

Reference No. HRRT 032/2013

UNDER HUMAN RIGHTS ACT 1993

BETWEEN SATNAM SINGH

PLAINTIFF

AND SHANE SINGH

FIRST DEFENDANT

AND SCORPION LIQUOR (2006) LIMITED

SECOND DEFENDANT

AT CHRISTCHURCH

BEFORE:

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Ms ST Scott, Member

REPRESENTATION:

Mr D Peirse for plaintiff

No appearance by first and second defendants

DATE OF HEARING: 11 November 2014

DATE OF DECISION: 9 March 2015

DECISION OF TRIBUNAL

Introduction

[1] The plaintiff, represented by the Director of Human Rights Proceedings, is a national of the Republic of India who arrived in New Zealand in approximately November 2011 to study English. In or about January 2012 he commenced work at Scorpion Liquor (2006) Ltd (Scorpion Liquor) in Mt Roskill, Auckland as a storeperson. The first defendant (Shane Singh) is the manager of Scorpion Liquor, a business owned by his mother, Raj Devi.

[2] It is alleged that in the period between January 2012 and March 2012 the plaintiff was subjected to racial harassment at the workplace by Shane Singh. On 6 March 2012 that harassment culminated in an assault on the plaintiff by Shane Singh. The plaintiff immediately left the workplace and did not thereafter return.

[3] For the alleged racial harassment, the Director seeks a range of remedies including a declaration (that the defendants breached Part 2 of the Human Rights Act 1993 (HRA)), a restraining order, a training order and damages of \$35,000 for humiliation, loss of dignity, and injury to the feelings of the plaintiff.

[4] A claim that the plaintiff was discriminated against in his employment was withdrawn by the Director on 17 October 2014, a month before the hearing.

No steps taken by defendants

[5] The statement of claim was filed on 5 November 2013. On 6 November 2013 each defendant was sent a Notice of Proceeding together with a copy of the statement of claim. They were advised that in terms of Regulation 15 of the Human Rights Review Tribunal Regulations 2002 they had 30 days after service of the notice of proceedings to file a statement of reply. Neither defendant filed such statement. Nor were the proceedings returned undelivered.

[6] By letter dated 16 January 2014 the Secretary wrote to the defendants noting that no statement of reply having been received, it would be necessary for them to apply for leave to file a statement of reply out of time should they wish to defend the proceedings. Neither defendant responded to this letter and neither has communicated with the Tribunal at any time. They took no part in the pre-hearing case management process.

[7] In a *Minute* issued on 13 August 2014 by the Chairperson the parties were given notice that the proceedings would be heard at either Auckland or Christchurch on Friday 11 November 2014. Certain case management steps were prescribed. Copies of the *Minute* were signed for by both defendants when delivered to Scorpion Liquor at 1228 Dominion Road, Mt Roskill, Auckland. A second *Minute* issued by the Chairperson on 15 August 2014 nominated Christchurch as the venue for the hearing as that is where the plaintiff now lives and it was correctly assumed the defendants would not attend the hearing no matter where it was held. The hearing date remained 11 November 2014. This *Minute* was returned to the Tribunal "undelivered". By formal notice dated 29 October 2014 the plaintiff and the defendants were given confirmation of the 11 November 2014 date. The precise location of the venue in Christchurch was also given. The notice sent to Scorpion Liquor at its premises at 1228 Dominion Road, Mt Roskill, Auckland was received and signed for but the copy addressed to Shane Singh (also at 1228 Dominion Road) was returned unserved. Neither defendant has ever communicated with the Tribunal.

[8] We are of the view that in the circumstances outlined both defendants are well aware of these proceedings and of the date of hearing but have elected to do nothing. Their stance matches their equal disinterest in proceedings brought against Scorpion Liquor before the Employment Relations Authority. In that forum both Scorpion Liquor and Shane Singh, having been served with the proceedings, took no part in the hearing. See the determination of the Authority in *Denyer v Scorpion Liquor (2006) Ltd* [2012] NZERA Auckland 448 5392831 (11 December 2012) at [10] to [17]. In that determination Scorpion Liquor was ordered to pay the plaintiff wage arrears of \$3,417.12, interest at 5% and a penalty of \$1,000. That decision also records that the

Authority was told by Shane Singh that Scorpion Liquor is owned by his mother, Raj Devi.

The evidence called by the Director

[9] The plaintiff, Satnam Singh, was the only witness called by the Director to give oral evidence. A summary of his evidence follows.

[10] Satnam Singh is a national of the Republic of India. He is currently 25 years of age and is a practising member of the Sikh faith. He explained there are five Sikh symbols, commonly known as the Five Ks. These are the five items of dress and physical appearance which give Sikhs a unique identity signifying discipline and spirituality. The symbols are:

[10.1] Kesh, uncut hair which is kept covered by a turban.

[10.2] Kirpan, a ceremonial sword or dagger, symbolising readiness to protect the weak and to defend against injustice and persecution.

[10.3] Kara, a steel bracelet symbolising strength and integrity.

[10.4] Kangha, a small wooden comb, symbolising cleanliness and order. The kangha is used to keep the hair clean and is normally tucked neatly in one's uncut hair.

[10.5] Kachhera, cotton boxer shorts, symbolising self-control and chastity.

[11] The plaintiff holds a bachelor in business management from the Guru Nanak Dev University in Amritsar. His home town is New Delhi where he attended the gurdwara or place of worship each day. He has frequently visited the Harmandir Sahib, informally referred to as the Golden Temple, which is the holiest Sikh gurdwara and is located in Amritsar.

[12] The plaintiff arrived in New Zealand in November 2011 on a student visa to study English at the Unitech Institute of Technology in Auckland. At all material times he lived in Mt Roskill, Auckland. He currently holds a work visa valid until November 2015 and lives in Christchurch.

[13] Needing an income to pay rent and being permitted by his student visa to work 20 hours per week, the plaintiff circulated his CV among several businesses in the Mt Roskill district. It was in this context he met Shane Singh who offered him (the plaintiff) a position. The plaintiff accepted the offer because Shane Singh is a Fiji Indian and the plaintiff believed the link with India meant he could trust him. Whereas the plaintiff speaks Hindi, Punjabi as well as English, Shane Singh speaks only English.

[14] In early January 2012 the plaintiff commenced work as a store person at the liquor store operated by Scorpion Liquor at 1228 Dominion Road, Mt Roskill and which is managed by Shane Singh. He was employed there for two months and six days. His duties included loading and unloading stock, helping customers, providing security on Fridays and Saturdays and cleaning the toilet and shop. There was no written employment agreement and he was paid between \$6 and \$7 per hour.

[15] The plaintiff was always required to work more than 20 hours per week. He was told by Shane Singh that he was training or learning the job. Initially the plaintiff did not mind working the hours but it took only a few days to learn the position. The plaintiff

ended up working an average of 42 hours a week throughout the period of his employment. Because he was underpaid by a substantial margin proceedings were later taken by the then Department of Labour before the Employment Relations Authority. This led to the decision of the Authority referred to earlier in which Scorpion Liquor was ordered to pay the plaintiff wage arrears of \$3,417.12 and a penalty of \$1,000.

[16] Describing the alleged racial harassment, the plaintiff said that after a couple of weeks Shane Singh began using abusive language towards him (the plaintiff) regularly and also made insulting and derogatory comments about Indians generally. Particular instances related by the plaintiff were:

[16.1] Shane Singh frequently used the term “fucking Indians” in front of the plaintiff. Sometimes this was said as a reference to Indian customers after they had left the shop and sometimes it was the plaintiff to whom Shane Singh was referring.

[16.2] Because Shane Singh spoke quickly it was occasionally necessary for the plaintiff to say “Pardon?”, asking Shane Singh to repeat himself. Shane Singh would reply “Fucking Indians can’t talk English”. This was said firmly and in an insulting way.

[16.3] Once the plaintiff heard Shane Singh say to another employee “Why do these fucking Indians keep long hair”? Later that same night Shane Singh addressed the plaintiff directly and asked the same question. When the plaintiff answered “We are from the Sikh religion”, Shane Singh laughed at him.

[16.4] Sometimes Shane Singh would refer to other Indian students who had previously worked for him at the shop as “Indian dogs”. He would add “If I said go bark, they will bark and if I said go bite, they will bite”. These comments would be made in the presence of both customers and a friend of Shane Singh (called “Mike”) and they would all laugh. The plaintiff himself was on occasion called an “Indian dog” by Shane Singh. The plaintiff said there was little worse which could be said as an insult and when Shane Singh was saying these things he was definitely not joking.

[16.5] On one occasion, approximately one week before the plaintiff’s employment ended, the friend “Mike” used his Iphone to make a video of the plaintiff cleaning the shop toilet. “Mike” commented “You fucking Indians [will] always clean my shit today and in the future”. Shane Singh repeated this insult to the plaintiff and said (with reference to the video) “I am going to put this on Facebook, on YouTube”. The plaintiff was hurt by these comments. Neither “Mike” nor Shane Singh were joking. The plaintiff had never experienced insults of this kind.

[16.6] On occasion Shane Singh’s mother would visit the shop. She did not speak to the plaintiff except once when he was cleaning the bottles on display. She told the plaintiff in a rude and abrupt manner that he had to go and clean the shop toilet.

[17] At approximately 4.30pm on 6 March 2012, after calling the plaintiff a “fucking Indian”, Shane Singh assaulted the plaintiff by hitting him on the head with a clipboard, knocking off the cap the plaintiff was wearing and the small turban he had tied on under the cap. He further assaulted the plaintiff by punching him in the head. When the

plaintiff told Shane Singh that he (the plaintiff) would not work at the liquor store any longer and wanted his pay, Shane Singh responded “I already have four or five fucking Indians. Fuck off”. When the plaintiff replied he would be back for his pay Shane Singh put up his fists and said “If I see you again you will lose your turban and your teeth”.

[18] The plaintiff immediately left the premises and did not return.

[19] Describing the effect of these events, the plaintiff said that when the abuse began he (the plaintiff) was in disbelief Shane Singh could be so rude to him and to people from India. He felt angry, distressed and belittled and kept asking himself “Why am I in this country”?

[20] Initially the plaintiff hoped the abuse would stop if his English improved. To avoid derogatory comments made by Shane Singh about the plaintiff’s beard and turban the plaintiff trimmed both his hair and beard. He also began to wear a small turban concealed by a cap. The cutting and trimming being against his faith the plaintiff felt uncomfortable and lacking in confidence. However, he needed the money and even though he was only paid between \$6 and \$7 per hour he hoped that if he stayed on and put up with the abuse he would eventually get paid at the correct rate.

[21] After the assault on 6 March 2012 the plaintiff would avoid Fiji Indians, believing they would put him down. Because of his lack of confidence he also became scared he would be attacked by Shane Singh and his friends. He has not forgotten the words “If I see you again you will lose your turban and your teeth” and even now is fearful of Shane Singh and of Fiji Indians.

[22] The cumulative effect of the events led to the plaintiff experiencing depression and thoughts of suicide. He consulted a doctor in Mt Roskill who prescribed medication.

[23] When a friend of the plaintiff’s returned to India that friend related to their circle what had happened to the plaintiff. The information got back to the plaintiff’s family and in a telephone conversation with his mother the plaintiff was informed his father had been shamed by the plaintiff’s cutting and trimming of his hair and beard. The mother reported the father had said “Do not come back home in your life. You are dead for us. We don’t want to see your face in our life. Just go and die [in shame].”

[24] Although the plaintiff has since spoken once to his father the relationship is best described as formal and distant.

[25] The plaintiff believes that as a foreign worker he has been exploited by Shane Singh and Scorpion Liquor.

The medical evidence

[26] The Tribunal received in evidence an affidavit sworn on 1 October 2014 by Dr Wee Teo who deposed that on 7 March 2012 he saw the plaintiff at his practice at Three Kings Accident and Medical Centre. The plaintiff reported to Dr Teo that he had been racially and physically abused by his Fiji Indian employer, that his wages had not been paid in full and that he was depressed and upset. Dr Teo prescribed a course of medication to treat the plaintiff’s depression and anxiety. He also provided the plaintiff with an “off work” certificate.

Credibility assessment

[27] We found the plaintiff to be a sincere and credible witness. There was no trace of affectation or exaggeration in his account.

[28] We turn now to the legal issues.

