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IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2022] NZHRRT 27

I TE TARAIPUNARA MANA TANGATA

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Reference No. HRRT 018/2018

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN TARIG ELHASSAN

PLAINTIFF

AND JUDITH WEBBY (CASTLE)

DEFENDANT

AT AUCKLAND

BEFORE:

Ms J Foster, Deputy Chairperson

Dr SJ Hickey MNZM, Member

Mr IR Nemani, Member

REPRESENTATION:

Mr J Suyker for plaintiff

Ms J Webby in person (absent and did not participate in the hearing)

DATE OF HEARING: 1 July 2020

DATE OF DECISION: 5 August 2022

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**DECISION OF TRIBUNAL<sup>1</sup>**

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[1] Mr Elhassan a Sudanese of Muslim faith arrived in New Zealand on a work visa in early 2017 and rented a room in a house from Ms Webby. After two months he was given two weeks' notice to leave because he hadn't yet found a job and Ms Webby didn't want anyone home during the daytime. The next day he was home in his room and Ms Webby began repeatedly arguing with him. Ms Webby was threatening and verbally abusive to Mr Elhassan and he moved out of the house that evening. Mr Elhassan claims Ms Webby

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<sup>1</sup> [This decision is to be cited as *Elhassan v Webby* [2022] NZHRRT 27.

has breached the Human Rights Act 1993 (HRA) by subjecting him to racial harassment and housing discrimination on the grounds of his employment status, colour, race, ethnic or national origin and religion.

[2] Ms Webby (who uses the first names Judy, Judith (and others) and surnames Castle, Kelly, Lane, Webby and Webbe) denies the claim but chose not to participate in the hearing of it.

## **BACKGROUND**

[3] The following background is taken from the evidence presented by Mr Elhassan, as Ms Webby chose not to participate in the hearing. The Tribunal heard evidence from Mr Elhassan and his friend Mr Aman Elkhidir. The Tribunal found them both to be credible witnesses and their evidence is accepted in full.

[4] On 4 March 2017 Mr Elhassan, a Sudanese Muslim arrived in New Zealand on a work visa. He is a qualified and experienced telecommunication engineer and had also taught at a university in Sudan. His goal was to set up his life in New Zealand and then bring over his wife and children.

[5] A few weeks after arriving Mr Elhassan found a room advertised on *Trade Me* in a four-bedroom house in Auckland placed by Judy Kelly (Ms Webby). Mr Elhassan told her he was looking for a job and she was happy for him to live in the house while job-hunting.

[6] On 25 March 2017 Mr Elhassan moved into the house after signing a “flat-house sharing agreement” and paying two weeks rent in advance. The agreement sets out the terms on which the “flatmate” and “head tenant” Judy Castle (Ms Webby) agreed to share premises and included a term that the flatmate must be working full-time. Mr Elhassan thought Ms Webby (although he knew her as Judy Kelly, then Judy Castle) owned the house. He only later learned her name was Judith Webby and she rented the house. Ms Webby had strict rules about which parts of the house were for her exclusive use and which could be used by Mr Elhassan and the others who rented rooms.

[7] On 29 May 2017, Ms Webby texted Mr Elhassan and told him he had two weeks’ notice to leave as he had enough time to find a job. She told him she did not want anyone home during the daytime as agents would be coming through each day and that from tomorrow, she wanted him out of the house between 9am – 5pm until he left on 11 June 2017.

[8] The next day, 30 May 2017, Mr Elhassan was home in his room as he did not want to leave the house. He had a Skype job interview at 2pm he was preparing for, he felt he should not have to leave when he had paid for his room and it would also have been tiring for him to do so as he was fasting. It was the third day of Ramadan, the month in the Muslim calendar that requires Muslims to fast from sunrise to sundown.

[9] Around midday Ms Webby texted Mr Elhassan to check if he was home and then proceeded to argue with him via text about whether he was required to leave the house immediately and what would happen if he did not. When Ms Webby threatened not to refund his bond and said she had changed the notice period to one week, he replied on 5 June that he was okay to leave if he got his bond and last weeks’ payment. She replied he would get no money as he was told yesterday to be out of the house during the day and threatened to throw his belongings outside.

[10] Sometime after this, Ms Webby argued with Mr Elhassan in person and she was shouting, calling him names and swearing at him. Mr Elhassan was so worried about his belongings and safety he called the Citizens Advice Bureau for help. They told him to take videos of the room so he could prove there was no damage and to record any conversations with her.

[11] Around 1.30pm Ms Webby forcibly opened Mr Elhassan's bedroom door and began arguing with him again, which he started recording on his phone part way through. The transcript of that recording is set out in full below (it refers to Ms Webby as Judy Castle, the name Mr Elhassan knew her by at the time):

JC Judy Castle

TE Tarig Elhassan

JC *[Indecipherable]* ... because I couldn't care what he says either. I would be out digging holes in the ground rather than lying on my fat ass here, doing nothing. That's what I'd be doing and that's what any human being with any sense of self-worth would be doing. They wouldn't be lying in there, sending off CVs – nobody cares about – you're one in ten thousand. Why would they look at a CV, says I'm from Sudan?

TE *[Indecipherable]* ... What's wrong with that?

JC Have you had – how many interviews have you had? Hundreds? No, you haven't. No, because I can tell you I've been in recruitment all my life. If I saw your CV come across a table, it'd go straight back down the rubbish bin.

TE Why?

JC And that's why –

TE Because of my name?

JC Eh?

TE Because of my name?

JC No, because there's hundreds of Kiwis out there. There's hundreds of Australian and British. Why would we give it to you? And if we do give it to you, over a Kiwi, then I will be the first one approaching my Member of Parliament. That's why – that's why – you won't get a job. I've told you. I have told you, I've been in recruitment all my life. The only way to get a job is to go knocking on the door, say "Hello, here I am. I'm fantastic, here's my CV." You don't get it sitting in there sending CVs off. Do you know how many CVs they get for every job? They get stacks. I don't think you're – I don't think you're a stand out guy. I don't think you're a stand out guy. And despite what the politically correct say, most recruitment are Kiwis, and Kiwis hate immigration. Like Britain hates immigration. Like America hates immigration. Stay in your own backyard. I will say it, because I don't care – I'm not politically correct. I hate immigration. It has done nothing for our way of life, except bring it down to a third world country, like yours. You won't be happy until we've got the whole – like Britain. Britain is now paying for their immigration. *[Indecipherable]* got Muslims bombing the shit out of them, killing innocent people, ok? America, got Muslims, they're bombing the shit out of them too, and it won't be long before it happens here. *[Indecipherable]* planning it in there.

JC/TE *[Indecipherable talking over each other]*

JC What?

TE You are afraid that I'm – I'm going to bomb you?

JC No, I'm not afraid.

TE All right.

JC No.

TE I'm not going to do that.

JC No, no. But your people do. Your people do. And we don't hear the Muslim population all rising up condemning the people that are bombing and killing babies, children. No, we don't hear the – we don't hear the Muslims saying how terrible this is, never. I have never once heard the Muslim hierarchy, ever. And I am not politically correct and I am the first one to say I hate immigration. Ok, because I've lived on this planet long enough to know and most people hate it. They might be nice to your face, but behind your face, they're not. And I'm not a politically correct person and I couldn't give a shit, because we have freedom of speech in this country. If I want to say it, I can say it. Ok? Don't you piss on in there – you stay there. No bond. You'll be out of here on Sunday, or you will not get any bond back. You want a bond, you want to argue it, go to the Tribunal. Ok? Disputes Tribunal. You ain't get nothing. Now go away because your big fat ass irritates me beyond belief. You think, because you're a male, who comes from a third world country that is used to dominating women, that you'll do it here. No you won't, sunshine. No you won't, because every morning I wake up and I see your car out there or other cars, it makes me feel physically sick. It's affecting my health. Ok? So get your lazy ass back in room and go to sleep. It's what you normally do. I don't know who's paying for you to be here. I don't know apart from Donald Trump who can afford to pay rent. It doesn't work. You are the laziest – I can't believe it, I said to some friends last night, here I've got a guy in a room here, who comes from a war-torn country where half the population are starving, trying to eke out something out of a dust bowl, and the other lazy bastard is in here, lying on his backside all day, waiting for someone to come and give him a job. Yeah? Don't come out here, don't move outside the door, don't move outside the door because this room is off-limits to you, ok? Everything is off-limits. I cut the internet, believe me, I'll cut the power. *[indecipherable]* ... think you're gonna win, mate, you'll never win with me. Not a good idea to upset people who owe you money. Always best I find. I've *[indecipherable]* in a very successful business – thirty years - I was too nice to people who owed me money. When I get the money, then I can be awful. I don't think you've been blessed with a – with a – with a – with a brain that you were born with. Don't come outside here, those doors are closed. The minute I hear them open, I'll be in your room, chucking your stuff out. In fact I've got my brother who's a cop coming over tonight. Wanna face him? He hates that his sister's health has been affected. He said "I don't even know why you let these mongrels into the house". He'll be more than happy ... to have a little chat. A little chat. Off duty. Get out of my house.

[12] Mr Elhassan had his Skype job interview at 2pm. After the interview as he needed to use the bathroom he went to ask Ms Webby (who was in her kitchen) for her permission to do so and he recorded the conversation. In brief, Ms Webby refused to give Mr Elhassan permission to use the bathroom and told him to go away, making comments such as "drop dead for all I care" and "you have no rights" as well as threatening to call

the police. Mr Elhassan tells Ms Webby he will agree to go if she refunds his money, but she refuses to do so even though he pleads with her to refund his money so he could go.

[13] Mr Elhassan decided to give up trying to get his money back that day and to move out of the house straight away. He left that evening with the help of his friend Mr Elkhidir, although Ms Webby refused to let him go into the house.

[14] On 5 June 2017 Mr Elhassan made a complaint to the Human Rights Commission. Ms Webby refused to participate in the complaint process and the matter was not resolved.

[15] Mr Elhassan considered the threat Ms Webby made involving her police officer brother was so serious that on 8 June 2017 he complained to the Independent Police Complaints Authority (IPCA) about this. IPCA could not investigate as he was unable to provide any evidence Ms Webby had a police officer brother but suggested he discuss concerns directly with the Police (which he did). On 7 July 2017 Police spoke with Ms Webby concerning her use of police intimidation in the recording and police records note the following. Ms Webby stated her brother was no longer in the police but declined to give his name, she admitted she should not have said that, but said she did not intend to imply violence. Police believed Ms Webby understood their concerns and did not consider any further action was needed.

[16] On 15 August 2017 the Disputes Tribunal ordered Ms Webby to refund Mr Elhassan the sum of \$400 (his bond payment) by 29 August 2017. Mr Elhassan has not received the payment.

[17] On 1 May 2018 Mr Elhassan filed this claim.

### **MR ELHASSAN'S CLAIM**

[18] Mr Elhassan claims Ms Webby subjected him to racial harassment in breach of HRA, s 63. He also claims Ms Webby subjected him to housing discrimination in breach of HRA, s 53 on the prohibited grounds of religious belief, race, ethnic or national origin and employment status, being HRA, s 21(1)(c),(f),(g) and (k).

[19] The remedies Mr Elhassan seeks are a declaration, a training order, damages of \$400 for pecuniary loss (for his unpaid bond) and damages of \$45,000 for humiliation, loss of dignity and injury to feelings.

[20] Ms Webby denies the claim. In her amended reply (statement of defence) filed on 16 July 2018 she denies she breached either HRA, s 63 or s 53. She says HRA, s 53 cannot apply because the exception to it in HRA, s 54 applies as she and Mr Elhassan were sharing residential accommodation.

[21] Ms Webby filed a defence to this claim but subsequently advised the Tribunal she would take no further part in the proceeding and would not be attending the hearing.

### **RACIAL HARASSMENT**

[22] We first consider Mr Elhassan's claim that the language Ms Webby used in the argument with him (set out above at [11]) amounts to racial harassment in breach of HRA, s 63.

## The law

**[23]** The HRA, s 63 makes it unlawful to subject any person to racial harassment, as set out below. The HRA does not provide for any exceptions to the application of s 63.

### 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).
- (2) The areas to which subsection (1) applies are—
  - (a) the making of an application for employment:
  - (b) employment, which term includes unpaid work:
  - (c) participation in, or the making of an application for participation in, a partnership:
  - (d) membership, or the making of an application for membership, of an industrial union or professional or trade association:
  - (e) access to any approval, authorisation, or qualification:
  - (f) vocational training, or the making of an application for vocational training:
  - (g) access to places, vehicles, and facilities:
  - (h) access to goods and services:
  - (i) access to land, housing, or other accommodation:
  - (j) education:
  - (k) participation in fora for the exchange of ideas and information.

## The issues

**[24]** The Tribunal must therefore determine the following matters:

**[24.1]** Whether Ms Webby used language that expressed hostility against him or brought him into contempt or ridicule on the ground of his colour, race or ethnic or national origins;

**[24.2]** Whether that language was hurtful or offensive to him;

**[24.3]** Whether that language was either repeated or of such a significant nature it had a detrimental effect on him in respect of access to accommodation, as in this case HRA, s 63(2)(i) is the relevant area.

**[25]** Mr Elhassan is required to prove his claim to the standard of the balance of probabilities.

**[26]** To establish whether Ms Webby racially harassed him in breach of HRA, s 63, Mr Elhassan must establish each of the elements above and these requirements are cumulative, see *Singh v Singh and Scorpion Liquor (2006) Ltd* [2016] NZHRRT 38 [61-63] (*Singh*).

**[27]** If the Tribunal is satisfied there has been a breach of HRA, s 63 it may grant any of the remedies set out in HRA, s 92(3).

## Analysis

[28] We proceed to consider each of the above elements Mr Elhassan is required to establish to prove Ms Webby racially harassed him in breach of HRA, s 63.

**Did Ms Webby's language express hostility against Mr Elhassan, or brought him into contempt or ridicule on the ground of his colour, race, or ethnic or national origins?**

[29] There is no doubt that Ms Webby used the language at issue, it was recorded by Mr Elhassan and is set out above at [11]. The issue is whether that language expressed hostility against Mr Elhassan or brought him into contempt or ridicule on the grounds of his colour, race, or ethnic or national origins. That is an objective test.

[30] The Tribunal is in no doubt that given the type of language used and the manner in which it was expressed it objectively expressed hostility against Mr Elhassan and also brought him into contempt or ridicule on the ground that he is a Sudanese, that is, on the grounds of his race, ethnicity and national origins.

[31] The language used by Ms Webby included the following:

[31.1] *"Why would they look at a CV, says I am from Sudan? ..." "If I saw your CV come across a table, it would go straight back into the rubbish bin."*

[31.2] *"There's hundreds of Kiwis out there. There's hundreds of Australian and British. Why would we give it to you? And if we do give it to you, over a Kiwi, then I will be the first one approaching my member of parliament."*

[31.3] *"And despite what the politically correct say, most recruitment are Kiwis and Kiwis hate immigration. Like Britain hates immigration. Like America hates immigration. Stay in your own back yard. I will say it because I don't care, I am not politically correct. I hate immigration. It has done nothing for our way of life, except bring it down to a third world country, like yours."*

[31.4] Referred to Muslims *"bombing and killing innocent people"* and that Mr Elhassan's *"people"* do that.

[31.5] *"You think, because you are a male, who comes from a third world country that is used to dominating women, that you will do it here. No you won't sunshine."*

[31.6] *"I said to some friends last night, here I have got a guy in a room here, who comes from a war-torn country where half the population are starving, trying to eke out something from a dustbowl, and another lazy bastard is in here, lying on his backside all day waiting for someone to come and give him a job."*

[31.7] A threat that her policeman brother was coming over that night and that he had said *"I don't even know why you let these mongrels into the house"* and he would be *"more than happy ...to have a little chat. A little chat. Off duty."*

[32] On the plain meaning of the language, it is both expressing hostility against Mr Elhassan as well as bringing him into contempt and ridicule on the ground that he is a Sudanese. Further, how the language was expressed by Ms Webby affirms this. The

Tribunal listened to the recording of the argument and heard the hateful tone used by Ms Webby when she spoke to Mr Elhassan.

[33] The Tribunal is satisfied Mr Elhassan has established Ms Webby used language that expressed hostility against him and also brought him into contempt or ridicule on the ground of his race or ethnic or national origin (that he is a Sudanese).

**Was that language hurtful or offensive to Mr Elhassan?**

[34] Whether the language used by Ms Webby was both hurtful and offensive to Mr Elhassan is a subjective inquiry. The question is not whether a reasonable person in the shoes of Mr Elhassan would have suffered offence, but whether he did (see *Singh* at [80]).

[35] The Tribunal has no hesitation in accepting Mr Elhassan's evidence that he was deeply hurt and offended by Ms Webby's comments. The comments had substantial harmful effects on Mr Elhassan that are discussed in full below at [80]. This included him being terrified by the threats made by Ms Webby that her policeman brother would visit him after hours. Mr Elhassan's evidence was that in Sudan you can be intimidated, arrested or detained just because a police officer wants to do it. Mr Elhassan said his confidence was shattered that he thought he would never get a job in New Zealand.

