

**NOTE: This determination contains an order prohibiting publication of the names of the parties and other certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 362  
3211179

BETWEEN	UCF Applicant
AND	B LIMITED Respondent

Member of Authority: Sarah Blick

Representatives: Anthony Drake and Rosie Judd, counsel for the applicant  
Sherridan Cook and Tom Sanders, counsel for the respondent

Investigation Meeting: 1, 3, 4 and 5 May 2023 at Auckland

Submissions received: At the investigation meeting

Determination: 07 July 2023

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] The applicant UCF was employed as the General Manager (GM) of People by the respondent B Limited from July 2020 until January 2023, when he was summarily dismissed. The dismissal followed an investigation into UCF's communications with an employee of B Limited's parent company in Australia, C Limited, via the social media platform, LinkedIn.

[2] UCF says B Limited's investigation and disciplinary process was procedurally flawed and the dismissal substantively unjustified leading to his unjustified dismissal. He seeks reinstatement, reimbursement of lost wages, compensation for loss of benefits,

interest and compensation for humiliation, loss of dignity and injury to feelings. UCF also seeks a penalty for an alleged breach of good faith and non-publication orders relating to his identity.

[3] B Limited says following a thorough and fair investigation it concluded UCF's conduct constituted a breach of its group policies and UCF's employment agreement. It says UCF's dismissal was justified and he is not entitled to any remedies.

### **Should non-publication orders be granted?**

[4] The Authority may order that all or any part of any evidence given, or pleadings lodged or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.<sup>1</sup> The principle of open justice is of fundamental importance and forms the starting point for determining whether the circumstances of a particular case justify an order for non-publication. Anyone applying for a non-publication order must establish that sound reasons exist for the making of such an order, displacing the presumption in favour of open justice.<sup>2</sup> A case-specific balancing of the competing factors is required.

[5] UCF submits there is a material risk of adverse consequences to his employment and future prospects if his name and identifying details are published, which are disproportionate to his circumstances, and as such the presumption of open justice is displaced. UCF says issues of inappropriate communications between a senior male and a more junior female employee are contentious in New Zealand and within the media and on social media, and the public scrutiny the determination may result in could cause him significant distress. UCF also identifies a family member who may be distressed by publication of the Authority's determination. He says publication could also have a chilling effect on future applications to the Authority by employees who will fear they cannot bring them before the Authority without being subject to distressing public scrutiny and comment, and this would not serve the interests of justice.

[6] B Limited opposes the application. It acknowledges there is likely to be an adverse impact on UCF's future employment prospects if his name is published due to

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<sup>1</sup> Employment Relations Act 2000, sch 2, cl 10.

<sup>2</sup> *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310; and *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.

the ability for prospective employers to search his name and see the Authority's determination and any news articles published about this case. However, B Limited submits the negative impact on UCF's future employment does not displace the principle of open justice because there are countervailing factors that weigh strongly in favour of open justice being preserved. It says the public has a genuine interest in cases involving workplace harassment, and non-publication orders should not be used as a shield by those responsible for workplace harassment to conceal their behaviour, because publication:

- (a) dissuades other individuals from engaging in similar behaviour;
- (b) ensures the individuals responsible are held accountable for their actions;
- (c) supports victims of workplace harassment because they can see perpetrators of workplace harassment are being held accountable;
- (d) removes the ability of individuals responsible for workplace harassment to conceal their behaviour from new employers and colleagues.

[7] B Limited says the public interest is acute in this case because UCF occupied a senior human resources (HR) role within one of New Zealand's largest employers. It says there is a legitimate interest in the public seeing B Limited has upheld its zero-tolerance approach to workplace harassment and ensured harassment is not allowed to exist, including at the most senior level of its organisation.

#### *Finding on non-publication orders*

[8] The reasons put forward by UCF are not sufficient to displace the presumption of open justice in the circumstances, which include the countervailing factors identified by B Limited. In light of the findings on the evidence and personal grievance below, I agree there is a real risk suppressing UCF's identity may permit him to engage in similar behaviour in another role.

[9] While there may be media scrutiny given the nature of the allegations, any fair and accurate report of this determination should reflect B Limited's findings, which were in relation to harassment, not sexual harassment. This determination should provide the relevant factual context for the dismissal, which will enable future employers or principals to make their own assessment as to UCF's suitability for employment relations or HR work.

[10] While publication of UCF's identity and any media coverage may have a negative impact on the family member identified, the claimed impact was advanced in the absence of medical evidence to support the claimed impacts and are not compelling enough to displace the presumption of open justice in all the circumstances.

[11] I am not prepared to speculate on whether publication of UCF's identity in this matter could have a chilling effect on future applications to the Authority by employees in a similar situation to UCF. Future applications for non-publication orders will be brought on their own merits and determinations are made based on a fact-specific assessment in a particular case.

[12] I therefore decline UCF's application for a permanent order. However, pursuant to clause 10 of Schedule 2 of the Employment Relations Act (the Act), an interim non-publication order is granted prohibiting the publication of UCF's name which will stay in place for the next 28 days commencing after the date of this determination. I also issue an interim non-publication order prohibiting the publication of B Limited's name and parent company for the next 28 days commencing after the date of this determination, given its publication would likely lead to UCF's identity. After the 28 days has elapsed this determination will be replaced by a fully intitled and non-anonymised version. If no challenge is filed within 28 days, the interim non-publication orders will lapse and any further steps in relation to non-publication would need to be addressed to the Employment Court.

[13] Computer-generated strings of letters are used to refer to UCF and his wife (referred to as EHF in this determination) which bear no resemblance to their names.

[14] B Limited seeks permanent non-publication orders in relation to the identity of C Limited's employee, referred to as Ms A in this determination. UCF has not opposed that application. Ms A did not provide evidence for the Authority investigation and did not have the opportunity to respond to assertions made about her so it is not appropriate for her name be on the public record through this determination. It is appropriate to grant the order because publication could genuinely have a chilling effect on future complainants coming forward to their employer in similar circumstances. Ms A's name and information likely to identify her referred to in the documents and evidence is permanently prohibited from publication.<sup>3</sup>

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<sup>3</sup> Employment Relations Act, sch 2 cl 10(1).

### **What has the Authority's process been?**

[15] UCF initially sought interim reinstatement to his position and for the Authority to accord urgency to its investigation. The parties reached an agreement whereby UCF was restored to B Limited's payroll pending the outcome of the Authority's investigation. In light of the agreement, UCF no longer sought interim reinstatement. Urgency was accorded to this matter.

[16] The Authority has heard evidence from UCF, EHF and William (Bill) Hodge. B Limited's Chief Executive Officer (the CE) gave evidence.

