

NOTE: This determination contains an order prohibiting publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 554
3154901

BETWEEN JXC
Applicant

AND VGM
First Respondent

XOZ
Second Respondent

Member of Authority: Helen Doyle

Representatives: Maria Dew KC and Daniel Joseph counsel for the Applicant
Simon Greening and Andrea De Stadler, counsel for the First
and Second Respondents

Investigation Meeting: 8 and 9 July, 12 August 2022, 25 and 26 July 2023 at Auckland

Submissions Received: 26 July 2023 from the Applicant
26 July 2023 from the Respondent

Date of Determination: 26 September 2023

DETERMINATION OF THE AUTHORITY

Non-publication

[1] Both parties seek a continuation of interim non-publication orders until the determination is issued with applications for permanent non-publication orders to be considered after that time.¹ There was no opposition to the respective applications.

¹ Interim order for non-publication for JXC made in a direction of the Authority dated 11 April 2022. Interim order for non-publication for XOZ and VGM made in a direction of the Authority dated 8 July 2022.

[2] The interim orders were made for JXC on the basis that she has suffered and continues to suffer ongoing mental health issues because of alleged sexual harm by XOZ. Additionally, the subject matter of the claim is sensitive and publication of her name would have further adverse consequences on her health and wellbeing. Further, that there is no significant public interest in knowing the identity of her name.

[3] The interim orders were made for VGM and XOZ and any witnesses they may call together with pleadings and evidence on the basis that they are part of a small ethnic community. Publication of the identity of VGM would likely lead to the identification of JXC. Further, that the allegations against XOZ are severe and publication of his identity would likely result in specific adverse consequences including irreparable reputational harm. Finally, that there is no significant public interest in knowing the identities of VGM and XOZ.

[4] It is appropriate for the interim orders for non-publication to continue until the matter is determined and further orders can then be made.

[5] The following orders are made in reliance on clause 10 of the second schedule of the Employment Relations Act 2000 (the Act) in relation to JXC until further order of the Authority.

[6] The Authority orders that JXC's name, address, identifying particulars, details of her health information, and the contents of the pleadings, statements of evidence lodged including the closed bundle of documents, are prohibited from publication in relation to this matter. Undertakings about the limitation of disclosure of documents in the closed bundle have already been given. The names of VGM and XOZ and witnesses, identifying particulars, and contents of the documents lodged in this matter are prohibited from publication.

[7] The parties are referred to by three randomly generated combinations of letters, which bear no resemblance to their actual name. The witnesses will be referred to by the letter of their first name.

Employment Relationship Problem

[8] JXC immigrated to New Zealand in October 2019 to study on a student visa. She was permitted in addition to her studies to work up to 20 hours per week and work full-time during vacation periods. Her visa expired on 6 November 2020.

[9] VGM is a duly incorporated company. It has its registered office in Auckland and owns and operates the business of a restaurant. The shareholders and directors of VGM are XOZ and his wife who I shall refer to in this determination by the letter M. M is the managing director and maintained day to day control of the restaurant operations. XOZ is the head chef.

[10] JXC first met M when she was at a mall. She realised that M was from her country. JXC was asked to join M for lunch at the restaurant owned and operated by VGM and did so later that day. JXC and M became friendly.

[11] JXC advised M sometime in or about November 2019 that she had experience working in a restaurant. M asked if JXC could work for VGM at the restaurant. JXC agreed and resigned from her then position on 6 December 2019, after she had started at VGM.

[12] JXC was employed by VGM as a part-time food and beverage attendant from 29 November 2019 until her summary dismissal on 31 May 2020.

[13] JXC say that she raised concerns about sexual harassment with M on 30 May 2020 and was then summarily dismissed.

[14] On 24 July 2020 the Auckland Community Law Centre raised personal grievances on JXC's behalf of unjustified dismissal, disadvantage and sexual harassment. The instances set out of inappropriate sexual conduct were stated in the letter to include:

- (a) During late January or early February 2020 XOZ deliberately touched JXC's breast and bottom and that deliberate touching, which also included touching of hands, continued until JXC's dismissal.
- (b) On 27 May 2020 when XOZ and JXC were alone at work together XOZ squeezed JXC's bottom and touched her vagina outside of her clothing and offered her \$150 in exchange for sex. This was declined and JXC went home.
- (c) On 29 May 2020 while at work XOZ said to JXC that he wanted to see her for sex when he returned from a work trip.
- (d) After employment was terminated it was stated in the letter that on 2 June while JXC was on a call with M and XOZ, XOZ called her a "slut" and threatened her.

[15] The grievances were responded to by counsel instructed by VGM at that time in a letter dated 14 August 2020. It was set out in that letter that there had been two earlier complaints of sexual harassment by JXC, that were not substantiated, and this was a third. Signed statements from two employees were attached. The fact of dismissal was accepted but said to have been on the basis of serious misconduct because of the false complaints. It was denied that XOZ had called JXC a “slut.” It was not accepted that there was any entitlement to compensation for sexual harassment and it was stated there was no evidence to support that.

[16] The next communication was a letter from Ms Dew dated 19 February 2021 advising that she had been instructed and that JXC had been significantly unwell since her dismissal as a direct result of the sexual harassment and sexual assault. It was set out that these were matters that JXC had reported to the police on 18 June 2020. Further, it was set out that JXC did experience some issues with other employees, but she denied making any allegations of sexual harassment by the employees and denied making any formal complaint about them. Copies of all personal information regarding JXC was requested.

[17] There was a response from VGM’s then counsel by letter on 19 March 2021. Some emails were attached between JXC and M but there was advice that the text messages had been lost. There was advice that XOZ strongly denied the allegations of sexual harassment made and would vigorously defend any claims.

[18] A statement of problem was lodged on 2 November 2021 which referred to additional sexual harassment to that in the letter of 24 July 2020 from the Community Law Centre. There were two main additional aspects.

[19] It was set out there was a proposition from XOZ for sex in late January 2020 after JXC’s husband’s visa application was rejected by Immigration New Zealand. It was alleged that XOZ suggested that if JXC had sex with him he would give her husband a job and help with his visa. JXC said that she refused the offer and XOZ threatened her saying he knew powerful people in their country and in New Zealand.

[20] The statement of problem set out that during the May 2020 COVID level 3 lockdown while JXC was alone with XOZ in the restaurant, he masturbated in front of her, grabbed her and there was then a sexual assault involving digital penetration and that XOZ made threats to kill her if she told anybody about his conduct.