[36] The Tribunal is well satisfied that language used by Ms Webby was both hurtful and offensive to Mr Elhassan.

**Was the language either repeated or of such a significant nature to have a detrimental effect on Mr Elhassan's access to housing?**

[37] The final element that Mr Elhassan needs to establish is HRA, s 63(1)(c). This element requires him to establish that Ms Webby's comments were either repeated or of such a significant nature it had a detrimental effect on him in respect of his access to housing. As already noted, access to housing is the relevant area on which Mr Elhassan relies for the purposes of HRA, s 63(1)(c).

[38] In this case, the language used by Ms Webby was of such a significant nature that Mr Elhassan felt unable to remain living in the house. He moved out of the house that same day, in fear and without having had the opportunity to arrange other accommodation.

[39] Mr Elkhidir said he arrived at the house around 5pm after another member of the Sudanese community had asked him to see what was happening and found Mr Elhassan waiting outside. Mr Elhassan told him Ms Webby had forced him to leave. Mr Elkhidir said Mr Elhassan seemed to be in complete shock at what had been said to him and the fact he had been kicked out of his home. Seeing how distressed Mr Elhassan was, Mr Elkhidir thought it was best to help him move his belongings then talk to him a safer place. Ms Webby, however, refused to let him enter the property to help so he waited by the car and then took Mr Elhassan to his own house. As he did not have enough room for Mr Elhassan to stay, they had to start searching straight away for somewhere for him to live and it was not until 3am they finally found a room that was available and suitable.

[40] Mr Elhassan had already been given notice and said he would leave on 5 June 2017, but the effect of Ms Webby's comments meant he was unable to keep living in the house until that time.



[41] Accordingly, the language used by Ms Webby was of such a significant nature that it had a detrimental effect on Mr Elhassan's access to housing.

## **Conclusion**

[42] For the reasons given, we find all the elements of racial harassment prescribed by HRA, s 63 have been established. That is, we have found Ms Webby used language that both expressed hostility against and brought into contempt and ridicule Mr Elhassan on the grounds of his race and ethnic or national origins, that was hurtful and offensive to him and that was of such a significant nature that it had a detrimental effect on his access to housing.

[43] Accordingly, the Tribunal finds Ms Webby has subjected Mr Elhassan to racial harassment in breach of HRA, s 63.

## **DISCRIMINATION IN LAND, HOUSING, AND OTHER ACCOMMODATION**

[44] We next consider Mr Elhassan's claim that he was subjected to discrimination in breach of HRA, s 53(1)(c), (d) and (e) by reason of his employment status, religious belief, race and ethnic or national origin as:

[44.1] Ms Webby ended his tenancy, giving him two weeks' notice and asked him to leave the house during the day;

[44.2] The next day she then shortened his notice period and denied him access to certain parts of the house, including the bathroom; and

[44.3] It was clear from Ms Webby's texts and comments that she took these actions because of his employment status (being unemployed) and his religion, race and ethnic or national origin (being a Muslim and of Sudanese ethnicity).

[45] Ms Webby in her statement of defence admitted she had given Mr Elhassan notice because he had not found a job, but she denies she breached HRA, s 53. She says HRA, s 53 does not apply because HRA, s 54 applies as she and Mr Elhassan were sharing residential accommodation in a private residence with a house sharing arrangement between them as flatmates.

[46] In response to this, Mr Elhassan does not dispute his accommodation was residential accommodation, but says this was not shared with Ms Webby.

## **The law**

[47] Section 53 of the HRA, makes it unlawful to discriminate in the provision of land, housing, and other accommodation by reason of any of the prohibited grounds of discrimination. The prohibited grounds of discrimination relevantly include religious belief (s 21(1)(c)), race (s 21(1)(f)), ethnic or national origin (s 21(1)(g)) and employment status (s 21(1)(k)).

[48] Section 54 then provides for an exception to s 53 in relation to shared residential accommodation.

[49] Section 53(1) and s 54, HRA are set out below.

**53 Land, housing, and other accommodation**

- (1) It shall be unlawful for any person, on his or her own behalf or on behalf or purported behalf of any principal,—
- (a) to refuse or fail to dispose of any estate or interest in land or any residential or business accommodation to any other person; or
  - (b) to dispose of such an estate or interest or such accommodation to any person on less favourable terms and conditions than are or would be offered to other persons; or
  - (c) to treat any person who is seeking to acquire or has acquired such an estate or interest or such accommodation differently from other persons in the same circumstances; or
  - (d) to deny any person, directly or indirectly, the right to occupy any land or any residential or business accommodation; or
  - (e) to terminate any estate or interest in land or the right of any person to occupy any land or any residential or business accommodation,—
- by reason of any of the prohibited grounds of discrimination.

**54 Exception in relation to shared residential accommodation**

Nothing in section 53 shall apply to residential accommodation which is to be shared with the person disposing of the accommodation, or on whose behalf it is disposed of.

[50] The term “residential accommodation” is defined in HRA, s 2 (1) to include *accommodation in a dwelling house, flat, hotel, motel, boardinghouse or camping ground.*

[51] The term ‘shared’ is not defined in the HRA.

**The issues**

[52] The Tribunal must determine first whether the s 54 exception to s 53 applies in this case. If s 54 applies, then Mr Elhassan’s claim he was subjected to housing discrimination must fail.

[53] Accordingly, the Tribunal must determine:

[53.1] Whether Mr Elhassan and Ms Webby ‘shared’ the accommodation for the purposes of s 54.

[53.2] If the answer to that question is no (and s 54 does not apply), whether Ms Webby subjected Mr Elhassan to housing discrimination in breach of s 53.

**Whether Mr Elhassan and Ms Webby shared the residential accommodation**

***The residential accommodation in this case***

[54] The residential accommodation in this case is a two storied house. Both Mr Elhassan and Ms Webby lived in the house as well as others. The house had five bedrooms or rooms used as bedrooms, two were upstairs (one of which Ms Webby used) and three were downstairs, one of which Mr Elhassan used. Ms Webby had strict rules about which of the other parts of the house he and the other flatmates could use. Ms Webby had exclusive use of the kitchen, dining room, living room and office in the house. Mr Elhassan and the other flatmates had to use the kitchen facilities in the garage and also had to use the garage as their dining and living area. Mr Elhassan had to use the garage to enter the house and not the front door (that was used by Ms Webby). There was a bathroom downstairs that was used by everyone.

### ***Mr Elhassan's submissions***

[55] Mr Elhassan submitted that in this case he had insufficient common use of the house with Ms Webby for it to be considered "shared" with her for the purposes of s 54.

[56] He submitted, relying on the definition of shared in the Oxford Dictionary, the meaning of the word shared denotes the relevant thing being shared should be used, occupied or enjoyed jointly, or possessed in common with others.

[57] He submitted the appropriate test to determine whether accommodation is shared for the purposes of s 54, is whether the residential accommodation considered as a whole, can be properly said to be possessed or used in common with another or others.

[58] Mr Elhassan noted there is a wide spectrum of accommodation that might constitute "shared" residential accommodation. He submitted it would clearly be beyond the plain meaning of the word "shared" for different owners of apartments in an apartment building to be said to be living in "shared" accommodation, even though they may share some common areas. He submitted some shared element or common area does not make any residential accommodation "shared".

[59] Here, he submitted the degree of sharing was even less than would be expected in an apartment building. He submitted there were no common areas used by Mr Elhassan and Ms Webby apart from the laundry and that in these circumstances, where there is no common enjoyment or possession, it cannot be said to be shared. He submitted given the division and operation of the accommodation Ms Webby was essentially running a dormitory/boarding house and section 54 has no application.

### ***Analysis***

[60] The purpose of the s 54 exception is to allow people to freely choose whom they share their residential accommodation with, regardless of whether that choice is based on one of the prohibited grounds of discrimination, for example: sex, sexual orientation, religion or age. One such example is a woman choosing to share her house only with other women because she has been a sexual assault victim and would not feel safe sharing her residence with men.

[61] The circumstances in which people live are infinitely various and there are many ways in which a person may choose to share their residential accommodation. Given the statutory wording and its purpose there is nothing to suggest 'shared' should be given any other meaning than its ordinary meaning.

[62] The ordinary or plain meaning of "shared" is, as referred to above at [56], used, occupied or enjoyed jointly or possessed in common with others. The Tribunal does not accept that this meaning (for the purposes of HRA, s 54) requires sharing of the whole of the residential accommodation or an equal sharing of the accommodation. Such an interpretation would unduly limit the rights designed to be protected by HRA, s 54. There can be unequal sharing.

[63] It will be a question of fact in each case as to whether the residential accommodation, considered as a whole, is being shared and each case will turn on its own facts.

[64] In this case there is no dispute that the relevant residential accommodation is the house. Mr Elhassan and Ms Webby both lived at the house. While he did not have access to all parts of the house, they both used the laundry and importantly, the bathroom.

[65] The circumstances are not analogous to Mr Elhassan and Ms Webby having separate apartments or flats with a common entrance way, as was submitted by Mr Elhassan. Rather, the circumstances are analogous to Mr Elhassan renting a room in Ms Webby's home – which is how he described the situation in his complaint to the Human Rights Commission. It is also of note that the written agreement between Ms Webby and Mr Elhassan describes their arrangement as one of house sharing.

[66] The fact Ms Webby rented out multiple rooms in the house does not exclude the application of s 54. Section 54 applies to any residential accommodation shared with the person disposing of it or on whose behalf it is disposed, irrespective of whether it is also shared with others. We have also already determined that "shared" does not require the accommodation to be shared equally.

[67] In this case the Tribunal is satisfied on the facts that Mr Elhassan and Ms Webby "shared" the accommodation for the purposes of s 54.

### **Conclusion**

[68] The Tribunal has found that Mr Elhassan and Ms Webby shared residential accommodation for the purposes of s 54. As s 54 applies then s 53 does not apply and Ms Webby cannot be liable for housing discrimination in breach of that provision.

[69] Accordingly, Mr Elhassan's claim that Ms Webby subjected him to housing discrimination in breach of s 53 must be dismissed.

### **Summary of findings on racial harassment and housing discrimination**

[70] The Tribunal has found that Mr Elhassan was racially harassed by Ms Webby in breach of HRA, s 63.

[71] The Tribunal has dismissed Mr Elhassan's claim that Ms Webby also subjected him to discrimination in breach of HRA, s 53.

[72] Having found that Ms Webby breached HRA, s 63, we now turn to assess remedy. Before doing so we note that Mr Elhassan submitted that the harm he has suffered as a result of the actions of Ms Webby is the same regardless of which of his causes of action is ultimately successful.

## **REMEDY ASSESSMENT**

### **Declaration**

[73] The Tribunal has found that Ms Webby racially harassed Mr Elhassan in breach of HRA, s 63. Mr Elhassan seeks a formal declaration that Ms Webby has committed a breach of HRA, Part 2 (s 92(3)(a)). There is nothing in this case that would justify withholding from Mr Elhassan a formal declaration that Ms Webby committed a breach of Part 2 of the Act in racially harassing Mr Elhassan in breach of HRA, s 63.

### **Damages for pecuniary loss**

[74] Mr Elhassan also seeks an award of damages for pecuniary loss under HRA, s 92M(1) for the losses suffered from his racial harassment, being \$400 for his bond payment that Ms Webby has not refunded. As the Disputes Tribunal has already ordered Ms Webby to refund him his \$400 bond payment Mr Elhassan asks this Tribunal to make an award on the condition that this order could not be enforced in addition to the Disputes Tribunal award.

[75] Mr Elhassan submitted the Tribunal has a wide discretion on the issue of remedies and is able to make a conditional order as sought here. He submitted that if the Tribunal did not make this order, there is a real chance he will be left without access to an effective remedy in respect of the \$400 bond money as he did not have the resources or expertise to enforce the Disputes Tribunal order, nor did the Office of Human Rights Proceedings have the ability to act for him to enforce that order.

[76] The Tribunal refuses to make the order sought by Mr Elhassan in respect of his \$400 bond. The request for such an order is ill-conceived for the following reasons. The Tribunal does not have jurisdiction to make an order that relates to an enforcement of an order made by another tribunal or court. Further, the matter is both moot and res judicata, given the Disputes Tribunal has already ruled on the payment of the bond.

### **Damages for humiliation, loss of dignity and injury to feelings**

[77] Mr Elhassan seeks \$45,000 damages under HRA, s 92M(1)(c) for humiliation, loss of dignity and injury to feelings (emotional harm).

[78] The general principles relating to an assessment of damages for humiliation, loss of dignity and injury to feelings was summarised in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [170] (*Hammond*). In assessing the appropriate level of damages, the following factors are relevant:

[78.1] There must be a causal connection between the racial harassment and the resulting harm;

[78.2] The award of damages is to compensate for humiliation, loss of dignity and injury to feelings, not to punish Ms Webby. Ms Webby's conduct may be a relevant consideration to the extent it exacerbates or mitigates the harm suffered by Mr Elhassan; and

[78.3] The circumstances of humiliation, loss of dignity and injury to feelings are fact-specific and turn on the personality of the aggrieved individual (Mr Elhassan).

[79] Three bands were identified in *Hammond* at [176] as a rough guide for awards for damages for emotional harm, the Tribunal noting such awards are fact-driven and vary widely. The lower band for the less serious cases is up to \$10,000. The middle band, for the more serious cases between \$10,000 and \$50,000. The highest band for the most serious category of cases is in excess of \$50,000.

### **Emotional harm suffered by Mr Elhassan**

[80] Mr Elhassan described the emotional harm he had suffered from the racial harassment as follows:

**[80.1]** He was shocked, deeply hurt and humiliated.

**[80.2]** He found it very stressful having to move out when he did not know where he was going to live, and he was moving away from his community.

**[80.3]** He was terrified that Ms Webby's policeman brother was going to come after him. He could not sleep for two weeks because of the threat that the policeman brother would visit him after hours.

**[80.4]** He lived for a long time in fear that Ms Webby's brother would detain him or harass him somehow.

**[80.5]** He was depressed, scared and anxious. He described being consumed with anxiety because of the combination of concerns - his humiliation and upset at the comments made to him, his fear for his personal safety, his stress about whether he had made the right decision to come to New Zealand, and worry he would not be able to find employment.

**[80.6]** His confidence was shattered because he thought he would never get a job in New Zealand and began to wonder if there was any point in applying for jobs as his CV would go straight in the rubbish bin.

**[80.7]** He began to doubt himself and he was not able to apply for jobs because he became so depressed, which ultimately just created more uncertainty about his future in New Zealand.

**[80.8]** He wondered if people were just being nice to his face and then would be nasty behind his back. In his evidence he stated as follows:

I know her opinions are her own, but I began to wonder whether everything that went wrong was my fault. I thought I might have been wrong to come to New Zealand as an immigrant to find a job, after all those years of trying. I wondered if I had made the right decision to try and make a better life for my family here.

**[80.9]** He described having the worst year of his life after the racial harassment and being so afraid he would see Ms Webby again and suffer more abuse. One of the reasons he moved to Wellington was to get away from her.

**[80.10]** He also submitted he suffered a loss of dignity by the diminishment of his humanity from his people coming under severe attack in the form of words used by Ms Webby

**[81]** Mr Elkhidir's evidence supported Mr Elhassan's as follows.

**[81.1]** Mr Elkhidir said when he arrived at the house Mr Elhassan was visibly distressed and seeming to be in complete shock as to what had been said to him. He took Mr Elhassan to his house and he started explaining everything and was crying when he played the recording of what Ms Webby had said to him, although he tried not to show it and be strong.

**[81.2]** Mr Elkhidir emphasised how upset and fearful Mr Elhassan was of Ms Webby's threat to send her policeman brother around. He said Mr Elhassan perceived the threat to be real and this threat would be extremely concerning to anyone from their community as police corruption and violence is a very real

prospect in parts of Sudan. Mr Elkhidir described how they had to start looking straight away that night for a place for Mr Elhassan to live and did not find one until 3am. It was on the other side of the city, away from Mr Elhassan's Sudanese community and normal support networks but Mr Elkhidir said the one positive thing was that having to move so far slightly lessened Mr Elhassan's fear for his physical safety.

**[81.3]** Mr Elkhidir said Mr Elhassan was distressed and humiliated by having been harassed to leave the house and go to look for a job when that was exactly what he was doing online, as most applications are online.

**[81.4]** Mr Elkhidir said Mr Elhassan had left his family and moved almost to the other side of the world with the idea of setting up a better life and bringing his family over and he was scared about what his future in New Zealand would be like, and whether he had made the right decision. He said Mr Elhassan found it hard to believe this was an isolated incident as this was his first experience of trying to settle in New Zealand, and it made him think that kind of treatment was something he would be subject to wherever he went. He said he even expressed ideas about leaving as he thought he was moving to a country where he would not be discriminated against because of his race and would not be threatened in his own home.

