IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2022] NZHRRT 28**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 069/2017
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**RITESH GOEL**
	PLAINTIFF
AND	**PETER BARRON**
	FIRST DEFENDANT
AND	**PERFORMANCE CLEANERS ALL PROPERTY SERVICES WELLINGTON LIMITED**
	SECOND DEFENDANT

AT WELLINGTON

BEFORE:
Ms GJ Goodwin, Deputy Chairperson
Mr IR Nemani, Member
Dr NR Swain, Member

REPRESENTATION:
Mr G Robins for plaintiff
Mr P Barron in person and on behalf of Performance Cleaners All Property Services Wellington Limited at the hearing
Mr M Bott for defendants in respect of written submissions dated 3 December 2021

DATE OF HEARING:	**17 and 18 September 2020**
DATE OF LAST SUBMISSION:	**9 December 2021**
DATE OF DECISION:	**16 August 2022**

DECISION OF TRIBUNAL[1]

[1] [This decision is to be cited as *Goel v Barron* [2022] NZHRRT 28.]

BACKGROUND

[1] Mr Goel was born in India. He had been in New Zealand for approximately two years before he made the call to Mr Barron, which is at the centre of this case.

[2] On 30 December 2016, when Mr Goel was walking around Lower Hutt, he saw a cleaning company van. The van had an 0800-phone number on it. Mr Goel was looking for work at that time and so made a call to that number. Mr Peter Barron, the sole director and joint shareholder of Performance Cleaners All Property Services Wellington Limited (Performance Cleaners), answered the call.

[3] The call between Mr Barron and Mr Goel was recorded because Mr Goel had an application on his phone that records all of his calls. Mr Goel said he had that feature on his phone because of previous bad experiences with customer services, especially overseas. Mr Goel said he did not initially recall the feature but, after the event giving rise to this claim, he remembered that he had a recording of the call.

[4] The content of the conversation between Mr Goel and Mr Barron is central to this claim. The Tribunal was played the audio version of this conversation and Mr Goel also provided a written transcript which is reproduced below:

RG **refers to Ritesh Goel**

PC **refers to Performance Cleaners (Mr Barron)**

PC Good afternoon.

RG Hi there. Um, I'm calling to find out if you have any cleaning jobs. I've seen your van standing somewhere and I'm just trying my luck.

PC Sorry?

RG Did you have any jobs in cleaning?

PC Sorry, who is speaking sorry?

RG Is this the cleaning company, the professional cleaners?

PC Who was speaking?

RG My name is Ritesh.

PC You're looking for a position for yourself Ritesh.

RC Yes I am. I just [*disturbance*].

PC I can't hear you now, what did you say?

RG Sorry, give me one second I'll jump into my car. [*disturbance*] Sorry one second please. Can you hear me now?

PC So is it for you?

RG Yes um I'm looking for a job for myself.

PC For you. Not for your wife or your brother or your mother?

RG Just myself, no.

PC For you, okay. And are you a New Zealand resident?

RG No I'm not, I'm on a work permit.

PC Yeah, no no. We don't trust you guys on those permits. We've learnt to be very, very um sceptical about uh work permits and what have you. So you're here to get New Zealand residency, is that what it's about?

RG Can you say that again?

PC So you're here to get New Zealand residency?

RG Um I will get that at one stage, yes.

PC Yeah, no. Look look, we're just seasoned [*or seasonal*] employers and we just keep away from you guys with work permits and that, we just don't have any confidence…well-known scammers.

RG You sound really genuine when, when you're talking, you're really respectable, but I think it's really wrong to make perception about everyone when you say "you guys".

PC Yeah, however, I think though, I think though Ritesh you sound more convincing than me though, you sound even like you might be quite a nice guy.

RG Haha, thank you so much. But I can't really change your perception please, but thanks for your time.

PC No. Talk to your countrymen, perhaps talk to them first and see what they can do about it.

RG Talk to who?

PC You have a lovely New Year and all the best.

RG Wow, ok.

PC Thank you.

[5] While Mr Barron expressed some doubt as to whether recording was complete, we are satisfied that the audio recording (and, likewise, the transcript as provided to us) was a complete record of the conversation between Mr Barron and Mr Goel.

