral were inconsistent about what they said they recalled Ms Rickman said. I agree that what was variously recorded in quotes in the statements varied but I observe that they were on the same theme of Ms Rickman saying why she was reluctant to employ Pasifika people. Both witnesses refer to this as occurring after the interview in what they both plausibly refer to as a discussion about the applicant's suitability initiated by Ms Rickman. The two witnesses were the co-interviewer with Ms Rickman (a clinical senior but subordinate to Ms Rickman), and a non-clinical manager present in the same open plan area where the interview took place but doing other work. The latter was interviewed (as agreed with Ms Rickman that they should be) sometime after the co-interviewer witness had initiated a list of complaints about Ms Rickman. Both witnesses to the post interview comments were consistent in saying they expressed positive comments about the interviewee when Ms Rickman asked them and that they thought the comments made by Ms Rickman not wanting to employ Pasifika for 'racial' reasons were unacceptable.

[22] Qestral interviewed a third person who was also present in the room at the time of the above interview but doing other work. Also, someone Ms Rickman wanted Qestral to speak to. That person is a close relative of Ms Rickman (the one involved in the nut allergy investigation). That person answered questions from Qestral which included matters relating

to interview questions that Ms Rickman allegedly had asked 'off script'. They gave their opinion that these were suitable questions (seemingly having heard the questions asked), but when asked about what they heard of the discussion after the interview, this person is recorded as saying that they could not recall or thought they must have had their headphones on.

[23] Qestral refers to another potential witness who was likely in another area⁶ although most spoken to were not sure. I accept that there were unfortunate unrelated circumstances making any statement from that person unavailable.

[24] Standing back from the above, I find that Qestral questioned those it reasonably could about what was claimed to have been said by Ms Rickman. This material was put to Ms Rickman for her feedback. She was supported by legal representation to do this. At this stage I find that this reflects a fair process even if Qestral had earlier not taken steps to give Ms Rickman more than the barest details through an informal chat with Mr O'Dowd. I find that Qestral appeared to correct this very poor initial process. I do not accept, as submitted for Ms Rickman, that others who were not present after the interview could have assisted Qestral to decide what she said after the interview.

[25] I now consider the reasonableness of Qestral's decision that it was not satisfied with Ms Rickman's feedback as to whether she said the above comments after the interview as set out in the material provided to her. I find it was open to Qestral not to be satisfied with Ms Rickman's feedback to the above. Although Qestral's written communications could have been much clearer about its reasoning in its investigation and outcome documentation, I observe that Ms Rickman's feedback included her explaining another situation to show, what I take, was her saying the comments were taken out of context from a different conversation. The situation she explains is replicated in Ms Van der Vault's evidence from a time they both worked together at a different workplace. Ms Rickman explained to Qestral she had a

⁶ It is common ground that a vacant residential villa was being used at the stage the facility was being established.

discussion with (does not name) people at Qestral that she had to let two employees 'go' when they were caught sleeping on the job on night shift and the employees were Pasifika employees. I observe here that this feedback to a fair and reasonable employer could appear to be a double down by the employee, who saw nothing wrong with discussing the ethnicity of people in relation to their employment in a workplace setting. Ms Rickman's response tends towards supporting a lack of insight into the appropriateness of such comments particularly by a senior manager.

[26] Ms Rickman also fed back that she would not call her staff 'lazy' but made no comment about the alleged 'fat' comment other than what I can see were various general denials that she said these things. A comment of 'fat' could without doubt be derogatory and when combined with a comment relating to ethnicity is significantly offensive. Ms Rickman when pressed in cross examination did not disagree with the inappropriateness of such a comment. I note that Qestral and Ms Rickman also had a statement to feedback on from one of the witnesses that Ms Rickman looked out the window at this particular interviewee saying something to the effect of 'look at her' in relation to the person's size.

[27] I find Qestral could have considered the above feedback did not weigh strongly against two witnesses as to what was said. Much has been made for Ms Rickman about the credibility of Ms Rickman's co-interviewer including evidence presented by Ms Van der Veldt that she complained about this person at around the time Ms Rickman was facing Qestral's investigation. I do not take from this evidence that it assists me to consider the co-interview witness could not be relied on by Qestral as to what they put forward about Ms Rickman's comments after the interview. Further I heard from Ms Rickman and Ms Van der Veldt as to why Ms Rickman was accessing her co-interviewer's personnel file around the time Ms Rickman was being investigated based on that person's complaints about her. I found Ms Rickman's oral evidence that she just wanted to look at the initial interview documentation for that person at a time the person had made a complaint about her to be concerning. Ms Van der Veldt had a starkly different version of why Ms Rickman was accessing this file which included a legitimate managerial reason. In short, Ms Rickman has

not assisted herself here in the way she has presented this evidence. If anything, it has in my view undermined her position that her co-interviewer was not credible.

[28] For Ms Rickman I am asked to consider that a higher standard than the standard of probabilities should have been applied here. Qestral says that probability , sometimes called likelihood, was the appropriate standard. I agree and note the above reference from the Court of Appeal at [18].

[29] Based on the above, I find it was within scope for Qestral to have found it likely that Ms Rickman said words to her colleagues when discussing the suitability of a job applicant for Qestral who was of Pasifika ethnicity with words to the effect that she was not keen to employ Pasifika people because they were ‘fat and lazy.’ That Ms Rickman subsequently employed this person could not reasonably have detracted from Qestral still being within scope to have found she likely made the comments after the interview in what I find was likely unguarded but significantly inappropriate views expressed to her colleagues.

