

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 73
5551213

BETWEEN RABAH BASHIR
Applicant

A N D LADBROOK LAW LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
S J Neville, Counsel for the Respondent

Investigation Meeting: 24 and 25 November 2015 at Auckland

Submissions Received: 7 December 2015 from the Applicant
14 December 2015 from the Respondent

Date of Determination: 7 March 2016

DETERMINATION OF THE AUTHORITY

- A. Rabah Bashir's employment was affected to his disadvantage by racial harassment.**
- B. Rabah Bashir's employment was affected to his disadvantage by bullying.**
- C. There is an order that Ladbroke Law Limited pay to Rabah Bashir compensation of \$7,500 including a reduction of 25% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- D. Rabah Bashir is ordered to pay damages of \$1,322.22 to Ladbroke Law Limited.**

E. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Rabah Bashir was employed as a law clerk by Ladbrook Law Limited until he was dismissed for redundancy on 2 December 2014. Mr Bashir alleges during his employment he was disadvantaged by various actions of the respondent director, John Appleby.

Facts leading to dispute

[2] Mr Bashir is originally from Sudan. He emigrated with his parents at the age of 11 years to New Zealand from the United Arab Emirates in 2003. Arabic is his first language but he learned English whilst resident in the United Arab Emirates.

[3] Upon his relocation to New Zealand, Mr Bashir attended Wairau Intermediate School in Forest Hill, Auckland. The school provided a class for ESOL (English as a second language) students that Mr Bashir attended for 3 years. He attended Westlake Boys College passing his NCEA examinations including achieving merit in NCEA English.

[4] Between 2009 and 2010, he attended Auckland University where he started a Bachelor of Arts and Commerce degree. In 2011 he was accepted into Victoria University's second year law programme. He graduated from Victoria University in 2013 with a Bachelor of Laws degree maintaining a B average.

[5] In June 2012 Mr Bashir met John Appleby. Mr Appleby was a director and sole practitioner in charge of the respondent. Mr Bashir was offered voluntary work at the respondent law practice. Later he was retained on a paid internship basis then offered permanent employment as a law clerk on 6 September 2013. During this period, Mr Bashir's relationship with Mr Appleby was collegial.

[6] From June 2014 the relationship changed. When critiquing Mr Bashir's written correspondence, it is accepted Mr Appleby commented about Mr Bashir's Arabic ethnicity and its connection to his lack of proficiency in written English. He

made comments that “bilingual speakers have weaknesses in both languages” and “written English can at times be difficult for non-native speakers”. He also drew an analogy between Mr Bashir’s ethnicity and difficulties with written correspondence to similar deficiencies in written English that he observed in his wife who is of Fijian/Indian descent. She spoke Fijian Hindi as her first language. She held no formal qualifications, although she had been a manager of a call centre in Auckland.

[7] In September 2014, trust work was removed from Mr Bashir and given to another employee. This was replaced by conveyancing work. He had limited conveyancing experience.

[8] Another employee, Eugene Raiki, had been assisting Mr Bashir with conveyancing work until he left to join another law firm located in the same building in October 2014.

[9] On 21 October 2014, a disagreement arose between Mr Bashir and Mr Appleby. Mr Bashir was blamed for failing to meet a deadline on a client file. When Mr Bashir tried to explain he had not been told about the deadline, Mr Appleby did not accept his explanation. Mr Appleby also blamed Mr Bashir for a client’s negative response to an email and letter of engagement Mr Bashir had sent. Mr Appleby believed the correspondence inferred to the client that Mr Bashir was stupid. Mr Appleby became agitated and raised his voice to Mr Bashir.

[10] The same day Mr Appleby issued a written apology to Mr Bashir by way of a file note.

[11] Mr Appleby suggested he sit down with Mr Bashir and Mr Appleby’s wife, who was responsible for his HR matters.

[12] On 4 November 2014, a staff meeting was held. The purpose of the meeting was to deal with a cashflow shortfall. Various suggestions for dealing with the cashflow shortfall were made. This included recommendations that Mr Bashir and Mr Appleby “have better collaboration and to sort out their issues” and “to meet twice a week”.

[13] Mr Appleby and Mr Bashir met the following day. The outcome was a further disagreement involving Mr Appleby raising his voice.

[14] In November 2014, Mr Bashir was left to undertake several large conveyancing matters culminating in three conveyancing matters occurring on one day. Mr Appleby was not present during the period of time Mr Bashir undertook the work.

[15] On 21 November 2014, Mr Appleby raised the possibility of a restructuring which included disestablishment of Mr Bashir's and another law graduate's jobs. The reason for the restructuring was business viability. Mr Appleby met with Mr Bashir and the other affected employee to discuss the restructuring proposal.