MR GOEL'S CLAIM

[6] Mr Goel claims that during the call of 30 December 2016 Mr Barron, either directly or indirectly, unlawfully discriminated against him (Mr Goel) in relation to employment and pre-employment and that Mr Barron racially harassed him.

[7] In particular, Mr Goel alleges that during the call:

[7.1] His employment application was rejected by reason of his ethnic or national origins, which included nationality or citizenship, in breach of either s 22 of the Human Rights Act 1993 (HRA) or in the alternative in breach of HRA, s 65; and

[7.2] He was subjected to discrimination in pre-employment in breach of either HRA, s 23 or in the alternative in breach of HRA, s 65; and

[7.3] He was subjected to racial harassment in breach of HRA, s 63.

[8] Mr Barron says he had no intention of discriminating against or racially harassing Mr Goel but that he (Mr Barron) was simply trying to ensure that he was hiring someone who was eligible to work in New Zealand.

[9] To be successful in his claim, it is for Mr Goel to establish, on the balance of probabilities, that Mr Barron and Performance Cleaners have discriminated against him and subjected him to racial harassment as alleged; see HRA, s 92I(3).

UNLAWFUL DISCRIMINATION

Discrimination in employment

[10] We first consider the allegation that Mr Goel has been the subject of unlawful discrimination in employment. Section 22 HRA provides:

Discrimination in employment matters

22 Employment

(1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer, —

(a) to refuse or omit to employ the applicant on work of that description which is available; or

…

by reason of any of the prohibited grounds of discrimination.

[11] One of the prohibited grounds of discrimination, in HRA, s 21(1)(g), is ethnic or national origins, which includes nationality or citizenship.

[12] To determine whether there has been a breach of HRA, s 22(1) we must consider:

[12.1] Whether Mr Goel was an applicant for employment.

[12.2] Whether Mr Goel was qualified for the work of the relevant description.

[12.3] Whether there was work of that description available.

[13] If so, we must then consider whether Mr Barron omitted or refused to employ Mr Goel by reason of a prohibited ground of discrimination, namely Mr Goel's ethnic or national origins which includes his nationality or citizenship.

Applicant for employment

[14] The first limb at [12.1] above is whether Mr Goel was an applicant for employment.

[15] There is no statutory definition of "applicant" in the HRA, so that term is to be construed in accordance with its ordinary or natural meaning. The online Oxford English Dictionary defines an applicant as simply a person who makes a request or a person who applies for some assistance or benefit. Likewise, "apply" is defined to include putting oneself forward as a candidate for a position, especially in a recruitment or selection process. There is no particular formality in this.

[16] Whether a person is an applicant for employment should also be considered in accordance with the "fair, large and liberal" interpretation adopted by New Zealand courts and this Tribunal in the case of human rights legislation; see *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 234:

> In interpreting human rights legislation the New Zealand Courts have resisted any attempt to limit their impact, noting that such legislation is to be "accorded a liberal and enabling interpretation" (*New Zealand Van Lines Ltd v Proceedings Commissioner* [1995] 1 NZLR 100 at p 103 per Smellie J) and at p 104 that: " 'The proper construction … requires an appropriate regard for the substantial body of authority, both in New Zealand and abroad, as to the special character of human rights legislation and the need to accord it a fair, large and liberal interpretation, rather than a literal or technical one' " (*Coburn v Human Rights Commission* [1994] 3 NZLR 323 at p 333 per Thorp J).(Footnotes omitted)

[17] Mr Goel was a "cold caller" making an unsolicited inquiry in relation to potential employment. In a cold call situation, there may not be work available or the cold caller may not have the requisite qualifications. Those are, however, matters for specific consideration under the limbs of HRA, s 22 referred to in [12.2] and [12.3] above. Whether a particular person who makes a cold call is an applicant for employment is fact specific.

It requires an individual consideration of the facts and surrounding circumstances and matters such as the nature of the position may bear on this.

[18] In this case, Mr Goel was clear that he was putting himself forward for such a position and that he was not seeking employment for a relative. In accordance with the dictionary definition above, Mr Goel was applying to Mr Barron for assistance or a benefit (employment). Mr Barron has not disputed that Mr Goel was an applicant for employment.

[19] On the facts of this case and applying the ordinary meaning of the word applicant, in the context of the purpose of the HRA (which includes the better protection of human rights in New Zealand) and in light of the interpretation referred to at [16] above, Mr Goel has satisfied us, on the balance of probabilities, that he was an applicant for employment.

Qualified for the work

[20] The next matter Mr Goel must prove is that he was qualified for work of any description.

[21] The work in question was that of a cleaner. That work does not require any formal qualifications. Mr Goel's evidence was that he was qualified as he was a hard worker, he had worked in the security industry and he did not mind working nights. We do not understand Mr Barron to disagree that Mr Goel was "qualified". Indeed, on 11 June 2020, Mr Barron wrote to Mr Goel offering him a position with Performance Cleaners.

[22] For the sake of completeness, we also note that Mr Goel's visa status does go to whether he was "qualified" for work. Mr Goel would only be "qualified" if he was entitled to work in accordance with the provisions of the Immigration Act 2009. Mr Goel's work visa, at the time of the call to Mr Barron, was issued 23 May 2016 and enabled Mr Goel to work for any employer in any occupation in New Zealand until 31 March 2017. Mr Goel gave evidence at the hearing that he subsequently extended his visa and, as at the date of the hearing, still had the right to work in New Zealand.

[23] Mr Goel has satisfied us, on the balance of probabilities, that he was qualified for the work in question.

Whether there was work available

[24] The third limb is whether there was work available.

[25] Notwithstanding that the defendants' statement of reply says there were no positions available, this was not referred to by Mr Barron in evidence. Rather, Mr Barron's evidence was that he was generally looking to hire people and he was hiring people up to the date of Mr Goel's call and after that week. Mr Barron did say there was likely to be a hiatus in hiring between Christmas and mid-January. Nevertheless, five days after Mr Goel's call, on 4 January 2017, Mr Barron told a third person to send in an application for employment. At no time during the call of 30 December 2016 did Mr Barron say there was no work available.

[26] Once again, given the evidence as a whole, Mr Goel has satisfied us on the balance of probabilities that there was work available.

Prohibited ground

[27] The Tribunal has found that Mr Barron was an applicant for employment, he was qualified for that employment and there was work available. Mr Barron nevertheless refused to employ Mr Goel, saying that he kept away from persons with work visas.

[28] In order for this refusal to amount to unlawful discrimination, the Tribunal must be satisfied on the balance of probabilities that the decision not to employ Mr Goel was by reason of a prohibited ground, which in this case is by reason of Mr Goel's nationality or citizenship.

[29] The phrase "by reason of" was considered by the Supreme Court in *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153 (*McAlister)*, where it was determined that this phrase required consideration of whether the prohibited ground was "a material ingredient in the making of the decision".

[30] Although that case was determined under s 104(1) of the Employment Relations Act 2000, the consideration of the "by reason of" phrase is equally relevant to HRA, s 22(1). The following passages from the decision of Tipping J are helpful:

> [48] The first matter I will address concerns the phrase "by reason of". In the *Eric Sides* case, the Equal Opportunities Tribunal said this phrase meant that the prohibited ground had to be a "substantial and operative factor". I respectfully consider that this statement is at least capable of being read as requiring too strong a link between the outcome and the prohibited ground.
>
> [49] The correct question raised by the phrase "by reason of" is whether the prohibited ground was a material ingredient in the making of the decision to treat the complainant in the way he or she was treated. In this case the question is whether Mr McAlister's age was a material ingredient in Air New Zealand's decision to demote him. The policy of the legislation is that a prohibited ground of discrimination should play no part in the way people are treated unless there is good cause for it to do so … (Footnotes omitted)

[31] Accordingly, to determine whether Mr Barron's refusal to employ Mr Goel was by reason of a prohibited ground of discrimination we must, determine whether Mr Goel's nationality or citizenship was a material ingredient in Mr Barron's treatment of Mr Goel.