**[81.5]** Mr Elkhidir said he thought about getting a psychologist to intervene but decided instead to have a really strong talk with Mr Elhassan, telling him to put his ordeal behind him, that it was a rare and one-off incident and he would not have to go through anything like this again. As Mr Elhassan was afraid, it was suggested he move to Wellington and he did this in September 2017. Although he worried that he would not get a job in Wellington he obtained one in November 2017.

**[82]** The Tribunal has no hesitation in finding that Mr Elhassan has established he suffered the emotional harm described above at [80] and this was caused by the racial harassment he suffered.

### **Assessment of damages**

**[83]** The Tribunal must now determine the amount of damages Mr Elhassan should be awarded to compensate for the emotional harm he suffered due to the racial harassment.

**[84]** Mr Elhassan seeks damages of \$45,000 on the basis the emotional harm he experienced from being racially harassed was substantial and deserving of an award in the middle band as identified in *Hammond*. Mr Elhassan submitted that placing the totality of the award towards the top of the middle band is appropriate as it recognised the seriousness of the harm caused by Ms Webby. He submitted a useful case as a comparison for damages is *Singh*, where \$25,000 was awarded for emotional harm suffered from racial harassment. In that case Mr Singh who is Seikh had his turban tapped by his employer with a clipboard and the impact on him was substantial as he was vulnerable. As a result of the racial harassment he suffered depression, anxiety, a severely strained personal relationship with his family and difficulty in trusting other Fijian Indians.

**[85]** Once a causal connection is established, damages must be genuinely compensatory, and should not be minimal so as to meet the broad policy objectives of the

legislation. The damages awarded must be an appropriate response to adequately compensate Mr Elhassan for the behaviour he suffered, see *Singh* at [101].

[86] The Tribunal finds it helpful to follow the approach of identifying the relevant factors that help classify the seriousness of the case, as was adopted in *Singh* at [103] to [105].

### **The type of harassment**

[87] As is noted in *Singh* at [106]-[108] while in principle racial harassment as a 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. This is reflected in the prominence the HRA gives to racial discrimination by containing provisions that make discrimination on the prohibited grounds of colour, race and ethnic or national origin unlawful as well as provisions that make racial disharmony and racial harassment unlawful. New Zealand is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination and one of the purposes of the HRA is to implement that convention.

### **The degree of hostility in the harassment, its frequency and where it occurred**

[88] Mr Elhassan was subject to racial harassment that was repeated throughout a verbal tirade from Ms Webby that lasted several minutes and included a threat to his physical safety. The racial harassment occurred on a single occasion and took place not in a public setting, but a private one – Mr Elhassan’s bedroom in his own home. Given the degree of hostility in the harassment it resulted in Mr Elhassan fearing for his physical safety in his own home, where he should have been able to feel safe. Further, the racial harassment occurred at a time when Mr Elhassan should have been preparing for a job interview.

### **Mr Elhassan’s vulnerability**

[89] Mr Elhassan was vulnerable in that he had recently arrived from Sudan, was unemployed and was unaware of what was acceptable in New Zealand culture. He was also vulnerable to the extent that his living situation had become precarious in that he had already been given notice by Ms Webby.

### **The psychological impact of the harassment**

[90] The emotional harm suffered by Mr Elhassan because of the racial harassment included feelings of fear for his physical safety, shock, distress, anxiety, self-doubt, depression, deep hurt and humiliation.

### **Conduct of the parties**

[91] The Tribunal must take into account the conduct of the parties in deciding what, if any, remedies to grant under HRA, s 92I(4).

[92] Mr Elhassan has done nothing that would disentitle him to damages or reduce their amount. He did not in any way incite Ms Webby’s comments and he later tried to encourage her to have a rational conversation with him (as is apparent from the second recorded conversation), then moved out of the house. Further, Mr Elhassan tried to have this matter resolved at the Human Rights Commission through mediation.



[93] Ms Webby's conduct may be relevant to the extent it exacerbates or mitigates the harm suffered by Mr Elhassan. This is because an award of damages is not to punish Ms Webby, but to compensate Mr Elhassan for the emotional harm he suffered from the racial harassment.

[94] Ms Webby did nothing to mitigate the emotional harm suffered by Mr Elhassan, rather her contact exacerbated the harm he suffered.

[95] After racially harassing Mr Elhassan she refused to let him use the bathroom, told him to go away repeatedly, but then refused to refund his money so he could go and then refused to let his friend into the house to help move his belongings. Ms Webby has not accepted responsibility for what occurred. She refused to engage in the Human Rights Commission process and failed to repay the bond money as ordered by the Disputes Tribunal.

[96] Ms Webby has also repeated racially based comments:

[96.1] When corresponding in respect of these proceedings with Mr Elhassan's counsel she sent a text message on 30 November 2017 that refers to Mr Elhassan's country as "*the hell hole*".

[96.2] On 8 May 2018 she repeated offensive comments she had made about Mr Elhassan's country on a radio talkback show, the *Leighton Smith Show* on Newstalk ZB. Ms Webby rang the show and made comments about these proceedings having been filed and the events leading up to it. In these comments she gets the name of Mr Elhassan's country wrong, saying it was Somalia and she repeats the comment she made about his country being "*at war and had killed millions, thousands of innocent people*".

### **Conclusion on damages**

[97] Mr Elhassan was particularly vulnerable given he had only recently arrived from Sudan, was unaware of what was acceptable in New Zealand culture and was yet to find employment. There is a substantial subjective element to the assessment of humiliation, loss of dignity and injury to feelings. As noted in *Hammond* at [170.5] the very nature of these heads of damages means there are subjective elements to assessment as the degree of intensity of Mr Elhassan's subjective feelings of fear, shock, distress, anxiety, self-doubt, depression, deep hurt and humiliation is incapable of objective proof or measurement in monetary terms. A global assessment must be made.

[98] Taking into account the findings made earlier, in our view \$28,000 is an appropriate response to adequately compensate Mr Elhassan for the humiliation, loss of dignity and injury to feelings he suffered from the racial harassment. The racial harassment was in a private setting over a brief period, but it was significantly hostile, and it had a significant effect on Mr Elhassan. We believe an appropriate response to what occurred is in the middle band discussed in *Hammond* at [176] and above the mid-point. We award \$28,000.

### **Training order**

[99] Mr Elhassan also seeks a training order to be made under HRA, s 92(3)(f). He submitted that as Ms Webby has shown no remorse or regret for her actions that without a training order there is a real risk she will continue to mistreat certain groups of people.

**[100]** The Tribunal agrees that Ms Webby should be required to attend appropriate training, not only to remedy the racial harassment by her against Mr Elhassan, but to also ensure it is not repeated. A training order was made in *Singh* even though the liquor store had been sold by the defendant, as it would enable the first defendant to comply with the provisions of the HRA in the future. In that case it was noted that the Tribunal made an order in *EN v KIC* [2010] NZHRRT 9 which observed at [75]:

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 they can take steps to avoid any repetition of what happened in this case.

**[101]** These comments apply in equal force to Ms Webby.

**[102]** We accordingly order that Ms Webby undertakes training at her own cost as to her obligations under the HRA to ensure that she is aware of these obligations, in particular under s 63 of the Act.

### **COSTS**

**[103]** At the conclusion of the hearing of this matter Mr Elhassan was, if costs were sought, invited to file a memorandum to allow any costs application to be dealt with in this decision.

**[104]** Mr Elhassan has applied for costs. Mr Elhassan is represented by the Office of Human Rights Proceedings and the memorandum seeking costs does not disclose the actual costs but seeks an award of \$3,750 per day of hearing time, based on this being the Tribunal's current standard daily tariff. Disbursements of \$104.98 for the costs associated with the common bundle are also sought.

**[105]** Mr Elhassan submits this is a case where the Tribunal should exercise its discretion to order costs as Ms Webby has not participated in this proceeding, either in the Tribunal or at the Commission stage. In particular, Ms Webby:

**[105.1]** Refused to engage in mediation;

**[105.2]** Did not participate in good faith or at all in information gathering by the Commission;

**[105.3]** Instructed a lawyer who filed a statement of defence but took no further steps in the proceeding; and

**[105.4]** Showed no remorse for any of her comments.

**[106]** Mr Elhassan submitted Ms Webby's failure to participate at the hearing made determining the case more difficult in that it fell to counsel and the Tribunal itself to question witnesses, and to hypothesise regarding potential defences that would not ordinarily fall to them. It was also submitted it cannot be said this is a test case, which is a common reason for the Tribunal refusing to award costs.

### **The law**

**[107]** The Tribunal's power to award costs in respect of this proceeding is conferred by HRA, s 92L. That gives the Tribunal a broad discretion to make any award as to costs that it thinks fit, whether or not it grants any other remedy.

[108] The general principles presently applied by the Tribunal in deciding whether to award costs were recently reviewed in *Director of Proceedings v Smith (Costs)* [2020] NZHRRT 35. In that case the Tribunal explained why, across all three of the Tribunal's jurisdictions, costs are not routinely awarded to the successful party; see [5].

[109] As emphasised in that case, costs should not be routinely awarded in the Tribunal and the determination of any application for costs must take into account a broad range of factors. The decision on costs must be made by exercising a broad judgment based on general principles applied to specific fact situations. The aim is to do justice in the particular circumstances.

[110] The general principles include, relevantly to this case, that the purpose of a costs order is not to punish an unsuccessful party.

## **Discussion**

[111] That Mr Elhassan is represented by the Office of Human Rights Proceedings does not preclude an award of costs being made. The Tribunal, however, in exercising a broad judgment based on the general principles applied to these facts, is of the view that it is not appropriate to award costs in this case.

[112] Ms Webby's failure to engage at all in the Commission stage and only limited engagement at the Tribunal stage, including failure to participate in the hearing cannot be said to amount to inexcusable conduct that substantially added to the difficulty and cost of proceedings before the Tribunal, so that it should result in an adverse costs consequence.

[113] It is always preferable for defendants to participate as it does aid the Tribunal in the determination of the case to have both sides of each argument fully presented. The Tribunal cannot agree that in this case the effect of Ms Webby's failure to participate at the hearing resulted in it being prolonged and the defendant's costs substantially increased.

[114] As the purpose of a costs order is not to punish an unsuccessful party, the fact Ms Webby has shown no remorse for her racial harassment of Mr Elhassan is not relevant to determining costs. Ms Webby's conduct in racially harassing Mr Elhassan and showing no remorse is inexcusable and has been recognised in the remedies granted, including damages.

[115] Accordingly, Mr Elhassan's application for costs against Ms Webby is dismissed.

## **ORDERS**

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

[116.1] A declaration is made under s 92I(3)(a) of the Human Rights Act 1993 that Ms Webby (Castle) racially harassed Mr Elhassan in breach of s 63 of the Human Rights Act 1993.

[116.2] Damages of \$28,000 are awarded against Ms Webby (Castle) under s 92I(3)(c) and s 92M(1)(c) of the Human Rights Act 1993 for humiliation, loss of dignity and injury to the feelings of Mr Elhassan.

**[116.3]** An order is made under s 92I(3)(f) of the Human Rights Act 1993 that Ms Webby (Castle) within 6 months of the date of this decision undertake training, at her own cost, in relation to her obligations under the Human Rights Act 1993 in order to ensure that she is aware of these obligations, particularly the obligations under s 63 of the Act.

.....  
**Ms J Foster**  
**Deputy Chairperson**

.....  
**Dr SJ Hickey MNZM**  
**Member**

.....  
**Mr IR Nemani**  
**Member**