[17] This determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.<sup>4</sup>

### **What are the issues?**

[18] The following are the issues for investigation and determination:

- (a) Was B Limited's decision to dismiss UCF for serious misconduct, and what it did to reach that decision, what a fair and reasonable employer could have done in all the circumstances at the time?
- (b) If UCF has a personal grievance, what if any remedies should be awarded, being;
  - i. Permanent reinstatement;
  - ii. Reimbursement of lost wages;
  - iii. Payment of a short-term incentive payment and an award of shares and options in B Limited;
  - iv. Compensation for humiliation, loss of dignity and injury to feelings?
- (c) If any remedies are awarded, should they be reduced for contribution?
- (d) Should interest be awarded on any amounts?
- (e) Has B Limited breached the duty of good faith and if so should a penalty be imposed, with some or all being payable to UCF?
- (f) Should any costs be awarded to either party?

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<sup>4</sup> As permitted by s 174E of the Employment Relations Act.

## **What is the background?**

### *Parties and Ms A*

[19] B Limited owns and operates a manufacturing business with operations in Aotearoa New Zealand and in the Pacific Islands. It employs approximately 1500 staff. It is a group member of C Limited, which is headquartered in Australia.

[20] UCF has extensive employment relations experience in New Zealand and has held a number of senior roles in those fields. In July 2020, he joined B Limited as the GM of HR/People. UCF is in his mid-late fifties.

[21] Ms A held a more junior HR role at C Limited but is no longer employed by it. There is no suggestion her employment ended due to her communications with UCF or the resulting investigation. It is common ground there were no reporting lines or interactions between UCF and Ms A as part of their roles.

### *Employment agreement, role description and relevant policies*

[22] UCF accepted the terms and conditions contained in a written employment agreement with B Limited. UCF's remuneration package included an annual base salary, superannuation, and short term and long term incentive plans.

[23] The role description provided by the parties describes UCF's role as "Leading the people, external affairs and safety function for New Zealand and the Pacific Islands". The role reports directly to B Limited's CE. Key "focus areas" are identified as talent management and attraction, capability building, business enablement and safety, organisational change and workplace relations. An important part of the role is leading collective employment agreement (CEA) negotiations and managing all CEA agreements and frameworks.

[24] B Limited says C Limited's Code of Conduct (COC) is a foundational policy within the organisation that all staff across C Limited's group are required to comply with. It is common ground that the COC applied to UCF as an employee of B Limited. When describing the group's "Bond" in the COC, the COC relevantly says staff "...work in a safe and satisfying environment. We choose to treat each other with trust and respect." The COC refers to "choosing to do the right thing" being important "because it helps keep us all safe, it helps us to treat all people, our communities and

the environment with care and respect, and it helps protect our business”. The COC contains a “Does it feel right?” quick test to assist staff in choosing “to do the right thing”. The quick test is as follows:

- Is it lawful?
- If my decision appeared in a newspaper or online, would I feel comfortable?
- Would I feel comfortable saying or doing this in front of my family or friends?
- Does my gut instinct tell me its right?
- Is it in line with Our Bond?

In relation to the answers, the COC says “if you answer ‘no’ to one or more of these questions, it probably doesn’t feel right; and if it doesn’t feel right, there’s a good chance it isn’t. If you’re still unsure, consult this Code of Conduct or speak to your manager.”

[25] Other relevant policies include an Inclusion and Diversity Policy (I&D policy), which confirms C Limited’s group of companies has no tolerance for bullying, discrimination or harassment in its organisation. There is also a Social Media Policy, which sets out C Limited’s expectations that employee engagement with social media is consistent with the COC. LinkedIn is listed as a social media platform within that policy.

[26] UCF’s employment agreement provided for termination with immediate effect on commission of any serious breach of the contract or if he was guilty of serious and or wilful misconduct.

#### *Ms A’s complaint to direct manager in Australia*

[27] On 26 October 2022 Ms A telephoned her direct manager at C Limited. The manager’s notes of the conversation say Ms A advised she had been messaging UCF for a few months but reported that their interactions had started to make her feel uncomfortable and she asked UCF to give her space, and that he agreed to that. Ms A said UCF kept trying to engage with her but she started to ignore his messages, and that he was often viewing her LinkedIn profile. The notes record that Ms A did not want UCF to lose his job and did not feel threatened by him. The notes record Ms A and her manager spoke again on 27 October 2022 and Ms A sent the manager screenshots of messages. The manager then discussed Ms A’s disclosures with C Limited’s GM of People (Australian GM) who instructed Australian law firm Kingston Reid to speak to

Ms A. A Senior Associate at the firm was chosen to investigate, Sophie Baartz (the Investigator).

*Investigator speaks to Ms A*

[28] On 3 November 2022 the Investigator telephoned Ms A and took a “file note” of the conversation. The file note repeats some contents from Ms A’s conversation with her manager but provides further details. Ms A says initially she and UCF’s communications were “very basic” but later UCF become a bit of a “confidant”, that he understood her role, and in August they chatted a lot and shared lots of banter. The Investigator recorded Ms A spoke about the following messages:

About mid-sept he said ‘I am really glad we are becoming good friends. He said We are close right? We talk regularly’. He said can I ask personal question. Sure. He said something like I know you have a boyfriend – but if you didn’t would it be different between us? Then I really backed off. Don’t want to get closer. I realised not genuine. So I ignored his messages.

...

I remember he once said it will be good for our relationship when you leave [C Limited]. I said why? He said you know, with my position and all that. I thought weird because my background is [redacted] – I often meet CEOs for coffee. It’s normal. Thought weird, but now in hindsight, I’m like – gross.

I said to [UCF] one day – “My mum posted a photo of me on social media from when I was 17. I showed my bf he said he didn’t recognise me’. And he said send me a copy so I did. He said “cutie” and I was like, not really – I look like a cartoon character with the fake tan etc.

He asked me “were you active”? I said I don’t understand. He reiterated. I didn’t really take offence. I said no I wasn’t. He said well I was always into girls from a very young age. I was like ok – and then the convo moved on. But now I look back and feel really yuck.

And he always now looks at my profile which is creepy...

[29] The notes say Ms A started talking about an unwell relative of hers around the beginning of September, who later passed away. She refers to a message “reiterating” that UCF give her space, and that she wanted to “tell him to fuck off but was trying to be polite – work you know”. Ms A explained “when it got weird” she would archive her messages with UCF.

*LinkedIn messages provided by Ms A*

[30] Ms A supplied LinkedIn messages to the Investigator on or about 3 November. The messages read as follows:

**30 September 2022**

UCF: Friday – enjoy your weekend (8.26 AM)

**5 October 2022**

UCF: Take care (4:57PM)

UCF Will dial out till hear from you (5:46PM)

**7 October 2022**

UCF: Watch out for any “odd” messages from my account over last few days.  
Resolved now (12:30PM)

UCF: (was hacked) (12:32PM)

Ms A: “thumbs up” emoji (12:43PM)

UCF: Noted, take care till ready to chat again. All good (12:45PM)

UCF: (do miss your insanity) (12.56PM)

UCF: Sorry – last comment, would you prefer to conclude chats....am ok with that  
(1:36PM)

Ms A: Hi [UCF], I think that might be a good idea. I need people around me to respect  
my personal space and when they say they would leave me be until I msg them  
back to uphold it. So far that hasn't happened (3:47pm)

UCF: Ok... (3.48pm)

**17 October 2022**

UCF: [UCF's dog's name] not doing so well. Just an fyi (10.25am)

**21 October 2022**

UCF: (he's bounced back)

UCF: In closing out, good luck on your new career – hope it goes well & gives you  
what you seek. (11.00am)

UCF: ...and you will be whistling dixie if you ever think I will apologise for being  
OCD on coms when a mate's doing it tough. Nada chance.....bye (12.07pm)

**26 October 2022**

UCF: Finish this week? (2.43pm)

**27 October 2022**

Ms A: Let me be clear. I feel you are harassing me. Do not contact me again.  
(10.03am)

UCF: Noted (10.12am)

[31] Ms A also provided screenshots of LinkedIn notifications stating UCF had viewed her LinkedIn profile.

