

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 338  
3064993

BETWEEN            VIRAT VIJ  
                                 Applicant

A N D                SIGNORA CAFÉ LIMITED  
                                 Respondent

Member of Authority:     Peter van Keulen

Representatives:         Applicant in person  
                                 Nick Mason, counsel for the Respondent

Investigation Meeting:    2 July 2020

Submissions Received:    2 July 2020 from the Applicant  
                                 2 July 2020 from the Respondent

Date of Determination:    25 August 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Virat Vij worked for Signora Café Limited (the Company) in its Columbus Coffee Café in Richmond, Nelson (the Café) from 15 February 2019 until his employment was terminated on 22 March 2019.

[2] Mr Vij believed he was employed to manage the kitchen of the Café and this informed how he worked, including how he interacted with other staff and his view of how the Café operated. Ultimately, for Mr Vij, this manifested into concerns with work practices in the kitchen of the Café, issues about staff conduct and performance and a desire for a hierarchy to

be communicated to all staff (essentially to enable him to manage the kitchen effectively). And during his employment Mr Vij compiled three reports for his employer that outlined these things; reports that he says went largely unanswered making it more difficult for him to do his job.

[3] From the Company's perspective it says Mr Vij was not employed to manage the kitchen of the Café and actually, Mr Vij was difficult to work with. In particular it says Mr Vij struggled to take direction on how to cook or operate in the kitchen, which in turn meant he could not adapt to fit into the work environment and this is why he became critical of others and the work practices.

[4] Regardless of which was right - Mr Vij's perceived faults of the Café and its employees; or the Company's perceived faults of Mr Vij – the end result was that Mr Vij's working relationship with other employees at the Café, including the owners of the Company, became dysfunctional and he was dismissed after five weeks of work under a valid 90 day trial period.

[5] Mr Vij raised a personal grievance for the way he was treated whilst employed by the Company; he rightly accepted he could not bring a claim for unjustified dismissal because of the valid trial period provision,<sup>1</sup> so his personal grievance alleged unjustified actions causing disadvantage, racial harassment and discrimination.

[6] The Company denies causing any disadvantage to Mr Vij, it says it did not discriminate against Mr Vij in the way it treated him and it denies that any of its employees racially harassed Mr Vij.

### **Unjustified disadvantage**

[7] Section 103(1)(b) of the Employment Relations Act 2000 (the Act) sets out that an employee may have a personal grievance against their employer where that employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[8] Mr Vij claims the Company acted in an unjustified manner causing disadvantage to his employment by:

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<sup>1</sup> Section 67B of the Employment Relations Act 2000.

- (a) Having a “fake” employment agreement and job description.
- (b) Unilaterally changing his position in the Café.
- (c) Breaching the employment agreement by not providing breaks.
- (d) Not taking action to address issues raised in his three reports concerning the conduct and performance of employees and health and safety issues.

[9] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of Mr Vij’s claim based on an unjustified disadvantage personal grievance are:

- (a) Did the Company act as alleged;
- (b) If so, did the actions cause any disadvantage to Mr Vij’s employment or a condition of employment; and
- (c) If so, were the Company’s actions justifiable?

[10] So, first I will turn to consider whether the events Mr Vij complains of occurred.

[11] Mr Vij was interviewed on 14 February 2019 by Trudi Brassfield, a shareholder and director of the Company. Mrs Brassfield was also, effectively, the manager of the Café. Mrs Brassfield says she interviewed Mr Vij for a role as a chef for the Café. Mrs Brassfield described the role as varied covering all aspects of food preparation and cooking for the Café as part of a team that had no hierarchy, so the role did not have any supervisory or management responsibilities.

[12] In contrast Mr Vij says he was interviewed for a role as a chef managing the kitchen at the Café, including the kitchen staff. Mr Vij says this was how the position was described to him in the interview.

[13] Mr Vij was offered a role in the Café after his interview. This offer was confirmed by the Company sending Mr Vij an employment agreement and job description. Mr Vij accepted the offer, signing the employment agreement before he commenced work in the Café on 15 February 2019.

[14] The employment agreement signed by Mr Vij recorded that his role was a “Café Worker”. Mr Vij crossed out “Worker” and wrote “Chef” so that his role was recorded as “Café Chef”, before he signed the agreement. The position description attached to the employment agreement recorded the position title as “Café Chef/Front of House” and Mr Vij did not make any changes to this title when he signed the employment agreement.

[15] When Mr Vij commenced employment he discovered his role was not a management role as he believed and he did not have a mandate or the authority to manage the kitchen as he expected. Mr Vij described his role as being part of a kitchen where all of the employees were doing the same work, which from his perspective would never work as it simply creates conflict.

[16] Mr Vij’s first complaint, that the Company had a “fake” employment agreement and job description, reflects his view that he was hired to manage the kitchen, but in reality his role was as a chef with no management responsibilities.

[17] When I asked Mrs Brassfield about management responsibilities for the role Mr Vij was interviewed for and then offered, she conceded that the role did have some management responsibility in terms of normal chef responsibilities. This covered managing aspects of the kitchen like ordering and controlling stock, checking quality of food, monitoring cleaning and instructing kitchen hands on what to do, but any of the chefs had these responsibilities and they were shared and interchangeable depending on who was working. She went on to explain that there was no hierarchy attached to the role such that Mr Vij was managing the kitchen nor did he have direct supervisory or management responsibility for staff.

[18] I believe that this general level of management and the responsibility expectations of a chef were discussed in the interview when Mrs Brassfield described the role to Mr Vij. The problem is, Mr Vij did not take any discussion about management responsibility or expectations to be shared responsibilities but rather he saw them as hierarchical meaning the role he was offered was as chef managing the kitchen. And, I believe this view was informed by confirmation bias that occurred for Mr Vij when he read the detail of the employment agreement, particularly the position description.

[19] The position description recorded that the purpose of the role was to “manage the kitchen team to ensure a safe work environment”. Some of the key accountabilities recorded

in the description included “supervise and maintain quality control for outgoing meals...”, “monitor productivity of the kitchen”, “stock control and rotation”, “manages and directs kitchen staff” and “manage food costs”.

[20] Reflecting on the employment agreement and the position description it seems that most of the language describing management and supervisory responsibilities can be interpreted as supporting both Mr Vij’s position on the role he accepted and the Company’s position; that is, I can see how and why Mr Vij believed his role was a hierarchical one, with responsibility for managing the kitchen including the staff and I can also see why the Company maintains that the role was a chef role on the same level as other chefs and with no hierarchical management status.

[21] On this analysis I conclude that the employment agreement provided by the Company to Mr Vij was not fake as it did represent his job, albeit with some parts being ambiguous and from Mr Vij’s perspective incorrect. This is not enough to sustain the complaint and I find that the Company did not act as alleged in terms of this aspect of Mr Vij’s grievance.

[22] The second complaint from Mr Vij is that the Company unilaterally changed his position when the Company, through Mrs Brassfield, wrote to him on 17 March 2019 and stated (amongst other things) in relation to his role:

Nobody reports to you. This is because there cannot be one person in charge seven days a week – every person must take responsibility for all tasks required on a daily basis.

[23] Mr Vij says that this statement and other parts of the letter supporting this amount to the Company changing his role from Café chef managing the kitchen to a Café worker.

[24] There are two reasons why I do not accept the statements made by the Company in the 17 March letter amount to a unilateral variation to Mr Vij’s role:

- (a) First, it simply states what Mr Vij’s role was as far as the Company considered it to be i.e. the role he was offered and accepted and had performed for over four weeks. There was no change from the Company’s perspective.
- (b) Second, Mr Vij knew shortly after he started working in the Café that his role was not the management role he expected. In several of his communications to

the Company after he said such things as “a chain in command needs to be put in place”, “make one person responsible and give the authority and accountability to run the place professionally” and “I need an understanding moving forward that new terms (new job description, delegation of authority/chain of command, staffing plans) need to be worked out as soon as possible”. So the letter of 17 March was not a change to Mr Vij’s role but confirmation of the role he knew he had and had been asking to have changed since he commenced work at the Café.

[25] So, I conclude the Company did not act as alleged in respect of this complaint by Mr Vij.

[26] The third complaint from Mr Vij is that the Company did not allow him to take breaks when he was working. I can deal with this allegation relatively easily. I have considered the evidence I heard on this aspect and conclude:

- (a) That there were times when Mr Vij was working in the café that it was busy and short-staffed and he felt like he did not have time to take breaks.
- (b) That even during the busiest times at the Café, the Company wanted its staff to take breaks and it facilitated this as best it could, encouraging staff to take breaks at times when the work could accommodate it.
- (c) There was nothing done by the Company to prevent Mr Vij from taking breaks when he was working.

[27] Overall I conclude that the Company did not act as alleged by Mr Vij in terms of not allowing him to take breaks.

[28] The fourth complaint from Mr Vij that informs his unjustified action personal grievance is that the Company did not respond to the various issues he raised with it about work practices in the Café kitchen. Mr Vij says these complaints were set out in three reports he submitted to the Company and he says further that the Company did not take any action to address his concerns.

[29] Based on the evidence submitted including various documents and the evidence I heard at the investigation meeting I conclude that in respect of Mr Vij's reports to the Company and the Company's responses the following relevant events occurred:

- (a) Mr Vij submitted his first report to the Company by email on 24 February 2019. This report focussed almost entirely on allegations Mr Vij made against another chef relating to poor work performance and an already fractious relationship between them, including a specific allegation that the chef told Mr Vij on one occasion to "take his shit face away". In this report Mr Vij also expressed his view that a chain of command needed to be put in place.
- (b) Mrs Brassfield suffered a serious medical event on 26 February 2019 which meant she was not able to work fully for two weeks including not working at all initially.
- (c) Mr Vij submitted his second report on 3 March 2019. This report also focussed almost entirely on allegations about the other chef, notwithstanding that that chef had in fact resigned on 3 March 2019. These allegations again centred on poor work performance and the fractious relationship. The report also restated Mr Vij's view about a chain in command being needed and concluded at the end, recognising that the chef had resigned, that Mr Vij could now manage the kitchen but he would need new terms clarified including a job description, a chain of command in place and appropriate staffing.
- (d) Mr Vij then submitted his third report on 10 March 2019. This report raised several new issues for Mr Vij including that he had not been able to take breaks, that the Café was short-staffed and that the staff were performing poorly with some specific examples, and that the grease trap in the kitchen smelt and was a hazard.
- (e) The Company responded to this third report, enabled somewhat by Mrs Brassfield's return to full time work managing the Café. The Company arranged to meet with Mr Vij and it responded in writing on the issue of taking breaks.

[30] What followed from this point of engagement was the meeting and exchanges of comprehensive correspondence which included the Company raising issues with Mr Vij's performance. Mr Vij then raised a personal grievance and the Company responded through its employment advisor. The end result was the issues with Mr Vij's performance were not resolved and Mr Vij was dismissed on 22 March 2019.

[31] So, in terms of this complaint by Mr Vij, it appears that the Company did not respond to Mr Vij's first two reports. Those reports dealt with two issues, Mr Vij's complaints about the other chef's performance and Mr Vij's view that a hierarchy needed to be put in place with him being promoted to manage the kitchen.

[32] Based on the evidence from Mrs Brassfield, I accept that the Company did turn to consider Mr Vij's complaints about the other chef's performance and the friction that was apparent in their relationship. It was satisfied that Mr Vij's complaints about the chef's performance were not founded and it discussed with the chef the need for her to try to cooperate and work with Mr Vij. The Company however, did not engage with Mr Vij over this issue.

[33] And it is correct that the Company did not respond to Mr Vij's request for a hierarchy to be established. But the company did consider it and its view was that a hierarchy was not required and would not work because one single chef was not working all of the time that the Café operated and therefore the management responsibilities needed to be shared.

[34] For completeness I do not accept that the Company failed to respond to Mr Vij's further issues raised in his third report and the correspondence exchanged after that.

[35] In summary, the aspect of Mr Vij's fourth complaint that is made out in terms of the Company's conduct is that it failed to respond to him on the two issues he raised in his first two reports.

[36] The next step in assessing the unjustified action causing disadvantage grievance is to ascertain if the actions that did occur caused a disadvantage to Mr Vij's employment or a condition of his employment.

[37] Disadvantage to employment or to a condition of employment needs to be disadvantage to an employment activity, or to an “on the job situation”.<sup>2</sup> In this case the failure to respond to Mr Vij regarding the performance of the other chef and his request for a hierarchy did not cause a disadvantage to his employment in the sense that it did not adversely impact on the performance of his job. For this reason Mr Vij’s personal grievance based on his fourth complaint cannot succeed.

[38] In conclusion Mr Vij’s personal grievance for unjustified action is not established as the Company did not act as alleged and where it did, this did not cause any disadvantage to Mr Vij’s employment.

### **Discrimination**

[39] Section 103(1)(c) of the Act sets out that an employee may have a personal grievance against his/her employer where the employee has been “discriminated against in that employee’s employment”.

[40] Mr Vij claims he was discriminated against in his employment by the Company as it:

- (a) Only provided him with two dirty jackets to use as his uniform when he commenced work and it never ordered the required uniform for him.
- (b) Required him to work in the kitchen without support or assistance, which meant he was overworked and he was unable to take breaks.
- (c) Terminated his employment in retaliation for him raising a personal grievance, yet it claimed to dismiss him for not following policies and procedures, which he then says if true amounts to disparity of treatment as other employees were not sanctioned in the same way for the same conduct.
- (d) Did not give him an adequate opportunity to prepare for a disciplinary meeting nor did it advise him of his rights.
- (e) Blamed him for another chef resigning without giving him an opportunity to respond to that chef’s allegations.

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<sup>2</sup> *Victoria University of Wellington v Haddon* [1996] 2 NZLR 409 (CA); *Air Nelson v Nell* [2008] ERNZ 483 (EmpC); and *Henderson v Nelson Marlborough District Health Board* [2016] NZEmpC 123.

[41] As with the unjustified disadvantage grievance the starting point is for me to determine whether the actions Mr Vij complained of occurred. Then, if the actions occurred I must then determine whether this conduct means Mr Vij was “discriminated against in [his] employment”. In this regard, section 104(1) of the Act sets out what “discriminated against in that employee’s employment” means. It states:

For the purposes of section 103(1)(c), an employee is **discriminated against in that employee’s employment** if the employee’s employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or involvement in the activities of a union in terms of section 107, -

- (a) refuses or omits to offer or afford that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
- (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
- (c) retires that employee, or requires or causes that employee to retire or resign.

[42] So, for “discriminated against in [his] employment”, if I find that the Company acted as Mr Vij alleges – so for example, it did only provide him with two dirty jackets to use as his uniform and it did not order his uniform – then I must:

- (a) Determine if the action is of the type described in sections 104(1)(a) – (c) of the Act, i.e. I must ascertain the nature of the treatment, including whether Mr Vij was treated differently from others in a similar situation; and
- (b) Decide if the Company acted this way, either directly or indirectly, because of Mr Vij’s race, i.e. I must establish that Mr Vij’s race was a material ingredient for the Company treating Mr Vij as it did.<sup>3</sup>

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<sup>3</sup> *Air New Zealand v McAlister* [2010] 1 NZLR 153.

[43] The other aspect that is relevant to my consideration of Mr Vij's discrimination claim is that the burden of proving the claim rests with Mr Vij.<sup>4</sup>

[44] So, in summary, Mr Vij must prove that he was treated by the Company in the way he complains of and this resulted in him being treated differently from other employees in a similar situation and then he must prove that his race was a material ingredient in the Company's decision to treat him this way.

[45] Turning to Mr Vij's first complaint that informs his discrimination claim, that the Company only provided him with two dirty jackets to use as his uniform when he commenced work and it never ordered the required uniform for him, I accept that the Company only provided two previously used jackets to Mr Vij and the Company did not order new uniform for Mr Vij. I also find that the failure to order new uniform for Mr Vij was because Mr Vij did not provide his clothing size to the Company.

[46] Next, having considered the evidence I am not satisfied that the Company's treatment of Mr Vij in giving him used jackets and then not ordering new uniform as it did not have his uniform size, is of a nature that meets any of the criteria in section 104 of the Act. This is not treatment that amounts to a failure to offer the same conditions of work or benefits as other similar qualified or skilled employees nor is it detrimental treatment that other chefs would not have been subjected to. To be clear there are two parts to my assessment. One, I am not satisfied that the treatment can be classified as a failure to provide conditions or benefits nor is it subjecting an employee to a detriment. And two, in any event, the Company would have treated any new chef this way – providing a temporary used uniform and waiting for sizing to be provided before ordering new uniform.

[47] Mr Vij's next complaint is that he was required to work in the kitchen without support or assistance, which meant he was overworked and was unable to take breaks. I accept that for a short period of time the Café was short-staffed and Mr Vij may have had to work harder to cover this but I do not accept that the Company prevented him from taking breaks. In terms of Mr Vij being overworked I accept that the nature of this treatment may meet the criteria in section 104 of the Act in terms of Mr Vij being subjected to some detriment but I do not accept that any other chef would have been treated differently. The reality is, the Café

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<sup>4</sup> *Post Office Union (Inc) v Telecom (Wellington) Ltd* [1989] NZILR 527 (LC); and *Idea Services Ltd v Crozier* [2017] NZEmpC 77.

was short-staffed for a short period of time but the Company addressed this quickly and efficiently. Unfortunately there was a short period of time when employees had to work harder to cover the inadequate numbers but that was an issue for all staff and would have been an issue for any chef working in the kitchen at that time. This treatment cannot amount to discrimination as Mr Vij was not treated differently.

[48] Mr Vij's third complaint is that the Company terminated his employment in retaliation for him raising a personal grievance, yet it claimed to dismiss him for not following policies and procedures, which he says amounts to disparity of treatment as other employees were not sanctioned in the same way for the same conduct.

[49] I am not satisfied that this treatment occurred. I find that the Company did not dismiss Mr Vij because he raised a personal grievance, rather it terminated his employment in reliance on a trial period provision. This decision was informed by various complaints the Company received from other employees about Mr Vij's performance and conduct at work, including one chef stating she resigned because of Mr Vij's behaviour and two employees advising they would resign if he continued to work in the kitchen. I am unable to conclude that Mr Vij was dismissed simply for failing to follow policies and procedures. But even if he was, I am not able to conclude that another chef would not have also been dismissed in these circumstances and for the same reasons. Again my conclusion is that Mr Vij was not treated as he complains but in any event if he was, he was not treated differently.

[50] The fourth thing Mr Vij complains of is that he says the Company did not give him an adequate opportunity to prepare for a disciplinary meeting nor did it advise him of his rights. I am not satisfied that this treatment occurred as alleged.

[51] The final complaint from Mr Vij is that he was blamed for another chef resigning without giving him an opportunity to respond to that chef's allegations. I accept that this is true and it occurred but as with Mr Vij's first complaint in his discrimination claim, I am not satisfied that the treatment is of a nature that meets any of the criteria in section 104 of the Act.

[52] In summary my conclusion is that Mr Vij's discrimination claim is not proven in that the events he complained of did not occur or if they did they did not amount to treatment meeting the requirements of section 104 of the Act; I am just not satisfied that Mr Vij was

discriminated against as he claims and he does not have a personal grievance for race discrimination.

## **Harassment**

[53] Section 103(1)(e) of the Act sets out that an employee may have a personal grievance against his/her employer where the employee has been “racially harassed in the employee’s employment”.

[54] Mr Vij claims he was racially harassed in his employment by employees of the Company, through the following conduct:

- (a) One of the chefs said to him “take your shit face away”.
- (b) Employees repeatedly mispronounced his name, calling him “Mr Viz” and “V-rat”.
- (c) Employees made stereotypical comments about Indian people and culture, with one particular incident where an employee told him people were uncomfortable around him because of his Indian background.
- (d) An employee gave him a bottle of deodorant and asked him to use it, complaining that he smells by the end of a day of working.
- (e) Employees “teamed up” against him, sabotaging the food he cooked, throwing out food he cooked that was fine for consumption, and using their own recipes or variations of Café recipes which caused confusion in the kitchen and made it more difficult for him to prepare food in line with Café requirements. This behaviour was then used to undermine him, disparage him and make him look like a poorly performing chef to the Company.

[55] Section 109 of the Act sets out what “racially harassed in the employee’s employment” means. It provides:

For the purposes of sections 103(1)(e) and 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 race, colour, 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 repetition, a detrimental effect on the employee's employment, job performance, or job satisfaction.

[56] The conduct that Mr Vij complains of as constituting his harassment claim is not conduct by his employer but rather conduct by colleagues. In this regard, sections 117 and 118 of the Act deal with racial harassment by employees of an employer (as well as other people).

[57] What sections 117 and 118 provide is that if an employee is subject to behaviour that is racial harassment as described in section 109 of the Act by a colleague, that employee may complain to their employer and the employer must inquire into what occurred and if it is satisfied that the behaviour occurred then the employer must take whatever steps are practicable to prevent any repetition of the behaviour. If the employer fails to take whatever steps are practical to prevent the repetition and the behaviour is repeated then the employee will have a personal grievance for racial harassment.

[58] In summary the questions to answer in respect of Mr Vij's harassment claim are:

- (a) Was there behaviour by an employee or employees that amounted to racial harassment in terms of section 109 of the Act;
- (b) Did Mr Vij complain to the Company about this behaviour;
- (c) Did the Company investigate and if necessary then take practicable steps to ensure the behaviour was not repeated: and
- (d) Notwithstanding this was the behaviour (amounting to racial harassment) repeated by the employee or employees that Mr Vij complained about?

[59] From my perspective Mr Vij's harassment claim falls short in four parts:

- (a) For Mr Vij's complaint about the other chef telling him to "take his shit face away", I am not satisfied that this amounts to harassment in terms of section

109 of the Act, but in any event it was investigated by the Company and the Company did take practical steps to prevent the behaviour from occurring again and the behaviour (or similar behaviour) was not repeated by the chef.

- (b) Mr Vij did not complain to the Company about employees mispronouncing his name.
- (c) Mr Vij complained about the various staff comments about his race and the deodorant incident on 18 March 2019 and the behaviour of this type was not repeated after this time.
- (d) When Mr Vij complained about some of the food he cooked being discarded the Company considered this and was satisfied that employees had made the right decision to discard the food. Further, there is no evidence that employees intentionally sabotaged the food Mr Vij prepared nor was there sufficient evidence to show that employees teamed up on him. Overall I am not satisfied that the behaviour of this type that did occur (such as discarding food Mr Vij prepared) was harassment under section 109 of the Act.

[60] In conclusion Mr Vij was not racially harassed in his employment and he does not have a personal grievance for racial harassment.

### **Conclusion**

[61] Mr Vij's claims for personal grievances are dismissed.

### **Costs**

[62] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[63] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority