

**Attention is drawn to the Prohibition
of Publication Order made at
paragraph [1] of this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 108
3000592

BETWEEN KIM RANDLE
 Applicant

AND THE WAREHOUSE LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Greg Bennett, Advocate for Applicant
 Penny Swarbick, Counsel for Respondent

Investigation Meeting: 17 May 2017 at Palmerston North

Submissions Received: 2 June 2017 from the Applicant
 7 June 2017 from the Respondent

Determination: 30 October 2017

DETERMINATION OF THE AUTHORITY

[1] There is a non-publication order prohibiting publication of the name or identifying details of the person referred to in this determination as the “complainant”.

Employment relationship problem

[2] Kim Randle was employed by The Warehouse Ltd (the Warehouse) for 6 years. In 2014 she was promoted to the position of ‘Team Leader’ in charge of the night-fill shift. The complainant worked night-fill shifts and reported to Ms Randle.

[3] On 12 October 2016 Ms Randle was dismissed following an investigation into a complaint that she had sexually harassed the complainant. Ms Randle denies the allegation and says her dismissal was unjustified. She seeks monetary remedies associated with her personal grievance.

The Authority's investigation

[4] Ms Randle initially applied for urgent interim reinstatement. The application was withdrawn on 21 December 2016. In a case management conference call on 1 March 2017 the remedy of reinstatement was removed entirely.¹

[5] Ms Randle and her husband both attended the Authority's investigation meeting. Warehouse Regional Manager, Ms Connie Semenoff, and in-house HR advisor for the Warehouse at time of Ms Randle's dismissal, Ms Lisa Bell, were both present at the investigation meeting. Each individual provided written and oral evidence. The complainant and the three employees who saw the incident for which Ms Randle was dismissed did not attend the Authority's investigation. I have referred to those staff members collectively as "the witnesses" and individually as witness A, B and C respectively.

[6] I have not recorded all the information received by the Authority concerning this employment relationship problem but have stated findings of fact and law necessary to dispose of the matter.² This determination has been issued outside the timeframe set out at s 174C(3)(b). The Chief of the Authority has decided exceptional circumstances exist which have delayed issuing this determination.³

Background summary

The complaint

[7] On 10 and 11 September 2016 the Warehouse held a conference for regional staff. An awards ceremony was held on the evening of 10 September 2016. Ms Randle, her husband, the complainant, and other employees attended the function. Staff were booked to stay at a local hotel after the event.

[8] The complainant left the function at 11.15pm. Ms Randle and her husband left at 12.30am or thereabouts. On return to the hotel Ms Randle went with witnesses A, B and C to a suite allocated to witness B and the complainant.

[9] On Monday, 12 October 2016 the complainant sent an email to Assistant Store Manager, Ms Kelly van de Wetering whom Ms Randle reported to. The relevant

¹ As communicated by her representative.

² As permitted by s 174(C)(4) Employment Relations Act.

³ Pursuant to s 174C(4).

portions of the email are recorded verbatim as follows. She stated that when Ms Randle entered her room she:

“...proceeded to try and climb into my bed with me and started grabbing, squeezing and rubbing my breasts saying how soft and round they were. I pushed her hand away and said what the hell... . Then she stood up and said I know I’m your boss and I hope your not in the union because I will deny everything. This shocked us all. Then she went to the end of the bed and looked like she was going to strip her clothes off. We all looked at her and said what the hell are you doing don’t do that. She replied isn’t that what it is all about. Then she came and tried getting into bed with me again started to do the same to my breasts as she was doing before so I pushed her hand away again and said what the fuck. By this time [witness A] could see I was getting quite distressed and kept saying to Kim come on Kim you should go back to your room...

...
The next morning down at breakfast she said with a big smile on her face [] I am sorry for molesting you last night in front of everyone at the table.”...

[10] The complainant went on to say, amongst other things, that she felt violated and had concerns about working with Ms Randle. The email was forwarded to Regional Manager, Ms Semenoff. She considered the complaint to be potentially serious. She sought assistance from Ms Bell and they commenced an investigation into the complaint.

The Warehouse’s investigation

[11] On 13 September 2016 Ms Semenoff and Ms Bell interviewed the complainant. She reiterated the substance of her complaint.

[12] On 14 of September 2016 they met with Ms Randle to advise her of the allegations and the investigation. She was informed that dismissal was a possible outcome and suspended on pay during this meeting. Ms Randle obtained representation later that day.

[13] Witnesses A, B and C were interviewed consecutively on 15 September 2016. Their statements generally concurred with the complainant’s account. The complainant was interviewed again later in the day. Notes from each of the interviews were provided to Ms Randle’s representative, Mr Greg Bennett, alongside the complaint and other relevant documentation.

[14] Ms Randle was accompanied by her representative at the meeting of 26 September and again on 12 October 2016. I have not fully recorded the content of

each meeting but have referred to the key elements of each discussion as reflected in the notes taken and oral testimony.⁴

The first investigation meeting -26 September 2016

[15] At the beginning of the meeting Mr Bennett alleged that the Warehouse had breached health and safety obligations by allowing staff to drink to excess. This matter formed an aspect of Ms Randle's claims before the Authority. I am satisfied that the Warehouse acted as a responsible host. There is testimony that the purchase of drinks was limited, security and hospitality staff were charged with monitoring consumption and the bar was closed for a period over the course of the evening.⁵ This claim is dismissed.

[16] During the meeting Ms Randle accepted she had touched the complainant's breasts. She said she had tripped and fallen on to the complainant's bed and "connected" with her breasts.⁶ She said she later sat next to the complainant but slipped from the bed and in doing so may have grabbed the complainant's arms. Ms Randle said it "could have happened when I came up the 2nd time" [again].⁷ Ms Randle apologised to the complainant at breakfast the following morning but denied using the words "for molesting you" as alleged. She said witness A had interjected with that comment.

[17] Mr Bennett criticized the investigators for not interviewing other attendees at the breakfast the following morning. He intimated there was a possibility of collusion amongst witnesses but did not elaborate further on the issue. A personal grievance concerning Ms Randle's suspension was raised, although this was not pursued before the Authority.

Further information

[18] After the first meeting the investigators contacted the complainant and the witnesses by phone to ascertain whether the touching could have been accidental. In differing ways each individual considered it was not.

⁴ Detailed notes were taken by both Ms Semenoff and Ms Bell in both instances but are not said to be verbatim.

⁵ Oral evidence of Ms Semenoff.

⁶ Respondent's Bundle of Documents, Ms Semenoff's notes at pg 98.

⁷ Respondent's Bundle of Documents, Ms Semenoff's notes at pg 102.

[19] Ms Semenoff also obtained statements from two additional people said by the complainant to have been present at breakfast when the apology was conveyed. Both statements said Ms Randle used the words alleged by the complainant. One of the statements came from the Assistant Store Manager, Ms van de Wetering, who had taken notes during the first meeting with the complainant. The other statement was provided by the husband of witness A.

The final investigation meeting - 12 October 2016

[20] A final meeting was held on 12 October 2016. The first portion of the meeting was occupied by discussions about the witnesses' statements. Ms Randle was given an opportunity to provide further information. She contended that she had been "set up" by the complainant and witness A and/or by Ms van de Wetering. I shall return to this matter.

[21] Following an adjournment Ms Bell advised Ms Randle that a preliminary view to dismiss had been formed. Ms Semenoff told the Authority that she had Ms Bell communicate her preliminary findings (and final decision) as she was new to her role and inexperienced at conveying matters of this nature.

[22] Ms Bell informed Ms Randle that although there were variances in the witnesses' statements, she [and Ms Semenoff] considered the essence of the information received from the witnesses was consistent. She said Ms Randle's version of events as to the touching, the comments made during the incident, and the content of the apology the following day, were at odds with the accounts given by those who had present during the incident and at breakfast, and was not credible. She and Ms Semenoff considered the conduct likely occurred.

[23] Mr Bennett provided submissions on those matters. Ms Randle restated her view that the complainant and/or witnesses had colluded. A further adjournment was taken. When the parties reconvened Ms Randle's employment was terminated with immediate effect. Outstanding wages and entitlements were paid soon after.

The issues

[24] An employer's decision to dismiss an employee and the actions it took in reaching that decision will be considered justifiable if a fair and reasonable employer

could have reached the same conclusion in all the circumstances.⁸ In determining the matter the Authority is required to assess the employer's actions; both as to whether there were reasonable grounds for the dismissal, and whether the process taken to reach that decision was fair at the time it reached the decision.

[25] Section 103A(3) sets out factors the Authority must consider when assessing whether the employer conducted a procedurally fair process. Subsections (3)(b) and (c) require the Authority to consider whether the employer raised the concerns it had with the employee, and gave the employee a reasonable opportunity to respond to those matters, before dismissing or taking action. I am satisfied that the Warehouse adhered to these minimum procedural requirements.

[26] At issue for Ms Randle is whether ss(3)(a) and (d) were complied with. To determine her claim the following issues need to be examined:

- a. whether the Warehouse's investigators genuinely considered Ms Randle's explanation or whether the investigation was biased against her and the outcome predetermined;
- b. whether the Warehouse's investigators sufficiently investigated the allegations against Ms Randle such that it could reasonably conclude that serious misconduct had occurred.

[27] A significant portion of the Authority's investigation required an assessment of information the Warehouse received. Most of the information was recorded in contemporaneous interview notes written by Ms Seminoff and/or Ms Bell. Ms Randle does not dispute the accuracy of those notes.

[28] It is important for Ms Randle to be aware that when assessing whether there were reasonable grounds to dismiss, the Warehouse is not required to prove that the alleged actions actually occurred, but rather, that after having conducted a full and fair inquiry into the allegations, whether it could have reasonably concluded that the event occurred. This standard was expressed by the Court of Appeal in *Airline Stewards and Hostesses of NZ IUOW v Air New Zealand*⁹ in the following way:

The employer must have more than mere suspicion but need not have proof beyond reasonable doubt of an actual offence by the employee.

⁸ Section 103A Employment Relations Act 2000.

⁹ [1990] 3 NZLR 549.

...

What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquires which left him on the balance of probabilities with grounds for and believing and he did believe that the employee was at fault.¹⁰

Did the investigators genuinely consider Ms Randle's explanations or was the investigation biased against her and the outcome predetermined?

[29] Ms Randle states Ms Semenoff had already formed a view of her guilt after her initial interview with the complainant and prior to meeting with her.¹¹ She further says Ms Semenoff giggled at both the meetings she attended,¹² had already made up her mind¹³ and did not consider her explanations.

[30] I do not accept this claim. Ms Randle was represented at each interview. No allegation of bias or predetermination was raised at either meeting. No mention is made in the notes from the first meeting about Ms Semenoff's behaviour. In the final meeting Mr Bennett reproached Ms Semenoff for giggling. Ms Semenoff said she had coughed. Whether Ms Semenoff giggled or coughed, I am unwilling to find that either action could be conclusively interpreted as demonstrating bias.

[31] Nor is there any evidence to lead me to conclude that the Warehouse did not give proper consideration to Ms Randle's explanations. Having heard Ms Randle's response, particularly that the touching was accidental, the investigators contacted the complainant and the witnesses primarily to obtain clarification on that issue. That inquiry undermines Ms Randle's assertion. This claim is dismissed.

Did the Warehouse sufficiently investigate the allegations such that it could reasonably form a view, and did, that serious misconduct occurred?

[32] Ms Randle challenges the information given to the Warehouse by the complainant and the witnesses. She says the Warehouse failed to take into account inconsistencies between their respective accounts, or investigate the relationship between herself and the complainant and some of the witnesses whom she says colluded against her.

¹⁰ Ibid at n 8.

¹¹ Brief of evidence, para. 16 and oral evidence.

¹² Affidavit dated 25 October 2016, para. 21.

¹³ Brief of evidence, para. 24 and 26.

Inconsistent statements

[33] Ms Randle via her representative alleges there are inconsistencies between the statements given by the witnesses and the complainant as follows:

- (a) Witness B's first statement does not refer to Ms Randle touching the complainant.¹⁴ Her second statement taken during the phone interview states "[the complainant] told me [the touching] was twice".¹⁵ Mr Bennett says witness B did not see the incident and was not present throughout the time Ms Randle was in the room.¹⁶

[34] I am unwilling to accept that assessment. Reviewing witnesses B's statements together she advised the Warehouse that she did not see Ms Randle get onto the bed as she was not in the bedroom at the time. It is clear that she entered the room before the first instance. I agree the first interview does not explicitly record that witness B say Ms Randle touching the complainant although inferences can be taken to that effect from the contents of the meeting notes. I note a clear statement is recorded in the notes about what witness B heard Ms Randle say. The second statement refers to the complainant telling her of the incident but that comment falls within witness B's description that she personally saw Ms Randle touch the complainant's breasts on two occasions. I consider the remark is likely a means of saying that her observations were confirmed by the complainant. I do not accept the submission that witness B was not present at the material time.

[35] Other examples of alleged inconsistency are as follows:

- (b) Witness A says in the first instance Ms Randle "*jumped on the complainant...facing her, legs astride*".¹⁷ Mr Bennett says that statement is at odds with the complainant who denied being straddled during her second interview and said "*she laid beside me with one leg over mine – facing me*".¹⁸
- (c) Witness B and C record Ms Randle as falling off the bed after each incident whereas the complainant and witness A say the complainant pushed her on

¹⁴ Respondent's Bundle of Documents, Ms Semenoff's notes at pg 86.
¹⁵ Respondent's Bundle of Documents, Ms Semenoff's notes at pg 105.
¹⁶ At 2.13 Final submissions.
¹⁷ Recorded in notes during the interview of 15 September 2016.
¹⁸ Notes during interview on 15 September 2016.

both occasions.¹⁹ I note the complainant says in her third interview that Ms Randle “*almost fell off the bed*”.²⁰

(d) Ms Randle’s representative points to witness C’s comment that the complainant had “*laughed*” after the first event²¹ and Ms Randle’s statement that “*everyone was laughing*” after the second instance.²² There is an inference that this evidence demonstrates Ms Randle’s actions were accepted by the group as accidental and not of concern to the complainant. In contrast the complainant’s initial complaint records she was distressed. The notes associated with witness A and B separately convey that the complainant appeared to be troubled, particularly after the second instance.

[36] The Warehouse’s view is that the inconsistencies were relatively minor. Ms Bell ascribes the differences as a consequence of individuals being in different positions in the hotel room, and dependant on what and whom each individual focussed on at the material times.

[37] At the final meeting Ms Bell’s express acknowledgement that there were variances between the witnesses’ statements demonstrates the investigators examined and considered those matters. I accept there are differences and agree it would be more concerning if the events had been identically described. I find the differences are slight and do not concern the core allegations. I am unwilling to conclude that the accounts of the complainant and the witnesses should have been considered unreliable on the grounds of mild inconsistencies between them.

Collusion

[38] At the Authority’s investigation Ms Randle spontaneously produced two posts sent by work colleagues to her facebook. She considers both posts demonstrate collusion amongst the witnesses.

[39] Ms Randle says the first post was sent on 25 September 2016. In it the sender discusses how staff “*moan[ed]*” both before and after Ms Randle’s arrival [the context implies Ms Randle’s appointment to her position]. The post states “*the way they talk*

¹⁹ The complaint dated 12 September; notes taken from Witness A, B and C on 15 September 2016.

²⁰ Phone interview 26 September 2016.

²¹ Respondent’s Bundle of Documents, Ms Semenoff’s notes at pg 88.

²² Respondent’s Bundle of Documents, Ms Semenoff’s notes at pg 99.

about you is disgusting and their thing is too (sic) get as many people on side to get rid of you". No individual staff member is named. The investigators agree Ms Randle briefly displayed the post during the meeting on 26 September 2016. Ms Bell says at the time she asked Ms Randle to forward a copy of it to her. Ms Randle does not challenge that evidence and it remains unclear why she did not do so.

[40] The second post is reported to have been made on 29 September 2016. The sender advises Ms Randle that she had "*herd (sic) what's gone round*" and that witness A had told her and another person [presumably about the conference incident].²³ It appears Ms Randle made reference to the post at the final meeting but was unwilling to show it to the investigators. She further advised she "*wouldn't say*" who sent the message.²⁴ The meeting notes reflect Ms Bell encouraging Ms Randle to show her the post and advising she could hide the name of the sender. Ms Randle agrees she did not take up that offer.

[41] I find it was reasonable for the investigators to take an inference, based on Ms Randle's reluctance to provide copies of the posts, that she did not wish the investigators to pursue the matters contained in each of the posts. Even if I am wrong, I am not satisfied that either post establishes that the complainant or witnesses were acting in concert against her. The facebook posts were not sent by anyone with direct involvement in the investigation. At best they indicate gossip between employees about Ms Randle and possibly the incident. It is understandable that Ms Randle may be upset about staff talking about her but the facebook evidence does not establish there was collusion between the witnesses to exaggerate or embellish their statements.

[42] During the Warehouse's final meeting Ms Randle told Ms Bell and Ms Semenoff "*I think I have been set up*" by witness A and the complainant. Two other individuals who were not present during the incident were also mentioned. She said that historically she had experienced difficulties with witness A and the complainant. She said Ms van de Wetering was aware of those difficulties but had not managed these properly. Later during the interview she speculated that Ms van de Wetering, the complainant and witness A and may have engineered the complaint. At the Authority's meeting she was unable to provide any reason as to why Ms van de Wetering would be motivated to set her up.

²³ Ms Randle says this post was sent to her on 29 September 2016.

²⁴ Respondent's Bundle of Documents, Ms Semenoff's notes at pg 116.

[43] As noted, Ms van der Wetering provided a statement concerning the content of Ms Randle's apology at the breakfast after the first investigation meeting. She did not attend this meeting but Mr Bennett questions why Ms Wetering did not declare she had heard Ms Randle's apology earlier given her initial involvement in the investigation. There is an inference that the provision of her statement two weeks after the event should be viewed with suspicion.

[44] Ms van de Wetering did not attend the Authority's meeting but I accept the Warehouse's evidence that the content of Ms Randle's apology at breakfast on 11 September 2016 was not at issue until Mr Bennett requested the Warehouse interview other breakfast attendees.²⁵ There is no evidence to support a suggestion that Ms van de Wetering's statement was furnished voluntarily. It is clear it was obtained as a direct result of Mr Bennett's concerns that the Warehouse had not interviewed all attendees at breakfast. I am unwilling to conclude that Ms van de Wetering's statement was provided to bolster the Warehouse's position purely based on the time it was obtained. There is a further allegation that Ms van de Wetering was not present at the breakfast when the apology was made and therefore her statement was fabricated. That matter was extensively canvassed as the Authority's meeting however I note that Ms Randle does not appear to have disputed Ms van de Wetering's presence at breakfast when the matter was discussed in the final meeting.²⁶ She asserted at that time that witnesses B and C had not attended the breakfast.

[45] The investigators did not specifically ask the complainant or any of the witnesses whether they had collaborated before they had been interviewed. That was a matter that could have been inquired about. However Ms Randle conceded, when questioned during the Warehouse's final meeting, that there was no evidence of collusion amongst the witnesses. Before the Authority Ms Randle said that the individuals in question do not like her and have manufactured a story about her. Against that allegation she accepts she touched the complainant's breasts. It is unclear how those two conflicting propositions can be reconciled.

[46] There is evidence that Ms Bell and Ms Semenoff considered whether the witnesses may have colluded.²⁷ Ms Semenoff's evidence is that she discounted the possibility. She says each individual had been interviewed separately and was clear in

²⁵ Two weeks after the complaint had been made.

²⁶ Respondent's Bundle of Documents, notes from final meeting at pg 117.

²⁷ Respondent's Bundle of Documents, Ms Bell's notes at pg 133.

the description of the incident. No factual information had been presented by Ms Randle or her representative to support the allegation of collusion. She says she had no basis on which to believe that the complainant and three witnesses would make up a claim of sexual harassment.

[47] I consider the Warehouse's failure to inquire into Ms Randle's concern to be a minor flaw in the context of the allegations and matrix of events the Warehouse was required to investigate. I agree with the submission on behalf of the Warehouse that further inquiry about alleged collusion would not have assisted its knowledge as to what had occurred on the night of 10/11 September 2016.

Could the Warehouse reasonably have concluded that serious misconduct occurred?

[48] Having reviewed the interview notes I accept the Warehouse's position that the complainant and the witnesses were routinely consistent on key aspects: there was an initial touching of the complainant's breasts by Ms Randle, the touching was accompanied by explicit comments, Ms Randle then removed herself from the bed for a short period of time, she returned to where the complainant was placed and touched the complainant again in the same area.

[49] At the first meeting Ms Randle explained that after she had "*connected*" with the complainant she said told her "*I'm so f**** sorry for touching your breasts*" but she also advised the investigators "*I can't remember what I've said*".²⁸ During the final meeting Ms Randle said she could not recall saying the words alleged and all she could remember was saying sorry.²⁹ Ms Randle conceded during the Authority's investigation that she still could not remember exactly what she said to the complainant, but remained resolute that she did not say the words alleged.

[50] In contrast, the complainant and the three witnesses each reported to the Warehouse, almost without variation, a sequence of words and phrases they say Ms Randle used. Each recalled that these were made either during or immediately after the first instance of touching.³⁰ I find the Warehouse was entitled to prefer the statements of the complainant and witnesses both about the events that occurred (which are not broadly disputed) and the sequence of comments Ms Randle made in

²⁸ Respondent's Bundle of Documents, Ms Semenoff's notes at pg 98.

²⁹ Respondent's Bundle of Documents, pg 115.

³⁰ Respondent's Bundle of Documents, pg 72, 82, 86, 88, 104, 105, 107,

the course of those. It has not been necessary to set out in full what Ms Randle was alleged to have said but objectively viewed, the remarks, particularly in the context of when they were said, do not suggest the touching was accidental. Ms Semenoff's evidence is that that she found the comments highly influential on her decision that the touching in the first instance was intentional and more likely than not in the second instance as well.

[51] For completeness, I note that the question as to whether it was reasonable for the Warehouse to reject Ms Randle's version of the breakfast apology and favour that of the complainant was contested before the Authority. No matter which version is more likely, I accept Ms Semenoff's evidence that the existence of the apology itself tended to indicate Ms Randle was aware her actions were inappropriate. I am not persuaded that the content of the apology determined the outcome of the Warehouse's decision and it is not necessary to make findings on the matter.

[52] Overall, I consider the Warehouse sufficiently investigated the allegations against Ms Randle. As a result of that inquiry it obtained information on which it was able to form an honestly held and reasonably founded belief that Ms Randle had engaged in the conduct alleged. This was a conclusion open for it to reach and was reasonable in all the circumstances. The actions can be fairly be characterised as serious misconduct.

Was dismissal a reasonable response?

[53] On balance I am satisfied that the Warehouse was justified in its decision to dismiss Ms Randle.

[54] The Warehouse was entitled to have a high degree of trust and confidence between it and Ms Randle, particularly where she was in a position of authority and required to manage, without supervision, staff working on night-fill shifts. I have no doubt Ms Randle's actions caused the Warehouse to have legitimate concerns about her judgment and behaviour with subordinate staff. I agree it was untenable for the Warehouse to have the complainant and Ms Randle work together again.

[55] Although not documented, Ms Semenoff gave evidence that she had contacted another regional Store Manager after the first meeting to enquire whether there was a suitable position for Ms Randle to be deployed. She says she was advised that there was nothing suitable in the foreseeable future.

[56] In all the above circumstances I find the dismissal was within the range of options that a fair and reasonable employer could have taken. It is unfortunate Ms Randle's employment ended the way it did but the Warehouse's decision to dismiss was justifiable and Ms Randle's claim has failed.

Costs

[57] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority