

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 281/09  
5027954

BETWEEN                      DANNY BACHU  
   Applicant  
  
AND                                DAVIE MOTORS LIMITED  
   Respondent

Member of Authority:        Dzintra King  
  
Representatives:              Applicant In Person  
   Penny Swarbrick, Counsel for Respondent  
  
Investigation Meeting:        24 and 25 November 2008  
  
Submissions Received        17 December 2008 and 6 April 2009 from Applicant  
   11 March 2009 from Respondent  
  
Determination:                14 August 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Mr Danny Bachu, claims that he has been sexually and racially harassed and constructively dismissed by the respondent, Davie Motors Limited.

[2]     The respondent says there has been no harassment and that Mr Bachu resigned of his own volition.

**Background and Events Complained Of**

[3]     Mr Bachu was employed as a car salesman. He commenced employment on 4 March 2005 and resigned on 2 August 2005.

[4]     Mr Bachu says that during the course of his employment he was subjected to a number of racial comments, an incident of sexual harassment and a number of

incidents constituting bullying and undermining behaviour. Mr Bachu is an Indian born in South Africa.

[5] The racist comments include:

- Remarks by Mr Steve Aitken, a fellow salesperson, to customers asking whether they were being attacked by Indians and Asians;
- Comments by Mr Paul Brewer, Manager of Davie Motors, to the effect that he could not stand Fiji Indians; and a comment that Mr Bachu displayed sexist attitudes towards women because he was South African;
- Comments by Mr Kyle Avery, Business Manager, that Pacific Islanders were coconuts and were not to be brought into his office;
- Comments by Mr Aitken and Mr Roger Perry, a salesperson, that Indians were dirty and filthy.

[6] The sexual harassment incident alleges that on 20 June 2005 Mr Aitken was watching television and sniggering in response to the programme being screened. Mr Bachu was sitting down. Mr Aitken walked over to Mr Bachu, placed his crotch on Mr Bachu's shoulder, rubbed it against Mr Bachu moving backwards and forwards and saying "Fuck Danny, fuck, Danny, fuck, fuck, fuck". Mr Bachu became very angry and told him never to do that again or he would take it further. Mr Perry laughed and said "Danny, you have just been fucked by Steve".

[7] The instances of bullying and undermining include:

- a. An unpleasant reception upon starting work when he was treated with disrespect;
- b. Cars being sold to other customers;
- c. A tirade by Mr Brewer (for which he apologised);
- d. Allegations of "burning" customers, his accent being mocked and mimicked and allowing others to view his sales performance;

- e. An assertion that his confidential tax information had been disclosed to others.

[8] A major issue in this case is whether Mr Bachu complained about these incidents to the respondent.

### **Notification to Employer**

[9] Mr Bachu went on sick leave on 11 July 2005, supplying a medical certificate stating stress as the reason and then making no further contact with the company. As a result of unsuccessful attempts to contact him by phone, Mr Ian Penten, the Chief Executive, wrote to Mr Bachu on 21 July.

[10] Mr Penten asked that Mr Bachu contact him or Mr Perumal, the Financial Controller, if he did not feel he could speak to Mr Brewer, who had left a number of messages asking Mr Bachu to contact the company.

[11] On 22 July the Human Rights Commission contacted the company regarding a racial harassment claim by Mr Bachu.

[12] On 26 July Mr Bachu spoke to Mr Penten after having received his letter. The same day he faxed a list of complaints to Mr Penten. The incidents deal with claims that he had been undermined and bullied; and with some of the racist comments.

[13] On 27 July the Human Rights Commission advised Mr Penten that Mr Bachu needed more time to put his complaints in writing. On 29 July the Commission suggested mediation. Mr Penten told the Human Rights Commission he wanted the allegations dealt with by having all the relevant people present.

[14] On 1 August 2005 a further medical certificate was received.

[15] The next day Mr Bachu provided a further list of complaints, including the sexual harassment one, and also resigned saying "I cannot ever return to this work place. Due to my state of health and the nature of incidents, I am unable to consider returning to work for the detailed reasons, I have expressed." Mr Bachu sought financial compensation as a settlement.

[16] The company says that by the time Mr Bachu brought his concerns to its attention he gave it no opportunity to resolve matters before resigning.

[17] Mr Bachu said Mr Penten had told him he would get back to him but he did not do so.

[18] Mr Penten said he had interviewed the staff who had been complained about and was waiting for the rest of the complaints to be provided to him when Mr Bachu resigned.

### **Racial Harassment**

[19] Racial harassment is defined in s 109. There are four key elements:

- a. The language, visual material or behaviour must be by an employer or representative of the employer; and
- b. Directly or indirectly express hostility against, or bring into contempt or ridicule, the employee on the grounds of race, colour or ethnic or national origins; and
- c. Be hurtful or offensive to the employee; and
- d. Either by its nature or through repetition have a detrimental effect on the employee's employment, job performance or job satisfaction.

[20] A 'representative' of the employer is someone who is employed by the employer and who either has authority over the employee alleging the grievance, or is in a position of authority over other employees in the workplace.

[21] Only Mr Brewer fits the definition of a representative of the employer.

[22] With regard to the allegations against his co-workers ss 117 and 118 apply. If the harassment is by a co-worker the employee is to complain to the employer or a representative of the employer. The employer must then undertake an enquiry and if satisfied that the events took place, take whatever steps are practicable to prevent a recurrence.

[23] If no practicable steps are taken s118 provides that the employee has a personal grievance against the employer.

[24] There are twelve allegations: eight by co-workers (Messrs Aitken, Perry and Avery); four by Mr Brewer.

