
IN THE HUMAN RIGHTS REVIEW TRIBUNAL
I TE TARAIPUNARA MANA TANGATA

[2024] NZHRRT 3

	Reference No. HRRT 067/2021
UNDER	THE HUMAN RIGHTS ACT 1993
BETWEEN	ITWINDER SINGH
	PLAINTIFF
AND	STEPHEN MCKEE
	DEFENDANT

AT AUCKLAND

BEFORE:

Ms J Foster, Deputy Chairperson
Ms LJ Gorringer JP, Member
Ms BL Klippel, Member

REPRESENTATION:

Mr I Singh in person
Mr PF Wicks KC for defendant

DATE OF HEARING: **1 August 2023**

DATE OF DECISION: **2 February 2024**

DECISION OF TRIBUNAL¹

[1] Mr Singh worked for approximately 10 years as a stable hand for a thoroughbred racehorse training business that was owned initially by Mr McKee's late father and from 2017 was owned by Mr McKee.

¹ [This decision is to be cited as *Singh v McKee* [2024] NZHRRT 3.]

[2] Mr Singh claims that during his employment, Mr McKee subjected him to racial harassment in breach of s 63 of the Human Rights Act 1993 (HRA) as he commented on and made fun of his Indian accent, made belittling remarks about Indians and objected to him and other staff speaking Hindi, telling them to speak English at work.

[3] Mr McKee admits on occasion he engaged in “group banter” where he had made joking comments regarding Indians and admits he had asked Indian employees to speak English only at work for safety reasons, but he denies Mr Singh was subjected to racial harassment in breach of HRA s 63.

[4] Mr Singh also claims Mr McKee subjected him to victimisation in breach of s 66 of the HRA as his complaint against another staff member was treated differently to how complaints by other staff members were treated. Mr McKee also denies this claim and says that as it arises from the same circumstances that form part of a claim Mr Singh filed in the Employment Relations Authority (ERA), s 79A of the HRA applies and the Tribunal has no jurisdiction to hear it.

ISSUES

[5] The issues the Tribunal must determine are:

[5.1] Whether Mr McKee subjected Mr Singh to racial harassment in breach of HRA, s 63.

[5.2] Whether the Tribunal has jurisdiction to hear Mr Singh’s claim of victimisation under s 66, HRA having regard to HRA, s 79A.

[5.3] If the Tribunal does have jurisdiction to hear the claim of victimisation, whether Mr McKee subjected Mr Singh to victimisation in breach of HRA, s 66.

[5.4] If Mr McKee did subject Mr Singh to racial harassment or victimisation in breach of the HRA, what is the appropriate remedy.

DID MR MCKEE SUBJECT MR SINGH TO RACIAL HARASSMENT?

[6] Mr Singh was employed by Mr McKee’s late father as a full-time stable hand in 2010. He was interviewed for the role by Mr McKee as he managed the staff on a day-to-day basis. In 2011 Mr Singh began working part time so he could do postgraduate study and he continued working as a part time stable hand until he was made redundant in 2020.² Mr Singh’s employment transferred to Mr McKee in 2017 when he took over ownership of the business.

² Except for the period from July 2017 to March 2018 when he worked for another employer.

[7] Mr Singh's evidence is that Mr McKee had made jokes about his accent and unflattering comments about Indians in general throughout his employment and Mr Singh would ignore this until the behaviour became more frequent in 2018 and 2019 with the introduction of other Indian staff.

[8] Mr Singh's evidence was that Mr McKee subjected him to racial harassment by behaving as follows:

[8.1] Regularly made remarks about Mr Singh's accent, including making fun of it and mocking or imitating his accent, such as repeating his words in an overly dramatised Indian accent. Mr Singh said he could clearly remember one time Mr McKee remarked "speak proper English, I can't understand you". Mr Singh said the mocking of his accent occurred many times in front of many non-Indian staff and was done by Mr McKee to be humorous and make the other staff smile or laugh.

[8.2] Insisting that Mr Singh and other Indian staff converse in English, not Hindi at work. If Mr Singh and other staff were conversing in Hindi, he would often (approximately monthly) tell them to speak English at work. Mr Singh said this was not done for safety reasons, but happened when Mr McKee felt like it, as sometimes he would not say anything when staff were conversing in Hindi. In addition, on two occasions Mr McKee used abusive language to reprimand him for speaking Hindi:

[8.2.1] In early 2019 he said to Mr Singh and others conversing in the coffee room; "Cunts talk in English, I am paying you in dollars not rupees"; and

[8.2.2] In September 2019 he said when passing by Mr Singh and another staff member chatting in the passageway during a break; "oi, I have told you cunts to speak in English at work".

