IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2016] NZHRRT 38**

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 AUCKLAND

BEFORE:

Judge W K Hastings
Deputy Chairperson

Dr H Hickey, Member
Pastor R Musuku, Member

APPEARANCES:

S Judd and D Peirse for the Plaintiff
S Lance for the Defendants

Date of Hearing:	**4, 5, 6 April 2016**
Date of Decision:	**23 December 2016**

DECISION

Introduction

[1] This is a rehearing of a claim filed on 5 November 2013 concerning alleged incidents that are said to have occurred between January and March 2012.

[2] The allegations are that between January and March 2012 Shane Singh; a Fijian Indian, subjected Satnam Singh; an Indian national of the Sikh faith, to racial harassment at the liquor store Shane Singh managed on behalf of its owner; Scorpion Liquor (2006) Limited (the company). Raj Devi, Shane Singh's mother, owned the company. Shane Singh is alleged to have racially harassed Satnam Singh by using abusive language towards him, by making insulting and derogatory comments about Indians generally, and on 6 March 2012, by hitting Satnam Singh's head with a clipboard, and then punching him. The defendants' position is that neither they nor their employee Aaed "Mike" Abu Iaila racially harassed Satnam Singh, and that their only issue with the plaintiff was his poor work performance.

[3] The original hearing before the Human Rights Review Tribunal (HRRT) on 11 November 2014 was held in the absence of the defendants. The Tribunal recorded its view at para [8] that both defendants were "well aware of these proceedings and of the date of the hearing but have elected to do nothing". As a result, the Tribunal heard only the evidence of the plaintiff Satnam Singh.

[4] Its decision in favour of Satnam Singh dated 9 March 2015 was set aside on 2 June 2015 on the basis of affidavits from the first defendant Shane Singh and his mother Raj Devi, the owner and director of the second defendant, that neither had been served with the notice of proceedings and that neither was aware of the hearing date. The plaintiff also conceded that the facts concerning the merits of the claim disputed by the defendants were sufficient to establish an arguable defence. As a result, the Tribunal set aside its decision because it was satisfied that there was, or may have been, a miscarriage of justice.

[5] The matter was reheard by a differently constituted Tribunal on 4, 5 and 6 April 2016. The rehearing was defended. The Director of Human Rights Proceedings called the plaintiff; Satnam Singh, to give oral evidence. Kuljeet Singh, a flatmate and friend of the plaintiff, gave oral evidence for the plaintiff by Audio Visual Link from Delhi, India. Ramanjit Singh Batth, the purchaser of the liquor store business, gave oral evidence in person for the plaintiff. The plaintiff also produced a sworn affidavit from Dr Wee Teo. Shane Singh, Raj Devi, and

"Mike" Aaed Abu Iaila, a former employee of the second defendant, gave oral evidence for the defendants.

Summaries of the evidence

Satnam Singh

[6] Satnam Singh said he is a practising member of the Sikh faith. He explained that there are five Sikh symbols, items of dress and physical appearance, which give Sikhs a unique identity signifying discipline and spirituality. The five symbols are:

1. Kesh - uncut hair which is kept covered by a turban;

2. Kirpan - a ceremonial sword or dagger, symbolising readiness to protect the weak and to defend against injustice and persecution;

3. Kara - a steel bracelet symbolising strength and integrity;

4. Kangha - a small wooden comb normally neatly tucked into one's hair, symbolising cleanliness and order; and

5. Kachhera - cotton boxer shorts, symbolising self-control and chastity.

[7] The first, the symbol of Kesh, is of relevance in this case.

[8] Satnam Singh entered New Zealand on a student visa to study towards a National Diploma in Business at the Newton College of Business and Technology in Auckland. He was permitted to work for up to 20 hours per week. He said he currently has a work visa entitling him to remain in New Zealand until November 2018.

[9] Although his father deposited $10,000 to Satnam Singh's New Zealand bank account, he said he wanted to work to make it easier to pay rent and other expenses. He said he circulated his CV among several businesses which resulted in an offer of employment from Shane Singh; the manager of the liquor store. Satnam Singh said he started work at the liquor store in early January 2012. He said the job required him to load and unload stock, help customers, provide security on Friday and Saturday, and clean the shop and toilets.

[10] With respect to Shane Singh's use of language, the plaintiff said after the first couple of weeks, Shane Singh started to use abusive language and make

derogatory references about Indians. He said Shane Singh used the term "fucking Indians" to refer to Indian customers after they left. He said Shane Singh also used the term to refer to him. He said his grasp of English when he started at Scorpion Liquor meant he had trouble following what Shane Singh said if Shane Singh spoke too quickly. He said when he asked "pardon?", Shane Singh would reply, "fucking Indians can't talk English".

[11] The plaintiff said Shane Singh asked him, "Why do you fucking Indians keep long hair?" He said that when he answered "We are from the Sikh religion", Shane Singh laughed.

[12] The plaintiff said Shane Singh referred to other Indian students who had previously worked for him as "Indian dogs". This reference was not transcribed by Cecelia O'Dell, the person at the Human Rights Commission who took his complaint.

[13] The plaintiff said Raj Devi, Shane Singh's mother, would sometimes visit the shop. He said she did not speak to him, except once. He was cleaning the bottles on display when she told him "in a rude and abrupt manner" to go and clean the toilets. Under cross-examination, he said that Raj Devi said nothing racist to him, and that he has "no issue with her".

[14] About a week before his employment at the liquor store ended, the plaintiff said that Aaed "Mike" Abu laila used an iphone to make a video of him cleaning the toilet. He said Mike told him "you fucking Indians always clean my shit today and in the future". He said Shane Singh repeated this and said he would post the video to Facebook and YouTube.

[15] The plaintiff was shown entries from a diary kept by Shane Singh. These entries purported to be contemporaneous with the events they described. The plaintiff denied the truth of various entries put to him that described him arriving late for work, drinking, texting on his phone and otherwise underperforming.

[16] With respect to Shane Singh's behaviour, the plaintiff said that on 6 March 2012, Shane Singh called him a "fucking Indian", hit him on the head with a clipboard, knocking off the cap he was wearing and the small turban he had tied on under his cap. He said Shane Singh told him, "I already have four or five fucking Indians. Fuck off." After the plaintiff told him he would be back for his pay, he said Shane Singh "put his fists up" and said "If I see you again you will lose

your turban and your teeth". He said he left the premises with his friend Kuljeet Singh who was visiting the store at the time.

[17] Although he conceded that it was not in either of his statements, the plaintiff said at the hearing that Shane Singh also punched him on 6 March 2012. The allegation of a punch was not transcribed by Cecelia O'Dell. The plaintiff attributed this to the fact that his brother Anish took over explaining what happened because his English was better than the plaintiff's. The plaintiff said it was a "communication mistake". He also said that when he referred to being "hit", in his briefs of evidence, and complaint to Ms O'Dell, the word "hit" included being hit with the clipboard and being punched. He then said that the hit and the punch were in fact two separate incidents. The hit referred to the turban being hit with the clipboard. When he prevented the turban falling off, he said that Shane Singh then punched him. In his statement to the Human Rights Commission dated 27 February 2013, he referred to the punch as the action that knocked off his cap and turban, not the hit with the clipboard. Under cross-examination, he said the turban was dislodged twice, once by the clipboard and once by the punch. Cecelia O'Dell recorded that he told her that the touching of his turban "was not only inappropriate but hugely offensive".

[18] The plaintiff said at the hearing that after he left the premises on 6 March 2012, he returned. This was not in either of his briefs of evidence. He said that when he returned, Shane Singh said "you will lose your turban and your life".

[19] The plaintiff said at the hearing that Shane Singh called him a "piggy". This too was not in either brief, was not in the initial complaint to the Human Rights Commission and was not in the statement made to James Denyer, the labour inspector who obtained an order[1] from the Employment Relations Authority for the plaintiff's wage arrears on 11 December 2012. The plaintiff said "maybe I forgot to tell her [Cecelia O'Dell] about piggy and losing life". He said that he "couldn't explain everything all at once, only what [I] remembered at the time".

[20] The plaintiff said he felt, angry, distressed and belittled by Shane Singh's words and behaviour. He said he hoped that the harassment would stop if his English improved. He said he then tried to get it to stop by cutting his hair and beard, and started to wear a cap even though this was against his faith. He went to the doctor when he felt suicidal and was prescribed a small dose of lorazepam.

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[1] *Denyer v Scorpion Liquor (2006) Limited* [2012] NZERA Auckland 448 5392831, 11 December 2012.

[21] The plaintiff said in his statement that his friend Kuljeet Singh returned to India and told people what had happened. He said somehow this got back to his family. Under cross-examination, he said it was not Kuljeet who told his family. He said that his family knew before Kuljeet returned to India. The plaintiff's mother told him in a telephone conversation that his father 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". The plaintiff said that his relationship with his father is still badly affected by what happened. He also said his ability to enter into trusting friendly relationships with other Fijian Indians has been compromised by what happened.

Kuljeet Singh

[22] In his statement dated 19 February 2016, Kuljeet Singh described what he heard and saw on 6 March 2012. He said he visited the liquor store where his friend Satnam Singh worked. He greeted the plaintiff and went to the beer fridge where he overheard a conversation between the plaintiff and Shane Singh.

[23] Kuljeet Singh said he heard Shane Singh say "you fucking Indian", and "you Indians are here for cleaning toilets and shit you are good for nothing." He said Shane Singh became aware he was listening and told Kuljeet Singh to "fuck off you motherfucker". Kuljeet Singh said he told Shane Singh to stop abusing his friend.

[24] Kuljeet Singh said he then saw Shane Singh hit Satnam Singh's head with some "cardboard" which caused his turban to be "removed from his head". Kuljeet Singh left the shop, and Satnam Singh followed him. He said Satnam Singh said "I am not going to work here anymore" after which Shane Singh said "I have lots of other fucking Indians who can work for me". Kuljeet Singh said Satnam Singh was very upset.

[25] Under cross-examination, he said the curtain by the beer fridge did not block his view of what was happening four or five feet away. He said that he saw Shane Singh use the "cardboard" to tip Satnam Singh's turban back, and that he caught it before it fell off. He said he saw no punch. He said he could recall no conversation about Satnam Singh's work performance, but he did not hear the start of the conversation. He said he did not hear Shane Singh say either that Satnam Singh would lose his turban and his teeth, or that he would lose his turban and his life. Although it was not in his statement, he said he heard Shane Singh refer to Satnam Singh as a "piggy".

Ramanjit Singh Batth

[26] Ramanjit Singh Batth gave evidence relevant to the issue of Shane Singh's non-appearance at the first hearing.

[27] In his statement dated 15 April 2015, he said he recalled receiving two packages on 14 August 2014. One was addressed to Shane Singh and one was addressed to the company. He signed for the packages. The new owner of the liquor store, Mr Chopra, told him to give them to Shane Singh. Mr Batth said he did not phone Shane Singh to collect the packages because when he had done so in the past, Shane Singh never came in to collect them. About a week later, he happened to see Shane Singh in his car outside the shop. He handed Shane Singh several items of mail including the two packages. Shane Singh put the letters in his car and drove off. Under cross-examination he said he did not see Shane Singh open them.

[28] Another package arrived for the company on 30 October 2014 at the liquor store. Mr Batth said he opened it and saw it was from the Ministry of Justice about Satnam Singh. He said he called Shane Singh who told him to "just throw it away, the case is already sorted out".

[29] Track and trace results were provided for the Registry's letter dated 16 January 2014 to Mr Singh, the Registry's letter with minute dated 13 August 2014 to Mr Singh, the Registry's letter with minute dated 13 August 2014 to the company, and for the notice of hearing dated 29 October 2014 to the company. It was also established that after the liquor store was sold in December 2013, the registered address of the company did not change.

Dr Wee Teo

[30] The plaintiff provided an affidavit dated 1 October 2014 from Dr Wee Teo, a physician who saw Satnam Singh on 7 March 2012. Dr Teo stated that Satnam Singh told him that he had been racially and physically abused, that his wages had not been paid, that he was depressed and upset, and that he had reported the matter to the Human Rights Commission. Dr Teo prescribed a course of lorazepam pills to treat depression and anxiety. The plaintiff also provided Dr Teo's notes from the consultation on 7 March 2012 which were consistent with the content of the affidavit.

Raj Devi

[31] Raj Devi was the director and owner of the company. She is also Shane Singh's mother. She said she did not remember Satnam Singh specifically but conceded that she may have asked him to clean the toilet. She said if she did make that request, "it was certainly not in a rude or abrupt manner". She said she has previously cleaned the kitchen and the toilet herself.

[32] She said she did not receive any documentation about the first hearing, and was not aware of the proceedings, date of hearing or venue. She said that she does not have racist attitudes and strongly refuted any suggestion that she racially abused the plaintiff.

[33] It was put to her under cross-examination that as the director and owner of the company, she had legal responsibility for the company's actions. She said all responsibilities were given to Shane. She said Shane was responsible for employing the plaintiff without a written contract, for paying him and for keeping proper records. She said she had no involvement in running the business. She said she could not remember if she obtained a General Manager's Certificate when Shane Singh's General Manager's Certificate was suspended in 2008.

[34] She was shown two judgments in which adverse findings were made in other proceedings about her credibility.

[35] In *Commissioner of Police v Singh and Devi*[2], Ms Devi opposed an application for a restraining order under the Criminal Proceeds (Recovery) Act 2009. Priestley J had to decide whether there were reasonable grounds to believe that Ms Devi unlawfully and knowingly benefited from significant criminal activity. He found that she was not responsible for the day to day running of the business having handed that to Shane Singh, but that she "turned a blind eye" and "made no inquiry" about the origin of unexplained amounts of money moving through Scorpion's and her bank account. He found on the balance of probabilities that Ms Devi was aware of her son's activities and derived a benefit from them. When Ms Devi applied to vary the orders in 2015 in *Commissioner of Police v Singh and Devi*[3], Hinton J saw no reason to depart from findings made by Priestley J and declined the application, but said that "it may be appropriate for the Commissioner to release a certain amount of funds to enable Ms Devi to engage a forensic accountant".

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[2] *Commissioner of Police v Singh and Devi* [2012] NZHC 344.
[3] *Commissioner of Police v Singh and Devi* [2015] NZHC 860.

[36] When asked about the defendants' non-appearance at the Employment Relations Authority hearing, she said she did not realise how serious the proceedings were. She denied that she had no respect for legal process and said she left everything to Shane. She explained that it took two years to pay the judgment because of the restraining orders.

[37] She said she did not realise that the company's address for service was not changed after she sold the liquor store. She said Shane, not her, collected mail from the registered address. She said she did not know about the Human Rights proceedings, denied that she decided not to attend and denied that she only became concerned about them when she saw the amount of the award.

[38] In re-examination, she said if she had been aware of the first Human Rights Review Tribunal hearing, she would have appeared.

"Shane" Shalendra Singh

[39] In his brief of evidence dated 18 March 2016, Shane Singh said that he was the manager of Scorpion Liquor until it was sold. He said he employed Satnam Singh on a part-time basis to the best of his recollection in February and March 2012. He said Satnam Singh was hired as a "general hand" doing general labour within the shop including cleaning the shop and shelves, unloading and stocking shelves and general store work. He said the plaintiff was not allowed to serve customers. He said Satnam Singh performed no security-related tasks. There was no written employment contract. He said there was a verbal agreement that the plaintiff would work for four weeks on trial to see if he was suitable, and it was Satnam Singh, not Shane Singh, who said he wanted to be paid in cash.

[40] Shane Singh said that he was not impressed with Satnam Singh's work ethic. He said he was lazy, spent a lot of time on his phone, turned up drunk on one occasion and had to be sent home, and on another occasion did not turn up for work at all. He said Satnam Singh had also been caught stealing beer and soft drinks from the store (which Satnam Singh denied).

[41] On 6 March 2012, Shane Singh said he asked the plaintiff to perform some tasks while he went home. On his return three hours later, he said the tasks had not been done. He said he decided to talk to him about this and asked what he had been doing. He said the plaintiff was not listening and looked the other way. He said he tapped the plaintiff on the head with his clipboard and said words to the effect, "oy are you listening to me?" He said it did not cause his turban to fall off.

He acknowledged that this was inappropriate. He said he knew that a Sikh's turban and hair is sacred. He denied knocking the cap and turban loose. He denied punching the plaintiff.

[42] Shane Singh said other staff members were present, including Aaed "Mike" Abu Iaila. He said Kuljeet Singh was not present when this incident occurred. It was his understanding that Kuljeet Singh was outside the store at the time.

[43] Shane Singh said he summarily dismissed Satnam Singh as a result of the alleged thefts, general laziness, and failure to complete tasks he had been asked to do.

[44] He denied racially harassing Satnam Singh. He accepted that he "told him off" for poor performance, but denied using the terms "fucking Indians" and "Indian dog". He accepted that he thought Satnam Singh's understanding of English was poor, but denied saying "fucking Indians can't talk English". He denied asking another employee, or Satnam Singh directly, "why do these fucking Indians keep long hair?" He denied telling Satnam Singh on 6 March 2012 that he would lose his turban and teeth, and that he would lose his turban and life. He recalled the incident when Mike Aaed appeared to be recording on his phone Satnam Singh cleaning the store. He said he told Mike Aaed to stop, and denied threatening to upload anything to Facebook.

[45] He said he has employed staff of many ethnicities and has never previously been accused of racism.

[46] He said he did not attend the ERA hearing because he thought "the problem would go away with a fine". He said there were a lot of other things going on in his life at the time, including the restraining order proceedings, criminal charges, and selling the business. He said he remembered returning a call from Cecelia O'Dell of the Human Rights Commission, but did not recall receiving any notice of hearing. He denied receiving documents and ignoring them. He remembered Ramanjit Singh Batth bringing papers to his attention, and remembered telling him to throw away a letter because he thought it was something to do with the ERA which had been "sorted", rather than the HRRT hearing.

[47] He said he made notes in the diary at the end of each day or the next morning. He identified the handwriting, in various coloured inks, as his. He recorded the incident of 6 March 2012 on 7 March 2012 in a note that takes up

half the page. The note makes reference to "Jordan" (the name Satnam Singh used at work). It states "Basically fired him today turned up 40 minutes late." Shane Singh wrote in the same entry, "asked why he's so slow, no answer, acting totally uninterested in job and had major attitude problem, specially tonite". Shane Singh continued, "Got into argument about work attitude and general behaviour, tried to step me out, started to throw boxes into corner and carry on like a dick!! Told him to go home, call me tomorrow to collect pay etc (carried on swearing etc at me and Michael as he walked out)". There are other less extensive references to Jordan's work performance on other days in the diary.

[48] Under cross-examination, decisions of the Liquor Licensing Authority and the Employment Relations Authority containing findings relevant to his credibility and apparent disdain of legal proceedings were put to Shane Singh for comment.

[49] In *Loye v Singh*[4], Shane Singh applied to renew his General Manager's Certificate. The Police applied to suspend or cancel it. The Liquor Licensing Authority found that part of his evidence lacked credibility (at [17]) and stated:

> ... we believe that Mr Singh clearly intended to deceive the authorities and circumvent the Court's orders by obtaining a new driver's licence. In our view this illustrates Mr Singh's lack of suitability to hold a General Manager's Certificate.

[50] In *Denyer v Scorpion Liquor (2006) Limited*[5], the ERA recorded that Shane Singh attended a teleconference on 19 November 2012, but did not attend the investigation meeting, did not contact the ERA to explain his absence, did not comply with earlier requests for wage, time and holiday records, and told the labour inspector Mr Denyer on 29 March 2012 that the "manager" of the liquor store was unavailable without telling him he was Shane Singh, the respondent in that proceeding.

[51] Shane Singh said he accepted he knew of the ERA claim and said there was no excuse for this lack of action. He accepted that he did not give the wage records in the diary to Mr Denyer but that he was relying on that diary now. He could not explain inconsistencies about Satnam Singh's start date in the diary but denied that he made these entries later. When asked why the only person criticised in the diary is Satnam Singh, he said Satnam Singh was the only employee whose performance was poor. He accepted that he did not require

[4] *Loye v Singh* LLA Wellington PH 976-977/2008, 16 July 2008; [2008] NZLLA 976.
[5] *Denyer v Scorpion Liquor (2006) Limited* [2012] NZERA Auckland 448 5392831, 11 December 2012.

employees to sign the entries about them or confirm their hours because the diary was for his use only.

[52] He accepted that he did not appeal either decision. Like his mother, he said the reason the wage arrears were not paid for 20 months was that his funds were frozen by the restraining orders.

[53] Shane Singh said he assumed that all the mail delivered to Scorpion Liquor related to the ERA case.

[54] He said he did not know Satnam Singh cut his hair. He said he did not notice any difference in his appearance when he worked at the liquor store.

"Mike" Aaed Abu Iaila

[55] In his brief of evidence dated 24 March 2016, Mike Aaed said he worked at the liquor store between January and September 2012. He said he observed Satnam Singh first hand. He said it was his understanding that Satnam Singh was hired as shop assistant. He said Satnam Singh never did security work; there were three men specifically hired as security guards. He said Satnam Singh had difficulty speaking and understanding English. He said he complained to Shane Singh about Satnam Singh's work performance. By way of example, he described incidents on 11 February, 20 February, 25 February and 29 February in which he claimed Satnam Singh was drinking, drinking stock without paying for it, and turning up late for his shift.

[56] He said on 6 March 2012, Shane Singh and Satnam Singh got into an argument about tasks Satnam Singh had not performed. He said Satnam Singh started to make excuses and argue with Shane Singh. He said Satnam Singh turned his back to Shane and refused to co-operate. He said he saw Shane Singh tap Satnam Singh's head with the clipboard to get his attention. He said he was standing two metres away when he witnessed this. He said Satnam Singh's turban did not come off. He said Shane Singh did not punch Satnam Singh. He said he did not hear any racial comments. He said he did not notice Kuljeet Singh in the store at the time.

[57] Mike Aaed said he did not record Satnam Singh cleaning the toilet. He said that on one occasion, he heard Satnam Singh singing in Indian in the back stock area. He said he came out to see what the noise was. On seeing Satnam Singh, he said that he pretended to record him because he was supposed to be arranging

stock instead of singing. He said he found it amusing and laughed about Satnam Singh becoming a Bollywood singer.

[58] Mike Aaed also said he never heard Shane Singh say “fucking Indians”, “Indian dogs” or refer to “fucking Indians keeping long hair”. He said he did not hear Shane Singh say to Satnam Singh that “fucking Indians can’t talk English”. Mike Aaed denied saying to Satnam Singh “you fucking Indians always clean my shit today and in the future”.

[59] Under cross-examination, he said he had a very good memory. It was put to him that the diary entries did not confirm that he was at work on the dates he mentioned seeing examples of Satnam Singh’s allegedly poor performance. He said that he was there on those dates and that not everything was recorded in the diary.

The issues

[60] There are four issues for this Tribunal to determine:

1. Has the plaintiff proven his claim that he was racially harassed by the first defendant in breach of s 63 of the Human Rights Act 1993 (HRA)? If he has, then there is no dispute that the second defendant would be vicariously liable under s 68.

2. What remedies should be granted if the plaintiff was racially harassed?

3. Did the defendants have a reasonable excuse for not attending the first hearing?

4. What costs should be awarded in relation to the first hearing in November 2014, proceedings after the first hearing, and the second hearing?

Harassment

[61] Section 63 of the Human Rights Act 1993 provides as follows:

> **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) of this section.
>
> (2) The areas to which subsection (1) of this section applies are –
>
> ...
>
> (b) employment, which term includes unpaid work:

[62] The plaintiff must, therefore, establish on the balance of probabilities that:

1. Shane Singh used language or physical behaviour;

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

3. that it was hurtful or offensive to the plaintiff; and

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.

[63] These requirements are cumulative. We will deal with the first two matters together and consider whether the plaintiff has established on the balance of probabilities that Shane Singh used language or behaviour that expressed hostility against the plaintiff, or brought the plaintiff into contempt or ridicule, on the ground of the plaintiff's Indian nationality or Sikh ethnicity.[6] They raise factual issues and require an assessment of each witness's credibility.

[64] First, we consider the allegations that Shane Singh used language which included "fucking Indians", "fucking Indians can't talk English", "why do fucking Indians keep long hair?", "if I see you again you will lose your turban and your teeth", "if I see you again you will lose your turban and your life" and "piggy"; and

[6] Although Sikhism is often described as a faith, Sikhs are also recognised as a community with distinct ethnic origins. In *Mandla v Dowell-Lee* [1983] 2 AC 648, Lord Fraser of Tullybelton held at 565 that Sikhs were an ethnic group for the purposes of the Race Relations Act 1976 (UK). It was not disputed in this case that Sikhs form an ethnic community.

the allegation that both Mike Aaed and Shane Singh said “you fucking Indians always clean my shit today and in the future”. We do not doubt that the language of which the plaintiff complains expresses hostility against or brings into contempt or ridicule the plaintiff on the ground that he is an Indian of the Sikh faith, that is, on the grounds of his colour, race, or ethnic or national origins. The issue is whether the plaintiff has discharged his burden of proving on the balance of probabilities that Shane Singh used this language.

[65] At the first hearing, the Tribunal found at [27] that Satnam Singh was a “sincere and credible witness” and that there was “no trace of affectation or exaggeration in his account”. In this hearing, having assessed all of the evidence, we have come to a different conclusion with respect to the plaintiff’s credibility.

[66] At the first hearing, the Tribunal found at [33] that the “uncontradicted evidence” was that Shane Singh used this language. As is obvious from the summaries of evidence above, we heard evidence in this hearing that did contradict Satnam Singh’s evidence that Shane Singh used this language.

[67] Turning to Satnam Singh’s credibility first, we have found too many inconsistencies within the plaintiff’s account of events, and too many inconsistencies between his account and the accounts of other witnesses, to find that it is more likely than not that Shane Singh used the language the plaintiff alleges he used.

[68] We accept that each retelling of an incident is unlikely to be identical in every respect. We also accept that accounts of what is alleged to have happened that are closer in time to the incident or incidents are more likely to be reliable because memory is fresher. In this case, the plaintiff gave broadly similar accounts of what he alleged happened in the weeks up to 6 March 2012, shortly after they happened, first to the Human Rights Commission and several months later to labour inspector Denyer. These accounts were naturally described in different ways by different authors. This does, however require, the Tribunal to discern whether differences between the plaintiff’s first-hand account and the recording of that account by others are significant. In this case, there is an added complication that the plaintiff’s brother related the plaintiff’s account to Cecelia O’Dell of the Human Rights Commission. This adds a further layer of interpretation. Although differences in detail matter less than substantive differences, we have found substantive differences that diminish the reliability of the plaintiff’s account and that tend to show both recent invention and embellishment.

[69] The first two inconsistencies are relatively minor. The first is the purpose of coming to New Zealand; the second is when he started work at the liquor store. He said in his statement that he came to New Zealand to study English, but his visa refers to business studies at a named institution. We place little weight on this inconsistency; the two are not mutually exclusive. The Employment Relations Authority determined that his employment started in the first week of January and continued to 6 March 2012, a period of some nine weeks, yet he told Cecelia O'Dell that he had worked at the liquor store for about six weeks. His friend Kuljeet Singh also gave evidence that Satnam Singh had worked at Scorpion for about six weeks. We place little weight on this inconsistency because the discrepancy is not great and could have resulted from confusion about whether the period of employment included a probationary period.

[70] The third inconsistency is less minor and indicates the plaintiff's tendency to embellish. This inconsistency relates to his description of his duties at the liquor store. He said his duties included customer assistance and security. Having read his emails to the Human Rights Commission and considered his own admission that he needed his brother, and later a Hindi interpreter, to assist him with his complaint, we are inclined to believe Shane Singh and Aaed "Mike" Abu Iaila that his fluency in English was insufficient for him to be of assistance to customers. We also accept that the plaintiff's duties did not include security because the company employed three men as security guards when needed on the weekends.

[71] We place greater weight on the following inconsistencies that diminish the plaintiff's credibility. There was no reference in the initial complaint to the Human Rights Commission that the incident on 6 March 2012 included a punch, a reference to "piggy" and a second threat that "you will lose your turban and your life". These things are sufficiently significant to be more than mere interpretation or transcription errors. As accounts are more reliable the closer in time they are to the incident they describe, the addition of these three details at the hearing indicates both recent invention and a degree of embellishment or exaggeration. There is also no internal consistency in the plaintiff's account as to whether there was one incident (a hit with the clipboard) or two incidents (a hit with the clipboard and a punch); if there were two incidents, whether it was the hit with the clipboard or the punch that dislodged the turban, whether the turban was dislodged once or twice, and whether the plaintiff returned after he left.

[72] There is an inconsistency between the plaintiff's account of what happened on 6 March 2012 and Kuljeet Singh's account. Kuljeet Singh said that Shane

Singh said “fucking Indians clean my shit today and in the future” to Satnam Singh on 6 March 2012, yet Satnam Singh gave evidence that these words were spoken by Mike Aaed a week earlier in a different context. This implies that Kuljeet Singh was told about the earlier incident and became confused about which incident these words were attached to. This diminishes Kuljeet Singh’s credibility.

[73] We find that the evidence given by the defence witnesses also lacked credibility. In other words, their evidence contributed little to the demise of the plaintiff’s case with respect to whether it is more likely than not that Shane Singh said the words he is alleged to have said. Their evidence also contributed little to the defence case. Shane Singh’s willingness to acknowledge that he should have done things differently with respect to the ERA hearing is an indication of credibility. On the other hand, Shane Singh’s denials that he used the language alleged by the plaintiff were supported by Aaed “Mike” Abu Iaila, but the credibility of Aaed’s evidence was diminished by his apparent recollection of specific dates and specific events four years later that were not supported by entries in the diary Shane Singh relied on as a contemporaneous account. It is odd, to say the least, that Shane Singh chose not to offer diary entries that would have helped his case before the ERA, yet offered them to us as evidence that he did not use racist language against Satnam Singh. In the absence of evidence that the entries were contemporaneous (such as evidence of acknowledgement by the employees about whom the entries in the diary were made), in the circumstances we give very little weight to the diary entries. We also accept that Shane Singh has been the subject of adverse comments as to his credibility in other hearings. These are relevant to our assessment of his credibility in this hearing.

[74] We found Raj Devi to lack credibility with respect to her evidence about the extent she knew of her son’s activities. Both Priestley J and Hinton J found on the balance of probabilities that she was aware of her son’s activities even though in those cases, as in this case, she protested that she delegated the day-to-day management of the business to her son. She appeared not to understand that delegating day-to-day management of running a business to her son does not remove her legal responsibilities as a director and owner. On the other hand, we accept that she personally did not use racially abusive language towards the plaintiff, and the plaintiff did not allege this.

[75] Given the inconsistencies between Satnam Singh’s earlier accounts and his evidence at the hearing, and given the inconsistencies between his account and the evidence of Kuljeet Singh, we find that Satnam Singh’s account of what Shane

Singh said is affected by embellishment and lacks credibility. We find that the plaintiff has not discharged his burden of proving on the balance of probabilities that Shane Singh used the language alleged.

[76] We turn now to consider whether the plaintiff has discharged his burden of proving on the balance of probabilities that Shane Singh's behaviour in tapping Satnam Singh's turban with a clipboard expresses hostility against or brings into contempt or ridicule the plaintiff on the ground that he is an Indian of the Sikh faith, that is, on the grounds of his colour, race, or ethnic or national origins. Once again, we do not doubt that the behaviour of which the plaintiff complains expresses hostility against or brings into contempt or ridicule the plaintiff on the ground that he is an Indian of the Sikh faith, that is, on the grounds of his colour, race, or ethnic or national origins. The issue is whether the plaintiff has discharged his burden of proving on the balance of probabilities that Shane Singh tapped Satnam Singh's turban with the clipboard in a manner that expressed hostility against and brought the plaintiff into contempt or ridicule on the ground that he is an Indian of the Sikh faith.

[77] There are obvious inconsistencies as to what happened on 6 March 2012 that have been discussed above. There is, however, common ground in the accounts of Satnam Singh, Kuljeet Singh, Shane Singh and Aaed "Mike" Abu Iaila. The common ground is that all of the witnesses agreed that Shane Singh tapped Satnam Singh's turban with a clipboard. Shane Singh admitted that he did it, and admitted that he knew that a Sikh's turban is sacred. Shane Singh's statement that he did this to get Satnam Singh's attention is not incompatible with characterising the tap as contemptuous, particularly in light of Shane Singh's admitted knowledge that a Sikh's turban is sacred. What also causes this behaviour to express hostility against the plaintiff and to bring him into ridicule or contempt is his already close proximity to and, therefore, existing degree of engagement with, Shane Singh at the time of the tap, and the fact that the tap occurred in an area open and visible to the public. In these circumstances, we find on the balance of probabilities that when Shane Singh deliberately tapped Satnam Singh's turban, he was reckless as to whether or not the tap would dislodge the turban and cause humiliation and loss of dignity. There are differences as to what happened next, but these differences do not affect the consistency between each witness's evidence that Shane Singh tapped Satnam Singh's turban with the clipboard in a manner that expressed hostility against and brought the plaintiff into contempt or ridicule on the ground that he is an Indian of the Sikh faith.

[78] We find that the plaintiff has proven on the balance of probabilities that Shane Singh tapped Satnam Singh's turban with a clipboard, and that this expressed hostility against or brought into contempt or ridicule the plaintiff on the ground that he is an Indian of the Sikh faith.

[79] We turn now to consider whether Shane Singh's behaviour in tapping Satnam Singh's turban with a clipboard was also hurtful or offensive to the plaintiff.

[80] Although the test for the first limb, (whether the behaviour expressed hostility against the plaintiff or brought him into contempt or ridicule) is objective, the test for the second limb (whether the behaviour was also hurtful or offensive to the plaintiff) is subjective. The question is not whether a "reasonable Indian" or a "reasonable Indian of the Sikh faith" would find the behaviour hurtful of offensive. The question is whether this particular plaintiff found it hurtful or offensive.

[81] In this respect, we found the plaintiff's evidence credible. Cecelia O'Dell recorded that he told her that the touching of his turban "was not only inappropriate but hugely offensive". Given his demonstrated knowledge of and upbringing in the Sikh faith, and the violation of Kesh that resulted from the defendant's behaviour, we accept without hesitation that the plaintiff found the defendant's behaviour hurtful and offensive.

[82] We turn now to consider whether Shane Singh's behaviour in tapping Satnam Singh's turban with a clipboard was of such a significant nature that it had a detrimental effect on the plaintiff in his employment.

[83] The behaviour occurred on one day only, but s 63(1)(c) does not require the conduct complained about to be repeated. It is sufficient if the conduct is of such a significant nature that it had a detrimental effect on the plaintiff. In this case, the deliberate tapping of Satnam Singh's turban, a symbol of his faith, with a clipboard, can only be described as significant.

[84] There can also be no doubt that this behaviour caused a detrimental effect. It ended the plaintiff's employment. There is evidence from Dr Teo that the incident contributed to the plaintiff's depression and anxiety to the degree that medical treatment was sought and given. We accept the plaintiff's evidence that the incident contributed adversely to his relationship with his family, and in particular with his father, and to his ability to enter into trusting friendly relationships with other Fijian Indians.

[85] Section 63(1)(c) requires the racial harassment to have occurred in one of the areas listed in s 63(2). One of the areas listed is "employment". This requirement is satisfied on the facts.

Summary of findings under s 63

[86] For the reasons given we find all of the elements of racial harassment prescribed by s 63 of the HRA have been established. In the course of the plaintiff's employment, the first defendant; Shane Singh, used physical behaviour in the form of deliberately tapping Satnam Singh's turban with a clipboard, 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. This conduct was hurtful and offensive to the plaintiff and was of such a significant nature that it had a detrimental effect on him. There is no dispute that the second defendant; Scorpion Liquor (2006) Limited, is consequently vicariously liable under s 68.

Remedy

[87] Section 92I(2) of the HRA provides that in proceedings under s 92B(1), the plaintiff may seek any of the remedies described in s 92I(3):

> (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.

[88] Section 92I(4) requires the Tribunal to take into account the conduct of the parties in deciding what if any remedy to grant.

[89] The plaintiff seeks the same remedies as were ordered by the Tribunal on 9 March 2015 except for a larger damages award and a larger award of costs to reflect the greater costs incurred as a result of the defendants' actions since the first hearing.

[90] The formal orders made by the Tribunal on 9 March 2015 were:

(a) a declaration that the first and second defendants breached the Human Rights Act by subjecting the plaintiff to racial harassment;

(b) an order restraining the defendants from continuing or repeating the breach or from engaging in, causing or permitting others to engage in conduct of the same kind as that constituting the breach;

(c) an order requiring the defendants to undergo training with the Human Rights Commission;

(d) an order that the defendants pay damages to the plaintiff of $45,000 for humiliation, loss of dignity and injury to feelings;

(e) an order awarding $3,750 costs to the plaintiff.

[91] In his closing submissions, the plaintiff submitted that an award of damages in excess of $50,000 was appropriate in light of evidence at the second hearing that the first defendant knowingly transgressed the plaintiff's Sikh religious beliefs when he hit the plaintiff's head, and in light of evidence that the first defendant exploited the plaintiff's employment situation by not having a written contract and not paying him the minimum wage or holiday pay. The plaintiff's submissions on the appropriate remedy assume we will have made factual findings consistent with those made at the first hearing. As is apparent, ours differ. We have found that racial harassment occurred, but only in the form of deliberate tapping of the plaintiff's turban with a clipboard. This will have the effect of lowering the damages award.

[92] The plaintiff also submitted that the plaintiff should be awarded total costs and disbursements of $20,539.41 to take into account the wasted costs of the first hearing which, he submitted, the defendants had no reasonable excuse for not attending, and the costs of steps taken between the first and second hearings.

[93] The defendants submitted that if we found the plaintiff has established racial harassment, then the award of damages should be substantially decreased to take into account the lack of evidence as to the claimed effects on the plaintiff, and to take into account contributory negligence by the plaintiff by way of his poor work performance. The defendants also submitted that the other orders sought are not necessary given the length of time that has passed, and the sale of Scorpion Liquor. The defendants submitted that neither Shane Singh nor Raj Devi are now employers.

[94] We turn now to consider each of the orders sought by the plaintiff.

Declaration

[95] While the grant of a declaration is discretionary, it should not ordinarily be denied (see *Geary v New Zealand Psychologists Board*[7]). We see nothing on the facts to justify withholding from the plaintiff a formal declaration that Shane Singh and Scorpion Liquor (2006) Limited breached s 63 of the HRA.

Restraining order

[96] We do not consider that there are grounds to make a restraining order. Such an order was made at the first hearing on the basis of a finding that racial harassment by Shane Singh was "a common occurrence at the liquor store and that Shane Singh's racist attitudes are deeply ingrained". The Tribunal decided it was necessary to prevent him 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". Now that Scorpion Liquor has been sold, and neither Shane Singh nor Raj Devi are employers, there is less reason for a restraining order to be made against either the first or second defendant. No such order is made.

Training order

[97] Even though the liquor store has been sold, we agree with the plaintiff that a training order is required not only to remedy the act of racial harassment by Shane Singh, but also to ensure it is not repeated. A training order would enable the first defendant to comply with the provisions of the HRA in the future. Such an order was made by the Tribunal in *EN v KIC* [2010] NZHRRT 9 which observed:

> The making of an order requiring [the defendants] to attend appropriate training is not just in the public interest, it is in their own interests as well, so that they can take steps to avoid any repetition of what has happened in this case.

[7] *Geary v New Zealand Psychologists Board* [2012] NZHC 384 at [107] and [108]

[98] We, accordingly, order that Shane Singh undertake training, in conjunction with the Human Rights Commission, in relation to his obligations under the Human Rights Act 1993 in order to ensure that he, and any future employees, are aware of those obligations.

Damages for humiliation, loss of dignity and injury to feelings

[99] 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.

[100] In this case, the claim for damages falls within s 92M(1)(c). Not each of humiliation, loss of dignity and injury to feelings need be established for there to be jurisdiction to make an award. There must, however, be a causal connection between the breach of s 63 and the damages sought. In this case, the facts we have found establish a direct causal connection between the behaviour of Shane Singh in deliberately tapping the plaintiff's turban with a clipboard and the humiliation, loss of dignity and injury to feelings experienced by the plaintiff.

[101] Once a causal connection is established, damages in racial harassment cases must be genuinely compensatory and should not be minimal. The damages awarded must be an appropriate response to adequately compensate the plaintiff for the behaviour to which he has been subjected, not to punish the defendant. The conduct of the defendant may, however, exacerbate or 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. The damages awarded must also meet the broad policy objectives of the legislation.

[102] There appear to have been no previous awards of damages for emotional harm for racial harassment under the Human Rights Act. In *Corbett v UDF*

Shopfitters Limited[8], the Employment Relations Authority awarded damages of $10,000 for emotional harm. The plaintiff in that case suffered verbal abuse from his co-workers that amounted to racial harassment, and he was constructively dismissed. The ERA did not apportion the compensation to different acts. This Tribunal awarded $15,000 damages for emotional harm caused by religious discrimination in *Nakarawa v Affco New Zealand Limited*[9]. The employer refused to make reasonable accommodation for the plaintiff's request not to work on a Saturday because of a religious belief. Similarly, this Tribunal awarded $25,000 damages for emotional harm in *Meulenbroek v Vision Antenna Systems Limited*[10] when an employer failed to make reasonable accommodation for the plaintiff's request not to work on a Saturday because of a religious belief. Neither case involved abusive behaviour.

[103] In a case concerning sexual harassment, *DML v Montgomery & M & T Enterprises Limited*[11], Chairperson Haines stated:

> [140] Provided a causal connection between the breach of s 62 and the damages sought is established, damages in sexual harassment cases must be genuinely compensatory and should not be minimal. See *Laursen v Proceedings Commissioner* (1998) 5 HRNZ 18 at 26 (Gallen ACJ). In that case it was also held that the real question is what is an appropriate response to adequately compensate the complainant for the behaviour which she suffered and the compensation should meet the broad policy objectives of the legislation. In the subsequent case of *Carlyon Holdings Ltd v Proceedings Commissioner (*1989) 5 HRNZ 527 At 535 Potter J agreed with Gallon J that the appropriate starting point is to ask what is an appropriate response to adequately compensate the complainant for the behaviour which she suffered. In addressing this question the criteria appropriate for the Tribunal to take into account included such matters as:
>
> [140.1] The nature of the harassment.
>
> [140.2] The degree of aggressiveness and physical contact in the harassment.
>
> [140.3] The ongoing nature.
>
> [140.4] The frequency.
>
> [140.5] The age of the victim.
>
> [140.6] The vulnerability of the victim.
>
> [140.7] The psychological impact of the harassment upon the victim.

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[8] *Corbett v UDF Shopfitters Limited* [2012] ERA Christchurch 151 5363617, 26 July 2012.
[9] *Nakarawa v Affco New Zealand Limited* HRRT Hamilton HRRT 011/2011, 24 February 2014; [2014] NZHRRT 9.
[10] *Meulenbroek v Vision Antenna Systems Limited* HRRT Invercargill HRRT 020/2013, 14 October 2014; [2014] NZHRRT 51.
[11] *DML v Montgomery & M & T Enterprises Limited* HRRT Wellington HRRT 018/2011, 12 February 2014; [2014] NZHRRT 6.

Potter J at 535 went on to comment:

> However, each case must be considered on its merits, which it seems to me a specialist tribunal such as the Tribunal, is especially suited to do. Accordingly it was of little assistance to me to be referred by counsel for the appellants to the schedule of Tribunal awards and to be invited to make comparisons.

[104] A general descriptive tariff of damages for emotional harm was provided in *Hammond v Credit Union Baywide*[12], where Chairperson Haines stated:

> [176] It can be seen that awards for humiliation, loss of dignity and injury to feelings are fact-driven and vary widely. At the risk of over-simplification, however, it can be said there are presently three bands. At the less serious end of the scale awards have ranged upwards to $10,000. For more serious cases awards have ranged between $10,000 to about (say) $50,000. For the most serious category of cases it is contemplated awards will be in excess of $50,000. It must be emphasised these bands are simply descriptive. They are not prescriptive. It is not intended they be a bed of Procrustes on which all future awards must be fitted. At most they are a rough guide and cannot abridge the general principles identified earlier in this decision.

[105] As at 2011, damages for non-economic loss (not inclusive of ancillary medical costs) ranged up to $40,000 in Australia for breaches of the Racial Discrimination Act 1975. This range is similar to that observed in the Queensland Civil and Administrative Tribunal for breaches of the Anti-Discrimination Act 1991 (Qld) up to 2015. On the issue of general damages, Chris Ronalds SC has made the following comments:[13]

> The damages in the discrimination arena under this head are relatively modest and amounts between $8000-$20000 are common. It appears that the courts have not accorded much weight or significance to the emotional loss and turmoil to an applicant occasioned by acts of unlawful discrimination and harassment.

In this case, it is helpful to follow an approach similar to that taken in relation to damages following sexual harassment in *Carlyon*[14], in which elements that help to classify the seriousness of the case are identified.

The type of harassment

[106] The harassment which is of concern in this case is racial harassment. While in principle this form of discrimination 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. As well as the application of part 1A - unlawful discrimination to the prohibited grounds of colour, race, and ethnic or

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[12] *Hammond v Credit Union Baywide* HRRT Napier HRRT 027/2013, 2 March 2015; [2016] NZHRRT 6.
[13] Chris Ronalds *Discrimination Law and Practice* (3rd ed, The Federation Press, Sydney, 2008) at 223.
[14] *Carlyon Holdings Ltd v Proceedings Commissioner (*1989) 5 HRNZ 527.

national origins, the HRA also contains the provisions making racial disharmony, and racial harassment unlawful; except for the provision on sexual harassment, the other prohibited grounds of discrimination do not feature such prominence in the Act.

[107] New Zealand is a signatory of the International Covenant on the Elimination of All Forms of Racial Discrimination which states in Article 2:

> States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> …
>
> (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

Furthermore, Article 4 states that state parties:

> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin

[108] The predecessor to the provisions of the HRA which relate to race, colour, or national or ethnic origin, the Race Relations Act 1971, had as its long title, "An act to affirm and promote racial equality in New Zealand and to implement the International Covenant on the Elimination of All Forms of Racial Discrimination. In relation to this purpose of the Race Relations Act 1971, Woodhouse J stated in the case *King-Ansell v Police*:[15]

> …that stated purpose is important as an aid to construction. Clearly the statute has an international as well as domestic significance, and that fact is emphasised by this country's earlier ratification of the Convention on 25 October 1966. As a result New Zealand has undertaken to support its provisions. Furthermore the express mention in the Act of its intention to implement the Convention demonstrates, if that were necessary, that the language of the Act is intended to adopt and reflect its purposes. Indeed the recurring reference in the New Zealand statute to discrimination on grounds of "colour, race, or ethnic or national origins" is taken directly from part of the definition of "racial discrimination" which appears in Article I of the English text of the Convention: "…any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin".

The degree of aggressiveness, physical contact and lack of ongoing nature

[109] Satnam Singh has not proven on the balance of probabilities that the verbal incidents occurred. The only incident which has been proven is the tap on the head with the clipboard. Shane Singh deliberately tapped Satnam Singh's head

[15] *King-Ansell v Police* [1979] 2 NZLR 531 at 536.

and was reckless as to whether this caused his turban to become dislodged and caused him humiliation and loss of dignity. While this behaviour is somewhat aggressive and physical, it is not the most serious case that can be envisaged.

The plaintiff's vulnerability

[110] Satnam Singh was an employee at Scorpion Liquor; Shane Singh was his manager. Satnam Singh had poor English language skills, was from a foreign country, and likely not as aware of the laws and customs of New Zealand as a native-born person would be. These factors indicate a degree of vulnerability. That Satnam Singh was not provided with a written contract, was paid less than minimum wage and was not paid wage arrears is evidence of this vulnerability.

The psychological impact of the harassment

[111] There is medical evidence of the impact of the alleged harassment. Satnam Singh visited Dr Wee Teo after feeling suicidal and was given medication to treat depression and anxiety.

[112] The harassment also resulted in Satnam Singh having severely strained personal relationships with his family, especially with his father, and has led to him having difficulty in trusting other Fijian Indians.

Conclusion on damages

[113] The first award of damages in this case took into account language allegedly used by Shane Singh. By way of contrast, having considered the evidence adduced at this hearing, we have found that the plaintiff did not discharge his burden of proving on the balance of probabilities that Shane Singh used the language alleged. We have, however, found what the first Tribunal described at [61] as "the singular feature of the present case"; the tapping of the plaintiff's turban with the clipboard, to have occurred. We have found that this behaviour 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. He was humiliated in a place where members of the public could see and hear what was going on, and in the presence of at least one other person. The first defendant admitted that he knew he transgressed the plaintiff's Sikh beliefs when he tapped his turban. This conduct was hurtful and offensive to the plaintiff and was of such a significant nature that it had a detrimental effect on him. He was already vulnerable through being underpaid and employed without a written contract. He was now made to feel that his identity as a Sikh had been

compromised through the violation of Kesh. His relationship with his family suffered. He became sufficiently depressed and anxious that medical treatment was sought and given. The plaintiff has shown significant humiliation, loss of dignity and injury to feelings.

[114] Although the racial harassment in this case consisted of one incident, in its context it was of a significant nature and had a detrimental effect on the plaintiff. Taking all of these factors into account, we are of the view that an appropriate award of damages under s 92M(1)(c) is $25,000.

Costs

[115] Section 92L(1) states that the Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy. The Tribunal has said that this provision "confers the widest discretion to make such an award as we consider appropriate to meet the justice of the case" (see *Horne v Bryant (No. 2)*[16] at [18]). Frequently, the Tribunal has awarded costs based on a daily rate of $3,750.

[116] The plaintiff seeks costs based on $3,750 per day of hearing time. Although this hearing was constantly disrupted by technical difficulties over the three days allocated to it, taking into account the time counsel spent waiting for the technical difficulties to be resolved (eventually by placing Dictaphones in front of counsel and witnesses) and the time spent preparing written submissions, three days of hearing time at a rate of $3,750 is a fair estimate of costs. An additional allowance of one day is appropriate for matters relating to the appeal of the first decision, the application to set aside the first decision, and the application to the chairperson to recuse himself from the second hearing. This amounts in total to $15,000. As the plaintiff was only partly successful in the second hearing, we would reduce this amount to $10,000 plus disbursements of $1,789.41 for witness expenses and the cost of the video link to Delhi, India.

[117] The plaintiff also seeks "wasted" costs of $3,750 from the first hearing. Whether these costs should be awarded depends to a large extent on whether the defendants had a reasonable excuse for not attending the first hearing. The first decision at [7] and [8] records the steps taken by the Tribunal to give the defendants notice of the first hearing. We also take into account the defendants' apparent disdain of legal proceedings when they took no part in the ERA

[16] *Horne v Bryant (No. 2)* HRRT Auckland HRRT 031/2002, 18 December 2003; [2003] NZHRRT 36.

proceedings. Shane Singh's explanation that he had other matters to attend to and that he thought those proceedings would be resolved with some sort of fine does little to allay the appearance of disinterest or disdain in legal proceedings.

[118] Mr Batth gave evidence that he received a package in August 2014, told the defendant that he had received it, and gave the package to the first defendant. This package concerned the HRRT hearing. He gave evidence that he received a second package in October 2014, and again told the defendant. This time, the first defendant told him to throw it away, he said because he thought it had something to do with the ERA case. Admittedly, best practice would have been personal service on the first defendant, but the second defendant's address did not change after the business was sold. Having received the August package relating to the HRRT proceeding, the defendants either knew about the first HRRT hearing or ought to have known about it. A reasonable person in these circumstances would have collected the mail, opened it, and would consequently have known about the first hearing.

[119] We find there was no reasonable excuse for the defendants not to have attended the first hearing and award costs of $3,750 for that hearing.

[120] Therefore, the award of costs is $13,750 plus $1,789.41 in disbursements.

Formal orders

[121] For the above reasons, the decision of the Tribunal is that:

(a) 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.

(b) An order is made under s 92I(3)(f) of the Human Rights Act 1993 that the first defendant undertake training, in conjunction with the Human Rights Commission, in relation to his obligations under the Human Rights Act 1993 in order to ensure that he, and any future employees, are aware of those obligations, particularly the obligations under s 63 of the Act.

(c) Damages of $25,000 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.

(d) Costs of $13,750 plus $1,789.41 in disbursements are awarded to the plaintiff.

_____	_____	_____
Judge W K Hastings	Dr H Hickey	Pastor R Musuku
Deputy Chairperson	Member	Member