[25] Mr Swarbrick submitted that three of the co-worker incidents did not fall within the 109 (b) definition because they related to Pacific Islanders; and, even they did, as these people were co-workers the employer had to have been notified and then failed to take action. I accept this submission and also accept that Mr Bachu did not relay any of these eight incidents to his employer.

[26] The incidents regarding Mr Brewer (a representative of the employer) are said to have occurred on 10 April, 12 and 19 and 22 June.

[27] The 22 June incident related to Mr Brewer's alleged assertion that Mr Bachu had a sexist attitude towards women because of his nationality. I think it is clear from Mr Brewer's evidence that he believed that Mr Bachu's attitude towards women was detrimental to effecting sales with female customers. This is an issue that Mr Brewer was entitled to raise with Mr Bachu.

[28] The other incidents relate to derogatory references to Indians or Fiji Indians. Mr Brewer denied making such comments but said he had made remarks about Fiji Indians being hard bargainers. I think it likely that Mr Bachu misinterpreted the comments made by Mr Brewer.

[29] The claims regarding racial harassment fail.

### **Sexual Harassment**

[30] The statutory provisions for sexual harassment are similar to those for racial harassment.

[31] I have no doubt that the incident Mr Bachu described taking place on 20 June 2005 which involved two of his co-workers did take place. It is a very detailed and bizarre account and it is difficult to see what would prompt Mr Bachu to make it up. Furthermore, his manner when recounting it led me to find his account credible. The

fact that he had initially referred to nudity on television and then revised that by saying that had been his assumption given the comments being made by the television watchers – he himself had not seen the screen – does not detract from the veracity of the account. It was clearly offensive and unwelcome and had a detrimental effect on his employment.

[32] The remaining issue is whether he referred it to the employer or a representative of the employer. Mr Bethune fits the definition of a representative of the employer.

[33] Mr Bachu says he told Mr Bethune about the incident during the course of a conversation on 24 June. He also mentioned the racial slurs. He said Mr Bethune's response was that Mr Aitken sold a lot of cars and being the top achiever he could not do much about it as salespeople were measured by performance. Mr Bethune replied that he had had incidents with Mr Aitken himself and was unable to do anything about it. He told Mr Bachu to stand up to Mr Aitken and said that he had once tried to prevent him from being reemployed.

[34] The evidence does not satisfy me that Mr Bachu reported the incident to Mr Bethune.

[35] Mr Bachu told me on the first day of the hearing that he had reported the matter to a senior employee, who he refused to name. This was Mr Sai-Louie. He said Mr Sai-Louie had advised him to sue the company and take the matter to the Human Rights Commission. Mr Sai-Louie denied knowing what the Human Rights Commission was and denied the conversation had taken place. Mr Bachu later said he had not reported it to Mr Sai-Louie but that Mr Sai-Louie had asked to speak to him so he assumed Mr Sai-Louie must have known about the incident. Mr Sai-Louie did tell me that he was aware that Mr Bachu and Mr Hoon (a Chinese employee) were having some problems and that he could imagine that Mr Aitken would not be the easiest person to get on with. Mr Bachu said Mr Sai-Louie told him that he believed Mr Aitken had shoved him against a chair. This is different from an acknowledgement that there was a sexual aspect to the incident.

[36] I think it possible that Mr Sai-Louie may have become aware of some incident involving Mr Aitken and Mr Bachu and that he did make a passing reference to it in a

conversation with Mr Bachu. I am not persuaded that he knew the details of the incident and I am satisfied that he did not make the comments attributed to him about suing the company and taking the matter to the Human Rights Commission.

[37] Mr Bachu had a tendency to assume knowledge on the part of others that did not exist.

[38] The first occasion on which Mr Bachu raised the sexual harassment incident was in his communication with Mr Penten.

[39] Although I am satisfied that this incident took place as no notification was made to the employer prior to Mr Bachu's resigning, and the employer had no opportunity to investigate and take practicable steps to prevent a recurrence, I am unable to find he has a personal grievance because he was sexually harassed.

### **Undermining and Bullying**

[40] Mr Bachu took exception to the manner in which he was treated at the commencement of his employment. He said "As a new employee I was treated with day one with hostility and disrespect and was forced to fend for myself. Immediately I sensed I was not welcome." Mr Brewer said Mr Bachu had complained to him that one of the salespeople had not shaken his hand when introduced. Mr Brewer said he had taken this up with the person concerned who told him he was unaware that he had created any offence. Mr Brewer reported this to Mr Bachu.

[41] Many of the incidents about which Mr Bachu complained were capable of being interpreted in a manner other than that in which he perceived them. He claimed that other staff were privy to his performance details. However, the document in question was a form that was open and accessible to all salespeople. The claims of being undermined by cars being sold to other customers cannot stand as this was general practice and not directed at Mr Bachu. He authorised a repair to a car when he did not have the authority to do it and was taken to task about that. There is nothing sinister in that.

[42] Mr Bachu claimed that his tax information had been leaked to other staff. He said Mr Brewer made a comment to him about hating people who didn't pay their tax.

There was evidence that Mr Bachu had spoken to other staff about his tax situation. The evidence does not satisfy me that Mr Bachu's tax information was given to employees who had no right to that information.

[43] Mr Bachu took exception to being corrected and did not like the way the company was run. He compared it unfavourably with his South African experiences.

[44] The matters that were raised with Mr Bachu were matters that the employer was legitimately entitled to raise. The one occasion on which Mr Brewer raised his voice when dealing with Mr Bachu was followed by an apology.

[45] I am unable to find that there has been a breach of the employer's obligations to Mr Bachu. Mr Bachu was not constructively dismissed.

### **Costs**

[46] If the parties are unable to resolve the issue of costs, the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King  
Member of the Employment Relations Authority