

UNDER Reference No. HRRT 088/2016
BETWEEN THE HUMAN RIGHTS ACT 1993
SAMOA NEEMIA
PLAINTIFF
AND INTERNATIONAL WASTE LIMITED
DEFENDANT

AT AUCKLAND

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms J Foster, Deputy Chairperson

Dr SJ Hickey MNZM, Member

Mr RK Musuku, Member

REPRESENTATION:

Ms O Woodroffe for plaintiff

Mr T Simmonds and Ms O Cann for defendant

DATE OF HEARING: 30 September, 1, 2, 3 and 4 October 2019

DATE OF DECISION: 19 July 2021

DECISION OF TRIBUNAL¹

INTRODUCTION

[1] In September 2014 Mr Samoa Neemia, a Samoan then aged 62, resigned from his employment at International Waste Ltd (Interwaste). Had he not resigned he would have been dismissed because of a recent breach of company policy and his disciplinary record. Mr Neemia claims that Interwaste discriminated against him on the grounds of age, race and ethnicity as a Samoan. His claims of discrimination are denied by Interwaste.

¹ [This decision is to be cited as *Neemia v International Waste Ltd* [2021] NZHRRT 32.]

BACKGROUND

[2] Interwaste is in the business of the safe and efficient management of biosecurity and healthcare risk wastes. Interwaste's business includes managing biosecurity (quarantine) waste at points of entry (ports and airports) into New Zealand; treating medical, clinical and controlled wastes; the quarantine of waste and container sweeping; secure destruction of waste; advanced recycling and waste tracking. The nature of these operations and the need to comply with numerous legislative requirements to ensure Ministry for Primary Industries' compliance certification required Interwaste's safety policies and procedures to be strictly complied with by employees.

[3] Mr Neemia was employed at Interwaste from 14 October 2010 to 4 September 2014 as a plant assistant in the waste recycling plant. Mr Neemia was aged 58 when employed by Interwaste and was aged 62 when he resigned.

[4] Mr Neemia worked in the inwards goods area and was required to work under instruction to achieve safe and compliant recycling and treatment of waste. Mr Neemia reported to the branch manager. For the first three years of Mr Neemia's employment his branch manager was Mr Young, and he was not subject to any disciplinary action.

[5] In November 2013 Mr Young left the company and Mr James was promoted from supervisor to the role of branch manager. From November 2013 Mr Neemia faced numerous disciplinary investigations for breaching company safety policies and procedures. Mr James was more compliance focused than his predecessor in relation to health and safety issues.

[6] The first disciplinary investigation Mr Neemia faced related to an incident on 20 November 2013 when Mr James saw that Mr Neemia had breached company policy by having both roller doors open at the same time in the truck lobby. Mr Neemia was upset about the way Mr James allegedly spoke to him about the breach. He went to see the human resources manager, but he did not make a formal complaint about Mr James. The outcome of the disciplinary investigation was that Mr Neemia received a verbal warning for breach of company policy.

[7] In 2014 Mr Neemia faced three further disciplinary investigations, the outcomes of which were as follows. On 20 May 2014 he received a final written warning for not following correct procedure for shredding material. On 4 June 2014 he received another final written warning for having both roller doors open in the truck lobby.

[8] On 4 September 2014 Mr Neemia resigned following another disciplinary investigation. Had he not resigned, Interwaste would have dismissed him for leaving quarantine waste pallets outside. That was a serious breach of policy and biosecurity requirements.

[9] On 6 July 2016 Mr Neemia made a complaint of discrimination to the Human Rights Commission. The parties attended mediation but the matter was not settled.

[10] At the Tribunal hearing of this claim a Samoan language interpreter was available to assist Mr Neemia and interpret any part of the proceeding as required. At the hearing Mr Neemia's counsel confirmed he did not require Samoan translations of the written statements of evidence, all of which were provided in English, including his own. Mr Neemia's and Mr Tua's written statements of evidence were taken as read for the record, and they otherwise gave their evidence in Samoan. The evidence given by

Interwaste's witnesses during examination was initially all interpreted for Mr Neemia into Samoan, and after he advised this was unnecessary, it was interpreted for him as and when he required this.

MR NEEMIA'S CLAIM

[11] On 9 December 2016 Mr Neemia filed these proceedings alleging Interwaste had subjected him to racial and age discrimination, racial harassment and victimisation in breach of ss 22, 63 and/or 66 of the Human Rights Act 1993 (HRA).

[12] Mr Neemia alleges it was discriminatory for Interwaste to give different treatment to his report about Mr James allegedly breaching company policy (swearing and verbal abuse) compared to Mr James' report about Mr Neemia allegedly breaching company policy (having both doors open in the truck lobby). Mr Neemia also alleges Interwaste discriminated in subjecting him to verbal bullying and swearing, bullying him by repeatedly disciplining him, and making him resign under duress.

[13] Interwaste denies Mr Neemia's allegations of discrimination in fact and law.

[14] It is for Mr Neemia to establish on the balance of probabilities that Interwaste has discriminated against him as alleged. See HRA, s 92(3).

[15] As the evidence of the parties is diametrically opposed, the outcome of these proceedings will depend on the credibility findings made by the Tribunal.

THE EVIDENCE BROUGHT BY MR NEEMIA

[16] It is unnecessary to recite at length the evidence brought by Mr Neemia; a summary of the evidence is sufficient.

Mr Neemia's evidence

[17] The key event that Mr Neemia focussed on in his case was the alleged discriminatory treatment of him arising from events on 20 November 2013. That is the difference in treatment given to Mr Neemia's report to the human resources manager, Ms Shandil, about Mr James' alleged behaviour (swearing and verbal abuse) compared to Mr James' report about Mr Neemia's alleged behaviour (having both doors open at the truck lobby), when both were breaches of company policy.

[18] Mr Neemia's account of events on 20 November 2013 was as follows:

[18.1] He was working in the truck lobby and had both roller doors open at the same time. Seeing this, Mr James yelled and swore at him, for example saying "Fucking Sam put one fucking door down and then one door up".

[18.2] Mr Neemia was so upset at being spoken to this way that he went to see the human resources manager, Ms Shandil. Mr Neemia told Ms Shandil that Mr James swore and yelled at him and he wanted to make a complaint about Mr James, but no disciplinary action was taken against Mr James.

[18.3] That during the meeting with Ms Shandil she said to Mr Neemia that as he was over 60 years of age, it would be hard for him to find another job.

[18.4] Later that day Mr James gave him a letter advising of the disciplinary investigation for having both doors open in the truck lobby and threatened him, saying “Oh Sam, see who is going to be the first to walk out.”

[19] Mr Neemia said that Ms Shandil telling him it would be hard for him to find another job because of his age made him feel powerless and this is why he didn’t speak up about subsequent unfair and bullying treatment of him by Mr James. On cross-examination Mr Neemia said his relationship with Ms Shandil was good, apart from when he went to seek her help in this instance.

[20] Mr Neemia said he was subject to verbal abuse and bullied by Mr James on multiple other occasions in the following ways:

[20.1] That Mr James swore at him on numerous specific occasions (which he detailed) during 2013 and 2014.

[20.2] That Mr James used swear words every time Mr Neemia asked him something.

[20.3] That Mr James told Mr Neemia he was dumb and that he didn’t like Samoan people.

[20.4] That in a meeting on 19 May 2014 Mr James threatened Mr Neemia, saying “What is your next move Sam?” and when asked what that meant said “Sorry, you’re gone”.

[20.5] That Mr James also made derogatory comments about him to other staff members, telling one staff member that Mr Neemia had been lying about having unloaded a truck and saying to another staff member that he didn’t like Mr Neemia because he was a Samoan.

[20.6] That Mr James asked a staff member whether Mr Neemia “was crazy” and then told that staff member that the general manager, Mr Richardson, didn’t like Mr Neemia. Mr Neemia said Mr James was subsequently made to apologise to him for this.

[21] Mr Neemia said his being disciplined for failing to follow correct procedure for shredding material, including not using correct PPE (for which he received a final written warning on 20 May 2014) was another example of Mr James bullying him. Mr Neemia produced photos he took of himself after this incident that showed how his face had been splashed because he was not wearing the correct PPE. Mr Neemia said it was Mr James’ fault that he was wearing an incorrect PPE mask that day. Mr Neemia said he was wearing a smaller mask that day because the PPE mask he usually used to ensure liquids were not sprayed on his face was damaged. Mr Neemia said he had asked Mr James for the correct mask but none was provided to him. Mr Neemia said the smaller mask he was wearing was one that had been given by a customer for disposal and that Interwaste had told staff to keep and use these masks.

[22] Mr Neemia said he had resigned under duress, out of fear that he would never get a job because of his age. He said Ms Shandil had told his support person to advise him to resign instead of being dismissed.

[23] Mr Neemia said his account was supported by his handwritten notes. Mr Neemia said he recorded in his notebook every time Mr James swore at him or acted strangely towards him and that he had started writing down notes in his notebook should something happen at work. Mr Neemia also said he was unable to find one of his notebooks, but had notes made from his notebook which he prepared for his lawyer a few years ago.

[24] Mr Neemia provided the Tribunal with copies of over 20 pages of handwritten notes. The notes referred to numerous things that had happened at Interwaste from 2013 to 2015, and included by way of example the following:

... on this Day 20 Nov 2013: Greg watching me, yelling to me and said f..k you, Sam put one fucken door down and then one up. He continued yell at me with foul language.

[25] The notes were written on pages taken from random pages from old office diaries (1997 and 2009). The dates of the diary pages had no relationship to the dates of the events the notes related to. Some of the notes were in different handwriting and there were multiple notes about some events.

Mr Tua's evidence

[26] Mr Mene Tua was an Interwaste employee from 2009 to 2018. Mr Tua worked with Mr Neemia and was also directly supervised by Mr James.

[27] Mr Tua said Mr James was rude, condescending, racist, a bully, very authoritative, frequently swore, and was often angry and yelled at staff. Mr Tua said Mr James treated Mr Neemia and himself (who was also Samoan) differently from others, as when he gave them instructions he swore and shouted, but when he gave instructions to the "white people" he spoke softly.

[28] Mr Tua said he saw and heard Mr James bully and swear at Mr Neemia many times and recalled one day seeing Mr James at the canteen with Mr Neemia, who was crying. Mr Tua said seeing a Samoan man crying upset him, so he shared his concern with Mr Cherrington, the engineer at Interwaste at that time, but Mr Tua did not know if Mr Cherrington talked to Mr Neemia about it.

[29] Mr Tua said Interwaste was not a nice place to work. Mr Tua said he resigned in 2018 after system changes were made and he could not physically manage the job. Mr Tua said he was ignored when he complained to management and tried to challenge the system changes.

[30] Mr Tua said he never made a complaint about Mr James at any time as he was reluctant to do so. Mr Tua said he had a good relationship with Ms Shandil, the human resources manager, and described her as a reasonable person. Mr Tua said he really liked Mr Richardson and considered him a good man.

THE EVIDENCE BROUGHT BY INTERWASTE

[31] As is the case for the evidence called by Mr Neemia, it is only necessary to provide a summary of the evidence brought by Interwaste.

Mr Richardson's evidence

[32] Mr Derek Richardson is Interwaste's general manager, and has held this role for over ten years.

[33] In his evidence Mr Richardson detailed how Interwaste is a multicultural, diverse workplace with many different ethnicities (approximately 15) and staff of all ages, including a number aged 60 and one over 70, and how in 2016 when Mr Neemia resigned from Interwaste, there were a large number of employees aged over 50 and a number over 60.

[34] Mr Richardson also described Interwaste's operations, the managing and treating of biosecurity (quarantine) waste, and how given the nature of these operations Interwaste had to comply with numerous legislative requirements to ensure compliance certification from the Ministry for Primary Industries. He detailed how, given this, and the substances staff were working with, Interwaste prioritised production, maintenance, application and training of appropriate policies and procedures for staff, and that high importance was given to compliance with company policies and procedures. Mr Richardson described how this was emphasised at all stages of employment and induction, through ongoing training on standard operational procedures and updates and easy access to health and safety policies and manuals, and how staff were required to individually sign off that they understood each section of the manual. Mr Richardson confirmed that Mr Neemia had signed off on each section.

[35] Mr Richardson emphasised that for the health and safety of the workplace and professional credibility and reputation of the business, breaches of policies, particularly serious and repeated ones, needed to be dealt with appropriately.

[36] Mr Richardson was aware that Mr Neemia was subject to a number of disciplinary investigations as he was kept appraised in similar ways when other employees were subject to these procedures. Mr Richardson confirmed that under company procedures Mr Neemia could have appealed any of the disciplinary decisions to him, but he never did so.

[37] Mr Richardson said he was frequently at the site where Mr Neemia worked and at times would stop and chat with him as he did with all staff, and said that these interactions were always friendly but professional, speaking on the mutually-liked topic of fishing. Mr Richardson said Mr Neemia never indicated any concerns to him at any time.

[38] Mr Richardson said he only became aware of Mr Neemia's complaints after he left Interwaste in 2016, after Mr Neemia complained to the Human Rights Commission.

[39] Mr Richardson said based on his involvement in Mr Neemia's disciplinary matters and everything he had reviewed relating to this matter, he considered Mr James and Ms Shandil acted professionally and appropriately. Mr Richardson denied that Mr James ever said to him that he did not like Mr Neemia. Mr Richardson's evidence was that Mr James was more thorough than the previous manager.

[40] In relation to Mr Neemia's resignation, Mr Richardson said Ms Shandil had asked him to approve Mr Neemia's request he be permitted to resign rather than being dismissed to assist him with his future employment and he had approved this.

[41] When cross-examined regarding Mr Neemia being disciplined in May 2014 for not wearing correct PPE and not operating the shredder correctly Mr Richardson said based on the photo Mr Neemia took of himself after this incident he could not have been following correct procedure and practice. Mr Richardson said Mr Neemia was disciplined as he should not have been standing where he was operating the machine, he should not have been looking into the shredder and he should have been wearing correct PPE.

Mr Richardson said correct PPE equipment was always available for staff to use, that staff used it and that there were frequent audits to check PPE was available.

[42] Mr Richardson said Mr Tua resigned in December 2018. This was after a major technical overhaul of the processing plant equipment increased the capability and productivity rate and the operational team and shift structures were reorganised. Mr Richardson said after these changes were implemented Mr Tua expressed concerns to the branch manager regarding his capability to perform his duties as a machine operator and reported he was feeling tired. Mr Tua was offered an alternative of being reassigned a new position as warehouse operator at the transfer station at Wiri. Mr Richardson said this position was less complex and required significantly less physical labour, but with the same pay rate. Mr Tua declined the alternative option and decided to resign.

[43] Mr Richardson expressed surprise at the content of Mr Tua's evidence given his longstanding relationship with Mr Tua and his employment history with Interwaste.

[44] Mr Richardson referred to the 27 May 2014 resignation letter Mr Tua had sent him that advised he was resigning and also states:

Derek I would like to say thank you very very much for your help for me, I know you are the good boss. Forgive me if I do something wrong. I really like the job, but I know I'm very illness.

[45] Mr Richardson noted some time after his resignation for health reasons Mr Tua requested it be withdrawn and by that stage Mr James had already begun recruiting for that role. However, to help Mr Tua, Mr James offered him a casual contract with a view to offering him a full-time position when one became available. In January 2015 Mr Tua was offered by Mr James (through HR) and accepted a full-time position. Mr Richardson also noted the person appointed to Mr Tua's original position is of Samoan nationality and is still employed by Interwaste.

Ms Shandil's evidence

[46] Ms Shandil was the human resources manager and health and safety manager at Interwaste from June 2008 to December 2018. Her role was to support the general manager on all human resources matters, assist branch managers and all staff with human resources and health and safety training across all sites. Ms Shandil's office was located at the treatment site where Mr Neemia worked.

[47] Ms Shandil said Interwaste was a multicultural and multi-age workforce and that being of Indian origin, born in the Islands and raised in New Zealand, she was able to relate well to most of the staff. Ms Shandil said all her dealings with Mr Neemia were of a professional nature. She described having a good working relationship with Mr Neemia, saying they were very comfortable talking to each other openly and honestly, and that she did not have difficulty communicating with him.

[48] Ms Shandil's evidence set out Mr Neemia's employment record. Ms Shandil said Mr Neemia's age when employed and his ethnicity were not a feature of any discussion or consideration at that time. Ms Shandil noted Mr Neemia's position was reviewed in a company-wide redundancy process in 2011 and he was not made redundant, and that he received annual hourly pay increases every year.

[49] Ms Shandil was involved in all of Mr Neemia's disciplinary investigations faced for breaches of policies and procedures. Ms Shandil said in respect of each of these the standard company process as set out in Interwaste's manual of human resources and

other policies was followed as shown in the documentation presented to the Tribunal and that it was part of her job to make sure these processes were appropriately followed. Ms Shandil said in each case she gave Mr Neemia detailed information on why the manager (Mr James) is pedantic about compliance and safety and how negligence by an employee can become a big environmental and economic issue to the country.

[50] Ms Shandil confirmed that on 20 November 2013 Mr Neemia came to see her in her office at about 9.30am as he was upset by how Mr James had spoken to him. Ms Shandil said Mr Neemia told her he had not closed one roller door before opening the other and recognised his conduct was not in accordance with Interwaste's policy. Ms Shandil said Mr Neemia did not mention Mr James swearing. Ms Shandil said Mr Neemia did not want to make a complaint about Mr James, although she sought to encourage him to make a complaint if he felt he was being treated unfairly, advised him a number of times he could make a complaint and assured him there would be no negative repercussions in doing so. Ms Shandil denied saying or indicating that if he made a complaint about Mr James he would lose his job. Ms Shandil said it was Mr Neemia who said at the meeting that because he was over 60 years old, finding a job would not be easy for him.

[51] Ms Shandil said her view was that Mr Neemia was attempting to defend his breach of biosecurity regulations and shift the focus, but when the option of making the formal complaint was raised he did not want to do that. Ms Shandil referred to the note she had recorded after the meeting with Mr Neemia, that records he knew he had done something wrong but was unhappy with the way he was treated, but he did not want to put in a complaint; he was just getting the matter off his chest and he felt better after giving his version of events.

[52] Ms Shandil was positive that if Mr Neemia had told her Mr James was swearing she would have mentioned that in her note. Ms Shandil said in her experience Interwaste was not a workplace in which staff swore at other staff or were offensive to other staff, but the work environment was a noisy one and you did have to speak loudly and sometimes yell to be heard over equipment.

[53] Ms Shandil said she told Mr Neemia she would speak to Mr James but because no formal complaint was made she could not take it any further than that. Ms Shandil said she did informally address Mr Neemia's concerns and discuss the matter with Mr James. Ms Shandil confirmed no disciplinary action was taken against Mr James because there was no formal complaint and she noted there was a clear grievance procedure set out in Mr Neemia's employment contract that he chose not to engage in.

[54] Ms Shandil said she agreed with Mr James that disciplinary action should be taken against Mr Neemia for his having both doors open in the truck lobby. Ms Shandil said Mr Neemia was subject to disciplinary action because he had by his own admission breached a company policy, and he had been reminded about the importance of that previously.

[55] Ms Shandil emphasised she did not take instructions from Mr James and that he was required to liaise with her for employment matters as she was the human resources manager. On cross-examination Ms Shandil firmly rejected the suggestion she had discriminated against Mr Neemia because he was a worker on the floor, Samoan and old, whereas Mr James was a manager, saying:

Greg was not my manager. I was the human resources manager, I was the one in the business longer than Greg, there was no way I would listen to Greg.

[56] Ms Shandil said apart from the time Mr Neemia came to see her on 20 November 2013 neither he nor anyone else had ever raised any matter with her concerning Mr James' treatment of Mr Neemia. Ms Shandil said she had no knowledge of Mr Neemia's allegations until he brought his discrimination complaint in 2016.

[57] In respect of Mr Neemia's allegations regarding his being disciplined in May 2014 for failing to follow the correct procedure and wear the correct PPE running the shredding machine, Ms Shandil's evidence was as follows. Ms Shandil said that had Mr Neemia worn the correct PPE he would not have been splashed and that the equipment and PPE had been used safely by staff for many years prior to this. Ms Shandil denied Interwaste ever provided or condoned the use of used masks that had been deposited with the company for disposal. Ms Shandil said she discussed the matter with Mr James, who advised Mr Neemia had been told many times not to operate the shredder in the way he was and without using the correct PPE. Ms Shandil noted the final warning letter issued to Mr Neemia on 20 May 2014 that he acknowledged by signing, advised he had the right to appeal the decision to the general manager and it was an opportunity for him to raise any concerns, yet he did not appeal or raise any concerns.

[58] Ms Shandil denied Mr Neemia's allegations that he was pressured to retire and was subject to comments and questions about retirement and his age.

[59] Ms Shandil noted Mr Neemia's resignation on 4 September 2014 followed a formal disciplinary procedure ending with him being found to have committed a serious breach of policy in biosecurity requirements by leaving quarantine waste outside. Ms Shandil said she advised Mr Neemia at the conclusion of the meeting on that day that Interwaste intended to dismiss him and he asked that instead of terminating his employment he be allowed to resign, to be better positioned to gain other employment. Ms Shandil said to try and help him, and with Mr James' support, she got Mr Richardson's agreement to that request, and this was granted simply as a gesture of goodwill so Mr Neemia could avoid any potentially negative consequences of having to say he was dismissed.

[60] Ms Shandil noted health and safety issues had become more prominent and Mr James was a more compliance focused manager, but that Mr Neemia was not the only person to be disciplined for breaching company policies. Ms Shandil said between 2009 to 2016 Interwaste terminated 15 people for breaching company policies.

Mr James' evidence

[61] Mr Greg James was employed by Interwaste in March 2013 and promoted to branch manager in November 2013 after the previous longstanding branch manager left.

[62] The branch manager's role included leading operations, maintaining and controlling general plant compliance, overseeing training and the supervision and safety of 17 staff, including Mr Neemia.

[63] Mr James said he was involved in all of Mr Neemia's disciplinary investigations alongside Ms Shandil and that these were conducted fairly in accordance with policies. Mr James said when he took over disciplinary matters Mr Neemia was not the only person who was disciplined. Mr James said Mr Neemia was repeatedly disciplined as he continually failed to adhere to company policies.

[64] Mr James was adamant that he never swore at, verbally abused, bullied, mistreated, or pressured Mr Neemia to retire, or was discriminatory in any way to Mr Neemia.

[65] Mr James denied disliking Samoan people and noted he had re-employed Mr Tua after he resigned in 2014 and that the person he employed to replace Mr Neemia and who is still employed at Interwaste is Samoan.

[66] Mr James said he was aware of good workplace practice and the importance of managing people fairly, with respect, and with compassion. Mr James said he never swore at work and that all his dealings with Mr Neemia were according to policies and procedures, and fair. Mr James said if he raised his voice to staff it was because the plant is very noisy and the machinery was loud.

[67] Mr James said on 20 November 2013 he did raise his voice and speak authoritatively to Mr Neemia because he had both doors open at the same time in the truck lobby, but he did not swear or verbally abuse him. Mr James said he raised his voice and spoke authoritatively as Mr Neemia had been spoken to about the doors several times and had breached a clear known and important policy connected to the Biosecurity Act. Mr James said as the manager he had to remind Mr Neemia what the policy was and could speak authoritatively without breaching company policy.

[68] Mr James denied it was his fault Mr Neemia was not using the correct PPE when using the shredding machine in May 2014. Mr James said Mr Neemia had not asked him to bring the right equipment nor asked for a replacement. Mr James said staff were aware there were several types and sizes of PPE available and they selected one as and when required. Mr James noted Mr Neemia had never complained to him about correct PPE not being available. Mr James said Interwaste did not condone the use of used masks that were given for disposal as that would be a serious policy breach.

[69] Mr James said Mr Neemia was not the only person he disciplined for failing to comply with company policies.

Evidence assessment

[70] As can be seen, Mr Neemia's account of events on which his allegations of discrimination are based differs entirely from that of Interwaste. The Tribunal prefers the evidence of Interwaste. It has not been persuaded to accept Mr Neemia's evidence in support of his account for the following reasons.

[71] The reasons why Mr Neemia was assessed as not being a credible witness include the following:

[71.1] Mr Neemia denied knowing why he had been disciplined for breaching company policies and maintained he had no idea what policies he had breached as it was never explained to him. This was despite clear documentation showing that for each of the disciplinary investigations Mr Neemia faced Interwaste had followed the standard disciplinary process. That process included Mr Neemia being advised in writing of the reasons for the investigation and him attending both an initial investigatory meeting to discuss the matter then a further meeting to discuss the outcome. In these circumstances it is simply not credible that Mr Neemia did not know why he was being disciplined.

[71.2] In relation to the disciplining of Mr Neemia for not using correct PPE, his allegations included that it was Mr James' fault he was wearing an incorrect PPE mask as he had failed to bring him the correct one, and that Interwaste condoned staff using masks that had been deposited for disposal. It is self-evident it would be a serious compliance breach for Interwaste to condone staff using such masks and Interwaste's unchallenged evidence was that the correct PPE masks were readily available for staff to access themselves.

[71.3] Mr Neemia gave no credible reason why he failed to raise any of his allegations until nearly two years after he left Interwaste. Mr Neemia's explanation was that this was because he had been made powerless to raise later complaints because Ms Shandil scared him into not making a complaint on 20 November 2013. This is not a credible explanation given the ability for Mr Neemia to raise allegations during the formal disciplinary process and his acknowledgement he had a good relationship with Ms Shandil.

[71.4] Mr Neemia relied on his handwritten notes to support his allegations but as these were not a reliable contemporaneous or near contemporaneous record of events, they were given no weight by the Tribunal. Mr Neemia made clear in his evidence that he was unable to find one of his notebooks but had notes made from his notebook that he prepared for his lawyer. He, however, gave no evidence to distinguish which, if any, of the notes were recorded contemporaneously or near the time of the events from those that were prepared for his lawyer at a much later time. Accordingly, the notes were not established as a reliable contemporaneous or near contemporaneous record of events at the time.

[72] Mr Tua was also assessed as not being a credible witness. Mr Tua gave evidence in strident terms, however, it is inconsistent with the following facts:

[72.1] His evidence of Mr James not liking him or Samoan people is inconsistent with Mr James reappointing him in 2014, even though his position had already been filled and also inconsistent with Mr James appointing a Samoan person to replace Mr Neemia.

[72.2] His evidence of Interwaste not being a good place to work is inconsistent with his statements in his 2014 resignation letter and with Interwaste offering him in 2018 an alternative position that required less physical labour.

[72.3] He gave no persuasive explanation as to why he never complained to management about Mr James despite him having a good relationship with Ms Shandil and Mr Robinson and having been willing to challenge system changes at Interwaste in 2018.

[73] In contrast the evidence of Mr Richardson, Ms Shandil and Mr James was clear, measured, logical, consistent and in many cases supported by contemporaneous documentation. Accounts of what had been said to have happened at a closer time to the incident are more likely to be reliable as memory is fresher. In addition, both Ms Shandil and Mr James are no longer employed by Interwaste so their evidence could be freely given without any concern of possible direct adverse effects on their livelihood. The Tribunal has no hesitation in accepting Mr Richardson, Ms Shandil and Mr James as honest and truthful witnesses.

[74] The Interwaste witnesses denied all of Mr Neemia's allegations of discrimination.

[75] The key focus of Mr Neemia's case was how his report to Ms Shandil on 20 November 2013 was treated. Ms Shandil was cross-examined extensively as to what occurred that day. Ms Shandil was clear Mr Neemia did not tell her Mr James swore at him. She said that had he done so she would have recorded that in her meeting note. This is consistent with Mr James' evidence that he did not swear at Mr Neemia but raised his voice and spoke authoritatively. Ms Shandil was also positive that Mr Neemia did not want to make a complaint about Mr James despite her advising him he could.

[76] Ms Shandil's evidence is consistent with her meeting notes. The note records Mr Neemia's concerns were that Mr James was "yelling" at him, that he felt "he was looked down on" and "did not like the tone" Mr James had used and that if Mr James "would have approached in a different manner, then Sam said he would not have felt bad. He said he knew he was wrong". The note also records "He does not want to put a complaint or anything its just he is letting off his chest (sic)".

[77] Ms Shandil firmly rejected Mr Neemia's allegation she scared him into believing that because of his age he would not get another job to prevent him from laying a formal complaint. Further, there is no logical basis for Ms Shandil to take that approach. Ms Shandil's explanation why no complaint was taken against Mr James is entirely logical and plausible if nothing had been said to her about Mr James swearing and no formal complaint was made. Ms Shandil repeatedly affirmed in her evidence that Mr Neemia was subject to disciplinary action, as he had by his own admission, breached a company policy and he had been reminded about the importance of that previously.

[78] Interwaste's version of events on 20 November 2013 is to be preferred as Ms Shandil and Mr James are considered to be credible witnesses and their evidence is supported by contemporaneous documentation, whereas Mr Neemia was not assessed as a credible witness.

[79] Interwaste's evidence refuted all of Mr Neemia's other claims of being mistreated whilst employed at Interwaste in 2013 and 2014. In brief, Mr James denied he ever swore at, verbally abused, bullied or mistreated Mr Neemia and both Mr James and Ms Shandil denied they ever pressured Mr Neemia to retire or resign. As Ms Shandil and Mr James are considered to be credible witnesses and Mr Neemia and Mr Tua are not, Interwaste's evidence is preferred.

[80] Further, Mr Neemia's claim of discrimination on the basis of his age, race or ethnicity is less plausible given the context in which these events occurred.

[81] Interwaste is a multicultural, diverse workplace with many different ethnicities and staff of all ages, including a number over 60 years of age. Mr Neemia was aged 58 when employed and Ms Shandil's unchallenged evidence was that his age and ethnicity were not a feature of any discussion or consideration at that time. Further, Mr Neemia's position was retained following a company-wide redundancy process in 2011. The person appointed by Mr James to replace Mr Neemia is Samoan.

[82] Interwaste is a workplace where the nature of the work required staff to meet high standards of compliance with policies and procedures. Mr Neemia was disciplined for breaches of company policies and procedures to biosecurity requirements and he was not the only worker who was disciplined for such breaches.

CONCLUSION

[83] Mr Neemia has failed to establish on the balance of probabilities the facts on which his alleged claims of discrimination are based. That is, he has failed to establish his allegations that his age, race or ethnicity were factors in determining how his 20 November 2013 report was treated, or that on any other occasion he suffered other ill-treatment because of his age, race or ethnicity.

[84] The claim filed by Mr Neemia against Interwaste is dismissed.

COSTS

[85] Costs are reserved. No submissions were made regarding costs. Unless the parties come to an arrangement on costs the following timetable is to apply:

[85.1] Interwaste is to file submissions as to the costs order it seeks within 14 days after the date of this decision. Mr Neemia's submissions in response are to be filed within the 14 days that follow. Interwaste is to have a right of reply within seven days after that.

[85.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

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Mr RPG Haines ONZM QC
Chairperson

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Ms J Foster
Deputy Chairperson

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Dr SJ Hickey MNZM
Member

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Mr RK Musuku
Member