



Act 2000 (the Act):

- (i) the name of the complainant is prohibited from publication indefinitely. She is referred to in this determination only as Ms Z; and
- (ii) the name of Arvind Adi is prohibited from publication for the period from the date of the investigation meeting until 29 days after the date of this determination. This period has been provided to allow time for Mr Adi to apply to the Employment Court for a continued prohibition on publication of his name if he considers the Authority's decision not to do so is wrong.

[3] In providing only a further limited non-publication order of Mr Adi's name, I consider the interests of the open administration of justice outweigh Mr Adi's concerns that his family, including two young daughters, might be embarrassed by the serious allegations made about his conduct. If his dismissal were found to be justified, that is a consequence he must bear. If his dismissal is found to be unjustified, that is sufficient vindication. The circumstances of this case are not sufficiently exceptional to warrant a variation to the normal provision for publication of the names of the parties.

### **The investigation**

[4] For the purposes of this investigation I have considered written witness statements from the Applicant, his wife Suman Adi, Rail and Maritime Transport Union industrial officer Scott Wilson, former passenger operator Sadeque Ali Syed and Veolia human resources manager Georgina Whittenham. Each of these witnesses attended the investigation meeting where Ms Whittenham, Mr Adi, Mr Wilson and Mr Syed answered questions from the Authority and counsel. Counsel for each party provided closing submissions regarding the facts and applicable legal principles.

### **The dismissal**

[5] Mr Adi was dismissed on 13 May 2008. Ms Whittenham made the decision to dismiss him because she concluded "*on the balance of probability, deliberate sexual harassment had occurred*" and because of "*the company's zero tolerance to sexual harassment which is considered serious misconduct*". She based the decision on the following factors:

- i. there was no reason for the complainant, Ms Z, to lie; and
- ii. a witness had seen Mr Adi touch Ms Z's leg in a rubbing motion which could not be construed as accidental; and
- iii. Mr Adi's response to that allegation lacked consistency as he had given different responses in three meetings held with him – once denying he had ever touched her, once suggesting he may have touched her leg in a “friendly” way, and once saying he could not recall; and
- iv. Mr Adi had not accepted he had done anything wrong even when he “*admitted*” touching Ms Z.

[6] The allegations related to events on 28 and 29 April 2008 when Mr Adi and Ms Z were working together on the trains collecting fares.

*The allegations about 28 April*

[7] Ms Z alleged, that during a train journey towards the Britomart station, Mr Adi had touched her leg, put his arm around her and “*with both hands grabbed her face and kissed her on the lips*”.

[8] In an initial statement of complaint, made on 29 April, Ms Z said Mr Adi had sat next to her during part of the journey when there were no passengers in the carriage. Another male passenger operator had been present. After that operator got off at the Glen Innes station, Mr Adi had “*kept tapping*” her leg and then put his arm around her, grabbed her face and kissed her on the lips. She said a trainee passenger operator – Sharna Olo – had then come into the carriage.

[9] In a second statement, made on 1 May, Ms Z said that after Ms Olo sat down near them, Mr Adi was “*still tapping*” and that Ms Olo saw this.

[10] Ms Solo provided a written statement on 30 April and was interviewed a further two times by Ms Whittenham. She said that she had walked into the carriage and seen Ms Z, Mr Adi and another male passenger operator. She had sat near Ms Z and said she saw Mr Adi touching Ms Z's thigh or knee. Questioned again later she said Mr Adi was rubbing his hand on Ms Z's knee. Ms Olo said she did not know

why the other male passenger operator present had not said anything. She had then left Ms Z, Mr Adi and the other male passenger operator in the carriage and returned to her work in another carriage. Ms Olo talked to Ms Z as they both left the train at the end of the journey at the Britomart station. Ms Olo said Ms Z had said Mr Adi had “*tried to kiss her*”. Ms Olo encouraged Ms Z to report the incident to her train manager.

[11] The other passenger operator in the carriage – and to whom the statements of Ms Z and Ms Olo referred – was Sadeque Syed. Both Mr Syed and Ms Olo had started working for Veolia the previous month.

[12] On 30 April Mr Syed gave a statement to a Veolia manager in which he recalled seeing and talking with Ms Z, Mr Adi and Ms Olo on the train on 28 April. He recalled the discussion as “*normal*” and said nothing happened in the time he was in the carriage between Papakura and Glen Innes stations.