THE LEGAL ISSUES

Racial harassment

[29] Racial harassment is defined in s 63 of the HRA:

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—
 - (a) the making of an application for employment:
 - (b) employment, which term includes unpaid work:
 - (c) participation in, or the making of an application for participation in, a partnership:
 - (d) membership, or the making of an application for membership, of an industrial union or professional or trade association:
 - (e) access to any approval, authorisation, or qualification:
 - (f) vocational training, or the making of an application for vocational training:
 - (g) access to places, vehicles, and facilities:
 - (h) access to goods and services:
 - (i) access to land, housing, or other accommodation:
 - (j) education.

[30] As the liability of Scorpion Liquor is vicarious, the terms of s 68 of the HRA must be noted:

68 Liability of employer and principals

- (1) Subject to subsection (3), anything done or omitted by a person as the employee of another person shall, for the purposes of this Part, be treated as done or omitted by that other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval.
- (2) Anything done or omitted by a person as the agent of another person shall, for the purposes of this Part, be treated as done or omitted by that other person as well as by the first-mentioned person, unless it is done or omitted without that other person's express or implied authority, precedent or subsequent.
- (3) In proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description.

[31] The effect of these provisions is that the plaintiff must establish, on the balance of probabilities, the following:

[31.1] That Shane Singh used language (whether written or spoken) or physical behaviour;

[31.2] That expressed hostility against, or brought into contempt or ridicule, the plaintiff on the ground of the plaintiff's colour, race, or ethnic or national origins; and

[31.3] That it was hurtful or offensive to the plaintiff; and

[31.4] That it was repeated, or of such a significant nature, that it had a detrimental effect on the plaintiff in respect of his employment by Scorpion Liquor.

[32] The requirements are cumulative. We address each element in turn but before doing so make two observations:

[32.1] By virtue of s 92I(4) of the HRA it is no defence to these proceedings that the breach was unintentional or without negligence on the part of the party against whom the complaint is made.

[32.2] Scorpion Liquor has defences under s 68 but having elected not to participate in these proceedings the question whether such defences are established by the evidence falls to be determined on the evidence given by the plaintiff.

“used language or physical behaviour”

[33] The uncontradicted evidence is that the behaviour complained of by the plaintiff is the language used by Shane Singh as well as Shane Singh’s physical behaviour, being the assault which occurred on 6 March 2012.

“expresses hostility against, or brings into contempt or ridicule ... on the ground of ... race ...”

[34] Whether the spoken words and the physical behaviour expressed hostility against the plaintiff or brought him into contempt or ridicule on the grounds of his colour, race, or ethnic or national origins is a question to be determined objectively.

[35] In our view the only conclusion which can be reached on the evidence given by the plaintiff is in the affirmative. That is, the language used by Shane Singh expressed hostility against or brought into contempt or ridicule the plaintiff on the ground that he was an Indian or an Indian of the Sikh faith, that is, on the grounds of his colour, race, or ethnic or national origins.

[36] Similarly, the circumstances in which the plaintiff was struck on his head included not only racist language but also the deliberate dislodging of his turban. There is little doubt this physical behaviour (in a workplace open to the public) expressed hostility against the plaintiff or was intended to bring him into contempt or ridicule.

“is hurtful or offensive to that other person”

[37] It must be shown the behaviour, in addition to expressing hostility against the plaintiff or bringing him into contempt or ridicule, was also hurtful or offensive to the plaintiff. Whereas the test for the first limb is objective, the test for the second is subjective. See by analogy the sexual harassment provisions in s 62(2) of the HRA and the analysis of that section in *DML v Montgomery* [2014] NZHRRT 6 (12 February 2014) at [110].

[38] It is not permissible to ask whether a “reasonable Indian” or a “reasonable Indian of the Sikh faith” would find the language or physical behaviour hurtful or offensive. The question is whether this particular plaintiff found it hurtful or offensive.

[39] The plaintiff being a credible witness we accept without reservation his evidence that he found the language and behaviour both hurtful and offensive. Indeed it is hard to

imagine that any person from India, particularly a person of the Sikh faith, would not feel the same way given the nature of the language used by Shane Singh and given the nature of the assaults on the plaintiff.

“either repeated, or of such a significant nature”

[40] Next the plaintiff must establish that Shane Singh’s language or behaviour was either repeated, or of such a significant nature, that it had a detrimental effect on the plaintiff in his employment.

[41] As to the language it was repeated over a period of approximately two months. This clearly meets the statutory requirement.

[42] The physical behaviour occurred on one day only. However, s 63(1)(c) does not require the conduct complained of to be repeated. It is sufficient if the conduct is of such a significant nature that it had a detrimental effect on the plaintiff.

[43] Here, for the reasons given, an assault comprising a punch to the plaintiff’s head and the deliberate striking of his head with a clipboard to dislodge his turban, a symbol of his faith, can only be described as significant.

“that it has a detrimental effect”

[44] As stated in *DML v Montgomery* at [117], “detriment” is not a term which is to be read down. In our view it readily includes the following effects as described by the plaintiff:

[44.1] Feeling compelled to reduce his visibility as a Sikh by trimming his hair and beard and by wearing a small turban concealed by a cap.

[44.2] Making the plaintiff feel ashamed of himself, humiliated and exploited by his employer.

[44.3] Causing depression and anxiety to the degree that medical treatment was sought.

[44.4] Causing the plaintiff to leave his place of employment to escape racial abuse, physical assaults and attacks against symbols of his religion.

Employment

[45] Section 63(1)(c) of the HRA requires the racial harassment to occur in one of the “areas” listed in s 63(2). One of the areas so listed is “employment”. There can be no doubt on the present facts this requirement is satisfied.

Section 63 – summary of findings

[46] For the reasons given we find all of the elements of “racial harassment” prescribed by s 63 of the HRA have been established. That is, in the course of the plaintiff’s employment the first defendant (Shane Singh) used language or physical behaviour which expressed hostility against the plaintiff or brought the plaintiff into contempt or ridicule on the grounds of his colour, race, or ethnic or national origins. Such conduct was both hurtful and offensive to the plaintiff and was repeated or of such a significant nature that it had a detrimental effect on the plaintiff.

The liability of the second defendant

[47] It is clear from the evidence that Shane Singh managed the liquor store on a daily basis. Section 68(1) of the HRA provides that anything done by a person as the employee of another person must be treated as done by that other person (as well as by the first-mentioned person) whether or not it was done with that other person's knowledge or approval. Under s 68(3) of the HRA it is a defence for the employer to prove that he, she or it took such steps as were reasonably practicable to prevent the employee from doing the act in question.

[48] In the present case Scorpion Liquor has not produced any evidence to show either that Shane Singh was not an employee or to establish the statutory defence under s 68(3). It follows that Scorpion Liquor is vicariously liable for the actions of Shane Singh. It is to be observed that there is evidence that Scorpion Liquor is owned by the mother of Shane Singh. On the plaintiff's account she shares her son's racist attitudes, once ordering him in a rude and abrupt manner to go and clean the shop toilet. It is unsurprising her company has made no attempt to establish any of the statutory defences.

[49] In the circumstances there is no need to discuss *Proceedings Commissioner v Ali Hatem* [1999] 1 NZLR 305 (CA).

[50] Having found the plaintiff's case established against both Shane Singh and Scorpion Liquor, we turn now to the question of remedy.

REMEDY

[51] Section 92I(2) of the HRA provides that in proceedings under s 92B(1) of the Act (as here), the plaintiff may seek any of the remedies described in s 92I(3). That is, if the Tribunal is satisfied (as we are) on the balance of probabilities that the defendant has committed a breach of Part 2, the Tribunal may grant one or more of the following remedies:

- (a) a declaration that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint:
- (b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order:
- (c) damages in accordance with sections 92M to 92O:
- (d) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach:
- (e) a declaration that any contract entered into or performed in contravention of any provision of Part 1A or Part 2 is an illegal contract:
- (f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of this Act:
- (g) relief in accordance with the Illegal Contracts Act 1970 in respect of any such contract to which the defendant and the complainant or, as the case may be, the aggrieved person are parties:
- (h) any other relief the Tribunal thinks fit.

[52] It is no defence that the breach was unintentional or without negligence on the part of the party against whom the complaint is made but the Tribunal must take the conduct of the parties into account in deciding what, if any, remedy to grant. See s 92I(4).

