

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2026] NZERA 399
3305560

BETWEEN

JAMES GATES
Applicant

AND

FULTON HOGAN LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Anjela Sharma, advocate for the Applicant
Kirsty McDonald and Bridget Craig, counsel for the Respondent

Investigation Meeting: 20, 21, 22 and 23 April 2026 in Nelson

Date of Determination: 23 June 2026

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] James Gates was employed by Fulton Hogan Limited (Fulton Hogan) full-time based in Nelson as a Traffic Controller (STMS) from March 2020.

[2] In February 2023 Fulton Hogan received complaints about Mr Gates' conduct from others he worked with. He was suspended, there was an investigation and then a disciplinary process. Mr Gates received a final written warning dated 2 May 2023 as a result.

[3] Later, another employee complained about his conduct towards her. Again, Mr Gates was suspended. Following an investigation and a disciplinary process, he received a letter dated 4 August 2023 and was summarily dismissed.

[4] Mr Gates says that he has personal grievances (unjustified disadvantage and unjustified dismissal) arising from the suspensions, the warning and the dismissal. He claims reimbursement, compensation for lost benefits and compensation for humiliation, loss of dignity and injury to his feelings.

[5] Mr Gates also sought the imposition on Fulton Hogan of penalties for claimed breaches of the duty of good faith. Mr Gates withdrew this claim during submissions, so it need not be addressed.

[6] Fulton Hogan says its actions were justified and it did not breach good faith in how it handled the suspensions, investigations and disciplinary processes.

Non-publication

[7] I prohibit the publication of the names, and the images lodged with the statement of problem, of the respondent's employees who were interviewed as complainants or witnesses during the respondent's investigations into Mr Gates' conduct which resulted in final reports on 21 April 2023 and 25 July 2023.

[8] The complainants and witnesses are not party to these proceedings. There is no public interest in their names being publicised but there is a risk that they may suffer harm if their identities are publicised.

[9] A non-publication order was sought with respect to specific evidence given by a witness. It has not been necessary to refer to the evidence and there is no reason to think that either party or others present might publicise it, so a non-publication is not necessary.

The Authority's investigation

[10] Bundles of documents were provided by Mr Gates, and a further bundle was provided by Fulton Hogan.

[11] I heard evidence from Mr Gates, his partner (Sharie Fredericksen), his lawyer who represented him before the dismissal (Gerard Praat), a friend who supported him in the first meeting with Fulton Hogan (Donna Nepe) and a manager from earlier employment (Te

Reremoana Nepe). By agreement, Mr Nepe's statement was accepted without him having to appear but the others all confirmed their statements on oath and answered questions.

[12] For Fulton Hogan, there was evidence from Gavin Stobie, Craig McNeilly and Anthony McCabe who all confirmed their statements on oath and answered questions. I will explain their respective roles below.

[13] Both parties provided comprehensive written submissions which they spoke to during the investigation meeting.

[14] In what follows, I may refer to the evidence, issues and submissions only to the extent necessary to make relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to resolve the matter. But I do acknowledge the effort and expertise of the representatives, all of which has helped me to reach the following conclusions.

Background

[15] There is evidence of, and no reason to doubt, Mr Gates' good reputation in previous employment, including managing the conduct of patrons in bars and similar situations.

[16] Mr Gates suffered a serious head injury in 2006. His evidence, which I accept, is that he told Fulton Hogan about that prior to his employment. Despite a full recovery, Mr Gates says that he can experience being mentally overwhelmed, when he has to process a lot of information that is coming to him quickly.

[17] As will be apparent, Mr Gates had reasonable time to respond to or revisit matters as they developed, even taking into account what he says about the lasting effect of his head injury.

[18] In his employment, Mr Gates was bound by terms in a collective agreement, together with Fulton Hogan's policies. To the extent necessary, I will refer to them in what follows.

[19] As an STMS, Mr Gates usually supervised other employees he was rostered to work with. Except for the matters that led to the warning and the dismissal, Mr Gates had no disciplinary history with Fulton Hogan and was well regarded for his work.

[20] Before the first set of complaints, there been some discussion with Mr Gates about extra responsibilities and an improved remuneration package. However, the evidence falls well short of showing that Fulton Hogan offered and Mr Gates accepted a promotion. If Mr Gates is entitled to remedies to settle any personal grievance, they must be assessed based on his agreed terms and conditions of employment, without regard to a possible promotion.

The First Suspension – February 2023

[21] Initially, two women who worked with Mr Gates complained to Fulton Hogan about his conduct. The complaints, put in writing, are dated 22 February 2023 and 23 February 2023. It is not necessary to set out the details at present but they can fairly be characterised as allegations of inappropriate sexual conduct.

[22] A third woman sent an email dated 24 February 2023 to Fulton Hogan under the subject “Witness statement”. A fourth woman in a statement also dated 24 February said she had witnessed inappropriate sexually derogatory statements by Mr Gates towards some female staff. A fifth woman in an undated statement said she had witnessed and been subject to “behaviours” by Mr Gates.

[23] On 24 February Mr Gates received separate phone calls from two managers to tell him that complaints had been received. Mr McNeilly was the second caller. At the time, he was Fulton Hogan’s divisional manager. Later, a letter was delivered to Mr Gates. It was from Mr McNeilly but signed on his behalf by Mr Westrupp, the manager who had first called Mr Gates. The letter had been drafted for Mr McNeilly. It referred to his phone call, the allegations by the two women (named) of inappropriate sexual conduct by Mr Gates towards them, Fulton Hogan’s decision to investigate the allegations and a proposal to suspend Mr Gates on full pay for the duration of the investigation. The reasons given for the proposed suspension were the sexual nature of the allegations and to preserve the integrity of the investigation. A meeting was set for Monday 27 February at 10.30 am for Mr Gates to make

submissions about the possibility of a suspension. Mr Gates was told he could bring a support person or a representative.

[24] The letter cautioned Mr Gates that dismissal was a possibility if the incidents were substantiated through the investigation and it referred to the availability of confidential workplace support.

[25] The letter did not refer to the statements from any of the other women, despite dates on two of them indicating they had been received by Fulton Hogan before the proposed suspension letter was delivered to Mr Gates.

[26] Mr Gates says that Mr Westrupp's call woke from his deep sleep after working a night shift roster. He says that he was disoriented and groggy, and was not told he could be represented until he received the letter about 5.00 pm on Friday, too late to arrange representation. However, Mr Gates had the weekend to consider the letter and could have asked to delay the meeting if he had wanted to be represented. There was no substantive unfairness caused by the timing of the phone calls to him on 24 February or the arrangements to meet on 27 February.

[27] Mr Gates attended the meeting on 27 February at about 10.30 am, accompanied by a support person (Donna Nepe). Mr McNeilly and Mr Westrupp attended for Fulton Hogan. After the meeting, Mr McNeilly sent a letter dated 27 February to Mr Gates confirming the decision to suspend him on full pay for the duration of the investigation. Again, the letter had been drafted for Mr McNeilly.

[28] No one made or kept any notes during the 27 February meeting. The best evidence about what happened is the email Mr Westrupp sent soon afterwards to Nicole McBreen, who was Fulton Hogan's South Island HR manager. I rely on it to find that Mr Gates agreed to the proposed suspension on full pay, was offered workplace support and was told he could give feedback by Wednesday on the terms of reference for the investigation.

[29] I do not accept Mr Gates' evidence that he was expecting to be told the specific allegations at the suspension meeting. The 24 February letter made it clear that the purpose of the 27 February meeting was for Mr Gates to respond to the proposed suspension only. It is

unlikely that Mr Westrupp and Mr McNeilly would have led him to think otherwise when they spoke to him on 24 February.

[30] Mr Gates and Ms Nepe describe it as him being “fobbed off” on 27 February. However, Mr McNeilly and Mr Westrupp properly deferred canvassing the details of the allegations, which would be the subject of the forthcoming investigation.

[31] Mr Gates says that he was asked to sign a letter of confirmation of suspension and a confidentiality agreement but the documents were not fully explained to him. He also says he was not provided with copies of the documents he signed at the time. Ms Nepe supports that evidence. I accept Mr Gates’ evidence about the confidentiality agreement, but nothing turns on it. He received the signed copy after the meeting.

[32] I do not accept Mr Gates’ evidence about the suspension letter. Mr McNeilly did not receive the draft from Ms McBreen for him to sign and deliver to Mr Gates until 2.38 pm on 27 February, after the meeting. Given that, Mr Gates could not have signed it at the meeting in the morning.

[33] The collective agreement permits suspension on full pay until the matter is resolved, where the employee is guilty of serious misconduct. Read in context, this must mean where the employee is alleged to be guilty of serious misconduct. The complaints against Mr Gates were of behaviour that could amount to serious misconduct. In short, Fulton Hogan was entitled to consider suspending Mr Gates on full pay.

[34] Mr Gates now says that Fulton Hogan did not give him an opportunity to suggest alternatives to suspension.¹ However, he knew because of the 24 February letter that the meeting was his opportunity to comment on the proposed suspension on pay. On 27 February, Mr Gates agreed to suspension on pay and did not suggest any alternative, despite having an opportunity to do so. The complaint now that Mr Gates could have suggested alternatives to suspension if he had been given the opportunity lacks merit.

[35] In summary, Fulton Hogan told Mr Gates of the possibility of suspension on full pay for proper reasons, alerted him to the nature of the allegations against him, gave him an

¹ Referring to wording in the 27 February 2023 letter confirming the suspension on full pay.

opportunity to respond to the proposed suspension, then made the decision to suspend him, in a situation where it was contractually entitled to consider a paid suspension. Fulton Hogan did not provide copies of the two complaints or the witness statements to Mr Gates beforehand, but summarised the nature of the two complaints sufficiently for him to be able to respond to the proposed suspension.

The First Investigation

[36] Mr Gates' direct manager (AJ) delivered a sealed package to him at his home later on 27 February. It contained a letter dated 27 February from Mr McNeilly confirming the suspension on full pay.

[37] There was also a second letter dated 27 February from Mr McNeilly setting out advice and the details of an employment investigation into allegations by the two complainants, a copy of the confidentiality undertaking Mr Gates had signed during the 27 February meeting, copies of the two written complaints and copies of the other witness statements, together with a copy of the proposed terms of reference for the investigation. Mr Gates was given an opportunity to comment about the proposed terms of reference by 1 March.

[38] The second 27 February letter also advised Mr Gates that Mr McNeilly had requested Nicole McBreen, Fulton Hogan's South Island HR manager, to investigate the matters raised and provide a written report to assist Mr McNeilly to determine whether the allegations were substantiated.

[39] Mr Gates did not comment about the proposed terms of reference. Mr McNeilly then wrote and hand delivered to Mr Gates a letter of 2 March to confirm the terms of reference (ToR) for the investigation.

[40] In the meantime, Mr Gates engaged a lawyer on 28 February (Mr Praat) but could not meet him until 8 March. Mr Gates also sought medical assistance arising from the stress he was experiencing, given the workplace allegations.

[41] Mr Gates is critical that he did not have an opportunity to get advice and comment on the ToR beforehand. There is no merit in the criticism. Mr Gates could have requested more time if he thought it was necessary at the time. No issue about the ToR was raised by

Mr Gates after he had received legal advice. Even now, Mr Gates has not identified anything about the ToR as unfair.

[42] Ms McBreen interviewed the two complainants, the three initial witnesses and two others between 3 March 2023 and 10 March 2023. Ms McBreen made notes which were transcribed and each interviewee then confirmed that as their accurate version of events. There was a follow up call with one of the complainants on 28 March at Mr Praat's request.

[43] Ms McBreen arranged to interview Mr Gates. All the original statements and Ms McBreen's transcribed notes were made available to Mr Gates beforehand. The interview was on 29 March and Mr Gates attended with his lawyer. Ms McBreen was assisted by a note taker.

[44] As with the other interviews, the notes were transcribed and Mr Gates later confirmed them as his accurate version of events.

[45] Mr Gates asked Ms McBreen to interview another employee as a witness to events. That was done on 3 April, those notes were confirmed and provided to Mr Gates.

[46] Ms McBreen wrote a draft report and sent that to Mr Praat on 12 April. Mr Gates took up the offer to respond to the draft report by having Mr Praat write a letter dated 17 April to Ms McBreen. The letter set out a comprehensive response to factual findings in the draft report. Ms McBreen then completed a final report dated 21 April, which was made available to Mr Gates.

[47] Mr Gates says that he had never been advised during the investigation process that one of the witnesses "morphed" into being treated as a complainant. I do not accept that evidence for the following reasons.

[48] Ms McBreen's interview notes for the person prominently show the person's name followed by "Reason ... Complainant Interview". The purpose of that interview is noted as to "investigate the allegations of inappropriate sexual conduct you have raised against JAMES GATES". Ms McBreen raised with Mr Gates during his interview what the person alleged he had done to her and Mr Gates responded. The draft report includes the name of the person as one of the three whose allegations were being investigated. Point 13 of the draft report that

followed is headed “[Name]’s Complaint”. Mr Praat responded to the person’s allegation, as if she was a complainant.

[49] In summary, the person’s statement was not received by Fulton Hogan until after the suspension, so she was not identified as one of the first two complainants. But from when Mr Gates received the interview notes (if not earlier), it was apparent that Fulton Hogan considered her as a complainant and Mr Gates responded on that basis.

[50] Mr Gates says that Ms McBreen did not take account of comments by AJ (his direct manager), as against those of the complainants and other witnesses. A comment now relied on by Mr Gates was made by AJ in connection with him being “very professional” when training people. AJ’s other comment was that she personally had not seen or heard anything that would cause her to worry about his conduct to others. But AJ also said that she had said to Mr Gates “James that’s not appropriate ... [a] couple of times” when she had first started. AJ also mentioned a culture of banter within the team.

[51] Mr Gates also refers to the interview conducted at his request with a witness who was present at the pre-Christmas function. One of the first complainants had alleged inappropriate sexual conduct by Mr Gates at the function. When interviewed, the witness did not support the allegation. It is apparent from Ms McBreen’s draft and final reports, that the responses by the witness contributed to her conclusion that there was insufficient evidence to substantiate the allegation.

[52] In my view, Ms McBreen considered all the information available to her, both consistent and inconsistent with the complainants’ allegations.

[53] Mr Gates says that there was no investigation into what motivated the allegations. Mr Gates suggested two explanations when he was interviewed by Ms McBreen. She answered both points in her draft and final report. Further consideration was not required.

[54] Mr McNeilly received the report dated 21 April 2023. His role was to make a preliminary decision as to whether there should be a disciplinary investigation. In light of the report’s findings, Mr McNeilly considered that there should be a disciplinary investigation. Fulton Hogan acted reasonably in coming to that view.

The first disciplinary investigation – 27 April 2023 to 2 May 2023

[55] Gavin Stobie is Fulton Hogan's regional manager in the Nelson office. He was responsible for the first disciplinary process.

[56] Mr Stobie wrote to Mr Gates on 27 April 2023. In summary, the letter set out allegations of serious misconduct based on Ms McBreen's final report. It was alleged that Mr Gates "honked" or squeezed a complainant's breasts (allegation 3), that at work he had shown her a photograph of his penis on his phone (allegation 4), and that he had made inappropriate sexual innuendo/comments to female employees (allegation 14).² Mr Stobie included relevant extracts from Fulton Hogan's policies, cautioned Mr Gates that disciplinary action might result and encouraged him to bring a support person or a representative to the disciplinary meeting. Mr Stobie would conduct the meeting, with Mr McNeilly and Tony McCabe in attendance. Mr McCabe at the time was Fulton Hogan's human resources manager.

[57] The meeting was on 1 May. Mr McCabe made notes which I accept as accurate as to what happened in the meeting. Mr Gates was not represented. There is no reason to doubt his evidence that it was because of the ongoing cost of representation. Mr Gates explained that he could call his lawyer on the phone if needed.

[58] Mr Gates denied allegation 3, except to say it was all banter and that he had once flicked the complainant's nipple after she had flicked his nipple. Mr Gates had provided the same response to Ms McBreen. Mr Stobie responded, saying that based on the report and witnesses' consistent statements there was sufficient to support the allegation.

[59] Mr Gates said they had swapped phones, but otherwise disputed allegation 4, saying that if she had seen the photo it was because she had gone through his photos. Mr Stobie told Mr Gates that he did not believe him, based on the witnesses and the report.

[60] Regarding allegation 14, Mr Gates said that everyone made such comments, not just him. Mr Stobie said that there were a number of witnesses whose accounts were consistent to support the allegations. Mr Gates said that they were lying.

² The allegation numbers came from Ms McBreen's report.

[61] Following those exchanges, Mr Stobie adjourned the meeting. Mr Gates says it was only five minutes before he was messaged to reconvene. Mr McCabe's notes indicate that there was a break of 11 minutes. Even if Mr Gates' evidence is correct, it adds nothing to his grievance. Mr Gates just relied on the explanations he had already given during Ms McBreen's investigation. The main point for Mr Stobie to further consider was the appropriate outcome, given Mr Gates' reliance on his earlier explanations and the conclusions reached by Ms McBreen.

[62] Mr Stobie's evidence is that he decided on a final written warning because Mr Gates was good at his job, had no previous record, was a long serving employee and should have a chance to right his ways. When he told Mr Gates about his preliminary decision, Mr Gates said he would accept the decision and had nothing further to add. Mr Gates declined the offer to adjourn the meeting to contact his lawyer. The meeting ended with Mr Stobie to put the outcome in writing.

[63] Mr Gates says in evidence that he did not understand the process. However, Mr McCabe's notes indicate and I find that Fulton Hogan carefully explained the process at each step and Mr Gates confirmed that he understood matters at the time. Additionally, Mr Gates had access to independent legal advice throughout. I do not accept Mr Gates' evidence that he did not understand the process.

[64] Mr Gates did not see Mr McCabe's notes of the 1 May meeting until he requested them months later, but in his evidence he disputes aspects of them reliance on his recollection.

[65] It is only necessary to comment on several points. Mr Gates says he was not told that Mr Stobie was now the decision maker. However, it is likely that Mr McCabe did follow his prepared notes which say that. Mr Stobie's role as decision-maker was also set out in the 27 April letter. It is likely that Fulton Hogan referred to Mr Gates' right to be legally represented and seek advice, so I do not accept Mr Gates' challenge to those references in the notes. Mr Gates claims he said "my words", not "my tongue" as noted, and he relies on Ms McBreen's interview. However, nothing turns on which word Mr Gates used in the 1 May interview.

[66] Mr Gates says he asked about a body camera during this meeting. Ms Fredericksen says that Mr Gates raised the point at the disciplinary meeting. Ms Fredericksen was not at the meeting so her belief about what was said on 1 May does not assist.

[67] Mr Stobie's evidence is that he does not remember discussions about a body camera in great detail, while Mr McCabe says that he would have recorded that in his notes, as notetaking was why he attended the 1 May meeting. I prefer Mr McCabe's evidence to Mr Gates' evidence, so I find that a body camera was not mentioned during the 1 May meeting.

[68] Mr Gates points to parts of the notes to support his contention that more than one person wrote the notes and that additional pages appear to have been inserted. In my view there is no reason to doubt the reliability of the notes as an accurate contemporaneous account of the meeting. Mr Gates also says, that to his recollection, the notes do not record several of his comments. However, for reasons explained later, I am cautious about accepting Mr Gates' recollection on important points, without corroboration. I do not accept Mr Gates' evidence to the effect that the notes leave out relevant information.

[69] Following the 1 May meeting, Mr Stobie wrote to Mr Gates on 2 May 2023 to confirm that he had accepted the three allegations as proven and had decided to issue Mr Gates with a final written warning which would remain on his file for 12 months.

Mr Gates returns to work – May to June 2023

[70] Mr Gates went on annual leave from early May 2023 and returned to work on 22 May 2023.

[71] Mr McNeilly and Mr Gates live nearby each other. Before Mr Gates left for the holiday, he and his partner had a chat with Mr McNeilly. Ms Fredericksen's evidence, which I accept, is that she urged Mr Gates to request Fulton Hogan to provide him with a body camera for protection against baseless allegation. Mr McNeilly says that he vaguely recalls a comment about a body camera, so I accept that it was mentioned during that conversation.

[72] In evidence is a copy of the first page of Ms McBreen's final report dated 21 April 2023 with Mr Gates' handwritten notes on it. The notes must have been written at different

times. A note reads “Re-Set Meeting” which was on 22 May, while another note reads “Final Written Warning – 12 months – letter”, a reference to what was said at the end of the 1 May meeting. Mr Gates’ evidence is that his notes “Body Cam (circled)” and “Body Cams” relate to discussions on 22 May before he started work. Mr Gates was told on 22 May that Fulton Hogan was still looking into it.

[73] Regarding body cameras, Fulton Hogan’s evidence, which I accept, is that they were trialled elsewhere then sometimes deployed in the region to help protect employees from the behaviour of motorists and others affected by traffic management requirements. Use of body cameras to monitor conduct between employees was not addressed and such use would raise other issues.

[74] In any event, as will be explained, the complaint in June following which Mr Gates was suspended and later dismissed, was not a false complaint. Fulton Hogan did not cause the complaint, the second suspension, the second investigation or the dismissal by not providing Mr Gates with a body camera to monitor his interactions with other employees.

[75] Mr Gates’ evidence is that he worked as requested over the next month, that management did not check with him to see how the situation was going for him, and that when he was rostered to work with young girls on night shifts, including the young woman who later made the June 2023 complaint about him (I will refer to her as OTO), he raised this with his manager who told him to “suck it up”.

[76] Mr McNeilly’s evidence is that Fulton Hogan asked Mr Gates at the check-in meeting on 22 May before he started work whether he had any concerns about returning to the same department and working with the same employees. Mr Gates said he had no issues with it. The gist of that evidence is supported by Mr Gates’ notes, referred to above, where he wrote “No qualms going back to TM”. Given Mr Gates’ response when asked, there was no requirement for Fulton Hogan to “check in with him” again.

[77] Mr McNeilly’s evidence is that Fulton Hogan rostered its staff to avoid Mr Gates working with the original complainants and to ensure he was not rostered to work solely with its young female staff members, if possible.

[78] The daily journals for the period 22 May – 26 June support that evidence. They also show that Mr Gates was first rostered with OTO on 12 June, then 13 June, 15 – 19 June, 20 June and 22 June. They were all day shifts and included another worker.

[79] Regarding the response Mr Gates says he received from his manager (“suck it up”), the daily journals show that he worked evening/night shifts only twice after his return to work, neither time with OTO. The manager was interviewed in the second investigation and denied telling Mr Gates to “suck it up”, saying that was not in her vocabulary. She also said that Mr Gates only spoke positively to her about OTO. Mr Gates now³ refers to a social media exchange from a year earlier showing his manager using that phrase about herself in a social context.

[80] However, it is not necessary to positively determine the point about the manager’s reported comment. Fulton Hogan’s rostering arrangements did not cause Mr Gates’ second suspension, the second investigation or his dismissal.

The second suspension – 27 June

[81] Mr McNeilly and OTO’s parents knew one another socially. He received a call from OTO’s mother in the evening on 22 June 2023. She told him that Mr Gates had acted inappropriately towards OTO, who had spent the past several days crying in her room. OTO hand wrote an account of what had happened. It is dated 23 June 2023.

[82] OTO also filled in a formal complaint form on 26 June.

[83] Mr McNeilly spoke to Mr Stobie and Ms McBreen about how to proceed. They decided that Mr McCabe should investigate the allegations.

[84] On 26 June Mr Gates received a text message from his manager to say that Mr McNeilly wanted to see him at the yard. When he returned to the yard, Mr Gates stopped in to see Mr McNeilly. Also present was Ms McBreen. Mr Gates was told to go into the board room. Mr Gates says that he was told by Ms McBreen that Fulton Hogan had no choice but to suspend him. After that, he was handed OTO’s two statements. Mr Gates says that

³ There is no record that Mr Gates mentioned the earlier use of the phrase, prior to his dismissal. Regardless of when Mr Gates first advanced the point, my conclusion at [80] would be the same.

Ms McBreen told him to come in at 8.30 am the next day “to sign the paperwork”. In summary, Mr Gates says that he was suspended on 26 June.

[85] Ms McBreen is an experienced HR manager. It is not inherently likely that she would have suspended Mr Gates without any forewarning. I also note her email to Mr Stobie and Mr McNeilly sent shortly after the meeting with Mr Gates which includes:

Update on JG process so far;

- CM/NM met with James and advised him of the allegations and proposal to suspend
- Invited him to meeting to discuss proposal tomorrow 8.30am (invite sent) – Gavin, letter attached fyi

...

[86] Mr McNeilly disputes that Mr Gates was suspended on 26 June at the meeting, given that the purpose of that meeting was to tell him about the meeting set for the next day, to consider whether Fulton Hogan would suspend Mr Gates. That is reflected in the 26 June invite to Mr Gates under Mr Stobie’s name, referred to in Ms McBreen’s email.

[87] I prefer Mr McNeilly’s evidence supported by Ms McBreen’s email, so find that Mr Gates was not suspended on 26 June.

[88] Mr Gates met with Mr Stobie on 27 June. Mr Gates says that Mr McNeilly was not present while both Mr McNeilly and Mr Stobie cannot recall. I accept Mr Gates’ evidence on that point.

[89] Mr Gates says he told Mr Stobie he was suspended the day before, so did not need a support person to sign paperwork. Mr Stobie does not recall that being said, but his evidence is that his letter of the same date reflects the outcome of the meeting.

[90] Ms McBreen was not present at the meeting but I note her email to Mr McCabe sent at 11.17 am 27 June about what had happened that morning. She reported “James agreed to the suspension we have proposed which was confirmed this morning”.

[91] I consider that the description in Mr Stobie’s letter corroborated by the report in Ms McBreen’s email is more likely to be accurate as to what happened on 27 June. I find that Mr Gates did not contest the proposed suspension and did not suggest any alternatives to

suspension. He was then told by Mr Stobie that he was suspended on pay for the investigation.

Second investigation

[92] Mr Gates received terms of reference (ToR) for the investigation into OTO's allegations. He was given and signed a confidentiality undertaking. Mr Gates could have but did not comment on the ToR, as previously.

[93] Mr McCabe interviewed OTO on 3 July. OTO signed a typed statement setting out details of her allegations.

[94] On 4 July Mr McCabe wrote to Mr Gates to schedule a meeting for 10 July. He also asked Mr Gates to advise him if he would have a support person or representative attending. Mr Gates instructed his lawyer to represent him. Mr Praat wrote to Mr McCabe on 7 July. He sought some information and clarification prior to any meeting, and Mr McCabe responded that day.

[95] Mr McCabe summarised the allegations in his email to Mr Praat. OTO claimed that Mr Gates had made unwanted commentary and physical actions towards her. She alleged that he called her "Sweet, Love or Darling and touching her on the thigh and across her shoulder (as indicated in her statement)."

[96] At the meeting on 10 July, Mr Gates responded to the specific allegations. He disputed most of the allegations and gave context around others to demonstrate that he said and did nothing improper. Mr Gates also claimed he was being set up by a woman who had been interviewed during the first investigation.

[97] After the meeting, Mr Praat wrote to Mr McCabe. He detailed the set-up explanation and named two of the women from the earlier investigation. He also set out Mr Gates' claim that he had been told by his manager to "suck it up" when he raised his rostering concern with her.

[98] That assertion prompted Mr McCabe to interview Mr Gates' manager. As mentioned earlier, she disputed the claim that she had told him to "suck it up".

[99] Mr McCabe interviewed OTO again, seeking her response to Mr Gates' explanations. Mr McCabe also interviewed the two women and another employee who Mr Gates had claimed could verify that there was a vendetta against him.

[100] Mr McCabe then drafted his investigation report and sent it to Mr Praat for Mr Gates' response. Mr McCabe also provided Mr Praat with copies of the additional interview statements. Mr Praat sent Mr Gates' response to Mr McCabe on 21 July. That included a request that Mr McCabe interview another employee.

[101] Having interviewed the additional employee and copied her statement to Mr Praat, Mr McCabe sent his final report to Mr Stobie.

The second disciplinary investigation – 27 July 2023 to 4 August 2023

[102] Having reviewed the final report, Mr Stobie considered that it was necessary to commence a disciplinary process. On 27 July 2023 he wrote to Mr Gates. The letter set out an allegation of sexual harassment amounting to serious misconduct which might result in Mr Gates' dismissal. Mr Stobie also referred to the recent final written warning.

[103] Mr Stobie in his letter said that the allegation was based on Mr McCabe's investigation, which reported that there was prima facie evidence that Mr Gates had sexually harassed OTO: by touching her in an inappropriate and unwelcome way that caused her harm; by the use of the words "Darling, Love and Sweetie"; and that use of the words, tying her shoe laces and two cases of touching her were uninvited.

[104] Mr Stobie met Mr Gates on 31 July at 2.00 pm. Also present for Fulton Hogan were Ms McBreen who took notes, and Mr Westrupp. Mr Gates was represented by Mr Praat. I accept that Ms McBreen's notes accurately reflect what happened. Mr Gates relied on his substantive reply set out in Mr Praat's 21 July letter but he also talked through his response in detail. The meeting adjourned shortly after 3.00 pm and it resumed nearly an hour later.

[105] When the meeting resumed, Mr Stobie advised Mr Gates that he considered that the allegations were substantiated, that it amounted to serious misconduct, that trust and confidence was eroded and with the final written warning, his preliminary decision was

summary dismissal. The meeting ended with Mr Gates being given the opportunity to respond to Mr Stobie's preliminary decision.

[106] Mr Praat wrote to Mr Stobie on 2 August. The letter set out examples of errors said to have occurred with the investigation and the disciplinary process. It said that the only decision open to a reasonable employer was either to dismiss the complaint or conclude that there was an insufficient basis for the positive finding for serious misconduct.

[107] Mr Stobie wrote to Mr Gates care of Mr Praat on 4 August. Mr Stobie referred to Mr McCabe's investigation and findings. He outlined his disciplinary process including what Mr Gates had said at the 31 July meeting, his preliminary decision and Mr Praat's 2 August letter. Mr Stobie directly responded to points raised in Mr Praat's letter. He then confirmed that Mr Gates' employment was terminated without notice, as of 4 August 2023. He advised arrangements for final pay and the return of any property.

Mr Gates started other employment while still employed by Fulton Hogan

[108] Two of Fulton Hogan's employees reported having seen Mr Gates working on a competitor's worksite near Stoke on 3 August 2023 at about 9.20 am. Mr McNeilly's wife also contacted him on 3 August to say that she had seen Mr Gates earlier that morning near Stoke while she was driving to work. Their signed statements dated in September 2023 have been produced to the Authority, but I did not require them to appear to give evidence.

[109] Mr Gates lodged and served payslips and his employment agreement with respect to this other employment, having been directed to do so.

[110] The employment agreement gives "24th July 2023" as the commencement date. It is signed and dated 17 July 2023 for the employer and signed and dated 7 August 2023 by Mr Gates. Each page is initialled for the employer and by Mr Gates. The employer used the same colour pen to sign, date and initial the agreement. Mr Gates used a different colour pen when he signed and dated the agreement compared to when he initialled each page.

[111] Mr Gates' evidence is that he was given a contract of employment to take away after he had approached the other employer. It is likely that Mr Gates had a copy of the agreement

in his possession from 17 July 2023. The use of different pens suggests he might not have initialled it and signed it at the same time.

[112] The payslip records that Mr Gates was paid for 55 hours for his first pay week with the new employer which ended on Sunday 6 August 2023.

[113] In evidence when questioned, Mr Gates first told me that 3 August was an observation day, a meet and greet with the new employer but he did not work and he was not at the reported worksite near Stoke. He explained the payment of 55 hours for the week ending 6 August as a “clerical error” that he had not noticed. He said he picked up the employment agreement on either 3 or 4 August and it was 7 August when he initialled, signed and dated it. He also said that the new employer wanted him to start on 24 July but he told them he could not start then.

[114] Mr Gates also said he was unaware of the payment until later, but it is not necessary to set out that evidence in any detail. Even if true, it would make no difference to my finding below.

[115] Later in re-examination, Mr Gates said that he started work for the new employer on Monday 7 August.

[116] While still being questioned by me, when the investigation meeting resumed the following day, Mr Gates asked to go over his answers to my questions (above) given the day before. He told me that he contacted the new employer on Monday after the preliminary outcome (31 July), asked to come in on the Tuesday, Wednesday, Thursday and Friday but told them he did not want to be paid as he was still employed by Fulton Hogan. He maintained that he was not at the Stoke worksite, but said it was near where he lives and said that he walks every night, by way of explaining why he might have been seen in that vicinity. Mr Gates did not resile from his evidence even when I pointed out that the reported sightings were timed in the morning, not the evening.

[117] Later in re-examination, Mr Gates said he was at Atawhai for the new employer, not Stoke.

[118] Mr Gates must have given the new employer his IRD and bank account details well before Sunday 6 August, since they are shown on the payslip. It is improbable that the new employer would have paid Mr Gates 55 hours for that week if he had only been observing and not engaged to work. It is also unlikely that the new employer would have paid Mr Gates unless satisfied that he had agreed to the terms it had offered on 17 July. Accordingly, I do not accept Mr Gates' evidence that he started work for the new employer on 7 August.

[119] Mrs McNeilly and one of the Fulton Hogan employees referred to above knew Mr Gates personally so would have recognised him by sight. There is no reason to doubt the reports that he was at Stoke in the morning on 3 August at the competitor's worksite and appeared to be working. I do not accept Mr Gates' evidence to the contrary.

[120] I find that Mr Gates started working for the new employer before Fulton Hogan dismissed him.

[121] Mr Gates told me in the morning why he needed to go over his answers given in evidence the day before. I accepted it was fair for him to do that. However, my finding is not because he changed his answers to my questions. Neither set of answers was a credible explanation for the payment for the week and the reports of him at the Stoke worksite.

[122] I note that the submissions for Fulton Hogan set out other matters to support a submission about Mr Gates' credibility. But it is not necessary to canvass them or make any findings.

[123] Mr Gates' evidence on this issue has caused me to be cautious about his evidence more generally with respect to disputed matters, unless it was otherwise corroborated.

Justification – a summary⁴

[124] Employees must raise with their employer any personal grievance claim (unjustified dismissal or unjustified disadvantage) within 90 days starting on the day the action alleged to cause the grievance occurred or came to their notice. If not raised within time, the employer

⁴ See Employment Relations Act s 103A.

could consent to the grievance being raised late or the employee may apply to the Authority for leave.⁵

[125] If raised within time, the employee may apply to the Authority to investigate and determine their personal grievance claim. As part of that, the Authority will need to assess justification.

[126] Whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[127] The Authority must consider whether the employer sufficiently investigated allegations beforehand, having regard to the resources available to it; whether it raised its concerns beforehand; whether it gave the employee a reasonable opportunity to respond beforehand; and whether it genuinely considered the employee's explanation beforehand. In addition, the Authority may consider other appropriate factors.

[128] One factor is good faith. The duty of good faith requires an employer who is proposing to make a decision that may adversely affect an employee's continued employment, to provide the employee with access to relevant information and an opportunity to comment on it before it makes the decision.⁶

[129] The Authority must not determine a dismissal or an action unjustified solely because of defects in the employer's process that were minor and did not result in the employee being unfairly treated.⁷

[130] Fulton Hogan is a substantial employer with resources that should enable it to fully investigate its concerns. The allegations against Mr Gates were serious so that too placed an obligation on Fulton Hogan to act fairly when it investigated and formed its view on the claims made against him.

⁵ Employment Relations Act 2000 s 114.

⁶ Employment Relations Act 2000 s 4(1A)(c).

⁷ Employment Relations Act 2000 s 103A(5), as at 2023.

Fulton Hogan justifiably suspended Mr Gates on 27 February 2023

[131] Mr Gates raised complaints about the first suspension, the first investigation and final written warning on 28 July 2023. That was just within time regarding the 2 May 2023 warning but out of time regarding the suspension and the investigation.

[132] Ms McBreen responded on 3 August 2023. She set out Fulton Hogan's substantive position and did not challenge any aspect as out of time. Later when matters were lodged in the Authority, Fulton Hogan again provided a substantive reply without challenging timeliness. While counsel now refers to some matters as being out of time, I consider that Fulton Hogan must be taken as having impliedly consented to grievance claims about the first suspension and the first investigation being raised out of time.

[133] I treat those grievance claims as properly before the Authority for determination.

[134] Given the nature of the allegations, Fulton Hogan had power under the collective agreement to suspend Mr Gates on full pay.

[135] Based on the findings set out earlier, Fulton Hogan's actions in suspending Mr Gates and how it did so were what a fair and reasonable employer could have done in all the circumstances at the time.

[136] It is convenient now to consider the issue raised by Mr Gates about whether he received "full pay" while suspended.

[137] I am referred to *Idea Services v Dickson* in support of Mr Gates' claim that he was not paid full pay while suspended.⁸ However, the case dealt with whether sleepovers constituted work under the Minimum Wage Act 1983 and, if so, whether that Act was complied with if an employee's average pay over a pay period exceeded the prescribed minimum. Those issues do not arise here.

[138] Mr Gates also submits that lost remuneration must reflect actual earnings and that can involve an assessment of the probability of continued overtime earnings having regard to the

⁸ *Idea Services v Dickson* [2011] NZCA 14. A later judgment of the Supreme Court granted leave to appeal, but no further judgment resulted – see *Idea Services v Dickson* [2011] NZSC 55.

pattern of earnings. I was referred to three decided cases,⁹ but it is not necessary to consider them in detail here. I am not assessing compensation for a proven personal grievance at this point.

[139] Mr Gates was employed as a permanent full-time employee. Under the collective agreement, Fulton Hogan had to make available at least 40 hours paid work each week. Fulton Hogan was entitled to require Mr Gates to work extended hours and overtime on a regular basis. Time worked in excess of 40 hours per week was classified as overtime and paid for at a higher rate. Night shifts were also paid for at overtime rates.

[140] In practice, Fulton Hogan offered overtime and night shift work based on its business needs, seasonal workflows, site requirements and staff availability. But Mr Stobie's evidence is that, while staff are guaranteed 40 hours, there is no entitlement to work or be paid overtime. I accept that evidence.

[141] Calculations for Mr Gates show that he worked an average of about 25 hours paid at overtime rates over the year prior to his first suspension. While Mr Gates often worked more than 40 hours a week and was paid overtime rates or on other shifts which were paid at an overtime rate, I find that he had no right to insist of such work being offered or for payment if it was not offered.

[142] Suspension on full pay required Fulton Hogan to pay Mr Gates 40 hours each week at his hourly rate, but it was not required to pay him at the rate of his average weekly earnings or otherwise make up discretionary overtime earnings that were not available because of the suspension.

[143] During the two suspensions Fulton Hogan paid Mr Gates 40 hours each week at his hourly rate in accordance with the collective agreement.

[144] Whether approached as a personal grievance claim under s 103(1)(b) of the Employment Relations Act 2000 or as a claim for arrears of wages, Mr Gates' claim for further payment fails.

⁹ Correct citations were not provided.

Fulton Hogan justifiably issued the final warning to Mr Gates - May 2023

[145] It is submitted that there was a structural failure in Fulton Hogan's process because multiple actors were involved but no individual undertook the full function of independently determining the facts, making it unfair to Mr Gates.

[146] Inevitably when an employer appoints someone to investigate allegations and delegates another person to make a decision about a disciplinary concern, different actors will have different roles. There is nothing inherently improper or unfair in that arrangement.

[147] In this case, the respective roles were made clear to Mr Gates.

[148] Fulton Hogan appointed Ms McBreen to investigate the matters which had been raised by the complainants and others with Fulton Hogan and provide a written report to Mr McNeilly to help him to determine whether the allegations were substantiated.¹⁰ Ms McBreen then did that. Her final report set out her conclusions and gave reasons in response to the allegations and Mr Gates' explanations. Ms McBreen's conclusions and reasons were what a fair and reasonable employer could have done in all the circumstances at the time.

[149] There is no reasonable basis to object to Ms McBreen's being assigned that role. Ms McBreen was not a complainant, a witness or otherwise connected to the matters to be investigated. Her earlier involvement regarding the suspension did not disqualify her from being able to properly and fairly investigate the complaints.

[150] Based on the report, Mr McNeilly decided that there should be a disciplinary investigation, with Mr Stobie as the decision maker. Those too were actions which a fair and reasonable employer could have taken in the circumstances.

[151] Mr Stobie specified the allegations of concern, met with Mr Gates, gave him a reasonable opportunity to respond to the concerns and genuinely considered Mr Gates' responses. Having heard directly from Mr Gates, Mr Stobie then decided to issue a final

¹⁰ To paraphrase Mr McNeilly's 27 February 2023 letter.

written warning to him. Mr Stobie's actions and how he acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[152] Mr Gates criticises the report and Mr Stobie's reliance on it.

[153] I need only mention the allegations that were upheld but note that Ms McBreen considered that there was insufficient evidence to uphold other allegations. That indicates that Ms McBreen was alert to the need to only make findings against Mr Gates if there were reasonable grounds to support them.

[154] Ms McBreen concluded that Mr Gates did "honk" or squeeze a complainant's breasts as claimed. Another interviewee said she had witnessed this. Ms McBreen did not accept Mr Gates' explanation that he had only once "flicked" the complainant's nipple in retaliation for her doing the same to him and explained why. That outcome was what a fair and reasonable employer could have concluded, based on Ms McBreen's inquiries.

[155] Ms McBreen concluded that Mr Gates showed the complainant a photo of his penis on his phone. Mr Gates did not dispute that the photo was on his phone but said she could only have seen it by searching his private messages. Ms McBreen preferred the complainant's account and explained why. That outcome was what a fair and reasonable employer could have concluded, based on Ms McBreen's inquiries.

[156] Ms McBreen concluded that Mr Gates made inappropriate sexual innuendo and commentary at work, as alleged and witnessed by those interviewed. Mr Gates did not dispute some of the statements attributed to him by those interviewed and said it was all in the context of workplace "banter". While there was banter between the employees, Ms McBreen concluded that Mr Gates pushed boundaries with more junior employees who felt they could not speak up. That outcome was what a fair and reasonable employer could have concluded, based on Ms McBreen's inquiries.

[157] Mr Gates offered no fresh explanation to Mr Stobie during the disciplinary process. Mr Stobie's reliance on Ms McBreen's detailed report was what a fair and reasonable employer could have done at the time.

[158] There is a submission that Fulton Hogan took no steps to resolve credibility, given that Mr Gates' explanation was that the complainants were not telling the truth. However, in ascertaining facts, an employer may be presented with differing accounts. Acting reasonably, they will be entitled to accept some in preference to others. They will need to show that the course taken to ascertain the facts was reasonable.¹¹ There was nothing else that Fulton Hogan could reasonably have done to resolve the conflict in accounts.

[159] I find that Fulton Hogan's actions and how it acted in issuing a final written warning to Mr Gates based on that conduct were what a fair and reasonable employer could have done in the circumstances at the time.

Fulton Hogan justifiably suspended Mr Gates on 27 June 2023

[160] Given the nature of the June allegations, Fulton Hogan again had power under the collective agreement to suspend Mr Gates on full pay.

[161] To summarise my earlier findings, on 26 June Mr McNeilly and Ms McBreen alerted Mr Gates to the new allegations, the possibility of his suspension and that he was to meet with Mr Stobie the following day about that. When he met with Mr Stobie on 27 June, Mr Gates agreed to the suspension.

[162] An employer contemplating suspension of an employee will usually be required to tell the employee of the possibility of suspension, the employer's ground for doing so and offer the employee an opportunity to persuade the employer not to do so.¹² That is what Fulton Hogan did.

[163] Fulton Hogan's actions in suspending Mr Gates and how it did so were what a fair and reasonable employer could have done in all the circumstances at the time.

Fulton Hogan justifiably dismissed Mr Gates – 4 August 2023

[164] Mr Gates says that the dismissal relied on the "unsafe" final warning and a flawed investigation. As explained above, there is no merit in the first point.

¹¹ *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at [20].

¹² *Sefo v Sealord Shellfish Ltd* (2008) 5 NZELR 407 at [38].

[165] On the second point, the second investigation is said to be flawed because it did not resolve inconsistencies, relied on mixed evidential material, was biased and partial and failed to engage with issues raised by him.

[166] As before, the respective roles were made clear to Mr Gates. Mr McCabe was engaged to investigate OTO's allegations and report to Mr Stobie.

[167] Mr McCabe considered that OTO was open, honest and consistent. Mr McCabe also relied on messages between OTO and her friends in Australia at the time of some of the incidents to corroborate her account of events. He investigated Mr Gates' contention that he was being set-up, but there was no evidence to support it. Mr McCabe found Mr Gates' account hard to believe.

[168] In summary, Mr McCabe formed the view that Mr Gates had twice touched OTO in an unwelcome way (on her lower thigh and on her back/shoulder), had tied up her shoe-laces without invitation and called her Darling, Love and Sweetie. Mr McCabe thought that those actions could be considered as sexual harassment as Mr Gates had touched OTO in an inappropriate and unwelcome way and it had caused her harm (feeling unsafe, not sleeping well and becoming quiet and withdrawn).

[169] Mr McCabe's conclusions and reasons were what a fair and reasonable employer could have done in all the circumstances at the time.

[170] I do not accept the submissions that Mr McCabe failed to resolve inconsistencies, relied on mixed evidential material, was biased/lacked impartiality and failed to engage with issues raised by Mr Gates. His report demonstrates that those assertions are not correct. The report also demonstrates that Mr McCabe dealt with issues raised by and for Mr Gates, to the extent he considered necessary. Mr McCabe's earlier involvement did not create a conflict that would prevent him from fairly and reasonably investigating OTO's complaints.

[171] Mr Stobie initiated a disciplinary investigation, having reviewed Mr McCabe's report.

[172] In reliance on Mr McCabe's report, Mr Stobie raised Fulton Hogan's concerns with Mr Gates, gave him a reasonable opportunity to respond and genuinely considered his

explanations. However, Mr Stobie did not accept the explanations given by and on behalf of Mr Gates. Mr Stobie then summarily dismissed Mr Gates.

[173] Those actions and how Mr Stobie acted were what a fair and reasonable employer could have done in all the circumstances at the time. In particular, a fair and reasonable employer could conclude that Mr Gates' conduct towards OTO amounted to sexual harassment under Fulton Hogan's code of conduct and that, taken with the recent final warning, Mr Gates' behaviour amounted to serious misconduct.

[174] I find that Fulton Hogan justifiably dismissed Mr Gates.

Summary

[175] Fulton Hogan justifiably suspended Mr Gates on full pay twice, justifiably issued him with a final written warning then justifiably dismissed him.

[176] Mr Gates has no personal grievance against Fulton Hogan and his claims are dismissed.

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

[178] If an Authority determination on costs is needed, Fulton Hogan may lodge, and then should serve, a memorandum within 28 days of the date of this determination. From the date of service of that memorandum Mr Gates will then have 14 days to lodge

Philip Cheyne
Member of the Employment Relations Authority