*CE advised of complaint*

[32] On 11 November 2022 the Australian GM advised the CE of Ms A's allegations, and provided the Investigator's file note. The CE formed the view the allegations warranted further investigation. He says he felt it was appropriate to conduct an external independent investigation due to the seriousness of the allegations, particularly given UCF's seniority. The CE instructed the Investigator to further investigate and a draft allegation letter was prepared.

*Initial meeting with UCF on 17 November 2022*

[33] The CE says out of respect for UCF, he wanted to notify UCF of the complaint and investigation in person. He says he did not consider it appropriate for UCF to have advance notice of the meeting because he did not want there to be a risk UCF could delete (or be accused of deleting) some or all of the LinkedIn messages he had with Ms A. The CE arranged for B Limited's counsel Mr Sanders (counsel) to accompany him to what would otherwise have been a scheduled monthly catch-up meeting. The CE says counsel was asked to assist in gathering the LinkedIn messages, as he did not know how to do so. UCF was not advised counsel would be present.

[34] On 17 November 2022 UCF, the CE and counsel met at one of B Limited's workplaces, away from UCF's usual workplace. The CE took "speaking points" to the meeting and went through them at the meeting. It is common ground that after the CE advised UCF of the complaint, UCF raised a concern that prior warning of the nature of the meeting should have been given to him. The CE says when this concern was raised, counsel explained the purpose of the meeting was to notify of the complaint and that an investigation would follow. Counsel assured UCF he was not required to provide a response to the allegations during the meeting and he was entitled to legal representation during the investigation. The CE's "speaking points" record him as saying:

I am not asking you to respond to the allegations here and now. Rather, the purpose of this meeting is to advise you that the complaint has been received and explain how I intend to address it. you will have any [sic] opportunity to fully respond to the complaint in due course.

[35] The CE advised the next step would be for the Investigator to interview UCF. The speaking points show the CE advised the focus of the investigation would be the LinkedIn messages between UCF and Ms A, and to make sure the Investigator had a complete picture they "would like" UCF log in to counsel's laptop and provide a copy of all their messages before the end of the meeting. As the CE was speaking, UCF interrupted and said he had deleted the messages already. The CE says he then asked UCF why they had been deleted. UCF responded that he no longer had any use for them, that Ms A had blocked him on LinkedIn, and the messages contained sensitive personal information that belonged to Ms A. The CE says after reading out the speaking points, counsel asked UCF to confirm if he had deleted all of the messages between UCF and Ms A. UCF confirmed he had and reiterated the reason he deleted them. UCF

says he says he was "directed" to open his laptop and show counsel his private messages, which he felt forced to do. The CE says counsel asked UCF to log in to his LinkedIn profile and show they had been deleted, and UCF agreed to do this.

[36] It is common ground UCF then accessed his LinkedIn account on his own laptop. The CE says UCF showed counsel he was no longer connected to Ms A and there was no active chat between them. The CE says at no point did counsel ask to view any private messages on UCF's LinkedIn profile. The CE says counsel then explained that some or all of the messages between UCF and Ms A may be saved as archived messages, and he guided UCF through his account settings to download them. Counsel explained to UCF he should receive an automated email from LinkedIn containing a link to download the archived messages. Counsel asked UCF to filter out any messages that were not between UCF and Ms A and provide a copy of any remaining messages to him and the Investigator.

[37] During the meeting counsel handed UCF a letter which detailed particulars of the allegations along with a summary that UCF had (a) sent messages to Ms A that were inappropriate, unprofessional and of a sexual nature; and (b) harassed Ms A by continuing to message her despite her express requests for him to stop. A copy of UCF's employment agreement, the COC, I&D Policy, the Investigator's file note and screenshots of LinkedIn messages provided by Ms A were enclosed. The letter alleged:

1. You initiated contact with Ms A on LinkedIn approximately eight months ago which either began as or evolved into one for inappropriate purposes. Initially, the communications included:
  - (a) Sending [Ms A] messages on some Fridays to wish her a good weekend;
  - (b) Sending [Ms A] messages asking how her day was going;
  - (c) Asking [Ms A] to send her mobile phone number so you could send a photo of the view from your house;
  - (d) Asking [Ms A] to show you around the office located at [Australian suburb and city] which occurred by video call; and
  - (e) Sending [Ms A] a message to the effect that: *'It will be good for our friendship when you leave C Limited'*. In response, [Ms A] asked *'Why?'* and you responded saying *'you know, with my position'*.
2. You made inappropriate comments and asked questions of a sexual nature of [Ms A]. In particular and in response to [Ms A] providing a photo of herself to you as a teenager, you responded with comments to the following effect:
  - (a) Calling her *'Cutie'*;
  - (b) Asking *'Were you active?'*; and
  - (c) In response to [Ms A] saying she did not understand what you meant by *'active'*, you repeated yourself and then stated words to the effect that *'I was into girls from a very young age'* with the implication being that "were you active" meant *"were you sexually active"*.
3. In about mid-September you continued to build an inappropriate relationship with [Ms A] and propositioned [Ms A] by saying words to the effect that:

*'I am glad we are becoming good friends' and asked 'do you agree we are close? You also asked "I know you have a boyfriend, but if you didn't, would things be different between us?'*

4. After you allegedly propositioned [Ms A], she asked that you give her space. You ignored [Ms A's] request and continued to contact and check-in on [Ms A] after she had asked you to give her space...

[38] The letter went on to record the LinkedIn messages Ms A had provided. It stated B Limited understood Ms A had deleted the messages relating to the allegations listed at 1, 2 and 3. It further stated if some or all of the allegations were substantiated, the conduct may be regarded as serious misconduct (justifying dismissal without notice), as it would appear it would breach provisions of the COC, I&D policy, UCF's employment agreement, his general duties as an employee to comply with reasonable workplace policies and procedures, and not engage in conduct which may bring B Limited into dispute or expose it to liability.

[39] The letter summarised the investigation process, including that the Investigator would interview UCF via audio visual link (AVL) which would be transcribed, and UCF was entitled to have a support person and/or representative attend the interview. The letter repeated that if allegations are upheld, UCF may be subject to a disciplinary process which could result in a disciplinary outcome up to and including dismissal (without notice). The letter directed UCF not to contact Ms A or to check-in on or view her social media accounts, and to keep the matter confidential.

[40] Finally, the letter stated UCF was free to continue working during the investigation but if he needed time off to properly prepare for the investigation, to let the CE know. The CE gave evidence that he allowed UCF to continue working because Ms A was no longer working for C Limited by this point and he had no immediate safety concerns as a result. The letter advised UCF he could access the employee assistance program.

*After the meeting on 17 November 2022*

[41] After the meeting, that same morning counsel emailed UCF a further copy of the letter and documents, copying in and introducing the Investigator to UCF. Counsel advised UCF to please send the downloaded archived LinkedIn messages to him and the Investigator as soon as practicable. That afternoon, UCF telephoned counsel and advised he had downloaded messages between him and Ms A and would send them through shortly.

[42] Around mid-afternoon on 17 November 2022 UCF emailed counsel, the Investigator and the CE an Excel spreadsheet containing LinkedIn messages, expressing no reluctance in doing so. The spreadsheet contained messages with Ms A and other LinkedIn members. UCF highlighted messages from Ms A which are all dated 31 May 2022. They could be characterised as “banter” about a colleague’s job and pay, and training Ms A was receiving from the colleague.

*UCF’s response on 18 November 2022*

[43] On 18 November 2022 UCF emailed a lengthy response to the allegations addressed to the CE, which was also sent to the Investigator and counsel. Salient parts are summarised below.

[44] UCF stated he could not be precise on who initiated the LinkedIn connection with Ms A, but believed it may have been Ms A. He acknowledged Ms A’s comment that they shared banter about “non-work stuff” which “pretty much made up the entirety” of their interactions as it was “made clear between us that no work conversations would be engaged”. He said he became a confidant but they did not discuss C Limited business as he was firm on keeping work boundaries in place. However, Ms A sought advice on the new role she was taking on and how to deal with a new colleague. UCF said the nature of the relationship was “friendship”. UCF referred to Ms A sharing photographs and other unrequested personal details with him. He said early on Ms A told him she was neurodiverse and had OCD.

[45] UCF recalled Ms A asking if he would like to see a picture of her when she was blonde and he said okay and she sent the picture. He did not dispute saying the word “cutie” in response, saying it was simply a word that you would use about a young person’s appearance and to him Ms A looked about 12 years old in the picture with outrageous bleached hair. To assume a romantic slant was an incorrect assumption.

[46] His use of the word ‘active’ in the question “were you active?” was taken incorrectly. He said it related to whether she was dating at a young age, and his reference to liking girls at a young age was based on him “kissing” girls from the age of 12 onwards - assuming he meant sex was not correct. He said Ms A noted she moved on from the question and thought nothing of it.

[47] UCF's recollection of the conversation about being "close friends" was different - he was seeking to do a "pulse check on the nature of our contact", so he asked her about their friendship. She described them as "close friends" which gave him a degree of comfort to continue discussions. He did not "proposition" Ms A - his point of enquiry was based on wanting to maintain a good friendship. No part of any conversation was sexually motivated, and no remotely sexual images were sent.

[48] His comment on it being "good to keep in touch" when Ms A left C Limited was entirely based on wanting to share his vast New Zealand connections to assist her with job opportunities which he regularly does with people.

[49] He said Ms A's chronology relating to Ms A's relative did not line up with their conversations, images Ms A sent of her unwell relative and Ms A advising him of the relative's passing. UCF said it seemed unfathomable Ms A would send pictures of her dying relative if she was actively trying to distance herself from him, and that she went on to advise of the sad news. UCF said he "fully acknowledged" Ms A "asked for a bit of space post the passing, but being a friend, I struggled to stay silent". He clarified Ms A's request for space was "a few days after her [relative] passed". He further said he found being shut off difficult to comprehend so he was attempting to indicate he was ready to listen. UCF said at the first sign of discomfort Ms A could have blocked him on LinkedIn, but she did not.

[50] His comments about Ms A being a "whistling Dixie" referred to the fact he would not apologise for caring about someone going through a tough time. Part of mental health awareness is to ask if "you are ok" and that is why he kept checking.

[51] He said he was acutely aware of his position within C Limited, hence his "extreme caution" in establishing this as a non-work friendship in which work was not discussed. He believed Ms A had no concerns about a power imbalance between them with no fear of his position due to her openness and the content of her messages. UCF said he went to some lengths to keep the interactions not associated to work and regularly checked in if Ms A was "ok" - "per the Bond". UCF said admittedly they had a relationship that was not "professional" but he was somewhat at a loss as to how to report it as it was not "personal" in the sense of a romantic relationship. He said the allegations were based on a collection of implied meanings that were not chronologically correct.

*EHF's response on 19 November 2022*

[52] EHF, UCF's wife, provided a written statement on 19 November 2022. She stated due to UCF's work status he can be a target for "unscrupulous females and as such works hard to maintain a clean reputation". She said she was aware of UCF's contact with Ms A on LinkedIn and had read messages between them, and there was nothing in them to suggest UCF's interest was sexual. She also referenced her concern about Ms A sharing photos of her relative's dying days, and that UCF checking in on Ms A after the relative's death was the action of a good and concerned friend. EHF also stated when UCF checked in with Ms A that should Ms A become single, he was checking the boundaries of friendship would not change because he was not looking for anything beyond friendship. EHF said the word "cute" carried no particular weight and UCF uses it all the time about all sorts of things. She also stated UCF has a habit of offering and aiding others in their work searches, and it is pure altruism on his part. EHF said she would be his support person and was happy to answer questions.

*UCF's response on 21 November 2022*

[53] On 21 November 2022 UCF provided a further unsolicited response addressed to the CE, the Investigator and counsel. UCF described having discussed the use of the word "cute" with several women and they had advised him it was "totally acceptable" and was not a romantic comment. He would also use the word "cute" in other scenarios. He also talked about his desire to help people in the job market with connections. He further elaborated on the context of him asking if Ms A was "active" - he said Ms A shared her "life journey" and when she asked about his, he shared that he was, among other things, "into girls at an early age". He said this did not relate to sexual activity - it was around discussing their youth. He reiterated he never "propositioned" Ms A and the entirety of her allegations were based on "incorrect assumptions".

[54] He reiterated he did not agree with Ms A's chronology of asking for space. He said her request was not connected to any other dialogue except to the passing of her relative, and this seemed to tie in with the screenshots Ms A sent. He asked why Ms A "simply didn't unhook our connection on LinkedIn" so he could not make contact. UCF said Ms A asked for some space "post" the relative's death which he found difficult. He says his wife's advice was to "keep checking in every few days or so", being what a friend would do. UCF also said in September/October 2022 his LinkedIn account

was compromised and he did not recall looking at Ms A's LinkedIn profile more than once.

*UCF's response on 22 November 2022*

[55] On 22 November 2022 UCF wrote to the Investigator again without prompting, saying he was taking the matter "very seriously". UCF described how he prides himself on being non-hierarchical and a previous experience involving suicide by a worker at another organisation as being the reason he approached unusual behaviour patterns in the way he does. Along with this response, UCF provided a message thread between himself and a career and workplace coach, in which he asked how a non-relative would interpret receiving a picture of a person holding the hand of a dying relative.<sup>5</sup>

*Investigator interviews UCF on 23 November 2022*

[56] UCF met with the Investigator via AVL on 23 November 2022. The interview lasted around 1.5 hours, was recorded and a transcript of the interview later prepared and provided to UCF. UCF confirmed its accuracy apart from some minor typographical errors. On 24 November 2022, UCF emailed the Investigator with a page of additional "residual thoughts".

*Investigator spoke to Ms A again*

[57] On 29 and 30 November 2022 the Investigator spoke to Ms A again by telephone. The conversations were recorded in file notes. The file note for 29 November 2022 says in response to UCF's statement about it being good for their friendship when she leaves C Limited, UCF's intention was to offer Ms A help in making connections. The file note records Ms A saying UCF was not offering his networks and was surprised at that comment because she is well-networked. She said when he said their friendship would be better when she left, she asked UCF to elaborate and he said because of "his position", and where she sat in the company.

[58] The Investigator relayed UCF's explanation that UCF used the word "cutie" as a reference to her young age. Ms A gave no comment.

[59] The Investigator advised UCF said his question about whether Ms A was "active" meant "were you dating?". In response, Ms A said she thought the question

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<sup>5</sup> There does not appear to be any context given to the coach nor is it clear UCF sought her consent to provide these messages to B Limited (or subsequently, to the Authority).

was intentionally grey and UCF is very careful with his words. Ms A said the “active” question came immediately after the photo of her as a teenager was sent.

[60] The Investigator outlined UCF’s explanation of his comment “that he was into girls from a very young age meant kissing girls”. The Investigator asked if Ms A had any response to that, and whether UCF had discussed his sexual history before. Ms A responded that UCF told her about very personal aspects of his marriage, some of which she outlined.

[61] In relation to Ms A’s allegation about UCF asking if they were close and if things would be different if Ms A did not have a boyfriend, Ms A was told UCF said he wanted to ensure she did not have the wrong impression, rather than gauging her interest in him. Ms A is recorded as responding:

I said in response I was not comfortable with that. He would ask me this every couple of weeks. Like, we’re really good friends yeah? I thought weird questions, that’s just intuitive. I would be like, yeah I guess? What am I supposed to say?

So he asked that – Do you think if you didn’t have a boyfriend we would date?

I was on the train and I was so frustrated. I said I am not comfortable with that question. He said noted. First I had said “[UCF] that is not the situation at the moment so not something I have considered. Not something that would cross my mind. I am not comfortable with that and I didn’t appreciate it.

He said like, noted.

[62] Finally, Ms A was advised UCF said she did not immediately ask for space and kept talking to him about her unwell relative for a period of time before asking for space. Ms A was asked to comment on the chronology and she relevantly stated:

- After his question about whether we would date there would have been some very brief conversations. I tried to distance myself.
- He would write the usual happy Friday, I would give very brief response.
- Re my [relative] – he would ask how is your [relative]. I would tell him not doing well. Leave it at that.
- He would message and I said I am busy right now.  
He was sending messages like ‘talk when ready’ ‘I’ll give you space until you’re ready’. ‘It makes me sad you’re going through this’. So my message ... on 7 October was referencing that.

[63] When asked about whether Ms A was able to retrieve any messages, Ms A said she tried and had now blocked UCF but had requested archived messages. Ms A expressed concern that UCF knew Ms A had left C Limited and would know she would receive a notification if he viewed her profile.

[64] The file note for 30 November 2022 records Ms A wanted to add some things after thinking about the Investigator's questions the day before. Ms A says she remembered saying she was spending time with family at the time she sent the photo of her relative in September 2022, to give her some space. She said if the photo was sent in isolation, maybe it could be a cry for help, but she sent it with a message to buy her some space, such as that she was busy with family. Ms A said by 25 September 2022 UCF was messaging either every day or second day, and she said to give her space.

*Further LinkedIn messages provided by Ms A*

[65] On 29 November 2022 Ms A sent the Investigator some retrieved LinkedIn messages from Ms A to UCF. Some messages could be characterised as banter, but also discussed Ms A's study and work history and Ms A choosing to work while on annual leave when she was meant to be seeing her boyfriend. A message dated 4 February 2022 said she was no longer on Facebook but was on Telegram and Signal, and shows Ms A sent her phone number to UCF.

*Draft report sent to B Limited's counsel*

[66] On 6 December 2022 the Investigator emailed B Limited's counsel a copy of her draft investigation report (draft report) and requested a meeting. An AVL meeting was then held between the Investigator and counsel, with the CE in attendance. The CE says he joined the meeting because he wanted to stay informed of the progress of the investigation. He read the draft report but says he did not comment on it and knew it was subject to UCF's comments and the confirmed findings. The Investigator asked whether redactions should be made to the draft report and be sent to Ms A and UCF, due to certain personal information within it. Counsel "suggested" Ms A was not entitled to see the draft report or annexures.

*Draft report provided to UCF*

[67] On 6 December 2022, the Investigator provided the draft report to UCF and invited him to comment on it by 12 December 2022. The draft report included reference to the Investigator's conversations with Ms A on 29 and 30 November 2022 along with the file notes, and the LinkedIn messages retrieved from Ms A which were not available at the time of UCF's 23 November 2022 interview.

*UCF makes a personal disclosure and provides a further response*

[68] On 8 December 2022, UCF asked to speak with the Investigator. They spoke via AVL on the same date and UCF made a personal disclosure he believed was relevant to the investigation. UCF also advised the CE of the personal disclosure.

[69] On 12 December 2022 UCF sent the Investigator a further detailed written statement.

*Final report issued 15 December 2022*

[70] The final report was sent to UCF on 15 December 2022 and made the following summarised findings on the individual allegations:

1	UCF initiated contact with Ms A on LinkedIn approximately eight months ago which either began as or evolved into one for inappropriate purposes	Substantiated
2	UCF made inappropriate comments and asked questions of a sexual nature of Ms A	Substantiated
3	In about mid-September UCF propositioned Ms A and asked if she was interested in more than friendship with him	Substantiated in part and otherwise, not substantiated
4	Ms A asked that UCF give her space. UCF ignored Ms A's request and contacted her on 30 September and 5 October 2022	Substantiated
5	UCF ignored Ms A's requests for space and contacted her on 7 October 2022	Substantiated
6	UCF ignored Ms A's requests for space and contacted her on 17 October 2022	Substantiated
7	UCF ignored Ms A's requests for space and contacted her on 21 October 2022	Substantiated
8	UCF ignored Ms A's requests for space and contacted her on 26 October 2022	Substantiated
9	On 27 October 2022 Ms A wrote to UCF saying "Do not contact me again"	Substantiated
10	On 27 October 2022 UCF responded to Ms A	Substantiated
11	On at least 25 October 2022, 31 October 2022, 2 November and around 8 and/or 9 November 2022, UCF viewed Ms A's LinkedIn profile	Substantiated

[71] In relation to allegation 3, the final report found UCF asked Ms A "whether things would be different between them if not for her boyfriend", but accepted his intent was to confirm Ms A did not have the wrong impression about their relationship. The Investigator concluded UCF had not "propositioned" Ms A, but considered Ms A honestly believed UCF was asking if she was interested in more than friendship, given

the words he used. The Investigator considered while it was poor judgment for a GM of People to let a relationship get to the point where it was necessary to clarify that their relationship was not more than friend, on its own this did not amount to a breach of the COC.

[72] The final report found the following breaches of policy had occurred:

- (a) Allegations 1(e) and 2 breached the obligation in the COC to “uphold professional integrity in relationships”.
- (b) Allegations 4-8 breached:
  - i. the obligation in the COC to treat others with “trust and respect”;
  - ii. C Limited's no tolerance approach to harassment under the I&D policy;
- (c) Allegation 11 breached the obligation in the COC to treat others with “trust and respect”.

*Letter of invitation to disciplinary meeting*

[73] On Friday 16 December 2022 the CE provided UCF with a letter inviting him to attend a disciplinary meeting on 22 December 2022. The letter summarised the final report’s findings and set out the CE’s preliminary view that UCF’s actions amounted to a serious and sustained breach of his obligations to B Limited. It said the messages exchanged over an extended period of time demonstrated a lack of judgement and a departure from the high standards of professionalism B Limited has in its leadership team. The CE’s preliminary decision was that UCF’s actions undermined the trust and confidence at the heart of the employment relationship and he did not consider an ongoing and healthy employment relationship was possible due to the high degree of trust and confidence needed in UCF as the GM People. He proposed to terminate UCF’s employment on the grounds of serious misconduct, without notice. The letter proposed a meeting at which UCF could be represented, may provide his feedback and any mitigating factors before making a final decision. The letter advised counsel for B Limited would also be attending.

[74] The Authority notes the letter contained a new allegation that on 19 December 2022, UCF had liked a post on Ms A’s Facebook profile, a possible further instance of serious misconduct.

[75] UCF says the gravity of the situation became apparent to him and he contacted Mr Hodge and then approached Mr Drake to provide legal advice. UCF requested the disciplinary meeting not take place for at least a month, which the CE agreed to.

*EHF provides further response*

[76] On or about 10 January 2023 a short letter from EHF was provided to the CE, referring to messages exchanged between UCF and Ms A in September 2022.

*Disciplinary meeting on 19 January 2023*

[77] On 19 January 2023 a disciplinary meeting was held, lasting around 3 and a half hours excluding a break. UCF, EHF, Mr Hodge, and UCF's two counsel, together with the CE and Mr Sanders attended. One of UCF's counsel took extensive notes of the meeting. The notes show Mr Sanders summarised the allegations against UCF and the final report's findings; explained B Limited's preliminary view of outcome was dismissal; and invited UCF and his representatives to provide their responses to the preliminary outcome and discuss mitigating factors they would like taken into account before making a final decision.

[78] Mr Hodge spoke about the concerns he had about the Investigator's process not being best practice including steps he would have taken as an investigator, and handed over some written points. UCF claimed had the Investigator warned him at their first AVL meeting that his actions may be found to be serious misconduct, he would have sought legal advice then.

[79] UCF provided further detailed responses to the allegations including disputing points around the chronology of messages and giving his own recollection. UCF stated he took on a "counsellor kind of mode" with Ms A after she disclosed very personal matters including about her childhood and around her relative. Both UCF and EHF then commented on what they viewed as Ms A's tendency to "over-disclose". Counsel suggested the use of the word "active" was an example of "safe clinical language", and EHF described how you ask an open-ended question to help people unload. UCF described feeling confused and hurt and did not understand why someone turned on him in the way Ms A did. He thought he and Ms A were "good mates" and wished she had told him to "fuck off" as Ms A said, and he would have.

[80] Counsel for UCF said the Investigator had not done her job properly and had come to conclusions which were not open to a fair and reasonable investigator in the circumstances because she had not asked necessary questions. Counsel said the final report was “unsafe”. UCF also spoke about his contributions to B Limited and the impact the investigation process had on him and his family. UCF referred to a number of points in mitigation of the proposed dismissal.

[81] The CE then summed up matters from his perspective, and said he would consider UCF’s responses. The CE said he still had grave concerns due to the findings of the final report and UCF’s apparent lack of judgement around his communications with Ms A. The CE reiterated that he and UCF, as members of the senior leadership team, needed to be held to the highest standards. UCF asked whether he would have a further chance to comment before a final decision was made. Counsel explained B Limited would go away and consider UCF’s responses and be in touch shortly. UCF now says he was told he would have a further chance to comment on the findings and outcome before a final decision was made.

#### *Letter of termination*

[82] By letter dated 25 January 2023 the CE confirmed the decision to terminate UCF’s employment without notice. The letter summarised UCF’s responses to B Limited’s preliminary views but advised it remained of the view UCF had committed a serious and sustained breach of his obligations to B Limited, amounting to serious misconduct under clause 6(c) of UCF’s employment agreement. The CE said he did not accept UCF’s communications with Ms A were not work-related by agreement with Ms A and outside UCF’s role as GM of People. It stated UCF’s LinkedIn profile clearly displayed that he was “GM People at [B Limited]” and that he failed to appreciate that messages and any other activity on LinkedIn reflect on B Limited and therefore must be consistent with UCF’s obligations to the company, including the COC.

[83] The CE agreed with the Investigator’s comment in the final report that:

[UCF] appears unaware of how that dynamic is borne of an imbalance of power. His persistent response throughout this investigation that their relationship proceeded on the basis that they had ‘agreed’ it was not work-related, further demonstrates his lack of awareness. If the scope of a global policy in a global company can be avoided by a senior employee (or any employee) establishing an ‘agreement’ with a more junior employee that the relationship was not work-related, the potential consequences are significant.

[84] The letter said it was inappropriate for UCF to characterise his communications with Ms A as not work-related and somehow avoid the responsibilities and expectations of his role as a senior executive within C Limited's group. The letter also said it was inappropriate for UCF to ask Ms A "were you active?" particularly because the Investigator also found UCF had followed the question up with messages that said he was "into girls from a young age". B Limited accepted the investigator's finding that those comments were of a sexual nature.

[85] The letter accepted the Investigator's finding that Ms A told UCF unambiguously that she wished to conclude their conversations on 7 October 2022, but despite this UCF continued to message Ms A. The CE agreed with the Investigator's view that as a leader within HR of a global company, UCF should be well aware of the appropriate support resources available to employees, but instead UCF did not offer her EAP or any other professional support but appeared to be trying to re-establish his friendship with Ms A. In confirming the outcome, the letter stated:

I am satisfied that, as set out in my letter of 16 December 2022, you breached [C Limited's] Code of Conduct ... policy by not upholding professional integrity in your relationship with [Ms A], and by not treating her with respect. You also breached [C Limited's] Code of Conduct ... and the Inclusion & Diversity policies by persistently messaging [Ms A] after she asked you to stop. In [the Investigator's] view, which I accept, this behaviour amounted to harassment. This behaviour breached the provision in your employment agreement that requires you to act professionally and at all times comply with all Group and Company policies.

These actions amounted to a serious and sustained breach of your obligations to [B Limited] under the Code of Conduct ..., the Inclusion & Diversity Policy, and your employment agreement. As General Manager, Human Resources, it is essential that your behaviour and interactions with other members of our staff is exemplary and reflects the highest standards of professionalism and human resources best practice. The leadership team at [B Limited] must model the behavioural expectations set for all of our staff through important policies such as the Code of Conduct ... and Inclusion & Diversity, and this is more so for you as the leader of our People function.

Unfortunately, your actions have undermined the trust and confidence that is at the heart of the employment relationship, and I can no longer trust that you are capable of discharging your duties as the General Manager of Human Resources in a manner which is consistent with the expectations and responsibilities of your role.

[86] The letter found the additional allegation regarding UCF viewing Ms A's Facebook profile not substantiated.

**Was B Limited’s decision to dismiss UCF for serious misconduct, and what it did to reach that decision, what a fair and reasonable employer could have done in all the circumstances at the time?**

*The test*

[87] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether B Limited actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred. Good faith obligations from s 4 of the Act apply.

[88] It is fair to say UCF was not in a position the great majority of other employees find themselves in when faced with allegations by their employer. His position as GM of People and many years of experience in employment relations is a clearly relevant additional factor when applying the test of justification in this case. He can be expected to be knowledgeable of current best practice in employment relations, including disciplinary processes and to model appropriate workplace behaviour and relationships in a modern workplace environment. This very uncommon and noteworthy factor has informed my assessment of the procedural and substantive justification for the dismissal.

*UCF’s criticisms of the investigation and disciplinary process*

[89] UCF says the process B Limited followed was not full and fair and the Investigator failed to conduct a thorough and fair investigation. He raises a number of criticisms including:

- (a) B Limited did not forewarn him of the nature of the 17 November 2022 meeting, and he was therefore denied the opportunity to bring a legal advisor or support person to it;
- (b) The 17 November 2022 meeting was not simply to notify UCF of the complaint, it was also to gather information relevant to the allegations against UCF. This risked UCF making adverse disclosures without having representation present;
- (c) The Investigator’s qualifications and impartiality;
- (d) The Investigator failed to inform UCF of the potential disciplinary consequences of the investigation at his interview on 23 November 2022;
- (e) The Investigator used different mechanisms to interview UCF and Ms A which was unfair and inconsistent;

- (f) The Investigator acted like a “proverbial sponge”;
- (g) The Investigator did not ask for photographs Ms A sent of her dying relative to clarify any confusion around the dates Ms A asked for space;
- (h) The Investigator chose not to answer a question posed by UCF in an email to her on 2 December 2022;
- (i) The Investigator departed from the process set out in the letter of 17 November 2022;
- (j) The Investigator “mischaracterised and overstated” her and UCF’s short discussion on 8 December 2022 as an interview;
- (k) UCF was not provided with the file note dated 26 October 2022 between Ms A and her manager prior to the dismissal;
- (l) The Investigator refused to accept a detailed explanation from UCF over his earlier “vague” responses regarding Ms A’s requests for space in September 2022, and failed to re-interview Ms A before determining UCF’s response was not truthful;
- (m) The CE failed to take steps to investigate the concerns raised by UCF and on his behalf at the 19 January 2023 meeting.

[90] UCF says these flaws resulted in the Investigator’s findings being unsafe. As such, he says it was not fair and reasonable for the CE to rely on them.

*Defects in process did not result in unfairness*

[91] I am unable to determine UCF’s dismissal was unjustifiable under s 103A of the Act solely because of defects in the process if the defects were (a) minor and (b) did not result in UCF being treated unfairly.<sup>6</sup> Applying the statutory test under s 103A requires an assessment of substantive fairness and reasonableness rather than minute and pedantic scrutiny to identify any failings, which could get in the way of a direct application of the statutory test.<sup>7</sup> I have carefully considered UCF’s criticisms about the process followed by B Limited and the Investigator. While there were defects in the process followed, some were minor, and others did not result in UCF being treated unfairly. I have not addressed all of the criticisms as they were either pedantic, minor, or not established on the information before me, and did not result in unfairness. I now address the matters of concern to the Authority.

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<sup>6</sup> Employment Relations Act 2000, s 103(5).

<sup>7</sup> A Limited v H [2016] ERNZ 501 (CA) at [46].

[92] There was some dispute between UCF and the CE about what occurred at the meeting on 17 November 2022 and how UCF reacted to it. I accept there was a potential for an imbalance of power to arise with B Limited being accompanied by counsel at the meeting. I also accept UCF's submission that the meeting held a dual purpose – to advise UCF of the allegations and request LinkedIn messages between UCF and Ms A. Holding a “dual purpose” meeting such as this could have resulted in unfairness to UCF.

[93] Having heard from UCF and the CE, I prefer the CE's evidence about the meeting as it is consistent with his speaking points and the nature and tone of subsequent correspondence between the parties. The picture UCF now paints of the meeting is not a fair reflection of what occurred. Although UCF likely felt pressure to agree to the CE's request to provide a copy of his LinkedIn messages before the end of the meeting, I am satisfied UCF willingly agreed to show his account to demonstrate he could no longer access messages between himself and Ms A. It is clear UCF intended to cooperate with the resulting investigation (and did) and would have provided the messages in any event, as he did later that day, having had the opportunity to read the letter and understand the potential disciplinary consequences of the investigation. The fact UCF had deleted the LinkedIn messages also did not form part of the allegations of serious misconduct, and UCF's explanation of why he had done so did not result in any adverse impact on UCF. UCF can also be taken to have known his rights at such a meeting and taken alternative action if he wished to.

[94] It is also clear UCF came to understand the seriousness of the investigation as it was outlined in the 17 November 2022 letter. The evidence shows he turned his mind to engaging legal support but chose not to until after the investigation process was complete. This was informed by two things - his unwavering belief that the allegations were, in his own words, “baseless”, and that the Investigator would “go nothing to see here”; and because he did not want to “harm relationships”.

[95] I agree the 26 October 2022 file note of Ms A's discussion with her manager ought to have been provided to UCF earlier. Although this was a procedural defect in B Limited's process, it did not result in UCF being treated unfairly. B Limited was up front about the origins of the allegations arising from the 26 October phone call throughout the investigation process, and says it did not rely on the file note. UCF has not said how being deprived of the opportunity to comment on the file note resulted in

any unfairness to him, nor can the Authority identify any unfairness. If anything, it tends to show Ms A's claims remained consistent during the investigation process.

[96] Concerns raised by Mr Hodge about the Investigator's qualifications and impartiality were not accepted by B Limited, nor are they accepted by the Authority.

[97] I agree that not interviewing UCF's only witness was likely a defect in the Investigator's process. However, the decision not to interview EHF was not plainly unreasonable in the circumstances given UCF agreed to EHF's response being taken as read without an interview, and the content of the messages was broadly admitted to by UCF. I am not satisfied this resulted in UCF being treated unfairly, particularly because EHF had the opportunity to be heard, and was heard, at the disciplinary meeting on 19 January 2023.

[98] UCF says the Investigator's decision to use two different mechanisms for interviewing UCF (by AVL) and Ms A (by telephone) was unfair and inconsistent. Where credibility is in issue, an in-person meeting is often clearly preferable over other means to ensure a full and fair investigation. I agree it was important for the Investigator to meet UCF using visual means, as the respondent to the complaint. However, there is no requirement that all witnesses should be questioned in the same way or to the same extent. The Authority is not satisfied the different approaches the Investigator took to interviewing UCF and Ms A resulted in UCF being treated unfairly.

[99] The Authority does not consider the Investigator acted like the "proverbial sponge" by failing to ask additional questions. She put UCF's responses to Ms A who commented where she wished to. By the time this occurred Ms A was no longer an employee of C Limited, and was under no obligation to cooperate or engage with the investigation. Ms A's responses were detailed in light of this fact. UCF was given the opportunity to comment on Ms A's further responses and the Investigator's assessment on UCF's evidence after receiving the draft report. In response, UCF provided very detailed responses to the draft findings, which were taken into account and incorporated in the final report. By way of example, UCF's personal disclosure was taken into account in relation to allegation 3 and no breach was found in relation to that allegation.

[100] The report accurately reflected that the content of the missing LinkedIn messages was largely admitted by UCF. For example, UCF admitted to calling Ms A a "cutie" in response to a photo, asked whether Ms A was "into boys" and dating, and

told her he was into girls from a young age. UCF's explanations of his intentions were not relevant to the assessment of whether such comments were objectively of a sexual nature. It was clearly open to the Investigator to make the finding that they were of a sexual nature and therefore inappropriate.

[101] It was open to the Investigator to prefer Ms A's account in relation to the limited factual matters in dispute and on matters which UCF remained vague or on which his explanations had evolved. One matter UCF focused on at the Authority investigation meeting was the timing of Ms A's initial request(s) for space. The final report found Ms A directly asked for space on 25 September 2022 which was "consistent with [UCF's] response that it was around the time (within 4 days) of her [relative's] passing". While UCF's evidence was not that Ms A asked for space "within four days" of her relative passing, his response on 18 November 2022 was that she had asked for it "a few days after" the passing.<sup>8</sup> It is clear the Investigator found UCF's earlier response to be consistent with Ms A's evidence because 25 September was within a few days of her relative's passing (namely, within four days). The Investigator also outlined sound reasons for finding Ms A's statements in relation to her initial request for space were more consistent and reliable than UCF's.

[102] The Investigator did not follow one of the steps in the investigation process set out in its 17 November 2022 letter, because the follow up interview with Ms A was not recorded and transcribed. This did not impact the fairness of the investigation because the Investigator's file notes of 29 and 30 November 2022 were detailed, and UCF clearly understood the contents of the file notes and fully responded to those in his response to the draft report.

[103] While there were some aspects in the investigation which an expert New Zealand-based workplace investigator may not describe as best practice, those aspects did not result in any discernible unfairness to UCF. Having heard from UCF during my investigation, it is clear some evidential matters he was vague or unsure about during B Limited's investigation have now become certain (and are self-serving). I find it was reasonable for B Limited to rely on the Investigator's report as its findings were supported by the evidence at the time, and the findings were reasonably open to her.

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<sup>8</sup> Common bundle, p 121 at para xi.

### *Conclusion on investigation and disciplinary process*

[104] UCF was advised of B Limited's concerns and potential consequences, given the opportunity to have a support person and/or engage representation, provided responses on several occasions, was formally interviewed by the Investigator, given the opportunity to comment on the Investigator's draft findings and further interviews of Ms A, had his comments taken into account, advised of the preliminary decision, spoke at length to the allegations and proposed outcome at the disciplinary meeting, and had his further responses genuinely considered prior to the decision to dismiss. When considering the investigation and disciplinary process as a whole and in context, the Authority is satisfied B Limited carried out a procedurally fair process. B Limited submits UCF's essential complaint is that his explanations for his behaviour and aspects of the chronology were not accepted by the Investigator. Having heard UCF's evidence, I agree that is the case.

### *Substantive justification*

[105] I am satisfied it was within the range of reasonable responses, and after considering the investigation report and hearing from UCF on 19 January 2023, for B Limited to conclude UCF's actions amounted to a serious and sustained breach of his obligations under the COC, I&D policy and his employment agreement. It concluded UCF had not upheld professional integrity in his relationship with Ms A, had not treated her with respect, and persistently messaged her after she asked him to stop, which amounted to harassment. It was entitled to conclude this behaviour breached the requirement to act professionally and at all times comply with all Group and Company policies.<sup>9</sup>

[106] That UCF's connection with Ms A ultimately resulted in her raising concerns demonstrates the risk UCF assumed by establishing and maintaining the connection he did. UCF's responses during the investigation process show he turned his mind to his employment obligations and the risks posed by the relationship at the time, when it came to discussing work matters with Ms A. It is clear UCF and Ms A did discuss Ms A's employment, despite UCF initially maintaining the relationship was entirely non-work related. UCF appears to have shared very personal information with Ms A, which she did with him. He could not regulate the extent and nature of what Ms A disclosed

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<sup>9</sup> Common Bundle, volume 1, tab 18, page 143.

to him, and at any point during the course of their eight months of contact, UCF could have chosen to stop it if he had concerns about their relationship. He did not. Rather, UCF continued to message Ms A despite a clear agreement to giving her space on 7 October 2022. When Ms A did advise UCF she felt he was harassing her, UCF failed to report it to the CE in the weeks that followed. Had UCF appropriately consulted the COC's Bond about choosing "to do the right thing", he may have entirely avoided the situation he was in.

[107] In all of the circumstances it was clearly open for B Limited to consider that as the leader of B Limited's people function, it was essential for UCF's behaviour and interactions with other members of staff to be exemplary, reflect the highest standards of professionalism and HR best practice, and to model the behavioural expectations set for all staff through its policies such as the COC and I&D policy. B Limited found UCF's actions undermined the trust and confidence at the heart of the employment relationship, and it could no longer trust he was capable of discharging his duties as the GM in a manner which is consistent with the expectations and responsibilities of the role. The Authority finds UCF's dismissal was a decision a fair and reasonable employer could have made in all the circumstances, consistent with the test for justification in s 103A of the Act.

**Has B Limited breached the duty of good faith and if so should a penalty be imposed, with some or all being payable to UCF?**

[108] UCF claims a penalty for a breach of good faith on the basis B Limited failed to provide him with the 26 October 2022 file note between Ms A and her manager. Although I have found this was a defect in the process, I was not satisfied it resulted in UCF being treated unfairly. If there was a breach in this case, it fell below the requirements under s 4 of the Act for it to be deliberate or intentional, or serious and sustained, before any penalty can be imposed for the conduct. The penalty claim is declined.

**Result**

[109] I find the decision to dismiss was one a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred. UCF's application is unsuccessful.

**Should either party contribute to the costs of representation of the other party?**

[110] 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 B Limited may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum UCF would then have 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. If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.

Sarah Blick  
Member of the Employment Relations Authority