[53] The heads of damages allowed by s 92M(1) are:

92M Damages

- (1) In any proceedings under section 92B(1) or (4) or section 92E, the Tribunal may award damages against the defendant for a breach of Part 1A or Part 2 or the terms of a settlement of a complaint in respect of any 1 or more of the following:
- (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the complainant or, as the case may be, the aggrieved person for the purpose of, the transaction or activity out of which the breach arose:
 - (b) loss of any benefit, whether or not of a monetary kind, that the complainant or, as the case may be, the aggrieved person might reasonably have been expected to obtain but for the breach:
 - (c) humiliation, loss of dignity, and injury to the feelings of the complainant or, as the case may be, the aggrieved person.
- (2) ...

A declaration

[54] While the grant of a declaration is discretionary, the grant of such declaratory relief should not ordinarily be denied. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, SL Ineson and PJ Davies) at [107] and [108]. On the facts we see nothing to justify the withholding from the plaintiff of a formal declaration that Shane Singh and Scorpion Liquor breached s 63 of the HRA.

[55] We now address the request by the plaintiff that a restraining order be made.

Restraining order

[56] We believe the request for a restraining order under s 92I(3)(b) of the HRA is properly made. It is clear from the evidence given by the plaintiff that racial harassment by Shane Singh is a common occurrence at the liquor store and that Shane Singh's racist attitudes are deeply ingrained. A restraining order is necessary to prevent him from continuing or repeating the breach, or from engaging in, or causing or committing others to engage in, conduct of the same kind as that constituting the breach established in these proceedings. For its part, Scorpion Liquor's liability as Mr Shane Singh's employer requires also that a restraining order be made against the company in order to make effective Scorpion Liquor's legal liability for the acts of racial harassment committed by Shane Singh or any other person during the course of their employment by the company. The more so given the Director of the company, Raj Devi, appears to condone the behaviour of her son, Shane Singh.

Training order

[57] Addressing now the question of a training order under s 92I(3)(f) of the HRA, we are of the view that both defendants are in need of assistance to understand why racial harassment is unacceptable at any time and in any context and to ensure that they and any other employees receive appropriate training. Such training will reinforce the restraining order we have made. We adopt the statement made in *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 (24 February 2014) at [104] and applied in *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51 (14 October 2014) at [180] to [183]:

Remedies such as a declaration and damages are, in a sense, palliative. Their importance is not be diminished on that account. But they are not on their own directed to preventing future breaches of the Act, especially in relation to others. The fact that s 92I(3)(f) HRA makes specific provision for training orders signifies that the Tribunal must in any particular case consider the need to prevent future breaches of the anti-discrimination provisions of the HRA. This is made explicit by the terms of the provision:

- (f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, **in order to assist or enable the defendant to comply with the provisions of this Act:** [emphasis added]

[58] The acts of racial harassment committed by Shane Singh and condoned by Scorpion Liquor must not only be remedied, they must not be repeated. We are of the view that requiring both Shane Singh and Scorpion Liquor to implement a training programme focussed on their responsibilities under the Human Rights Act is the most effective means of achieving that end.

[59] We accordingly order that Shane Singh and Scorpion Liquor, in conjunction with the Human Rights Commission, provide training to the management staff of Scorpion Liquor (which is to include Shane Singh) in relation to their and the defendants' obligations under the Human Rights Act 1993 in order to ensure that those employees (including Shane Singh) are aware of those obligations.

Damages for humiliation, loss of dignity and injury to feelings

[60] We come now to the request for an award of damages under s 92M(1)(c) for humiliation, loss of dignity and injury to the feelings of the plaintiff. Not each of these heads of damages need be established for there to be jurisdiction to make an award. We remind ourselves of the general principles as recently set out in *Hammond v NZCU Baywide* [2015] NZHRRT 6 (2 March 2015) at [170]. We do not intend reciting those principles at length but emphasise the following:

[60.1] There must be a causal connection between the breach of s 63 and the damages sought. See by analogy *Winter v Jans* HC Hamilton CIV-2005-419-854, 6 April 2004 at [33] and [34]. Here the facts we have found establish a clear and direct causal connection between the actions of Shane Singh and the humiliation, loss of dignity and injury to feelings experienced by the plaintiff.

[60.2] Provided a causal connection between the breach of s 63 that the damages sought is established, damages in racial harassment cases must be genuinely compensatory and should not be minimal. The real question is what is an appropriate response to adequately compensate the plaintiff for the behaviour he has been subjected to and the compensation should meet the broad policy objectives of the legislation.

[60.3] The award of damages is to compensate for humiliation, loss of dignity and injury to feelings, not to punish the defendant. The conduct of the defendant may, however, exacerbate (or, as the case may be, mitigate) the humiliation, loss of dignity or injury to feelings and therefore be a relevant factor in the assessment of the quantum of damages to be awarded for the humiliation, loss of dignity or injury to feelings.

[61] In the present case the language used by Shane Singh was highly offensive and insulting. We here refer in particular to the repeated references to the plaintiff and other Indians as "Indian dogs", condoning if not encouraging the making of a video of the plaintiff cleaning the shop toilet coupled with the statement that it would be posted on Facebook and YouTube. The plaintiff was also told, in effect, that he was fit only to clean Shane Singh's "shit". The abusive language was used in the presence of others, including customers in the store and the derogatory comments led to the plaintiff attempting to modify his appearance as a Sikh. The singular feature of the present case, however, is that the verbal harassment of the plaintiff was aggravated by the physical assault which took place on 6 March 2012 at the shop premises. This involved a blow to the plaintiff's head and the dislodging of his small turban and cap. The assault was accompanied by racial abuse, the plaintiff being called a "fucking Indian" and when the plaintiff said he wanted his pay, Shane Singh put up his fists and said "If I see you

again you will lose your turban and your teeth". The cumulative effect of Shane Singh's conduct was to attack the plaintiff's identity as an Indian, particularly as an Indian of the Sikh faith and to rob him of his dignity as an individual. He has been humiliated in public and made to feel ashamed of himself and of his faith.

[62] There is also the factor that the plaintiff's own father has largely disowned him for bringing dishonour to the family by compromising his "Sikhness". It is unsurprising the plaintiff became depressed and anxious to the degree that medical treatment was sought and prescribed.

[63] We are of the view that the racial harassment in this case was serious although not approaching the most serious. While it is not the purpose of an award of damages under s 92M(1)(c) to punish the particular defendant, the Tribunal must not underestimate the degree to which a perpetrator's actions can intensify the humiliation, loss of dignity and injury to feelings experienced by the victim, as happened here.

[64] Taking all these factors into account we are of the view that a proper award of damages under s 92M(1)(c) is \$45,000. This award is higher than the \$35,000 sought in the statement of claim but the Tribunal is not bound by the amount nominated by a plaintiff. See *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, [2013] NZAR 760 (8 April 2013) (Fogarty J, GJ Cook JP and Hon KL Shirley) at [103] to [108] and *Nakarawa v AFFCO New Zealand Ltd* at [100]. Having seen and heard the plaintiff and having had opportunity to make our own assessment of the circumstances in which the humiliation, loss of dignity and injury to feelings came about we are of the view that a higher award is both justified and required.

Costs

[65] The Director seeks costs from the defendants at the rate of \$3,750 per sitting day.

[66] The hearing occupied just over half a day and the legal submissions presented by Mr Peirse were both detailed and extensive. In these circumstances we award \$3,750 as requested.

FORMAL ORDERS

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

[67.1] A declaration is made under s 92I(3)(a) of the Human Rights Act 1993 that the first and second defendants have committed a breach of Part 2 of the Act in that the plaintiff was subjected to racial harassment as defined in s 63 of the Act.

[67.2] An order is made under s 92I(3)(b) of the Human Rights Act 1993 restraining the defendants from continuing or repeating the breach of s 63 of the Act, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach.

[67.3] An order is made under s 92I(3)(f) of the Human Rights Act 1993 that the first and second defendants, in conjunction with the Human Rights Commission, provide training to the first defendant and to the management staff of the second defendant in relation to their obligations under the Human Rights Act 1993 in order to ensure that the first defendant and the management staff of the second defendant are aware of those obligations, particularly the obligations under s 63 of the Act.

[67.4] Damages of \$45,000 are awarded against the first and second defendants under ss 92I(3)(c) and 92M(1)(c) of the Human Rights Act 1993 for humiliation, loss of dignity and injury to the feelings of the plaintiff.

[67.5] Costs of \$3,750 are awarded against the defendants in favour of the plaintiff.

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Mr RPG Haines QC
Chairperson

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WV Gilchrist
Member

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Ms ST Scott
Member