[13] On 1 May Mr Syed went along with the union organiser Mr Wilson and a number of other union members to a meeting between Mr Adi and Ms Whittenham. Mr Syed was sent away from the meeting without being asked about what he saw and heard on 28 April. He was not interviewed at any stage by Ms Whittenham as part of her inquiry.

#### *The allegations about 29 April*

[14] In her first statement of complaint, made on 29 April, Ms Z said that during a train journey earlier that day Mr Adi had “*come over and kept rubbing my leg, getting his hand closer to my private parts, till he reached my areas*”.

[15] In an interview with Veolia representatives on 1 May Ms Z said Mr Adi had been “*rubbing her leg and trying to lift up her top*”.

[16] Ms Z said that, when Mr Adi stood up to give the ‘all clear’ at a station stop, she left that carriage and got into another carriage with the train manager Junior Keremete.

[17] In her first statement Ms Z said that she was “*in shock and frightened*” and “*too scared to tell anyone*”. In her 1 May interview she said she told Mr Keremete that she did not like Mr Adi, would not go into the carriage with him and that he had touched her inappropriately.

[18] On 1 May Mr Keremete provided a written statement in which he recalled Ms Z asking him on 29 April if she could work in the front of the train with him. He said Ms Z had said she was not comfortable working with Mr Adi in the back of the train because he was “*acting creepy*”. Mr Keremete said he asked her if everything was OK and she had said everything was fine but she was just more comfortable working with him. Mr Keremete also said he had walked through the train earlier to get a passenger count and “*noticed nothing out of the ordinary*”.

[19] Mr Keremete was not interviewed at any stage by Ms Whittenham as part of her inquiry.

#### *The employer's inquiry*

[20] Ms Whittenham conducted Veolia's investigation into Ms Z's complaint.

[21] Ms Z's complaint was first made to a train services officer on 29 April. That officer had Ms Z write a statement and brought her to Ms Whittenham's office the next day.

[22] After speaking with Ms Z, Ms Whittenham made arrangements to see Mr Adi, informed him that a serious allegation of a sexual nature had been made against him and got Mr Adi's agreement to being stood down from work while the matter was investigated. Before he left work Mr Adi was given a letter setting out the allegations, the name of the complainant, a time and date for a meeting to hear his explanation, possible disciplinary consequences and encouraged to bring a representative to the meeting.

[23] Ms Whittenham also arranged for a Veolia manager to get written statements from Ms Olo, Mr Keremete and – because he had been mentioned by Mr Adi – Mr Syed.

[24] During the course of her subsequent inquiry Ms Whittenham:

- a. read written statements from Ms Z, Ms Olo, Mr Keremete and Mr Syed;
- b. met with Ms Z on 1 May;
- c. met with Mr Adi and union representatives on 1 May;
- d. after speaking with Mr Adi on 1 May, telephoned Ms Z and Ms Olo to clarify aspects of their statements;
- e. spoke with another manager on 6 May about whether there were any other work issues concerning Ms Z;
- f. met with Ms Olo on 6 May to further check her recall of when during the train journey the alleged leg touching had occurred and ask for further description of it;
- g. met with Ms Z again before 8 May to discuss the investigation with her and to check a discrepancy between her statement and Ms Olo's about when in the train journey the alleged touching had occurred;
- h. met with Mr Adi and his representatives on 9 May to provide further information and hear his responses;
- i. met with Veolia's general manager and operations manager on 9 May to discuss her investigation and her preliminary conclusion that dismissal was warranted;
- j. met with Mr Adi and his representatives on 12 May to advise of her preliminary decision to dismiss and invite further comment;
- k. met again with Veolia's general manager to advise that her decision was to dismiss Mr Adi;
- l. met with Mr Adi and his representatives on 13 May to advise of her decision to dismiss him; and confirming the reasons for that decision by letter on the same day.

[25] Mr Adi's union representative, Mr Wilson, raised a personal grievance about the dismissal with Veolia that day.

### **The issues for investigation**

[26] The broad questions for determination are:

- i. whether Veolia’s inquiry into Ms Z’s complaint of sexual harassment by Mr Adi and Veolia’s subsequent decision to dismiss Mr Adi were what a fair and reasonable employer would have done in all the circumstances at the time (that is the test of justification under s103A of the Employment Relations Act 2000 (the Act)); and
- ii. if not, what remedies should be ordered (if any), after considering mitigation and contribution.

## **Determination**

[27] The Authority’s role is not to conduct again an investigation into the specific allegations made against Mr Adi, and to determine whether he did touch Ms Z on the days and in the ways alleged. Rather its role is to consider whether the employer has shown it conducted a full and fair investigation that disclosed conduct capable of being regarded as serious misconduct.<sup>1</sup>

[28] Case law confirms that this investigative fullness and fairness is not to be tested by minute and pedantic scrutiny of individual elements of that process but, rather, a broad assessment of its fairness in light of the seriousness of the allegation and its potential consequences.<sup>2</sup>

[29] The Employment Court has described the requirements on an employer in this way:<sup>3</sup>

*An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies.*

[30] Veolia’s “*harassment prevention policy*” applies to this case. It sets out “*guidelines for a fair process*” including a requirement to “*consider all the evidence and weigh it carefully before deciding whether there is substance to the complaint*”.

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<sup>1</sup> *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 at [32] (CA).

<sup>2</sup> *King v PPCS Richmond Limited* (EC, Auckland AC61/05, 19 October 2005, Colgan J) at [78]

<sup>3</sup> *Hudson v Air New Zealand* [\[2006\] 1 ERNZ 415](#) at [144] (EC, Shaw J).

[31] Mr Adi faced a very serious allegation of sexual harassment. The evidence to support that allegation had to be proven to a high degree of probability.<sup>4</sup>

[32] For the reasons given below, I find that Mr Adi's dismissal, and how Veolia acted in course of deciding to dismiss him failed to meet the required standard. It failed to conduct an inquiry that was full and fair enough to establish the allegations to the necessary high degree of probability. Consequently its decision and how it acted in reaching that decision was not what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal. Mr Adi has a personal grievance and remedies need to be addressed, including whether his reinstatement is practicable.

*The employer's inquiries into the allegations*

[33] Ms Whittenham was, Veolia submitted, in a difficult position at the end of her inquiry. She had conflicting statements on the one hand from Ms Z and Ms Olo and on the other from Mr Adi, including what Ms Whittenham considered to be an inconsistency or change of story from Mr Adi.

[34] However I do not accept Veolia's submission that Ms Whittenham's decision – that Ms Z's allegations were more likely than not to be true – was reached after a fair and thorough process. Rather I accept the submission of Mr Adi's counsel that Ms Whittenham's conclusion was fatally flawed because it was made on the basis of inquiries that were neither full nor fair.

[35] Key flaws in Ms Whittenham's inquiry included:

- a. her failure to interview Mr Syed and Mr Keremete;
- b. the weight given to the statements of and interviews with Ms Z and Ms Olo over the statements of Mr Syed and Mr Keremete; and
- c. the emphasis on alleged inconsistencies or change of story by Mr Adi while disregarding inconsistencies between the statements of Ms Z and Ms Olo.

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<sup>4</sup> *Kumar v Icehouse (NZ) Limited* [2006] 1 ERNZ 381 at 57 (EC, Travis J).

*(i) failure to interview Mr Syed and Mr Keremete*

[36] There were no direct witnesses to the most serious allegations made by Ms Z about Mr Adi's conduct on 28 and 29 April as his actions were said to have occurred when no-one but those two people were in the carriage.

[37] This heightened the importance of any conclusions about what most likely happened when Ms Z, Mr Adi, Ms Olo and Mr Syed were all together in the carriage on 28 April – as those conclusions (particularly about the credibility and accuracy of those four individuals) would, in turn, have considerable weight in determining the likelihood of the alleged events when Ms Z and Mr Adi were alone. For that reason it was particularly important to probe the extent to which Mr Syed's evidence corroborated or contradicted Ms Olo's evidence (because she said he was there) – and that could not be fairly done without interviewing him.

[38] Similarly Mr Keremete's temporal and physical proximity to the alleged events of 29 April made it important to closely check the extent to which his account corroborated or contradicted Ms Z's evidence of what she said and her demeanour. Conclusions regarding that would also bear on an assessment by Veolia of whether Ms Z's or Mr Adi's account of events on 29 April was most likely to be true.

[39] In short, the evidence of Mr Syed and Mr Keremete went directly to specific events and the differences in their evidence from other witnesses raised a direct credibility contest about what happened.<sup>5</sup>

[40] The Employment Court has explained the requirement for further inquiry of witnesses in this way:<sup>6</sup>

*In general, it may well be acceptable when initiating an investigation into suspected misconduct for an employer to simply ask witnesses what they know and to listen uncritically to their replies. Equally, if what the witnesses say is consistent and apparently complete, it may be acceptable to rely on what they have said without further inquiry. Where, however, there are significant differences between the accounts given by witnesses or the responses are unsatisfactory, more will be required of the employer to ensure that the investigation is full and fair.*

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<sup>5</sup> *Man O'War Farm Limited v Bree* [2003] 1 ERNZ 83 at [36] (CA).

<sup>6</sup> *Timu v Waitemata District Health Board* [2007] 1 ERNZ 419 at [93].

[41] Ms Whittenham's written witness statement indicated she relied on Ms Olo's evidence because Ms Olo was "*a mother of four*", who "*appeared to me to be a reliable witness*" with "*no reason to make anything up*" and that Ms Olo had been a "*reliable and really good employee*" throughout her employment.

[42] Ms Whittenham had only recently joined Veolia's Auckland operation at the time of this inquiry. She accepted in her oral evidence that she had never met Mr Syed or Mr Keremete, knew nothing about their employment records or whether they had children (which she considered as an indicator of reliability in respect of Ms Olo). Neither did she identify any reason either man might make something up about what they had seen or heard.

[43] Ms Whittenham had no satisfactory answer as to why she did not interview Mr Syed apart to say she had read his statement and "*just didn't speak to him*" because she "*didn't think he would change his statement*". Having never met him or having any other knowledge of him or his likely responses, this is a clear failing in her inquiry. Both Ms Z and Ms Olo identified him as having been present at the time of alleged leg rubbing on 28 April and Ms Olo's evidence was that she thought Mr Syed could see what was happening but did or said nothing. However in her witness statement Ms Whittenham suggests it was possible Mr Syed had not seen anything because Ms Olo and Ms Z were wrong about the timing of when Ms Olo witnessed the leg rubbing. There was a clear conflict of evidence that Ms Whittenham should have tested by interviewing Mr Syed to see if he impressed her as someone reliable – a factor she considered in respect of Ms Olo's evidence.

[44] Asked whether Mr Keremete might have had something useful to say about Ms Z's demeanour in the immediate aftermath of the alleged 29 April incident – that is whether she may have appeared shocked and frightened as she said – Ms Whittenham accepted that "*he may have added something more*".

[45] However she appears to have decided not to interview him because she was told by another manager that Mr Keremete was initially reluctant to say anything but had called back and later given a written statement. Ms Whittenham's evidence was that she believed Mr Keremete's initial reluctance was part of a "*culture*" at Veolia of staff "*not want[ing] to do in their fellow workers*". On her own admission of never

having met Mr Keremete before and knowing nothing of him or his character, that is not a conclusion she could fairly reach about him or his evidence. There are some apparent inconsistencies between the evidence of Ms Z and Mr Keremete about their conversation on 29 April. Ms Whittenham could have probed those inconsistencies by interviewing Mr Keremete to see if he impressed her as someone reliable and with no reason to lie – factors she took account of in respect of Ms Olo’s evidence.

*(ii) weight given to Ms Z and Ms Olo’s statements*

[46] Against this background, Ms Whittenham’s inquiry clearly gave more weight to the statements of Ms Z and Ms Olo. There were a number of inconsistencies between the two – such as whether Mr Adi’s alleged assault of Ms Z occurred before or after Ms Olo came into the carriage, and whether it was before or after Mr Syed came into the carriage. Ms Whittenham did make inquiries of the two women about those inconsistencies but ultimately decided to ignore the differences and rely on their accounts. That contrasts starkly with how she dealt with the accounts of the two men who were identified witnesses to part of the alleged events or immediate aftermath. It is difficult to reconcile that approach to the requirements of Veolia’s harassment prevention policy which include requirements for “*freedom from bias on the part of the person making the decision*” and to “*consider all the evidence and weigh it carefully before deciding whether there is substance to the complaint*”.

*(iii) approach to inconsistencies*

[47] Ms Whittenham’s decision to dismiss Mr Adi expressly relied on what she saw as a lack of consistency between his accounts of whether he had touched Ms Z’s leg while sitting next to her in the carriage on 28 April. The evidence suggests that in one meeting he accepted the possibility that he may have touched Ms Z’s leg unintentionally or in a “*friendly*” way. And the evidence of Ms Olo and Ms Z was that this occurred during the time that Ms Olo and Mr Syed were in the carriage. He later said that he could not recall if he actually had or not, but I accept the submission of Mr Adi’s counsel that this is not inconsistent with whether Mr Adi had earlier accepted a possibility. As his counsel submitted, Mr Adi’s admission of an incidental touching of Ms Z’s leg as they sat side-by-side on the seat of a moving train did not amount to an admission of the more serious physical assaults alleged by Ms Z (and

which Mr Adi had consistently denied).

[48] By contrast there were a number of differences in the account of Ms Z about what she said Mr Adi did and whether Ms Olo and Mr Syed were present during one incident of leg touching. She also changed important elements of her account between her initial interview on 29 April and a second interview on 1 May.

#### *Other issues*

[49] Because of the conclusion I have reached about the inadequacy of Veolia's inquiry – and the consequent lack of justification for its decision to dismiss – I need not determine other issues canvassed in the investigation and which may have gone to justification. Those issues include whether:

- a. Veolia policy required an operational rather than human resources manager to conduct the inquiry;
- b. the severe sanction of dismissal was warranted even if the allegations about Mr Adi had been satisfactorily investigated and established on the balance of probabilities, properly applied;
- c. Ms Whittenham was, in fact, the sole decision-maker.

#### **Remedies**

[50] Remedies to be considered for Mr Adi's established grievance are reinstatement, lost wages, and compensation for hurt and humiliation.

#### *Reinstatement*

[51] Veolia opposes reinstatement as being impracticable. It says it no longer has trust and confidence in Mr Adi and does not want to risk having him working alone with passengers or other employees at night. Veolia asserts it could not effectively roster Mr Adi and Ms Z on different lines and shifts if he returns to work and that she would be distressed by having to work with or near him.

[52] I do not accept Veolia's assertions discharge its onus to prove the impracticability of reinstatement. Around 160 passenger operators work on rosters

over three different lines. It must be possible to at least minimise the likelihood of Mr Adi and Ms Z having to work together. There is also the prospect that either Mr Adi or Ms Z could be assigned to ticket office or 'back office' work to further reduce the likelihood of contact.

[53] Veolia's safety concern also appears overstated for two reasons. Firstly, in light of its failure to conduct a full and fair inquiry, Veolia is not entitled to treat Mr Adi as if it had proven the allegations against him. Secondly, each train has a train manager who supervises the operators so that Mr Adi need not work alone with passengers and staff for any extended period.

[54] Mr Adi is to be reinstated to his former position or one no less advantageous. He is to be reinstated to the pay roll from the day following the date of this determination. However, in order to allow time to make any necessary arrangements for his return to work, Veolia may elect not to require him to attend work for up to 14 days from that date. The parties may seek urgent mediation assistance if there is any real difficulty in making and agreeing those arrangements.

#### *Lost earnings*

[55] Mr Adi's evidence was that he had applied for six jobs and regularly contacted an employment agency in the period between his dismissal and the investigation meeting. He accepted that he could have done more in searching for work. His family has relied on his wife's earning from a hospital job meanwhile.

[56] As Mr Adi had not, I find, taken all reasonable steps to mitigate his loss in that period, he is awarded lost wages for 30 weeks rather than the full period.

#### *Compensation for hurt and humiliation*

[57] I accept Mr Adi evidence that he has suffered humiliation, loss of dignity and injury to feelings as a result of Veolia's faulty inquiry into the allegations against him.

[58] In setting an appropriate, modest level of compensation I also take into account Mr Adi's testimony that he was more concerned about blame and his

character than money.

[59] Veolia is to pay Mr Adi the sum of \$5000 as compensation under s123(1)(c)(i) of the Act.

### *Contribution*

[60] No reduction under s124 of the Act is made for conduct of Mr Adi contributing to the situation giving rise to his grievance. In light of Veolia's inadequate inquiry, I cannot safely identify blameworthy conduct which might otherwise have required a reduction in remedies.

### **Summary and orders**

[61] Veolia failed to conduct a full and fair inquiry into allegations against Mr Adi and consequently its decision to dismiss him was unjustified.

[62] Mr Adi is to be reinstated to his position or a position not less advantageous.

[63] Veolia is to pay to Mr Adi:

- a. lost wages for 30 weeks; and
- b. \$5000 in compensation under s123(1)(c)(i) of the Act.

### **Costs**

[64] Costs are reserved. If the parties are not able to agree costs between themselves, Mr Adi may lodge a memorandum as to costs within 28 days of the date of this determination. Veolia will have 14 days to reply if a costs application is lodged. No application will be considered outside this timeframe without prior leave.

Robin Arthur  
Member of the Employment Relations Authority