[16] The parties met again on 28 November 2014. Mr Bashir provided oral feedback and a letter raising a personal grievance.

[17] During this period, the parties reached an agreement about the transfer of a Vodafone account to Mr Bashir. Subsequently, Vodafone charged the respondent a termination fee. The respondent seeks to recover the termination fee and outstanding monthly payments against the account by way of counterclaim.

[18] On 2 December 2014, Mr Bashir was advised that his role was being disestablished and he was to be paid in lieu of notice.

[19] On 13 December 2014 the respondent replied to the personal grievances raised.

[20] In January 2015, Mr Bashir obtained further employment. This employment was at a substantially higher pay rate than what he was receiving from the respondent.

Issues

[21] On 24 November 2015, I issued an oral determination dismissing various personal grievances.¹ The unjustified disadvantage personal grievances proceeding to hearing are:

- (a) Racial harassment comments about weaknesses in both languages for bilingual speakers;
- (b) Blaming Mr Bashir for the actions of others (21 October and 4 November 2014);

¹ *Bashir v Ladbrook Law Limited* [2015] NZERA Auckland 368.

- (c) Lack of support given to Mr Bashir for conveyancing work;
- (d) Unjustified disadvantage in the redundancy process up to and including 28 November 2014.

Was Mr Bashir unjustifiably disadvantaged in his employment by actions of the respondent?

[22] For an employee to have a valid disadvantage personal grievance claim under the Act, he must prove that his employment, or one or more conditions of his employment, was affected to his disadvantage. The burden then shifts to the employer under s 103A, to establish that its actions were what a fair a reasonable employer could have done in all the circumstances.

Racial harassment comments about weaknesses in both languages for bilingual speakers

[23] The applicant submits the respondent accepted the comments were related to his racial background but failed to accept the comments were offensive and hurtful even after being notified by Mr Bashir. Mr Appleby had no knowledge or expertise in languages especially Arabic. His experience of Hindu languages was from his limited exposure to culture and through his partner. His comments and comparison of Mr Bashir to his wife's written English difficulties was unwarranted because there was little similarity in language and education. The example given of his bilingualism affecting his written English by a failure to use pluralisation made no sense. The comments continued to be repeated throughout his employment including at times in front of other staff. Mr Bashir became reluctant to seek assistance from Mr Appleby.

[24] The respondent rejects any suggestion it made racially motivated comments. It states Mr Appleby's evidence was that he does not think the applicant has a problem with bilingualism. Rather the issue was with the applicant's writing and problems with plurals. It refers to the documents produced as examples of Mr Bashir's writing difficulties. The respondent has further examples of these difficulties that it has not produced. It states Mr Appleby's evidence was that he was simply putting forward a suggestion there may be an issue with plurals. It is accepted Mr Appleby is not a linguist but has lived in non-English speaking countries. It also submits he had researched languages such as Arabic and Hindi. It further submits the personal grievance letter does not raise an issue about being hurt by racial comments

the respondent made. It also rejects any suggestion Mr Bashir was ridiculed in front of other staff.

[25] A personal grievance may arise where an employee has been racially harassed in the employee's employment.² Racial harassment is defined as follows:

109 Racial harassment

For the purposes of s.103(1)(e) and s.123(d), an employee is racially harassed in the employee's employment if the employee's employer or a representative of that employer uses language (whether written or spoken), or visual material, or physical behaviour that directly or indirectly –

- (a) Expresses hostility against, or brings into contempt or ridicule, the employee on the ground of the race, colour or ethnic or national origins of the employee; and
- (b) Is hurtful or offensive to the employee (whether or not that is conveyed to the employer or representative); and
- (c) Has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance, or job satisfaction.

[26] "Brings into contempt" is not defined in the Act. The Oxford Dictionary³ defines "contempt" as "the feeling that a person or a thing is [worthless](#) or beneath [consideration](#)." To hold someone or something in contempt is to "consider someone or something to be [unworthy](#) of respect or attention."

[27] Similarly "brings into ridicule" is not defined in the Act. The Oxford Dictionary⁴ defines "ridicule" as "the subjection of someone or something to contemptuous and dismissive language or behavior".

[28] Mr Bashir raised this disadvantage grievance with sufficient particularity in his personal grievance letter to the respondent dated 28 November 2014.⁵ He stated Mr Appleby "continuously made reference to my racial background and claimed it affected my standard of work." He then gave examples as follows:

July - You took a strict line with me by openly shaming and criticising me in front of staff. In particular you criticised any written work I have produced from a simple email to complex letters. Your justifications for these actions were always that 'English was my second language', the only reasonable inference I can get from what you are saying is that I am incompetent due to having a second language. You have also made several comments to the effect bilingual speakers have an advantage but

² Section 103(1)(c) and 123(d) of the Act.

³ Oxford Press *The Oxford Dictionary*
<http://www.oxforddictionaries.com/definition/english/contempt>.

⁴ Oxford Press *The Oxford Dictionary*
<http://www.oxforddictionaries.com/definition/english/ridicule>.

⁵ Applicants Bundle of Documents (ABD) Tab 19.

their disadvantage is weakness in both languages. You have also tried to run a correlation between me and your wife (who is also bilingual), and you made comments to the effect that we both write in an inaccurate manner.

[29] The letter concludes “I have suffered a great deal of distress and humiliation due to the way you have treated me while working for you.”

[30] There is evidence Mr Bashir felt ridiculed by Mr Appleby’s comments. There was no evidential foundation for Mr Appleby to comment upon Mr Bashir’s racial background including in particular his bilingualism when critiquing his work performance. Mr Appleby admitted that he was not an expert linguist. He also admitted he did not speak a second language. His ‘research’ consisted of his knowledge of the history of Arabic and Hindu people, which he colloquially described as “Mongols rampaging across Persia.”

[31] Whilst the Hindi and Arabic or Urdu languages may have similar origins, it does not justify the comments to Mr Bashir. Likewise Mr Appleby’s time in the Pacific Islands providing legal services to local people, has little logical connection to the work performance of a bilingual New Zealand qualified lawyer.

[32] Similarly I can discern no basis to draw any comparison to Mr Appleby’s wife’s situation other than the fact they both learnt English as a second language. They have different ethnic and academic backgrounds.

[33] Mr Appleby accepted under oath that his comments were directed at Mr Bashir’s Arabic ethnicity but were not racist. When questioned by the Authority about the evidential foundation for his comments Mr Appleby stated “that written English can be difficult for non-native speakers was a fact”. This ignored the relevant facts that Mr Bashir had attained a high level of academic literacy in English including merit in NCEA English and a reasonably good law degree from Victoria University in Wellington. His Arabic ethnicity and bilingualism did not prevent these milestone achievements. If anything his ethnic background appears to have spurred him to achieve.

[34] The correspondence alleged to show Mr Bashir’s difficulties with written prose due to his bilingualism is equivocal. The example of a failure to use plurals (‘lead’ as opposed to ‘leads’)⁶ ignores the correct use of plurals in the remainder of the document. The alleged error can also be attributed to inattention and inexperience

⁶ Document N Statement of JW Appleby sworn 24 November 2015.

in formal letter writing. There is nothing in these examples to support an assumption Mr Bashir's race or ethnicity was attributable for these errors.

[35] Despite raising this issue with the respondent on 28 November, it was not remedied. Instead Mr Bashir's employment was terminated 4 days later on 2 December 2015. It is not until 11 days after termination that the respondent took any action about this grievance.

[36] The respondent's belated reply does not offer any apology nor does it give any opportunity to meet and resolve the grievance. Rather it seeks to justify the lack of action by denying any intent to be racially offensive. Firstly it reaffirmed Mr Bashir's bilingualism was the reason for his poor written English skills stating "written English can at times be difficult for non-native speakers". It then states this "was intended as constructive feedback" and was "not expressed as a racist comment".

[37] The legal tests for racial harassment have been met. The comments ridiculed Mr Bashir on the grounds of his race or ethnic origin. There was no evidential basis to attribute any issues with Mr Bashir's work to his race or ethnic origin. These defects were not minor.

[38] Mr Bashir gave evidence of how hurtful these comments were to him. He told me they made him feel worthless. More particularly these comments continued to be repeated throughout Mr Bashir's employment. Mr Bashir gave evidence of how he felt stressed and upset during the remainder of his employment about these continual comments.

[39] In the circumstances, Rabah Bashir's employment was affected to his disadvantage by racial harassment.

Blaming Mr Bashir for the actions of others (21 October and 4 November 2014)

[40] It is accepted Mr Appleby yelled at Mr Bashir on 21 October and 5 November 2014.

[41] There is a written apology from Mr Appleby for the 21 October incident for losing his temper and saying inappropriate things that upset Mr Bashir. Mr Appleby apologised at hearing for the incident on 5 November 2014.

[42] Mr Appleby gave some context to his behaviour namely the intended restructuring of his business for financial reasons and the birth of a child. It seemed the matter could have been handled better at the time but was not.

[43] Workers are entitled to have a safe workplace. This includes one free of bullying. Bullying is about behaviours that are repeated and carried out with a desire to exert dominance and an intention to cause fear and distress.⁷

[44] Mr Appleby was in a position of power and control over Mr Bashir as his supervisor. His behaviour on these occasions was bullying. He accepted losing his temper and saying things that upset Mr Bashir on 21 October.⁸ He then repeated this behaviour again. No action was taken to remedy this behaviour after 21 October and following the raising of the personal grievance. These defects were not minor.

[45] Rabah Bashir was unjustifiably disadvantaged by the respondent's actions on 21 October and 5 November 2014.

Lack of support given to Mr Bashir for conveyancing work

[46] The applicant submits he had no support after the departure of Eugene Raika. The respondent submits he continued to have access to Mr Raika, even though he worked for another law firm in the same building, because he could bill any supervision work to the respondent.

[47] The applicant does not state the term of his employment was affected to his disadvantage by the alleged lack of support. From the evidence it is equivocal whether there was a lack of support or a lack of communication.

[48] The applicant has failed to show on the balance of probabilities there was an unjustified disadvantage. This disadvantage application is dismissed.

Unjustified disadvantage in the redundancy process up to and including 28 November 2014

[49] The applicant submits he should have been retained as opposed to another employee because he could generate more fees.

⁷ *Isaac v Chief Executive of the Ministry of Social Development* ERA Auckland AA200/08 at [54]-[55].

⁸ ABD at tab 16.

[50] If an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with that could be expected to satisfy the s 103A test.⁹

[51] There is no complaint about the pre redundancy notice and consultation process. In absence of any unfairness in the process leading to redundancy, it is an employer's prerogative to determine which staff are made redundant. Staff may not agree with the decision but it does not make it unfair.

[52] The applicant has failed to show on the balance of probabilities there was an unjustified disadvantage. This disadvantage application is dismissed.

Remedies

[53] Having found there were two personal grievances of unjustified disadvantage, I am required to consider remedies. The applicant seeks remedies under s123(1)(b) to (d) of the Act.

[54] I intend taking a global approach to remedies for the non-economic losses from the unjustified disadvantage grievances. This is because they arose over the same short time span and were part of a pattern of controlling behaviour. The resulting hurt experienced by Mr Bashir cannot be sensibly separately apportioned to each grievance as a consequence.

[55] There is no evidence of lost remuneration or mitigation under s123(1)(b) of the Act. It was understood Mr Bashir secured a job at a higher rate of pay within days of being terminated.

[56] There was evidence Mr Bashir was hurt by the respondent's behaviour. Similar cases have awarded damages of \$10,000 under s123(1)(c) of the Act subject to any reduction for contributory behaviour under s124 of the Act.¹⁰ I intend taking the same approach here.

[57] I may provide for a recommendation to the respondent employer under s123(d) of the Act where an unjustified disadvantage grievance arising from racial harassment is proven. Given the parties' employment relationship has terminated and

⁹ *Grace v Brake Team Accounting* [2014] NZCA 541 , [2015] 2 NZLR 494, (2014) 10 NZELC 79-049, [2014] ERNZ 129, (2014) 12 NZELR 219 at [85].

¹⁰ *Corbett v UDP Shopfitters Ltd* [2012] NZERA Christchurch 151.

the respondent no longer employs solicitors, there is little point in making any particular recommendation and I decline to do so.

Contributory Behaviour

[58] Section 124 of the Act requires the Authority “consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance” in deciding the nature and extent of remedies to be provided in respect of a personal grievance. Contributing behaviour to be taken into account in the reduction of remedies must be both causative of the outcome and blameworthy.¹¹

[59] There is no contributing behaviour in respect of the racial harassment grievance. There is contributing behaviour in respect of the bullying claim. There was evidence Mr Bashir was being somewhat belligerent at times in his dealings with Mr Appleby causing the outbursts. This was both causative and blameworthy behaviour and justifies a 25% reduction in compensation.

[60] There is an order that Ladbrook Law Limited pay to Rabah Bashir compensation of \$7,500 including a reduction of 25% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

Counterclaim - Vodafone

[61] The respondent seeks reimbursement of \$1,322.22 incurred as a consequence of the early cancellation of the applicant’s cellphone contract with Vodafone. The debt comprises the monthly payment of \$480.29 and an early cancellation fee of \$953.06 less wages owed of \$111.13. The applicant accepts he is liable for the monthly payment but denies he owes anything for the cancellation fee.

[62] Mr Bashir accepted he had agreed to take over the cellphone plan but instead cancelled the respondent’s plan by signing up to a new plan. He was aware this could result in a cancellation fee because he referred in his evidence to making enquiries about.

[63] The cancellation fee was clearly incurred due to Mr Bashir’s actions at the time. This was in breach of the agreement he had with the respondent about his

¹¹ *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49].

retention of the cellphone. There is sufficient causation to warrant an award of damages of \$1,322.22 pursuant to s162 of the Act.

[64] Rabah Bashir is ordered to pay damages of \$1,322.22 to Ladbrook Law Limited.

[65] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority