

Judgment: 17 March 2011
**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC22
ARC 73/09**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN DANNY BACHU
Plaintiff

AND DAVIE MOTORS LTD
Defendant

Hearing: 8 March 2011
(Heard at Auckland)

Counsel: Mr L Lankovsky, counsel for plaintiff
Ms P Swarbrick and Mr D Dickinson, counsel for defendant

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JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The plaintiff, Mr Bachu who is of Indian origin, was employed by the defendant as a car salesman in March 2005. His employment came to an end in July or August 2005. He actually left his employment on 11 July 2005 and did not return to the workplace after that date. A doctor's certificate was delivered to the workplace, under which the plaintiff's general practitioner certified that he was medically unfit from 12 July 2005 until 7 August 2005. The employer wrote to him expressing concern about his illness and seeking further information.

[2] Following their correspondence the employer received communications from the Human Rights Commission, to whom the plaintiff had made a complaint of racial and sexual harassment in his employment. The Human Rights Commissioner apparently indicated that, rather than the matter being dealt with by the Commission,

the plaintiff should notify a personal grievance and have the matter dealt with under the Employment Relations Act 2000 (the Act). The plaintiff subsequently notified a personal grievance alleging constructive dismissal on the basis of racial and sexual harassment, bullying and undermining behaviour.

[3] In late July and early August 2005 at the invitation of the chief executive officer of the defendant, Mr Ian Penten, Mr Bachu set out his allegations in writing. Earlier, having received some telephone indication from Mr Bachu as to his allegations, the chief executive officer had commenced an enquiry within the company of those alleged to have been involved. He formed the view that the allegations of Mr Bachu were unfounded.

[4] Matters appeared to rest there. Mr Bachu in his written documents had indicated that he would not be returning to work and as the second of the two written documents was dated 2 August 2005, the chief executive officer regarded the employment as having ended on 2 August 2005.

[5] On 21 October 2005 the employer received a letter from lawyers acting on behalf of Mr Bachu, dated 19 October 2005, setting out a claim for reimbursement and compensation. An industrial advocate, acting on behalf of the employer, responded on 11 November 2005 denying the claim and there was then discussion between the advisors as to the matter being referred to mediation. Apparently the matter could not proceed to mediation. On 24 November 2006, Mr Bachu's own legal advisors wrote to him confirming that mediation would not proceed and seeking instructions as to whether he wished to commence proceedings in the Employment Relations Authority (the Authority). It appears that the matter then fell further into abeyance and proceedings were not commenced in the Authority until late in November 2008. I am presuming that the proceedings were filed within the limitation period prescribed within the Act. Nevertheless, the point is not in issue because limitation has not been pleaded nor pursued by the defendant.

[6] The Authority conducted an investigation meeting over two days on 24 and 25 November 2008. The determination of the Member of the Authority, who

conducted the investigation meeting, was issued on 14 August 2009.¹ The plaintiff was disaffected by the determination which dismissed his application. He was similarly disaffected by a further determination of the Authority dated 4 November 2009 under which he was ordered to pay the defendant a sum of \$10,000 by way of costs and \$325 in disbursements. The plaintiff then issued a challenge in this Court on 11 September 2009. The plaintiff has elected to challenge the whole of the determinations of the Authority and seeks a full hearing of the entire matter (a hearing de novo).

[7] The plaintiff's claim was eventually encapsulated in a "2nd amended statement of claim" filed with the Court on 15 February 2010. That amended statement of claim constitutes the pleadings now before the Court on behalf of the plaintiff. Statements of defence were filed by the defendant to the original statement of claim and the amended statement of claim. There were some interlocutory applications relating to security for costs and stay of the costs determination. The applications were eventually resolved on the basis that the stay of the costs determination would be granted but that the plaintiff would make substantial payments into Court to be held on an interest bearing account. It appears that the application for further security for costs was then not pursued. The plaintiff by this stage was in receipt of a grant of legal aid.

[8] The particulars of claims set out in the amended statement of claim contain a general allegation that during the course of the plaintiff's employment he was subject to racial and sexual harassment, bullying and undermining behaviour by his work colleagues and the defendant. He alleges that the defendant also disclosed to other employees confidential financial information relating to an alleged debt he owed to the Inland Revenue Department. The amended statement of claim then sets out partially specified instances of alleged racial harassment by fellow employees against the plaintiff. The allegation of sexual harassment and release of personal tax information to fellow employees is specified as follows:

4.2.6 On 20 June 2005 at about midday the plaintiff was in the used car office of the business at which time Mr Aitken was watching a television programme. From what the plaintiff was able to see it appeared to be

¹ AA 281/09.

sexually charged material featuring nudity. At the time of watching the plaintiff was sitting at his desk. At some point, while the programme was still running, Mr Aitken approached the plaintiff and touched the plaintiff's shoulders with his genitals while contemporaneously making indecent suggestions. Another co-worker, Mr Perry was also present.

4.2.7 The plaintiff was personally informed of difficulties he was having with the IRD by both Mr Aitken and Mr Perry on or about 22 June 2005, such information presumably arising from information given to the defendant's account department and then made available to other personnel.

[9] The plaintiff alleges that he raised his concerns with a person in a position of responsibility above him in the company but that appropriate steps to ameliorate the problem were not taken.

[10] Mr Bachu, in the amended statement of claim, pleads that the resignation of his position occurred on 11 July 2005, which of course was the date when he ceased attending the place of employment.

[11] Mr Bachu alleges that as a result of a failure of the employer to take steps to prevent the alleged racial and sexual harassment, he had no other option than to resign and that such resignation resulted from a constructive dismissal. He seeks reimbursement of lost earnings in the amount of \$95,191.80 from 11 July 2005 until 31 July 2006, together with compensation for humiliation, loss of dignity and injury to feelings. He also seeks interest on the lost earnings, together with costs. As I have indicated, he also includes within the challenge, the determination as to costs made by the Authority on 4 November 2009.

The evidence presented at trial

[12] Mr Bachu gave evidence but did not call any witness to support him. His brief of evidence consisted of eleven paragraphs in which he failed to particularise the allegations of racial harassment contained in the amended statement of claim.

[13] He stated that during the course of his employment he was subjected to a number of racially abusive comments and felt that he was being racially harassed. He named the persons who he alleged were abusing him. He stated that the general

nature of the abuse was comments made as to his Indian origin. Beyond that, he did not specify what the allegations were or the circumstances relating to them. He did specify one incident in which he alleged that the supervising sales manager accused him of having a sexist attitude towards women as a result of his nationality. However, that particular alleged incident is not specified in the pleadings.

[14] Insofar as the allegation of sexual harassment is concerned, Mr Bachu referred to the one incident occurring on 20 June 2005 where one of his fellow employees, he alleges, was watching sexually charged material on a television set and came over and placed his genitals on Mr Bachu's shoulder and that employee and another employee present then made obscene noises and gestures. That incident is referred to in the amended statement of claim and indeed is more particularised in the pleadings than it is in the brief of evidence. Mr Bachu claimed that between 24 and 28 June 2005 he reported the racial slurs and sexual harassment to the used vehicles sales supervisor Mr Paul Bethune.

[15] Insofar as the issue of the Inland Revenue Department is concerned Mr Bachu gave brief evidence on this matter. It appears that the Inland Revenue Department erroneously required the defendant to make deductions from the plaintiff's pay and forward it to the Inland Revenue Department in repayment of an alleged debt. Mr Bachu stated that his co-workers became aware of this through breach of confidentiality and he was ridiculed by them.

[16] As I have indicated after the date of termination of employment Mr Bachu wrote to Mr Penten of Davie Motors Ltd, particularising his allegations. Those are contained in two separate documents in the bundle prepared and produced by the solicitors for the defendant. However, during the course of evidence Mr Bachu did not refer to those documents.

[17] For the defendant I heard evidence from Mr Paul Brewer who, at the time, was the used car sales manager. I also heard evidence from Mr Bethune who was at the time the used vehicle sales supervisor, but is now a vehicle sales consultant for the company. I also heard evidence from Mr Terry Perumal, who is the financial controller/administration manager for Davie Motors Ltd. Finally, I heard evidence

from Mr Penten the chief executive officer. Mr Brewer who was effectively the person responsible for Mr Bachu, stated that at no stage did he receive any complaint from Mr Bachu as to the allegations he now makes. He stated that if he had received such a complaint he would have taken it seriously and dealt with it. Insofar as the Inland Revenue Department issues are concerned, his recall was that it was Mr Bachu himself who raised the matter with his fellow employees and it was the subject of discussion at the workplace. Mr Brewer stated in evidence that he cautioned Mr Bachu about discussing such personal matters with his fellow employees. He also recalled Mr Bachu making comments about the way he ran his home, which indicated to Mr Brewer, a somewhat unacceptable attitude to women. Insofar as the issue of sexual harassment was concerned, Mr Brewer again said that he would have done something about it if he had known. He also considered that it would have been impossible to have missed it if it had occurred, as he would have heard other staff talking about it, in view of the fact that all of the employees worked closely together.

[18] Mr Brewer recalled Mr Bachu finishing work with Davie Motors. Mr Bachu appeared to be under personal stress as a result of his wife being absent in South Africa to look after a sick relative and that he had to attend to other family matters while she was away, which placed pressure on him. He stated that Mr Bachu asked for time off from time to time to take care of personal problems which he granted, but he was surprised at the way Mr Bachu simply left work and didn't return.

[19] Mr Bethune also stated in evidence that he was never informed by Mr Bachu of the allegation of racial slurs and sexual harassment. He said if he had been informed he would have taken the matter up immediately with his superiors and something would have been done about it as such conduct would have been regarded as unacceptable. He did recall that he had discussions with Mr Bachu concerning his performance as a salesman with the company and to assist him with performing in accordance with the requirements of the company.

[20] Mr Perumal gave evidence that he was the person who first greeted Mr Bachu when he arrived for work on the first day. He recalled that Mr Bachu arrived earlier than expected and that he then took him around and introduced him to the other staff.

Mr Bachu made a complaint that one of the employees hadn't shaken his hand and Mr Perumal passed this on to the chief executive officer who immediately spoke to the other employee about it. That employee then, in turn, greeted Mr Bachu. That employee was apparently on the phone when Mr Bachu was first introduced to him. Mr Perumal as financial controller, was the person who received the letter from the Inland Revenue Department requiring Davie Motors Ltd to make deductions from Mr Bachu's wages. He said that he actioned that. He confirmed that such information is kept within his particular area of the premises, that it was totally confidential and that it was kept in a locked cabinet. He confirmed in evidence that there was no way that such information would be leaked to other employees. This in turn corroborates Mr Brewer's evidence that it was Mr Bachu who raised these matters with the employees in the first instance. Mr Perumal denied that he had ever been approached by Mr Bachu with any complaints concerning racial or sexual harassment. Mr Bachu during the course of his evidence and, particularly under cross-examination, maintained that he had informed Mr Perumal as to these complaints.

[21] A significant omission from the evidence of Mr Bachu in support of his claim is that there was absolutely no evidence as to the issue of quantification of reimbursement or compensation. Mr Lankovsky conceded at the conclusion of the case that no evidence had been adduced. He submitted that if I found that the allegations of racial harassment, sexual harassment or constructive dismissal were substantiated that I could make an award of compensation based on principles usually applying. It is clear that Mr Bachu was not seriously pursuing his claim for reimbursement of wages, even though the amended statement of claim specifies a sum of in excess of \$90,000 under this head.

Findings

[22] It is apparent from a reading of the determination of the Authority dated 14 August 2009 that a considerably greater amount of evidence as to the racial allegations was presented by Mr Bachu during the course of the Authority's investigation. The racist comments, which are mentioned in the determination, are akin to, though not exactly the same as, those that are contained in the amended

statement of claim. Certainly these are substantially greater than the meagre evidence that was presented before me.

[23] The one allegation of sexual harassment appears to be the same, both before the Authority and this Court. It is also clear that Mr Bachu gave evidence at the investigation as to bullying and undermining behaviour alleged again not presented before this Court.

[24] The Authority Member held that the allegation of racial harassment failed. This was primarily on the ground that Mr Bachu failed to complain to the employer or a representative of the employer at a time when he was still in employment, and as would enable the employer to carry out the enquiry and if necessary deal with the matter pursuant to the provisions of the Act. Similarly while the Authority Member accepted that the alleged act of sexual harassment took place, again, Mr Bachu did not raise it until his communication with Mr Penten after termination of employment. She found that the employer was not given the opportunity to investigate and take practicable steps to prevent recurrence if there was a finding that the act had occurred.

[25] The Authority Member also made findings as to credibility of Mr Bachu. Similar issues were raised when Mr Bachu was cross-examined during the Court hearing. At the Authority investigation Mr Bachu initially indicated that he reported matters to a senior employee who he refused to name. Later, during the course of the investigation he did name the senior employee as a person who was in fact appearing during the course of the investigation. However, that person denied that Mr Bachu had the conversation with him which he alleged. Under cross-examination before the Court, Mr Bachu then changed his evidence in this regard and named the secret employee as Mr Perumal. When Mr Perumal gave evidence he also denied that Mr Bachu had reported the incident to him. Quite apart from these particular points, I found Mr Bachu's evidence contradictory and at times chaotic. In respect of the undermining and bullying allegations before the Authority, the Authority Member again made a finding as to Mr Bachu's credibility against him and indicated that Mr Bachu had a tendency to assume knowledge on the part of others that did not exist. I

formed the view that when confronted with matters pointing to previous inconsistency, he simply changed his stance.

[26] Ms Swarbrick referred to these matters in her final submissions. She submitted that there was no evidence presented to support the claims although she did eventually concede, as the Authority Member had found, that the incident upon which the sexual harassment claim is based occurred. In that respect she submitted that it was not sufficient to constitute sexual harassment under the Act. It may be categorised as distasteful but there was no evidence that Mr Bachu drew it to the attention of the employer. She also submitted that it was in any event, not sufficiently serious to amount to sexual harassment; Mr Bachu did not find it serious and this is confirmed by the way that he alleges he dealt with it by standing up to the employee allegedly involved.

[27] Mr Lankovsky based his brief submissions on the allegation that Mr Bachu was constructively dismissed. This, he submitted, resulted from the failure of the employer to seriously ameliorate the position.

[28] The evidence of the four witnesses called for the employer is clear as to their lack of knowledge of the allegations of racial harassment or sexual harassment. The evidence of Mr Perumal satisfies me that the information concerning the Inland Revenue Department enquiry was not leaked to other employees. That, accompanied by the evidence of Mr Brewer that it was Mr Bachu who first raised the issue with other employees, satisfies me that that is how the other employees knowledge of the Inland Revenue Department matter occurred.

[29] I am satisfied that had Mr Bachu raised the allegations of racial and sexual harassment and the other allegations the subject of evidence before the Authority at its investigation, the senior managers who gave evidence would have taken the matter further. Mr Penten, I accept, was totally unaware of the allegations until after he had written to Mr Bachu on 21 July 2005 to express concern to him about his apparent illness and absence from the workplace. I accept that he was genuinely astonished at the matters that came to his attention as a result of the complaint being made by Mr Bachu to the Human Rights Commission.

[30] As I have indicated there appears to have been substantially greater elaboration of Mr Bachu's allegations during the course of the investigation by the Authority than was presented before me during the course of the hearing. Having heard the evidence from Mr Bachu and the witnesses called by the defendant, it is clear that Mr Bachu's challenge to the findings in the determination of the Authority cannot possibly succeed. There was no evidence which would satisfy me that the relationship between Mr Bachu and his employer was so undermined that he was forced to resign in circumstances amounting to a constructive dismissal.

[31] The findings of the Authority Member as to Mr Bachu's lack of credibility were reinforced by Mr Bachu's evidence before me. This was particularly so in relation to the evidence arising under cross-examination of him as to his explanation on the secret witness point. As a result I prefer the evidence given by the four witnesses for the defendant and therefore find that the allegations of racial discrimination are not substantiated. I accept Ms Swarbrick's submission that even if the alleged sexual harassment had occurred and it is probable that it did, Mr Bachu himself clearly did not regard it as so serious to warrant a complaint. He dealt with it at the time. It was not the basis for him terminating his employment. Again I accept Ms Swarbrick's submission that even if the incidents of racial harassment and sexual harassment did occur Mr Bachu did not notify them to the employer at a time when a sensible enquiry could have been conducted and for them to be logically and appropriately dealt with.

[32] The challenge to the first determination fails. Even if I had found that there was substance to Mr Bachu's allegation that he was constructively dismissed it would be extremely difficult for me upon the evidence presented to make any award of reimbursement or compensation. While Mr Bachu alleged on one or two occasions that he was humiliated and undermined by what had occurred, evidence which might prove or corroborate that simply was not present. There was no evidence whatsoever as to the level of reimbursement sought. I consider also that the Authority Member's determination in respect of costs having regard to a previous Calderbank offer made by the defendant is appropriate and the challenge in respect of that determination also fails. Pursuant to s 183(2) of the Act, the determination as

to costs of the investigation of \$10,000 and disbursements of \$325 become an order of this Court.

[33] Clearly an issue as to costs remains in respect to these proceedings. I shall reserve the issue of costs requiring the parties to deal with it by the filing of memoranda within 14 days.

M E Perkins
Judge

Judgment signed at 1pm on 17 March 2011