[21] The statement of problem stated that on 30 May 2020 JXC told M about XOZ's inappropriate and unwelcome touching and the request for sex, but did not disclose the sexual assault incident during the level 3 lockdown, to spare M's feelings.

[22] On 31 May 2020, JXC was summarily dismissed from her role via a text message from M and JXC says she was not paid notice.

[23] JXC seeks compensation for lost wages for a period of nine months in the sum of \$13,374, compensation for the unjustified dismissal in the sum of \$15,000, compensation for unjustified disadvantage/sexual harassment in the sum of \$50,000 and the imposition of a penalty on VGM for breaches of the employment agreement and obligations to provide a safe working environment and XOZ for inciting, instigating, aiding, and abetting the breaches. Costs are also sought. JXC is legally aided.

[24] VGM and XOZ deny that XOZ engaged in any of the behaviour alleged. VGM and XOZ say that the allegations in the statement of problem lodged in the Authority have grown over time, are materially changed, and were not raised earlier in the letter raising personal grievances dated 24 July 2020. Further, that the police statements are inconsistent.

[25] M did not agree that there was disclosure made to her as stated by JXC on 30 May 2020. M says the disclosure was that XOZ had asked her on a date and JXC said that she could prove this.

[26] It was accepted that JXC was dismissed on 31 May 2020 but the statement in reply stated that it was not unjustified.

[27] In final submissions lodged on behalf of VGM and XOZ it is accepted that the dismissal was procedurally unfair. The significance of the procedural unfairness means that the dismissal will be found to be unjustified.

[28] The parties attended mediation in June 2021 before the statement of problem was lodged.

The Authority's investigation

[29] An investigation meeting was held in Auckland on 8 and 9 July and 12 August 2022. Pursuant to clause 16 of schedule 2 to the Act, a change has taken place in the member constituting the Authority.

[30] It was agreed by the Authority and counsel that evidence would need to be retaken although the parties were not required to file further statements of evidence or submissions. Several meeting dates were offered and the investigation meeting proceeded on dates that the parties were available on 25 and 26 July 2023.

[31] Witnesses apart from M and XOZ were excluded until they gave their evidence.

[32] The Authority was advised by Ms Dew that JXC was very vulnerable, and some accommodations for the investigation meeting would be required. JXC presented in a vulnerable manner throughout the Authority investigation. She gave evidence from a separate room via an audio-visual connection and was accompanied by a support person from the Community Law Centre whilst she gave her evidence. Such accommodation significantly reduced the likelihood of JXC and XOZ coming face to face. Where necessary, additional breaks were taken.

[33] There was disclosure in the closed bundle of documents of police interview notes, sketches made during interviews, a police case summary report and medical letters from a doctor, counsellor, psychiatric registrar (redacted) and oral medicine specialist (redacted). There is also a supported assessment report from ACC. The Authority did not hear any medical evidence.

[34] In addition to evidence from JXC the Authority heard evidence from XOZ and M and three other witnesses who were employees at the restaurant at the material time.

[35] There was cross-examination of the witnesses. The questioning was appropriate. There was no need for the Authority to intervene or restrict questioning of JXC.

[36] An interpreter was available throughout the investigation meeting although was not required in a significant way for all witnesses including JXC. Some concerns were raised with the interpretation by both parties. Although challenging, I am not satisfied that the difficulties were such the Authority did not understand the nature of the evidence given to have a material impact on the evidence required for determination.

[37] At the end of the evidence, the counsel spoke to their submissions that had been lodged earlier.

Standard of Proof

[38] The main issue for determination in this matter is whether the alleged events of sexual harassment/sexual assault took place. The fact of dismissal and that it was procedurally unfair is not disputed.

[39] JXC disclosed to the police that she had been sexually harassed and assaulted between June and November 2020. Over that period increasingly serious disclosures were made culminating with the disclosure of a serious sexual assault during the level 3 lockdown at an interview with a police translator present on 20 November 2020.

[40] In or about mid 2022 the police advised that there was insufficient evidence based on their guidelines for a prosecution. While not able to be ruled out entirely, it is less likely that there will be a police prosecution. There was some delay in progressing this matter in the Authority, while this issue was unclear, to prevent any potential prejudice to XOZ. I am satisfied from Mr Greening that XOZ understood he had privilege against self-incrimination and all the allegations were denied by him in their entirety when he gave his evidence.

[41] JXC bears the burden of proof in respect of the sexual harassment alleged. The standard of proof in this matter is that of the balance of probabilities even if what is alleged could constitute a crime. The Authority needs to be satisfied on the evidence that the occurrence of what is alleged sexual harassment, and sexual assault, is more likely than not.

[42] Ms Dew and Mr Greening agree that the civil standard may need to be flexibly applied to accommodate the seriousness of the allegations.

[43] A judgment of the Supreme Court in *Z v Dental Complaints Assessment Committee* considered what the civil standard applied flexibly meant. The issue for the Supreme Court was whether a disciplinary tribunal could find a charge of indecent assault despite an acquittal on the same charge in criminal proceedings. As part of this there was an issue about the standard of proof to be applied by the disciplinary body.²

[44] The Employment Court referred to this judgment of the Supreme Court in *Ritchies Transport Holdings Limited*.³ The Employment Court was considering standard of proof in a

² *Z v Dental Complaints Committee* [2008] NZSC 55 per Blanchard J.

³ *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [104] – [107].

different context to the current matter, but set out passages from the Supreme Court judgment. I set these out below.

[45] The majority of the Supreme Court stated:

Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.⁴

[46] Further the majority confirmed:

The natural tendency to require stronger evidence is not a legal proposition and should not be elevated into one. It simply reflects that reality of what judges do when considering the nature and quality of the evidence and deciding whether an issue has been proved to “the reasonable satisfaction of the tribunal”.⁵

[47] I have proceeded based on the balance of probabilities standard, assessed with the nature and quality of the evidence, where some alleged conduct is of a very serious nature.

The issues

[48] The Authority needs to determine the following issues in this case:

- (a) What are the material provisions of the employment agreement?
- (b) When were grievances raised?
- (c) Was JXC sexually harassed in her employment?
- (d) Was JXC disadvantaged in her employment by actions whilst she was employed?
- (e) Was the dismissal of JXC what a fair and reasonable employer could have done in all the circumstances?
- (f) If VGM acted unjustifiably, what remedies are available and are there issues of contribution and mitigation?
- (g) Was the application for penalties commenced within the statutory timeframe?
- (h) If it was, then should penalties be award?

⁴ Above n2 at [102]

⁵ Above n 2 at [105].

What are the material provisions of the employment agreement?

[49] The clauses in the individual employment agreement (the employment agreement) between VGM and JXC dated 29 November 2019 are not numbered. They do have separate headings.

[50] The employment agreement has a 90-day trial period.

[51] The hours of work clause provided that the employer would roster JXC on for a minimum of four hours each week with the timing of the work hours to be set out in a roster. Usually JXC was rostered on for about 20 hours.

[52] JXC was paid \$17.70 gross per hour initially.

[53] The health and safety clause provides the employer had a duty to provide and maintain a safe working environment for employees and others in the workplace.

[54] The resolving employment relationship problems clause states that if the employee has any concerns about their employment, or how they are treated at work, they should tell the employer as soon as possible so these can be resolved. The first step is for the employer and the employee to talk about the problem and try to find possible solutions.

Raising of personal grievances

[55] Grievances were raised in the letter dated 24 July 2020 from the Community Law Centre of unjustified dismissal, unjustified disadvantage and sexual harassment. There is some dispute about what was said by JXC to M on 30 May 2020. What was clear from either account that day was that there was behaviour raised about XOZ that JXC felt needed to be brought to the attention of M and that something needed to be done. That communication forms part of the raising of the grievances.

[56] The serious sexual assault alleged during the level 3 lockdown period was not disclosed until a later date. The grievance of sexual harassment raised on 24 July 2020 alleged inappropriate sexual conduct and set out a list using the words “These instances include.”

[57] The words used to describe the grievance of sexual harassment and the instances of conduct on 24 July 2020 are arguably broad enough to cover further disclosure of conduct alleged to be sexual harassment. Alternatively, VGM conducted itself in such a way after receiving the grievance by its responses, attendance at mediation and statement in reply to

conclude consent to any extension of time. The focus at the Authority investigation meeting by VGM and XOZ on the additional sexual harassment was that they went to the unreliability of the claims of sexual harassment.

Was JXC sexually harassed in her employment under s 108 of the Act?

[58] JXC alleges under s 103(1)(d) of the Act that she was sexually harassed in her employment by XOZ who as one of the directors of VGM is a representative of VGM.

[59] Section 108 of the Act provides:

108 Sexual harassment

- (1) For the purposes of sections 103(1)(d) and 123(d), an employee is **sexually harassed in that employee's employment** if that employee's employer or a representative of that employer—
 - (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains—
 - (i) an implied or overt promise of preferential treatment in that employee's employment; or
 - (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
 - (iii) an implied or overt threat about the present or future employment status of that employee; or
 - (b) by—
 - (i) the use of language (whether written or spoken) of a sexual nature; or
 - (ii) the use of visual material of a sexual nature; or
 - (iii) physical behaviour of a sexual nature,—

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

[60] If established JXC says that the conduct she alleges occurred between January and May 2020 falls within the definitions in s 108(1)(a) and/or (1)(b) of the Act because of its nature.

[61] VGM and XOZ say that there is no evidence before the Authority of sexual harassment and that an analysis of the evidence that is before the Authority supports the evidence given by XOZ and other witnesses. JXC says that her account of events is reliable and credible.

Could the alleged harassment have occurred without other staff and M observing?

CCTV cameras

[62] There were CCTV cameras in the restaurant however the evidence was that they are focused on the till area, the dining area, and areas outside of the restaurant. There is no dispute that there are no CCTV cameras in the kitchen area and storerooms. No CCTV footage was presented as part of the evidence.

Wage and time records

[63] JXC was employed to work front of house serving food and drink although said in her evidence that she would do whatever task she was asked to do. Her evidence was that she would work different hours but would often work Monday, Friday, Saturday, and Sundays. There was some dispute about whether Monday was a usual workday for JXC. JXC supplied to the Authority copies of her time records for May 2020. She took a photo of these records on her phone on 27 May 2020 at 8.45am. The time records show her working each Monday for the month of May 2020. The records show she worked on 6 and 27 May 2020 which were Wednesdays.

[64] The time records show JXC's first name was typed at the top of the pages that related to her. The days Monday to Sunday were typed down the side with the words "in" and "out" above. Under "in" JXC recorded the time she commenced work and under "out" when she left work. There was a gap to put the dates in for the week in question Monday to Sunday. JXC explained in her evidence there were pages for other employees to fill in in the same manner. That there was the existence of such a time record for employees was not disputed by M. There was no dispute that there were also payslips.

[65] Neither pay slips nor time records have been disclosed. When M was asked why this was she said that they were mislaid when there was a shift of house. I found the evidence about this to be unsatisfactory. The dates for the house shift did not seem to align clearly with the period in question even allowing for the difficulty in recalling after an extended period. There is a statutory requirement to keep and provide wage and time records for employees when asked.

[66] The importance of preserving such information must have been apparent, if not before, at least when personal grievances were raised in the 24 July 2020 letter from the Community Law Centre. The significance of the personal grievances raised and the seeking of legal advice

by VGM shortly after 24 July 2020 makes it surprising that any records that may assist with who worked and when, were not preserved.

[67] JXC said in her evidence that M would make a paper roster for each week and that was placed at the reception table in the restaurant for all staff to see. Another employee at the material time agreed when asked at the Authority investigation meeting that there was a paper roster. M, and two other employees at the material time, denied that there was a paper roster saying that there was individual advice about the hours to work. I prefer the evidence of JXC, supported by one other employee, as more likely that there was a paper roster and that would have been further evidence about who worked and when. In the absence of what would have been the best evidence, the Authority heard evidence from M, XOZ and the three other employees about staffing in the restaurant.

Were other employees and M always present at the restaurant?

[68] Some of the alleged conduct such as some momentary touching and verbal requests for sex could have occurred when other staff had their attention focussed elsewhere and/or could not hear what was said. There were places out of sight of the CCTV cameras. Even if observed a touch may not have been considered inappropriate rather accidental and/or innocent. There are alleged events complained of that could not have occurred in the presence of other staff.

[69] The first was the sexual assault alleged to have taken place on a date during the level 3 lockdown between 27 April and 13 May 2020 in the kitchen. During that period the restaurant was open for takeout only. No sit-down customers in the restaurant were permitted and customers, if coming to order or pick up takeaways, could not enter the restaurant. JXC said that the other staff member working in addition to XOZ on the day of the assault was out doing a delivery when the assault took place. I shall refer to that staff member as S.

[70] The second was the alleged incident on 27 May 2020 which was a Wednesday. JXC said in evidence that there were kitchen staff present but they went outside for a smoke break and M had left the restaurant earlier. JXC said in her evidence that XOZ asked her to remove some bags from the takeaway container boxes and put them in the storeroom. She said that she went into the storeroom and XOZ came to her touching her breast and vagina over clothing. He then left \$150 between some of the containers and left. JXC said she that initially took the money and went to the bathroom but then left it between the containers in the same place. She said that it felt like he was offering her money for sex.

[71] The evidence established that the busy time for the restaurant was Friday to Sunday. Over that period there was evidence that there were three staff in the kitchen and a full complement of staff front of house including M. JXC's evidence was that on the quieter days usually Monday to Thursday she would be working at the front of house by herself.

[72] Three employees who were employed at the material time gave evidence. U was a Chef. He joined the staff of VGM on 26 November 2019. His day off was on Tuesday. U lived upstairs from the restaurant and said that he always opened and closed the doors of the restaurant each day. There was some dispute about that from JXC. U said that Monday to Thursday there were two staff in the kitchen including XOZ and in front of house there were two staff members including M. He said that he was working on 27 May 2020 which was a Wednesday and did not notice anything strange. U said that over the level 3 lockdown period everyone worked every day except for JXC.

[73] S also worked in the kitchen. He joined the restaurant on 15 November 2019 and his days off were Wednesday and Thursday. His evidence was very similar to that of U about the number of staff working over the busy period and during the quieter weekdays. 27 May 2020 was his day off but he was at work on 29 May 2020. He also said that everyone worked over the level 3 lockdown period. He agreed that he would sometimes do take out deliveries during the level 3 lockdown.

[74] G worked as a supervisor. He said that the usual days he worked were Friday to Tuesday and his day off was Wednesday and sometimes Thursday. He was not present on 27 May 2020. His evidence was similar to U and S about the number of staff at the busy time and during the other periods.

[75] M managed the restaurant. Her evidence was that she worked every day during the level 3 lockdown when the restaurant was open for takeaways' deliveries and was always present at the restaurant with XOZ until closing, when she worked. Although Monday was a day that M did not usually work she said that she did spend many Mondays at work. M and XOZ's children were quite young at that time. M said her mother-in-law looked after the children and she was almost always present at closing of the restaurant.

[76] JXC agreed in her evidence that M would come to the restaurant most days because she was the owner but that the days and times change and she would often go home about 6.30 to 7pm which was before closing. She described M as coming and going and not at the restaurant "every time" with "eyes on her."

[77] XOZ denied ever touching JXC or making any requests for sex. He said that other employees would always have been present including at closing.

Conclusion about the ability for the events to have occurred without others present?

[78] The Authority has not received the best evidence in the form of time records, pay slips and/or rosters about who was working in the restaurant to determine whether there was an opportunity for the alleged sexual harassment and sexual assaults to have taken place. The reason advanced why is unsatisfactory. The evidence about who worked when must be considered in that light.

[79] Three witnesses were adamant that everyone except JXC worked every day over the level 3 lockdown period. I do not conclude that it is more likely that all staff would have been required to attend for the entire period of the level 3 lockdown when there were no sit-down customers, only takeaways.

[80] I accept it is more likely than not M would come in most days. It is less likely that she was always present including at closing and could have observed everything.

[81] Taking the above matters into account I do not conclude that there was no opportunity for the alleged events complained of to have taken place, without been seen by others.

Pattern of sexual harassment complaints?

[82] There were two statements attached to the letter of 14 August 2020 responding to the grievances raised. The statement from G was dated 26 February 2020. There was reference initially in his written statement to an argument about a service matter and that that had been reported to M with a “created story” that G had tried to touch JXC’s leg. G wrote that M checked the CCTV records and realised that this had not happened and that after the incident the statement says that JXC was frequently telling gossip to M against him. Further, that she tried to create drama and provided incorrect information and expected to make a wrong picture about him to M.

[83] There was also a statement provided by U dated 2 May 2020. It stated that its purpose was to report the incidents that occurred in the restaurant with JXC. There was reference to JXC making many mistakes during service and an argument about this when they were raised with her. It was also written that she had complained that U was bullying her. It was stated that M understood what had happened and advised JXC not to behave in such a manner. Later

U wrote that JXC made another complaint saying that he had invited her to Temple as well as that he had a crush on her.

[84] Mr Greening submits that the statements support a history of false complaints and that there is no evidence that either U or G's complaints were fabricated.

[85] JXC did not dispute in her evidence that she had problems with other staff members at times including when they shouted at her. She denied however, making any accusations of sexual harassment against other staff and denied making any formal complaints to M about the behaviour of other staff. Her evidence was that she had never seen the complaints until they were attached to the lawyer's letter.

[86] M was unable to provide clear evidence about the dates that she said JXC had complained about G and U and when the complaints were investigated by her. She accepted that the written complaints attached to the solicitor's letter dated 14 August 2020 had not been shown to JXC during her employment.

[87] Both G and U denied when questioned, that they had written the statements after JXC had left. G when cross-examined said that he wrote the complaint at work although he had only been employed about a month at that time. 26 February 2020 was also Wednesday. G's evidence was that Wednesday was his day off.

[88] U's written complaint dealt with historic matters and the date of the complaint indicated that these must have been before the start of the level 4 lockdown because after that the restaurant was closed for a month. The complaint is dated 2 May 2020. This was shortly after the level 3 lockdown had commenced from 27 April 2020.

[89] The main response to the grievances raised in July 2020 in the 14 August 2020 letter was that JXC had a habit of making false complaints supported by these two complaints in addition to the complaint made to M on 30 May 2020 and the alleged sexual harassment raised in the personal grievance letter.

[90] I conclude it is inherently more likely that the complaints were written after JXC's employment was terminated. I have relied on the wording in the complaints with the references to past events, the dates of the statements, the fact M could not identify the date of any complaint by JXC or the date of any subsequent investigation. There were no notes produced by M that she may have taken at the time of any discussion with JXC. There is also the fact that the written complaints were never shown to JXC during her employment. I conclude it

more likely these two complaints were written after the grievances were raised. I do not for these reasons place much weight on the two written complaints to conclude a pattern of making false complaints on the part of JXC.

Delay in disclosure, increasing seriousness of conduct disclosed and inconsistency with disclosures.

[91] As part of determining reliability of evidence the Authority considers its consistency with what is agreed or shown in the evidence to have occurred. The Authority also considers whether the evidence is consistent with what has been said on other occasions particularly with what is shown to have occurred close to the time when the events are alleged to have occurred. That is because statements made close to the time when events in dispute occurred are more likely to be reliable as memories are clear and there is less of a risk of reconstruction which can occur subconsciously, not necessarily dishonestly. Different issues present themselves with allegations of sexual harassment.

[92] Ms Dew submits that the Authority should not take that delay in disclosure of the allegations to indicate they are not true. She refers to the delay being attributable to cultural differences, language limitations where the Police translator was only present at the November 2020 interview, and fear. Further, that the medical evidence provided shows JXC suffered symptoms of severe psychological and physical harm connected to the alleged sexual abuse.

[93] Ms Dew submits that the way JXC disclosed the most serious sexual harassment was done in a consistent way with reporting serious sexual harm. She refers to s 127 of the Evidence Act 2006 that provides that in the event of the delayed making or failure to make a complaint by a victim of sexual assault the Judge may tell the jury there can be good reason for the victim of an offence to delay or fail to make a complaint of the offence.

[94] Ms Dew refers to an article by Elisabeth McDonald “Rape Myths as Barriers to Fair Trial Process” which includes reasons for delay and variations in victims processing traumas.⁶

[95] The Authority is dealing with this matter under the Act. The statutory requirement in the Act at the material time to raise grievances within 90 days of the action occurring or coming to the notice of the employee is based on timely notification and resolution of employment relationship problems. The difficulty that may have caused with notifying sexual harassment

⁶ Elisabeth MacDonald “Rape Myths as Barriers to a Fair Trial Process” (Canterbury University Press Christchurch) (2020).

was recognised recently with an extension of the time frame to raise a personal grievance for sexual harassment to 12 months in the Act 2000.⁷

[96] I accept that the Authority should be cautious in making adverse inference about the delay in disclosure and/or progressive disclosure by itself, without considering other aspects of the factual matrix.

[97] Finally, for completeness the Authority is not bound by the Evidence Act 2006 although can be guided by its provisions.⁸

JXC has other employment options in January/February 2020?

[98] There were no issues of concern when the employment relationship started. JXC described work as going well and said it was a fun workplace with some joking. She said it felt it was like a second family. JXC said that things changed after the Christmas party when she observed some flirting from XOZ directed towards her. JXC says that the first upsetting conduct was in late January 2020 when her husband's visa application was rejected by Immigration New Zealand on 29 January 2020. The letter from Immigration New Zealand was produced confirming this.

[99] JXC said that she applied for around 10 to 15 jobs during this period between January and February because of this conduct and was successful in obtaining a role in an area related to her study. The Authority did not see the applications but a timesheet for work undertaken in the same area in which JXC was studying was provided.

[100] The timesheet from a recruitment agency pertains to work carried out on 28 January 2020, a Tuesday evening. This was before the alleged conduct complained of on 30 January in XOZ requesting sex and touching thereafter. I accept being on the recruitment agents' books presented the possibility of ongoing work in the area. JXC said that if the agency wanted her to work she would be advised and could accept or decline a shift.

[101] M recalls JXC advising her that she had the job and told her that if she left she would need to give two weeks' notice. XOZ and M in evidence said that this was course related and unrelated to any workplace issues. JXC said that she did not need to carry out course related work. JXC said in her written and oral evidence that when she told XOZ she was taking the

⁷ Section 114(1) and (7) of the Employment Relations Act. Section 114(1) was replaced on 13 June 2023 by the Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act 2023.

⁸ Section 160 (2) Employment Relations Act 2000.

new job he threatened her saying that he would not leave her alone if she took the job. In her oral evidence JXC said that XOZ told her he would kill her and dispose of her body if she took a new job. This threat was disclosed in her police statement dated 20 November 2020. XOZ denied that he made any threats of this nature and said he was unaware that JXC was carrying out this other work.

[102] It would not seem unusual for JXC to want to undertake work in a field related to her study even if not required to do so for the purpose of the course or her visa. On its own, coupled with the fact that she undertook some work for the organisation before the issues of concern appear to have arisen, it does not advance matters. At its high point the evidence not to take up the new role and continue instead with her work at VGM is not inconsistent with her evidence that she felt threatened if she did not stay.

Motives to allege sexual harassment/ sexual assault

[103] Questions as to motive arose in questioning and submissions. Mr Greening in his submissions says that JXC had motive to make these claims. He submits that she was no longer studying and her visa was solely tied to her studying and without employment she would have been unlawfully in New Zealand and likely deported. Mr Greening also submitted that JXC was unhappy about her dismissal.

[104] Ms Dew submits that the visa expired on 6 November 2020 and had plenty of time to run before it expired when initial disclosures were made, and grievances raised.

[105] I am not satisfied that at the time of the initial disclosure to M the visa was a significant motivation or that there was any other evident motivation. There was still time to run on the student visa and it was not tied to employment. The dismissal had not occurred. JXC went to work that evening after the disclosure with M. Her evidence was that M told her to attend her rostered shift. JXC had a measure of confidence that concerns could or would be dealt with.

[106] The initial disclosure to M is important. Motivation is fluid and can change as time progresses.

Extent of disclosure to M

[107] On 30 May 2020, JXC and M spent the day together. Time was spent at a beauty parlour, eating food and a supermarket. The rest of the staff and XOZ went on a staff trip out

of Auckland that day. I'll set out what JXC and M said in their respective evidence about the discussion.

[108] JXC said she was scared to tell M about her husband's behaviour because they had a good relationship. She said that she started the conversation by asking M about her relationship with her husband and asked her "if a friend's husband was flirting what would she do." She said that M told her that she would tell a friend straightaway.

[109] JXC said that she held M's hand and M was anxious and panicked. She said that she told her about the harassment and that her husband touched her hand and "squeezed her". JXC said in her written evidence that she referenced the \$150. She said that she did not refer to the serious sexual assault as she did not want to hurt M's feelings. JXC said that M started to "scold her husband" and they talked about some confidential matters. JXC said that she discussed a situation with another woman and that M had said that she had flirted with XOZ. JXC said that in her mind she thought that M may blame her as well. M dropped JXC off at home and then went to the restaurant.

[110] M did not accept disclosure was made as JXC had said it was in her evidence. Her evidence was that JXC simply told her XOZ had asked her on a date and that JXC could prove that and that she could ask XOZ to go to a place.

[111] M said that when she got to the restaurant, she spoke to XOZ about the date and he said that had not happened. M said that she also looked at the CCTV cameras and there was nothing untoward to see. M felt that JXC could no longer continue to work at the restaurant. Her evidence was that on 30 May 2020 she made the decision to dismiss.

[112] JXC said that when she went to work that night nothing was initially unusual but then there seemed to be some gossiping and she felt awkward. She said that she asked M if she had said anything following on from their discussion and M said no.

[113] The conversation on 30 May 2020 was a difficult one for both JXC and M. There was risk for JXC to make a disclosure to M about the alleged conduct of her husband. She could have lost a friendship and a job. M was placed in a very uncomfortable position between an employee who was also a friend and her husband.

[114] The Authority has certified translations of text messages between M and JXC at the time of and following termination.

[115] On 31 May 2020 M sent a text message to JXC as below:

Don't come to work today. I will also give you salary until 12 July and I'll find you a job in between. I will call you later.

[116] JXC responded:

..., I haven't done anything wrong.

[117] M responded

No nobody thinks that way because nobody knows it ... This is the best option we have. You would have done the same thing if you were me ... would you remove our ... TikTok response.

[118] JXC responded

...I want to talk to you. I haven't done anything whorish.

[119] There were then some text messages about removing a TikTok.

[120] There was a text message on 7 June from JXC to M which translated, provided:

I didn't do anything wrong to you and your family. And I told you what happened at work, it's verbal and sexual harassment but I didn't do anything. I just told you because he's your husband. What did you do you just fired me. What a silly opinion. And the law is, if you fired someone in your staff, you must pay 2 months' salary. And you making some other trouble with me. What a headache this is!

[121] Given the friendship between JXC and M and JXC's anxiety about disclosure to M I conclude it less likely that she would have disclosed conduct of XOZ at this time if there had not in fact been such conduct. M's evidence was that the only disclosure was that XOZ had asked JXC on a date and that JXC could prove this. The text on 7 June 2020 suggested that there was more disclosed that being asked out on a date. Even if M is correct and all that was said at that time was about a date and being able to prove it, it is less likely JXC would have put herself in a position of proving something where she could be found to have not told the truth. I do place weight on JXC's return to work after disclosure, supporting that M's reaction to the disclosure was at least initially not unsupportive.

Increasingly serious disclosures to the police

[122] The disclosures to the police commenced on 9 June 2020. JXC complained on that date that her employer had been sexually harassing her at her place of work and described the harassment as touching hands without consent and inviting her to meet after work. JXC was

also concerned about not being paid money from an employee pool that she was entitled to. JXC expressed in her evidence difficulties with disclosure at that time to a male police officer.

[123] On 18 June JXC disclosed touching of “breast and bottom” by telephone to the police.

[124] On 29 June 2020 there was another telephone call with the police to establish the extent of the touching. JXC disclosed unwanted touching from the end of January 2020 described as “everyday” and “ always on top of clothing.” She explained that she would be touched on her breast, bottom or vagina with his hand. She was asked how XOZ touches her vagina and the record shows her response was that “it was always on top of her clothing and not inside.” It is also recorded that the first time she put it down to an accident but it happened up to ten times.

[125] On 12 July 2020 JXC sent a text message to the police expressing concern that they have taken no action about the disclosed sexual harassment. She expressed concerns about her reputation being destroyed and lies being told by about her by “criminals.” I have taken that to be referring to XOZ and M. JXC referred to health problems. During this period JXC is also recorded as having been upset by a trespass notice served on her by the police on behalf of M and XOZ and that it may interfere with her student visa and make her fail the vetting process. She also expressed concerns about things that are being said about her in the community by M and XOZ.

[126] On 30 July 2020, JXC went to the police station with a friend as interpreter, but no formal statement could be taken.

[127] The police record reflects that on 12 August 2020 there was disclosure of a serious sexual violation by XOZ for the first time, but a full statement was not taken. In or about August 2020 JXC is recorded as being concerned that XOZ was parking outside her property and she stayed for a period in a safe house.

[128] On 4 October 2020 when JXC was scheduled to have an appointment with the police she was hospitalised after a harm attempt.

[129] On 20 November 2020, JXC gave her first full interview with a translator present and that included disclosure of the level 3 lockdown alleged serious sexual assault and that during that assault XOZ had a knife to her neck.

Medical evidence

[130] As set out earlier the Authority did not hear any evidence from medical professionals. A doctor's medical report in the closed bundle provides that JXC consulted the doctor on 20 August 2020 and disclosed sexual abuse (digital penetration). In response to Mr Greening's submission that this was three months after the alleged incident Ms Dew submitted that JXC saw a doctor in June 2020. That is a statement JXC made to the police but there is no medical report to support that visit and I can't place weight on that.

[131] JXC saw a counsellor under the ACC sensitive claims contract from 8 July 2020 and there were 24 meetings. There is a lengthy letter to the Community Law Centre from the counsellor dated 16 December 2020. I could not be satisfied from the letter when the level 3 lockdown sexual assault was first disclosed. There were other disclosed concerns that also caused JXC distress. These included reputational concerns in the community from alleged rumours and online postings, issues about the police and justice system and slowness to prosecute, the trespass order, threats from being watched and immigration status.

[132] A supported ACC assessment by a psychologist did not occur until 8 March 2021. In April 2022 there was a medication review with a psychiatry registrar.

[133] I accept Mr Greening's submission that the medical professional reports about what had occurred resulted from self-reporting. The Authority did not hear any medical evidence.

[134] Over the period from on or about late June 2020 JXC became increasingly unwell. She attributes that to the sexual harassment but causation has not been able to be tested.

Allegations grow and change

[135] Mr Greening submitted that the sexual harassment allegations continued to grow in seriousness and the evidence continued to change over time. I accept that. Some inconsistencies could be explained by difficulties with language and being able to articulate what had occurred and delay that can occur with disclosure of sexual harassment or assault. Some are less clearly explained.

[136] An example of the allegations growing in seriousness was the production during the Authority investigation of a radiologist report dated 20 April 2023 about JXC's jaw joint. In her evidence JXC attributed that jaw issue to trauma suffered by her during the level 3 alleged incident because of a punch from XOZ. There had been no mention of this in the statements

of evidence or statement of problem. I could not find this referred to in the police reports. In the closed bundle of documents there is a letter from an oral medical specialist dated 13 April 2022 that referred to it being reported that the joint pain and facial pain occurred following an assault about two years prior.

[137] Another example is the nature of the threats disclosed to the police by JXC in the interview on 20 November 2020. The threat alleged in January 2020 is that XOZ said he would kill JXC if she left her job and set her on fire in her car. Further that XOZ said that out of Auckland there are “big jungles and forests” and if he killed her no one would find her.

[138] Mr Greening refers to doubt by the police expressed as to the veracity of JXC’s claim. I accept Ms Dew’s submission that this is the first time that there has been consideration of the evidence related to this matter by a tribunal and that any conclusions reached by the police about the veracity of the complaints are essentially irrelevant.

Conclusions about whether there was sexual harassment?

[139] There was opportunity for conduct alleged to have occurred because I have not been able to conclude that there were always other staff present who would have observed such conduct. Some of the alleged conduct involved verbal requests which could have occurred without others overhearing and touching, if it was momentary, may not raise concern. I have placed little weight on the evidence that JXC had a history of making complaints about sexual harassment.

[140] The fact of disclosure on 30 May 2020 to M is significant because there was no apparent motivation for JXC to make a disclosure at that time about XOZ if it was not true. JXC was friendly with M, not presenting at that stage as unwell and as stated earlier, her return to work after disclosure is significant signalling at least a possibility of the employment relationship and friendship continuing. Putting the alleged sexual assault during the level 3 lockdown aside for the moment, the sexual harassment in May had become more serious and that is consistent with the timing of the disclosure to M. It was important to JXC that she be believed. As at the time of the disclosure to M she considered that she was in a position to prove some conduct that concerned her.

[141] There is a dispute about exactly what was disclosed on 30 May 2020. It was a difficult conversation but whatever was said resulted in M questioning XOZ and looking at the CCTV

cameras. JXC was dismissed before being asked anything further about what was alleged which would have been what a fair and reasonable employer could have been expected to do.

[142] The sexual harassment alleged in the Community Law Centre letter of 24 July 2020 that raises the grievances was not initially disclosed to the police on 9 June 2020. The touching of breast and bottom however is disclosed on 18 June 2020 and the vagina over clothing touching is disclosed after a telephone call in which the police wanted to understand the extent of the unwanted touch on 29 June 2020. It was disclosed in a manner not inconsistent with some of the difficulties with such disclosures.

[143] I conclude on the balance of probabilities that it is more likely than not that the conduct described in the letter of 24 July 2020 raising grievances took place. That is the touching of JXC's hand, bottom and breast from late January or early February 2020 and the touching of the vagina over clothing on 27 May 2020 with JXC inferring the \$150 left by XOZ was in exchange for sex. Additionally I find there was a request for sex on 29 May 2020. I am not satisfied to the required standard that there was a request for sex in late January 2020. The Authority is not able to be satisfied to the required standard on the evidence available that XOZ followed JXC home or made threats to kill.

[144] The allegation about the sexual assault during the level 3 lockdown is very serious. The evidence about that is limited. Looking at the nature and quality of the evidence with such a serious allegation I do not find it proven to the balance of probabilities standard.

Does the conduct found to have occurred amount to sexual harassment?

[145] The touching that has been found to have taken place of JXC's breasts, bottom, and of the vagina over clothing is physical behaviour of a sexual nature that falls within s 108(1)(b)(iii) of the Act.

[146] The indirect and direct requests for sex on 27 and 29 May 2020 contain an implied promise of preferential treatment by way of the offer of money on 27 May 2020 and more general implied preferential treatment on 29 May 2020. Given the requests were made in the workplace and the power imbalance in the relationship, the requests did carry an implied threat to future employment status. Sexual harassment as defined in s 108(1)(a) (i) and (iii) occurred with the requests for sex.

[147] I am satisfied from the evidence that the conduct that has been found to have occurred was unwelcome and offensive to JXC.⁹

[148] JXC has made out her personal grievance of that she has been sexually harassed in her employment and is entitled to consideration for remedies.

[149] There is a separate claim for unjustified action causing disadvantage on the basis that when the sexual harassment was disclosed JXC was summarily dismissed and that the harassment was unjustified disadvantage because there was a failure to provide a safe workplace.

[150] That overlaps with the findings of sexual harassment and the unjustified dismissal. By its nature sexual harassment makes a workplace unsafe. A separate finding of unjustified disadvantage is not required.

Was the dismissal on 31 May 2020 unjustified?

[151] The dismissal on 31 May 2020 was not the action of a fair and reasonable employer. There was no procedural fairness as required by s 103A(3) of the Act and the defects in the process were not minor and did result in JXC being treated unfairly.

[152] I do not find that there was a substantive reason for the dismissal. JXC had simply disclosed what she considered to be sexual harassment in the workplace. If there was a lack of clarity about that then M should have investigated that further with JXC. Instead JXC was dismissed.

[153] JXC was unjustifiably dismissed from her employment. She has made out her claim of unjustified dismissal and is entitled to consideration of remedies.

Remedies

Unjustified dismissal

Lost wages

[154] The claim under this head is for reimbursement of nine months lost wages. JXC says that she was unable to work consistently until February 2021.

⁹ *Craig v Slater* [2018] NZHC 2712 at [400].

[155] If the Authority determines that an employee has lost remuneration because of a personal grievance then s 128(2) of the Act provides that the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time. The Authority may in its discretion under s 128(3) order an employer pay to an employee a sum greater than that for compensation for remuneration.

[156] Mr Greening submits that there is no evidence of any mitigation. JXC's ability to properly mitigate her loss from the medical information was quite limited. She became increasingly unwell although initially was able to undertake some limited cleaning. I have not found that the level 3 lockdown sexual assault allegation proven. Any award needs to reflect that. Other causal aspects however such as a concern about rumours in the community had, from the medical information, a serious impact on JXC's wellbeing and I conclude contributed to emotional distress and an inability to continue to work. This could have been avoided if JXC had been dealt with in a fair and reasonable manner after the 30 May 2020 disclosure before dismissal.

[157] Taking all matters into account I make an award in the exercise of my discretion under s 128(3) of the Act for a period in excess of three months until the end date of the initial visa which is 6 November 2020. I conclude it likely if the matters that have been found to constitute grievances including summary dismissal had not occurred or been dealt with appropriately then employment could have continued until that date.

[158] That is a period of 22 weeks and 5 days. At the material time JXC's hourly rate had increased to \$18.90 per hour. She usually worked 20 hours per week. \$18.90 multiplied by 20 hours is \$378 gross. \$378 multiplied by 22 is \$8,316 gross. I have taken the last period of 5 days to be based on 10 hours work as 6 November 2020 was a Friday and Saturday and Sunday were usual workdays. \$18.90 multiplied by 10 hours is \$189 gross. The two figures added together are \$8,316 plus \$189 is 8,505 gross.

[159] I have paused on whether JXC was paid beyond 31 May 2020. M had said she would be paid until 12 July 2020. It is the position of VGM that JXC was paid beyond 31 May 2020. A final pay slip was the only information about this and it was handed in at the Authority investigation meeting. The final pay slip refers to payment for the period ended 31 May 2020 with a pay date of 12 June 2020. There is a gross amount stated as termination pay of \$747.16. I remain unclear if this was payment for work already undertaken which is what JXC maintains, or payment of two weeks in lieu of notice which is what M says. I'll leave that matter to

counsel to resolve with leave to return at the time of cost submissions to the Authority, if necessary.

[160] Subject to any issues as to contribution JXC is entitled to reimbursement of lost wages in the sum of \$8,505 gross.

Compensation

[161] The claim for compensation for the unjustified dismissal is \$15,000 although this was stipulated to be appropriate when combined with a claim for compensation of \$50,000 for sexual harassment. There was evidence of the loss of dignity and humiliation caused to JXC by the sudden dismissal without any procedural fairness. JXC was particularly vulnerable because she was a migrant and alone in New Zealand. Her husband was not able to join her and there was knowledge of this. There were financial concerns. In these circumstances the summary dismissal caused injury to JXC's feelings.

[162] JXC was not paid until 12 July 2020 as initially promised and assisting JXC with finding another job never came to fruition and caused distress.

[163] Under each of the heads in s 123(1)(c)(i) of the Act I am satisfied that JXC has experienced harm because of the dismissal. I have had regard to other awards of compensation in cases that are similar to this matter.¹⁰

[164] An appropriate global award for compensation for the unjustified dismissal subject to any issues of contribution is the sum of \$15,000.

Contribution (unjustified dismissal)

[165] The Authority is required under s 124 of the Act where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance. If required, then the Authority can reduce remedies that would otherwise have been awarded.

[166] I do not find that JXC contributed towards the grievance of unjustified dismissal.

Compensation for sexual harassment

¹⁰ *Richora Group Limited v Cheng* [2018] NZEmpC 113.

[167] There is a claim under this head for \$50,000 compensation. The Authority has not found proven to the required standard the alleged significant sexual assault during the level 3 lockdown which is the basis for the high claim for compensation. Much of the medical information references this incident as a significant contributing factor towards unwellness and there is a conclusion in the supported assessment from the ACC psychologist that the symptoms of PTSD are linked to this sexual assault. Care needs additionally to be taken that there not be an overlap with any award made under this head with the award for the unjustified dismissal. It is clear however that the fact of sexual harassment and the manner in which it was dealt with was more significant than the unjustified dismissal. It is appropriate to assess compensation for this separately.

[168] There is evidence to support an award under this head not solely confined to that sexual assault and not already compensated for by the award of compensation for the unjustified dismissal. Sexual harassment and the sexual harassment/assault on 27 May 2020 have been found proven to the required standard. JXC was clearly distressed by these instances and found them unwelcome and offensive even if to some extent that evidence was overshadowed by the impacts of the alleged more serious assault. The harassment made JXC's workplace unsafe and unpredictable. Her enjoyment of work diminished. The incident on 27 May 2020 found to be established is referenced in the supported assessment as something that scared JXC. JXC was vulnerable as a young employee on her own in a new country without any family support at the time of the sexual harassment. Her options for reporting the unwelcome and offensive behaviour were very limited. When she did report it cautiously and with reservation there was no real support. Almost immediately after returning to the workplace JXC experienced uncomfortableness that suggested to her others had been told and the sympathy and support lay elsewhere. This had a significant impact on her dignity and caused humiliation which stayed with her and contributed toward some of her mental anguish found in the medical information. JXC felt blamed as a victim.

[169] Rumours are attributable to the sexual harassment she disclosed. There were late-night phone calls between M and XOZ and JXC after dismissal. JXC said that M was threatening and XOZ called her a "slut." M and XOZ deny this conduct. M said it was JXC's husband making threats. Notwithstanding that there were very real concerns on the part of JXC that she was blamed and her reputation was damaged within the ethnic community by rumours. JXC produced comments made on a picture of her on Facebook that she attributed to M. She said that the comment was made by a person who had a nickname that M had. The comment was "Don't try to lure other's husbands --- you've proven to be a whore, aren't you?" M denies

that this was her and said that she did not have a Facebook account and she had no idea who had set this up. Regardless of who made the comments they are indicative of the very real concerns JXC had that the information was in the community. This could have been avoided with proper investigation of the sexual harassment concerns and a supportive workplace environment. The failure to do that was humiliating for JXC.

[170] I have considered awards made in similar cases. I have weighed that a serious sexual assault was not proven to the required standard. I have also weighed the award already made for compensation for the unjustified dismissal to make sure there is no overlap.

[171] Under each of the heads in s123(1)(c)(i) of the Act I am satisfied that JXC has experienced harm because of the sexual harassment. I conclude subject to any issues of contribution that an appropriate award is the sum of \$25,000.

Contribution (sexual harassment)

[172] I do not conclude that JXC contributed to the personal grievance of sexual harassment.

Penalties

[173] A penalty is sought against VCM for breaches of the employment agreement for failure to provide a safe workplace, ending the employment relationship without cause and notice and the implied term to act in good faith. A penalty is sought against XOZ for instigating the breach of a failure to provide a safe workplace.

[174] An action for the recovery of a penalty must be commenced under the Act within 12 months from when the cause of action became known or should reasonably have become known to JXC. Commencement is with the lodging of a statement of problem. The statement of problem was lodged on 2 November 2021. The employment relationship ended on 31 May 2020. I do not conclude the action was commenced within time even if the later date when grievances were raised in late July 2020 is taken as reasonable knowledge.

[175] The application is therefore outside of the statutory timeframe for commencement and penalties cannot be considered.

Orders made:

[176] I order VGM to pay to JXC the following:

- (a) Reimbursement of lost wages under s 123(1)(b) of the Act in the sum of \$8,505 gross. Leave is reserved for either party to return to the Authority if required about the notice period within the timeframe set for costs submissions.
- (b) Compensation under s 123(1)(c)(i) of the Act for the unjustified dismissal of \$15,000 without deduction.
- (c) Compensation under s 123(1)(c)(i) of the Act for sexual harassment in the sum of \$25,000 without deduction.

Costs

[177] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Dew may lodge, and serve, a memorandum on costs within 14 days of the date of issue of this determination.

[178] From the date of service of that memorandum Mr Greening has 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[179] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹¹

Helen Doyle
Member of the Employment Relations Authority

¹¹ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1