

Reference No. HRRT 032/2013

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN SATNAM SINGH

PLAINTIFF

AND SHANE SINGH

FIRST DEFENDANT

AND SCORPION LIQUOR (2006) LIMITED

SECOND DEFENDANT

**BEFORE:**

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Ms ST Scott, Member

**REPRESENTATION:**

Mr RW Kee, Director of Human Rights Proceedings for plaintiff

Mr S Lance for first and second defendants

**DATE OF DECISION:** 2 June 2015

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**DECISION OF TRIBUNAL SETTING ASIDE DECISION GIVEN ON 9 MARCH 2015<sup>1</sup>**

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**Background**

[1] Following a hearing on 11 November 2014, the Tribunal as presently constituted delivered a written decision on 9 March 2015 finding in favour of the plaintiff that he had established as against both defendants a claim of racial harassment. Various remedies were granted, including a declaration, restraining order, training order and damages. See *Singh v Singh and Scorpion Liquor (2006) Ltd* [2015] NZHRRT 8.

[2] Neither defendant attended the hearing.

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<sup>1</sup> [This decision is to be cited as: *Satnam Singh v Shane Singh and Scorpion Liquor (2006) Ltd (Setting Aside)* [2015] NZHRRT 16]

[3] Both defendants thereafter exercised their right of appeal to the High Court but that appeal has been adjourned to allow application to be made to the Tribunal for the decision of 9 March 2015 to be set aside.

### **The application to set aside**

[4] The application to set aside was filed on 12 May 2015 and is supported by an affidavit sworn by Raj Devi, the director and owner of Scorpion Liquor (2006) Ltd (Scorpion Liquor) and by an affirmation by her son, Shane Singh, who managed the business. The essential ground of the application (supported by the affidavit evidence) is that neither Scorpion Liquor nor Shane Singh were served with notice of the proceedings and were not aware of the hearing date. In the alternative, it is submitted they have a good defence. The evidence given at the hearing on 11 November 2014 by the plaintiff is said to be wholly wrong.

### **The plaintiff's position**

[5] The plaintiff, who continues to be represented by the Director of Human Rights Proceedings, accepts the sworn evidence provided by Ms Devi and by Shane Singh raises disputed facts concerning the merits of the claim sufficient to establish they have an arguable defence. However, the plaintiff does not concede the defendants have a proper excuse for not defending the claim.

[6] For the plaintiff it is submitted that where a defendant has an arguable defence but does not have a reasonable excuse for failing to defend, the judgment should be set aside on condition the defendant pays the costs of the wasted hearing. So while the plaintiff does not oppose the application to set aside, he submits the defendants should pay costs. The defendants, on the other hand, submit they do have a reasonable excuse for failing to attend and therefore should not have to pay costs.

[7] In a joint memorandum dated 22 May 2015 Mr Kee and Mr Lance propose that to avoid further costs and the inconvenience involved in arguing about wasted costs at the present time, the question should be reserved to be dealt with as part of the substantive hearing. It is suggested that if the decision of 9 March 2015 is set aside, the Tribunal should then convene a case management conference for timetable directions to be given.

### **Discussion**

[8] Neither the Human Rights Act 1993 nor the Human Rights Review Tribunal Regulations 2002 make explicit provision for the Tribunal to set aside a decision where a hearing has taken place in the absence of a defendant who, contrary to the Human Rights Review Tribunal Regulations, regs 12, 13, 18 and 19(3) has not been given notice of the proceedings or of the date of hearing or of both.

[9] The Tribunal is, however, required to act in accordance with the principles of natural justice, in a manner that is fair and reasonable and according to equity and good conscience. It must also act according to the substantial merits of the case, without regard to technicalities. See s 105 of the Act which provides:

#### **105 Substantial merits**

- (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
- (2) In exercising its powers and functions, the Tribunal must act—
  - (a) in accordance with the principles of natural justice; and

- (b) in a manner that is fair and reasonable; and
- (c) according to equity and good conscience.

**[10]** Where, as here, in the mistaken belief a defendant has been served with the proceedings and given notice of the date of hearing, the Tribunal proceeds in the absence of the defendant, a miscarriage of justice may well occur. This would be incompatible with the Tribunal's statutory obligations.

**[11]** While the error could be corrected on appeal, a simpler and more expeditious remedy is for the Tribunal, on application, to set aside the decision. As to the procedure, an analogy can be drawn with High Court Rules, r 15.10. As noted in *Sharman v New Zealand Association of Counsellors Inc* [2013] NZHC 3553, [2014] NZAR 638 at [59], tribunals are free to adopt and share their own procedures, as long as fairness is the touchstone.

**Formal order**

**[12]** In the present case the Tribunal is asked to make, in effect, a consent order setting aside the decision of 9 March 2015. Having regard to the affidavit evidence and to the respective positions of the parties as set out in the joint memorandum dated 22 May 2015, we are satisfied there has been, or may have been, a miscarriage of justice. The decision of 9 March 2015 is accordingly set aside. Whether or not the defendants should pay the costs of the wasted hearing held on 11 November 2014 is reserved to be dealt with as part of the substantive hearing.

**Future conduct of the case**

**[13]** To ensure these proceedings are progressed to a hearing without delay the Secretary is directed to arrange a teleconference at the earliest practical date, such conference to be convened by the Chairperson with a view to case management directions being given.

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**Mr RPG Haines QC**  
**Chairperson**

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**WV Gilchrist**  
**Member**

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**Ms ST Scott**  
**Member**