[8.3] Telling Mr Singh in 2018; "It wouldn't matter if an Indian dies, there would still be a billion left" after Mr Singh had told him how he had just avoided being kicked by a horse that was playing up.

[8.4] In 2018 he said to Mr Singh when he asked about some outstanding wages for extra shifts; "How much do I owe you, \$5 or \$10, isn't that what you get in India?".

[9] Mr Singh wrote to Mr McKee on 19 October 2019 and raised various employment issues, including Indian staff being ridiculed for using their native language at work and being asked to speak English only. Mr McKee stopped behaving like this to him after he received the email.

[10] Mr McKee disputed much of Mr Singh's evidence as to how he behaved and denied any of the behaviour amounts to racial harassment. In particular, he:

[10.1] Denied he ever commented on, made fun of or mocked Mr Singh's accent.

[10.2] Denied he often objected to Mr Singh and other Indian employees conversing in Hindi and told them to only speak English at work. He said he had once asked employees for safety reasons to ensure when handling horses, that where possible they spoke in English.

[10.3] Denied he ever said to any Indian employees "cunts talk in English, I am paying you in dollars, not rupees" or "oi, I have told you cunts to speak in English at work".

[10.4] Admitted he had engaged in what he described as "group banter" where a range of joking behaviour and comments arose in an endeavour to be funny, but he denied these were made directly to Mr Singh. He admitted the following remarks were made in this context (not in the circumstances Mr Singh described):

[10.4.1] "Please speak in English, I pay you in dollars not rupees".

[10.4.2] "How much do I owe you, \$5 or \$10, isn't that what you get in India".

[10.4.3] "It doesn't matter if one Indian dies, there will still be a billion left".

The law

[11] The HRA through s 63 makes it unlawful to subject any person to racial harassment in employment and certain other areas. The relevant parts of s 63 are set out below.

63 Racial harassment

- (1) It shall be unlawful for any person to use language (whether written or spoken), or visual material, or physical behaviour that—
 - (a) expresses hostility against, or brings into contempt or ridicule, any other person on the ground of the colour, race, or ethnic or national origins of that person; and
 - (b) is hurtful or offensive to that other person (whether or not that is conveyed to the first-mentioned person); and
 - (c) is either repeated, or of such a significant nature, that it has a detrimental effect on that other person in respect of any of the areas to which this subsection is applied by subsection (2).
- (2) The areas to which subsection (1) applies are—
 - ...
 - (b) employment, which term includes unpaid work:
 - ...

[12] For the Tribunal to be satisfied that a person has been subject to racial harassment each of the elements in s 63 (1) must be established and these requirements are cumulative.³

[13] Accordingly, Mr Singh must establish to the standard of the balance of probabilities all the following:

[13.1] That Mr McKee used the language described by Mr Singh at [8] above; and

[13.2] That language either expresses hostility against Mr Singh or brings him into contempt or ridicule on the ground of his race, or ethnic, or national origin (being Indian); and

[13.3] The language was hurtful or offensive to him; and

[13.4] The language was either repeated or of such a significant nature that it had a detrimental effect on his employment.

Did Mr McKee use language as alleged?

[14] Mr Singh must establish that it was more likely than not that Mr McKee used the language described by Mr Singh at [8] above.

[15] Each of Mr Singh's specific allegations regarding the language used by Mr McKee are considered below.

Comments regarding Mr Singh's Indian accent

[16] The Tribunal is satisfied that it is more likely than not that Mr McKee did regularly comment on Mr Singh's Indian accent, including making fun of it and mocking or imitating it, for the reasons discussed below.

[17] The Tribunal accepts Mr Singh as a credible witness. His evidence was consistent and measured. Mr Singh made appropriate acknowledgements such as that prior to 2018 he was able to ignore the jokes and comments about his accent or unflattering comments about Indians in general and Mr Singh also acknowledged that after he sent the 19 October 2019 email to Mr McKee, he no longer made any such comments.

[18] Mr McKee admitted he engaged in "group banter" where joking behaviour and comments arose. Mr McKee was the employer and in control of the workplace environment. Given this and Mr McKee's admission that he had engaged in joking behaviour and made comments in the workplace in these circumstances the Tribunal

³ *Singh v Singh* [2016] NZHRRT 38 at [61]-[63].

considers it is more probable than not that at times Mr McKee did make fun of and mock Mr Singh's accent to humour other staff as Mr Singh described.

[19] Mr McKee repeatedly denied ever making comments about or making fun of Mr Singh's accent. He however acknowledged when giving evidence that "nothing I've said, whether it be accent or whether it be these one-liners, I might add over a period of nearly nine years, has been directed totally at Mr Singh." This evidence is inconsistent with his statement he never made comments about or made fun of Mr Singh's accent. Nor could Mr McKee logically explain this inconsistency.⁴

[20] As Mr McKee's account was less plausible than that of Mr Singh and his evidence regarding this was not consistent, the Tribunal considers Mr Singh's account is more probable.

Requirement to speak English

[21] Mr Singh claims that Mr McKee often insisted that he and other Indian staff only speak English and that on two occasions Mr McKee swore when reprimanding him.⁵ The Tribunal is also satisfied that it is more likely than not that Mr McKee used this language for the reasons discussed below.

[22] The Tribunal accepts Mr Singh as a credible witness. His evidence was consistent and measured. Mr Singh appropriately acknowledged that after he sent the 19 October 2019 email to Mr McKee, he no longer made any comments about him speaking Hindi.

[23] Mr Singh's evidence that Mr McKee used this language is corroborated by the email dated 19 October 2019 where he expressly refers to Mr McKee using "abusive language to ridicule and ban the use of native language of employees".⁶ As the 19 October 2019 email was contemporaneous with the language used, it is reliable corroborative evidence of this having occurred.

[24] Mr Singh's credibility in this regard is also supported by the response Mr McKee gave to Mr Singh's Human Rights Commission (the HRC) complaint, dated 25 February

⁴ When first asked by the Tribunal to clarify what he meant by his reference to "accent" Mr McKee denied it meant he did mock Mr Singh's accent and said it meant they have many different ethnicities in the business, such as Irish, Russian, Māori and that "we have never mocked accents. I mean it's just, what's the point". When asked again by the Tribunal what it meant he denied it meant he did imitations of accents, but he did not take the opportunity to further clarify his meaning. When re-examined and asked by his counsel what he meant when he used the word "accent" Mr McKee said "I - no, well, I guess I work with so many people who have accents. Or I deal with people on a daily basis with, who have accents."

⁵ See [8.2] above.

⁶ That email sent to Mr McKee on 19 October 2019 raised various issues both on behalf of other employees and Mr Singh's own personal issues. It included the following "Another ongoing issue is your use of abusive language to ridicule and ban the use of native language of employees in communicating between themselves at work. There is no provision in the law which states use of 'English only' language. Also you raised objection to staff getting together in their off time. Yourself [others] have continuously used offensive language against the employees including myself about their ethnicity and county of origin."

2020.⁷ In his response of 10 June 2020 Mr McKee admitted the following (after noting it had never been his intention to make Mr Singh feel humiliated due to his ethnicity):

Having said that, I acknowledge when workers have spoken in Hindi I have said “please speak in English in front of me, and I have added, I pay you in dollars not in Rupees.” This was my unfortunate attempt at humour, and I recognise now that Itwinder did not appreciate that and I apologise.

[25] Mr McKee’s evidence that he only told staff to speak English at work for safety reasons while handling horses and had not often objected to Mr Singh and others conversing in Hindi seems self-serving and implausible for the following reasons.

[26] Safety concerns are not referenced as a reason for him having asked staff to speak English in his response to the HRC complaint and when this was put to him Mr McKee did not provide a reasonable explanation simply stating, “Just wasn’t written in there I guess”.

[27] It was undisputed that some of the Indian staff Mr McKee employed had very limited English so that an interpreter was needed when they commenced employment. In these circumstances, the Tribunal considers it is unlikely that staff were asked to “speak English where possible” when handling horses for genuine safety reasons. Requiring that of staff with limited English is impractical and less likely to enhance safety.

[28] Furthermore, Mr McKee’s evidence regarding this was not consistent. When asked why it is important that everyone speaks English he said:

Well, I think you could get around it by somebody who had better English than someone else explaining something to them and then moving on. But this was like a full-time, this has been going on for some time during the day, and I said the place can function better, we’ve got Europeans here that can’t speak your language, it’s going to be a crossover, please can you all speak in English. It wasn’t to have a detrimental effect against their language or their religion or anything else, it was just to make sure the place was functioning safely.

[29] When asked to explain why that evidence was different to his earlier evidence which was that he had asked employees when handling horses to ensure that for safety reasons they spoke in English, he said:

Yeah, I guess, well I guess overall I prefer them to speaking in English, but it certainly wasn’t represented to them in a manner of aggression. It was just simply a, for the business and the running of safety, I would prefer that everybody can speak in English when they are at work.

[30] This evidence also supports Mr Singh’s evidence that Mr McKee insisted he and Indian staff speak English whenever Mr McKee felt like enforcing this rather than being directly related to a safety issue.

⁷ Mr Singh’s HRC complaint relevantly included the following: “The employer yelled at me and another migrant staff in abusive language for talking in our native language. This happened in early 2019 and then again in September 2019. These two instances he used abusive language, there were other instances where he insisted us to only speak in English when communicating without the use of abusive language.”

[31] Mr McKee denied using the word “cunts” when telling Indian staff to speak English, but he did not dispute he swore and used that word on occasion. It was also undisputed that it was common for staff to swear. The Tribunal finds it is therefore plausible that Mr McKee did use the word “cunts” when referring to the Indian staff. It is also noted that in response to a question from the Tribunal regarding what he could recall about swearing in the work environment he said:

“It’s actually-what I’m trying to put across is it’s not, any swearing is not actually directed at a person, it’s just people swear, you know.

[32] For all these reasons, the Tribunal is satisfied that it is more likely than not that the comments requiring Mr Singh and other Indian staff to speak in English were made as described by Mr Singh.

Other admitted comments

[33] Mr McKee does not dispute making the comments “It wouldn’t matter if an Indian dies, there would still be a billion left” and “How much do I owe you, \$5 or \$10, isn’t that what you get in India?” but he disputes the circumstances in which they were made were those as alleged by Mr Singh.⁸

[34] Mr McKee however, accepts that even if made in the ‘group banter’ environment he says they were made in, they could objectively be seen to have gone too far and brought into ridicule Mr Singh even if not stated directly at him and made in an endeavour to be funny. Given this the Tribunal does not need to determine the exact circumstances in which these comments were made.

Conclusion regarding Mr McKee’s language

[35] In summary, the Tribunal is satisfied that Mr Singh has established that Mr McKee did use all of the language as set out at [8] above, as he:

[35.1] Regularly made remarks about Mr Singh’s accent, including making fun of it and mocking or imitating his accent.

[35.2] Often objected to Mr Singh and other Indian staff conversing in Hindi and insist they speak English, including saying the following:

[35.2.1] “Cunts talk in English, I am paying you in dollars not rupees”; and

[35.2.2] “oi, I have told you cunts to speak in English at work”.

[35.3] Made the following comments to Mr Singh:

⁸ See [8.3] and [8.4] above.

[35.3.1] “It wouldn’t matter if an Indian dies, there would still be a billion left”.

[35.3.2] “How much do I owe you, \$5 or \$10, isn’t that what you get in India?”.

Did the language either express hostility against Mr Singh or bring him into contempt or ridicule on the ground of his race, ethnic, or national origin (being Indian)?

[36] The Tribunal must now consider whether the language used by Mr McKee meets the statutory test of being language that either expresses hostility against Mr Singh or brings him into contempt or ridicule on the ground of his race, or ethnic, or national origin (for being Indian). This is an objective enquiry.

[37] The Tribunal is well satisfied that the language used by Mr McKee objectively brings Mr Singh into contempt, as in it shows disregard and disrespect, or ridicule for being Indian for the following reasons.

[38] Ridiculing Mr Singh’s Indian accent, by commenting on it and making fun of it plainly brings him into ridicule for being Indian.

[39] Objecting to Mr Singh and others conversing in Hindi and insisting they speak English at work when this was not necessary for safety reasons and where it was known some staff had very limited English plainly brings Mr Singh into contempt for being Indian. These actions show disregard and disrespect to Mr Singh on the grounds of his race, ethnic and national origin as they infer his native language (a fundamental part of his ethnic identity) is inferior to English and is somehow inherently objectionable.

[40] For Mr McKee to refer to Mr Singh and other Indian staff as “cunts” and to refer to paying them in dollars not rupees, on the plain meaning of these words brings Mr Singh into contempt for being Indian. The Tribunal finds while these comments did bring Mr Singh into contempt, they did not express hostility against him for being Indian. Whilst Mr Singh was clearly offended by these comments because of the use of the swear word, the Tribunal does not consider the comments objectively can be found to express hostility as the swearing was not particularly aggressive and it was undisputed that swearing was commonly used by staff.

[41] The specific comments Mr McKee made “It wouldn’t matter if an Indian dies, there would still be a billion left” and “How much do I owe you, \$5 or \$10, isn’t that what you get in India?” on their plain meaning bring him into contempt or ridicule for being Indian. As already noted, Mr McKee acknowledged he made the comments and that they objectively could be seen to have gone too far and brought Mr Singh into ridicule.

Was the language hurtful or offensive to Mr Singh?

[42] Whether the language used by Mr McKee was either hurtful or offensive to Mr Singh is a subjective enquiry. The question is whether Mr Singh suffered hurt or offence and the intention of Mr McKee is not relevant.⁹

[43] The Tribunal has found Mr Singh to be a credible witness and accepts Mr Singh's evidence that the language used by Mr McKee was hurtful to him and on some occasions was offensive to him. Mr Singh stated in his evidence that the language Mr McKee used made him feel humiliated, belittled and at times angry.

[44] The Tribunal is satisfied that language used by Mr McKee was hurtful to Mr Singh and on some occasions was offensive to him.

Was the language either repeated or of such a significant nature to have a detrimental effect on Mr Singh's employment?

[45] Mr Singh has already established that the language was repeated. Mr Singh must also prove to the standard of balance of probabilities that Mr McKee's language had a detrimental effect on his employment.

[46] The law recognises that detrimental effects in employment can include intangible effects such as having to work in a hostile, demeaning or offensive work environment created by the harassment, see *Read v Mitchell*.¹⁰ In that case the High Court interpreted the words "detrimental effect" in HRA, s 62(2)(b) that are identically worded to HRA, s 63(1)(c). The High Court held there can be a detrimental effect from the harassment even if other employment related detriments are also being suffered:¹¹

"...The provisions of s 62(2)(b) of the Act prohibit conduct which has a "detrimental effect". In our view, those words should not be read down in such a way that they have no effect in circumstances where a parallel and more immediate employment-related detriment is also being suffered. Nor should the fact that the victim either voices robust objection on the one hand or elects to tolerate the harassment, however unwelcome and offensive on the other, make any difference. If the conduct has a detrimental effect the case is made out.

Applying that law to this case we are of the firm view that the appellant should succeed on her claim under s 62. Detriment did not have to go to the extent of dismissal, actual or constructive, nor was it an answer to the claim that the issue of sexual harassment was not raised earlier or in another forum. Many women, in particular, will put up with an environment in which unwelcome or offensive conduct is prevalent rather than run the risk of losing employment, getting offside with fellow workers or having a confrontation with a dominant employer. For many, making a formal complaint would be the last resort".

⁹ See *Singh v Singh* above n 3 at [80].

¹⁰ See *Read v Mitchell* [2001] NZLR 470 (HC).

¹¹ At p 480.

[47] Mr Singh claims the detrimental effect on his employment was that it created a workplace where he was constantly being humiliated because of his ethnicity and language, which is a fundamental part of his ethnic identity. The detrimental effect is the creation of a demeaning work environment.

[48] Mr Singh's evidence was he felt humiliated, belittled, and felt he had no self-respect from being made fun of in public in front of other people and from having his way of speaking being put down, being made to feel he was not speaking English correctly and that his language was inferior. His evidence was that from 2018 once the comments became more frequent every time at work, he felt like he had no self-respect because he would be anticipating another comment coming, and if the other Indian staff were talking to him, he anticipated being told again not to speak his first language.

[49] Mr McKee submitted there was some doubt as to whether Mr Singh could establish detriment as:

[49.1] There were no consequences in so far as Mr Singh's ongoing employment was concerned. The remarks stopped after his 19 October 2019 complaint and Mr Singh remained in employment after this and wished to retain his employment at the time of consultation over the proposed restructure. Mr McKee did not however dispute that detrimental effects on Mr Singh's employment could be intangible effects such as that claimed and did not have to be tangible.

[49.2] The alleged racial harassment was only one of a number of workplace issues that Mr Singh was experiencing in 2018 and 2019. This has been acknowledged by Mr Singh and was detailed in his 19 October 2019 email and his original HRC complaint. Mr McKee suggested that it was these issues that were affecting Mr Singh's personal health and hurting his professional career.

[49.3] Mr Singh produced no independent evidence of the claimed profound impact on his personal health or professional career.

[49.4] In some instances, the remarks at issue were made when there were other Indian staff present and in other instances they were made when Mr McKee was joking with a group so they were not made in a context where Mr Singh may have felt out of place or outnumbered as the only Indian person present. The problem with this submission however is the detriment Mr Singh claims he suffered is constantly feeling humiliated at work not that he felt out of place or outnumbered as the only Indian person.

[50] The Tribunal is satisfied that the language Mr McKee subjected Mr Singh to did have a detrimental effect on Mr Singh's employment in the period from 2018 to 2019 in that it created a demeaning work environment where he was constantly humiliated and anxious as to when the next unwelcome humiliating remark would be made.

[51] Although Mr Singh had other employment related concerns at the same time that may have resulted in him suffering additional employment related detriment (including anxiety and stress), the Tribunal finds that the racial harassment had the detrimental effect that Mr Singh claimed of creating a demeaning work environment where he was often humiliated.

[52] The Tribunal accepts Mr Singh's evidence as to the impact of the racial harassment on his employment. Whilst Mr Singh did not produce any independent evidence to support the detrimental effect on his employment this was unsurprising given humiliation is often only internally manifested. The Tribunal has no hesitation in accepting that even Mr Singh, whom is an intelligent, educated person who appears to have significant strength of character felt constantly humiliated by his employer's racist remarks after they became more frequent, and he could no longer ignore them.

Conclusion on racial harassment

[53] The Tribunal has found for the reasons given that all the elements of racial harassment prescribed by s 63 have been established. We have found Mr McKee used language that brought into contempt and ridicule Mr Singh on the grounds of his race and ethnic or national origins. We have found that language was hurtful and offensive and that it was repeated and had a detrimental effect on his employment.

[54] The Tribunal finds Mr McKee has subjected Mr Singh to racial harassment in breach of s 63 of the HRA.

MR SINGH'S CLAIM OF VICTIMISATION UNDER HRA, s 66

[55] Mr Singh alleges Mr McKee breached s 66 of the HRA because he never acknowledged a formal complaint Mr Singh made against another staff member in August 2020, nor did he inform Mr Singh of the outcome, whereas a similar incident between two other employees was thoroughly investigated by the management.

[56] Section 66 of the HRA makes it unlawful for a person to be victimised (that is treated or threatened to be treated less favourably) because that person is making use of their rights or promoting others to make use of their rights under the HRA or because they have made a disclosure under whistle-blowing legislation.¹²

[57] Mr McKee denies this and says neither Mr Singh's statement of claim nor his evidence raises any matter that falls within that provision. Mr McKee also says the Tribunal does not have jurisdiction to consider this alleged breach because it relates to

¹² At the time this claim was filed the relevant whistle-blowing legislation was the Protected Disclosure Act 2000. It is now the Protected Disclosures (Protection of Whistle-Blowers Act 2022) as s 40 of that Act replaced HRA, s 66 on 1 July 2022.

matters that are before the Employment Relations Authority (ERA) and therefore s 79A of the HRA applies to prohibit the Tribunal from considering it.

[58] Section 79A of the HRA prohibits a person from the bringing a complaint under Part 2 of the HRA and also pursuing a personal grievance under the Employment Relations Act 2000 based on the same circumstances. It provides as follows:

79A Choice of procedures

- (1) If the circumstances giving rise to a complaint under Part 2 are such that an employee would also be entitled to pursue a personal grievance under the Employment Relations Act 2000, the employee may take one, but not both, of the following steps:
 - (a) the employee may make in relation to those circumstances a complaint under this Act:
 - (b) the employee may, if the grievance is not otherwise resolved, apply to the Employment Relations Authority for the resolution of the grievance under the Employment Relations Act 2000.
- (2) To avoid doubt, a complaint referred to in subsection (1) includes, but is not limited to, a complaint about sexual harassment or racial harassment.
- (3) For the purposes of subsection (1)(a), an employee makes a complaint when proceedings about that complaint are commenced by the complainant or the Commission.
- (4) If an employee makes a complaint under subsection (1)(a), the employee may not exercise or continue to exercise any rights relating to the subject matter of the complaint that the employee may have under the Employment Relations Act 2000.
- (5) If an employee applies to the Employment Relations Authority for a resolution of the grievance under subsection (1)(b), the employee may not exercise or continue to exercise any rights relating to the subject matter of the grievance that the employee may have under this Act.

[59] At the hearing, Mr Singh conceded that the effect of HRA s 79A was that he was not permitted to pursue this claim under HRA s 66 as it relates to matters that are already before the ERA, as that claim includes an allegation he was unjustifiably dismissed when made redundant in December 2020, and that this unjustifiable dismissal was motivated by him having raised various issues in his employment.

[60] The Tribunal agrees the effect of HRA s 79A is that Mr Singh is precluded from bringing this claim under HRA s 66.

REMEDY

[61] The Tribunal having found that Mr McKee racially harassed Mr Singh in breach of HRA, s 63 may grant the remedies in HRA, s 92I(3).

[62] In deciding what, if any remedies to grant, the Tribunal must take into account the conduct of the parties as provided in HRA, s 92I(4).

Declaration

[63] Mr Singh did not seek a formal declaration be made under HRA, s 92I(3)(a) but the Tribunal considers it is appropriate that a declaration is made. There are no factors which should preclude Mr Singh being granted a formal declaration that Mr McKee committed a breach of HRA, s 63 by subjecting Mr Singh to racial harassment.

Damages

[64] Mr Singh seeks damages of \$20,000 under HRA, s 92M(1)(c) for humiliation, loss of dignity and injury to feelings (emotional harm).

[65] General principles relating to an assessment of damages for emotional harm were summarised in *Hammond v Credit Union Baywide*.¹³ Applying those to this case in assessing the appropriate level of damages, the following factors are relevant:

[65.1] There must be a causal connection between the racial harassment and the emotional harm suffered by Mr Singh.

[65.2] The award of damages is to compensate for the emotional harm suffered by Mr Singh, not to punish Mr McKee. Mr McKee's conduct may be a relevant consideration to the extent it exacerbates or mitigates the emotional harm suffered by Mr Singh.

[65.3] The circumstances of humiliation, loss of dignity and injury to feelings are fact specific and turn on the personality of the aggrieved individual (Mr Singh).

[65.4] Three bands were identified in *Hammond*¹⁴ as a rough guide for awards for damages for emotional harm, the Tribunal noting such awards are fact-driven and vary widely. The lower band for less serious cases is up to \$10,000. The middle band, for the more serious cases is between \$10,000 and \$50,000. The highest band for the most serious category of cases is in excess of \$50,000.

Emotional harm suffered by Mr Singh

[66] Mr McKee did not dispute that Mr Singh would have suffered some emotional harm if the Tribunal found he had been racially harassed.

[67] The Tribunal has no hesitation in accepting Mr Singh's evidence that as a result of the racial harassment he felt humiliated, belittled, had self-doubt, a loss of self-respect, aggravation, frustration, anger (for being sworn at for conversing in his native language,

¹³ *Hammond v Credit Union Baywide* [2015] NZHRRT 6.

¹⁴ At [176].

in particular as Mr McKee knew the majority of Indian staff had very limited English proficiency), anxiety and stress.

[68] In addition to suffering anxiety and stress at work, Mr Singh described that when away from work these concerns would not disappear and would play on his mind as he was still thinking about whether something was going to happen or if he would be in these humiliating and challenging situations again.

[69] Mr Singh did not dispute that the racial harassment was only a partial cause of his anxiety at work given the other matters going on. That the racial harassment was a contributing or material cause of the emotional harm is sufficient to establish a causal connection and the Tribunal is satisfied of this.

[70] The Tribunal is satisfied that Mr Singh has established that the racial harassment caused him emotional harm in the form of humiliation, loss of dignity, and injury to feelings including anger, frustration, aggravation, stress and anxiety.

Assessment of damages

[71] Once a causal connection has been established, damages must be genuinely compensatory and should not be minimal so as to meet the broad policy objectives of the legislation. The damages awarded must be an appropriate response to adequately compensate Mr Singh for the behaviour he suffered.¹⁵

[72] It is helpful, as Mr McKee submitted, to follow the approach of identifying the relevant factors that help classify the seriousness of the case as was adopted in previous Tribunal cases regarding racial harassment.¹⁶ These are discussed below.

The type of harassment

[73] As the Tribunal has previously noted,¹⁷ while in principle racial harassment as a form of harassment is no more invidious than discrimination based on other prohibited grounds, it is obvious that our culture is particularly sensitive to this type of discrimination. This is reflected in the prominence the HRA gives to racial discrimination by containing provisions that make discrimination on the prohibited grounds of colour, race and ethnic or national origin unlawful as well as provisions that make racial disharmony and racial harassment unlawful. New Zealand is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination and one of the purposes of the HRA is to implement that Convention.¹⁸

¹⁵ See *Singh v Singh*, above n 3 at [101].

¹⁶ See *Singh v Singh* at [103]-[105] and *Elhassan v Webby* [2022] NZHRRT 27 at [87]-[90].

¹⁷ See *Singh v Singh* at [106]-[108] and *Elhassan v Webby* at [87].

¹⁸ International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969).

The degree of aggressiveness in the harassment, its frequency and where it occurred

[74] Mr McKee submitted that while the remarks about Mr Singh's race could be seen as distasteful and were repeated, they were not frequent. Mr McKee noted the harassment did not prevent Mr Singh from doing his job as he remained working well after the conduct was complained of, there was not physical contact involved and in terms of swearing, the aggressiveness was low.

[75] Whilst Mr McKee submitted the racial harassment was not frequent, Mr Singh was subjected to it regularly and more than monthly during the relevant period.¹⁹ The degree of aggressiveness in the racial harassment was relatively low, as it did not involve any physical behaviour and much of it was done for ostensibly humorous purposes. However, on two occasions the racist remarks included swearing and on another it included reference to loss of an Indian life being not important. Further, the racial harassment was by Mr Singh's employer at his workplace where he should not have been subjected to such behaviour.

Mr Singh's vulnerability

[76] As submitted by Mr Singh, he was vulnerable in that the harassment was being directed at him by his employer in his workplace, and as such there was a power imbalance. This was not disputed by Mr McKee, but he emphasised the fact that Mr Singh had no other vulnerabilities. He noted how Mr Singh was robust in his correspondence with Mr McKee as his employer, highly educated, highly intelligent, a New Zealand citizen and not therefore in the category of vulnerable employees who have a language difficulty, or lack education, or are subject to visa restrictions or requirements.

The psychological impact of the harassment

[77] The emotional harm suffered by Mr Singh because of the racial harassment included in particular, humiliation and loss of dignity, but also injury to feelings, in the form of anger, frustration, aggravation, stress and anxiety.

[78] The psychological impact of the harassment was however not so significant that it required Mr Singh to seek medical help.

Conduct of the parties

[79] The Tribunal must take into account the conduct of the parties in deciding what, if any, remedies to grant under HRA, s 92I(4).

[80] Mr Singh has done nothing that would disentitle him to damages or reduce the amount. He did not in any way incite Mr McKee's comments, he raised the issue with

¹⁹ 2018 to 2019.

Mr McKee in October 2019, and he tried to resolve the matter at the HRC through mediation.

[81] Mr McKee's conduct may be relevant to the extent it exacerbates or mitigates the harm suffered by Mr Singh. This is because an award of damages is not to punish Mr McKee, but to compensate Mr Singh for the emotional harm he suffered from the racial harassment.

[82] Mr McKee did nothing to exacerbate the harm suffered by Mr Singh. After Mr Singh complained about Mr McKee making racist remarks in October 2019 the remarks stopped and Mr McKee apologised to Mr Singh for the harm he may have caused.

Conclusion on damages

[83] The racial harassment Mr Singh was subjected to was not particularly hostile, but he was subjected to this in his workplace by his employer repeatedly over nearly two years. As a result of the harassment Mr Singh, in particular suffered humiliation and loss of dignity, but also injury to feelings.

[84] Mr Singh submitted that because he was subjected to the racial harassment over a prolonged period of time it is therefore, appropriate he be awarded damages of \$20,000 in the middle band discussed in *Hammond*. Mr McKee submitted that the appropriate award of damages should be in the lower band discussed in that case and further down that band, so less than \$10,000. Mr McKee notes in this case the effect of the racial harassment on Mr Singh is not as pronounced as in the case of *Singh v Singh* which caused loss of employment and resulted in significant emotional harm (medically diagnosed anxiety and depression) deserving of an award of damages of \$25,000.

[85] There is a substantial subjective element to the assessment of humiliation, loss of dignity and injury to feelings. As the Tribunal has previously noted²⁰ the very nature of these heads of damages means there are subjective elements for assessment as to the degree of intensity of Mr Singh's feelings of humiliation, loss of dignity, belittlement, self-doubt, loss of self-respect, aggravation, frustration, anger, anxiety and stress is incapable of objective proof or measurement in monetary terms. A global assessment must be made.

[86] Taking into account the findings made earlier, in our view \$10,000 is an appropriate response to adequately compensate Mr Singh for the humiliation, loss of dignity and injury to feelings he suffered from the racial harassment. Mr Singh was subjected to racial harassment in his workplace by his employer over a prolonged period. The racial harassment was not particularly hostile, did not have any ongoing consequences for Mr Singh and stopped once he brought Mr McKee's attention to it. The harassment

²⁰ See *Hammond* at [170.5].

however resulted in Mr Singh suffering humiliation, loss of dignity and injury to feelings throughout the nearly two years he was subjected to it. We believe an appropriate response to what occurred is at the junction of first two bands discussed in *Hammond*. We award \$10,000.

COSTS

[87] No issues of costs arise as neither party sought these.

FORMAL ORDERS

[88] For the foregoing reasons the decision of the Tribunal is that:

[88.1] A declaration is made under s 92I(3)(a) of the Human Rights Act 1993 that Mr McKee racially harassed Mr Singh in breach of s 63 of the Human Rights Act 1993.

[88.2] Mr McKee is to pay Mr Singh damages of \$10,000 under s 92I(3)(c) and s 92M(1)(c) of the Human Rights Act 1993 for humiliation, loss of dignity and injury to the feelings of Mr Singh, no later than 20 working days after the date of this decision.

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Ms J Foster
Deputy Chairperson

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Ms LJ Gorringe JP
Member

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Ms BL Klippel
Member