Did Qestral carry out sufficient inquiry about whether Ms Rickman more likely than not made ‘racial and derogatory comments’ to herself by the use of a racially inappropriate name (overheard by two other employees) about visitors to the workplace from the local runanga?

[30] Ms Rickman raises the same issue here about the level of proof required by Qestral to make findings that she made the ‘blacks’ comment. My response remains as above at [28]. Ms Rickman’s feedback to Qestral was that she either did not say this comment, could not recall or it is not something she would have said.

[31] I do not find Qestral’s investigation was insufficient as to whether this comment was likely made for the reasons below.

[32] Ms Rickman says that the employee who eventually make a statement through Ms Scott’s recording of it did not have her evidence ‘corroborated.’ I heard from Ms Scott for

Qestral. She was a straightforward witness. I found her evidence as the person interviewing the employee who says they heard the comment to be plausible in that there was a reluctance for the employee to complain as a migrant employee. I find it similarly plausible that the other employee with them also a migrant employee, while interviewed by Ms Scott, was even more reluctant and did not want to be named. In this context it seems unlikely two such employees would make up this story and in the context I find Qestral did what it could to investigate.

[33] As I understand it, Ms Rickman was focused on having others support that she is not a 'racist' in relation to this comment particularly. Mr Rickman asked Ms Moana-O-Hinerangi to provide evidence that in her dealings with Ms Rickman she did not detect Ms Rickman as someone who was 'racist'. Ms Moana-O-Hinerangi was connected to the visitors to which the comment allegedly related. Ms Rickman had met her through a relative and this resulted in engagement with the local runanga which I take was predominantly connected with showing people through the Qestral complex and what it had to offer. Ms Moana-O-Hinerangi's evidence included that she felt able to identify a 'racist' and did not consider Ms Rickman was one. I respect this witness gave her evidence with dignity and honesty and from her experience as someone highly valued and respected. However, her views relate to her dealings with Ms Rickman and not from being present when the comments were allegedly made. To that extent, I do not accept this evidence assists me greatly even though I find it was genuinely and generously given. Qestral also did not talk to Ms Moana-O-Hinerangi after Ms Rickman put her on the list of people she wanted Qestral to speak with. I find it reasonable that Qestral did not speak with this witness as part of its investigation because she was not there when the alleged comment was overheard. I find the same in relation to others on Ms Rickman's list not interviewed by Qestral in its investigation. In short, they were not there.

[34] As to Ms Rickman's position here, while she denied to Qestral that she said the words or could not recall, I note that her evidence to me also includes her comment that if the words are not spoken to someone it is different. Qestral did not make a finding she had spoken the words to the runanga visitors.

[35] I accept based on what was before Qestral that it could have found it likely that Ms Rickman made the above comment.

If so, was Qestral justified to have decided that Ms Rickman's comments were serious misconduct?

[36] Ms Rickman accepts that if an employer was to find the above comments (both incidents) were made by an employee they could be serious misconduct. I also agree that a finding of serious misconduct was available to Qestral to have found for such comments.

If so, was Qestral justified to summarily dismiss Ms Rickman for serious misconduct for making these comments?

[37] I find it was within scope for Qestral to have summarily dismissed Ms Rickman based on not trusting her to continue in its employment. The final disciplinary meeting notes show that Ms Rickman indicated she had nothing further to say about the matters being proposed for sanction including dismissal. Her explanation to me was that she was exhausted and thought there was no point.

[38] To the extent that the investigation process was lengthy and multi-issued, I find it likely that had Qestral not presented Ms Rickman with all matters before it, it could reasonably have been criticised for not investigating sufficiently the matters that others had brought forward. Ms Rickman clearly asked for all material from the outset. I find Qestral provided an opportunity for Ms Rickman to respond to a proposal to dismiss and she did not do this. I note she remained fully represented. Even, if I am wrong to conclude the comments overheard by two employees were investigated properly or that Ms Rickman did not have enough time to comment on them, I agree with the submission for Qestral that the comments about Pasifika could have reasonably justified dismissal on their own. I set out below why I agree with this.

[39] I accept Qestral operates a large multi-ethnic workforce. In any workforce, it is not a stretch to consider that the comments in either of the incidents made by Ms Rickman during the course of her working days were racially judgmental and demeaning to a group of people whose skin and or culture are different to the speaker. An employer could reasonably take into account that this was a senior manager trusted to employ and manage staff in a business that promotes residential care and support for the elderly. I accept there could be reputational risk, commercially and as a good employer if unguarded comments such as those Qestral found Ms Rickman said (after they were brought forward by others and not Ms Rickman herself) continued.

Other matters investigated

[40] I pause to consider the two matters Qestral found were misconduct after first being proposed as serious misconduct. This shows me support for the decision makers' genuine consideration of the outcome. It is consistent with what both Ms Appleton and Mr O'Dowd, say about seriously considered the material before them before making a final decision.

[41] I have also considered whether overall the Qestral decision makers were influenced by not just the misconduct matters, but what had become a wide investigation with much said by others in lengthy statements most of which was found inconclusive (seven matters) or not progressed. However, I have found above that Qestral was justified to make its findings on the comments made across two incidents, and then within scope to have concluded it had lost its trust in Ms Rickman because of these comments, the Pasifika comments on their own or both.

Outcome

[42] Based on the above, the claim by Bianca Isabella Rickman against Qestral Corporation Limited that she was unjustifiably dismissed is unsuccessful.

Costs

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

[44] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Qestral 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 Ms Rickman will then have 14 days to lodge any reply to memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[45] 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.⁷

Antoinette Baker
Member of the Employment Relations Authority

⁷ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1