[32] It is common knowledge that New Zealand citizens do not require work visas and Mr Barron has acknowledged that he knew Mr Goel was not a New Zealand citizen. On learning that Mr Goel had a work visa Mr Barron continued the conversation, expressing his view that such persons (being persons with work visas so not New Zealand citizens) were to be avoided in an employment context. Mr Barron's comments to Mr Goel included references to him being in a class of "well-known scammers" and that he should ask his "countrymen".

[33] While Mr Barron asserted that he has previously employed persons on work visas there was no independent evidence before us as to that. In any event, that would not of itself mean that Mr Barron was not, in this case, making a decision based on a prohibited ground of discrimination.

[34] Mr Barron was reacting specifically to the characteristics of the person he could hear on the call. He knew Mr Goel was from a country other than New Zealand, as he required a work visa. As a result of listening to the recorded conversation, and considering the tone and content of that conversation, we are satisfied that Mr Goel's visa status, and so his nationality or citizenship were material factors in Mr Barron's decision to decline to consider Mr Goel for employment.

[35] Finally, for the sake of completeness, we have considered whether the statement of Tipping J in *McAlister* at [30] above, that a prohibited ground of discrimination can play a part in the way people are treated where there is "good cause", has any relevance in this case.

[36] While Mr Barron has not provided any evidence of a "good cause", he did say that he was trying to ensure that he was hiring someone who was eligible to work in New Zealand. Under s 350 of the Immigration Act 2009 it is an offence for an employer to employ any person who is not entitled to do the work in question. Not all visa types will permit an employer to hire an applicant for a position. Visas may have restrictions as to the particular employer the holder may work for or they may be restricted as to the number of hours an applicant may work.

[37] In this case, however, Mr Barron was advised at the outset of the conversation that Mr Goel had a work visa. Mr Barron's subsequent comments did not go to clarifying any of the visa qualifications referred to at [36] above. There is, accordingly, no available "good cause" defence.

Conclusion on HRA, s 22

[38] Mr Goel was a qualified applicant for available work, he was not given work by Mr Barron. Mr Goel's nationality or citizenship were material ingredients in Mr Barron's decision to decline Mr Goel. We find, therefore, that Mr Goel has established, on the balance of probabilities, that there has been a breach of HRA, s 22 by Mr Barron and Performance Cleaners.

Indirect discrimination

[39] For the sake of completeness, we note that Mr Goel argued (in the alternative) that he was indirectly discriminated against, in breach of HRA, s 65. Given our findings in [37] we do not consider this further.

HRA, s 23 – Discrimination in pre-employment

[40] In the event that we are wrong in our conclusion at [26] that there was work available, we also consider Mr Goel's allegation that he was discriminated against in pre-employment, in breach of HRA, s 23. There is no requirement in HRA, s 23 for any work to be available.

[41] Section 23 provides:

> **23 Particulars of applicants for employment**
>
> It shall be unlawful for any person to use or circulate any form of application for employment or to make any inquiry of or about any applicant for employment which indicates, or could reasonably be understood as indicating, an intention to commit a breach of section 22.

[42] In considering the proper interpretation to be put on the phrase "could reasonably be understood as indicating, an intention to commit a breach of section 22" in HRA, s 23 we are again mindful of the interpretation to be placed on human rights legislation as referred to at [16] above.

[43] We have already found that the prohibited ground of ethnic or national origins, which includes nationality or citizenship, was engaged in Mr Barron's treatment of Mr Goel.

[44] We have also found that Mr Barron's enquiries did not go to whether Mr Goel's work visa entitled him to be employed by Mr Barron as a cleaner. It is our view that the inquiries made by Mr Barron of Mr Goel in the conversation between them can reasonably be understood as indicating that Mr Barron would refuse or omit to employ Mr Goel on the grounds of nationality or citizenship. We find that Mr Goel has satisfied us, on the balance of probabilities, that Mr Barron has breached HRA, s 23.

[45] As with HRA, s 22, we note that Mr Goel argued (in the alternative) that he was indirectly discriminated against, in breach of HRA, s 65. Given our findings in [44] we do not consider this further.

RACIAL HARASSMENT

[46] Finally, we proceed to consider Mr Goel's allegation of racial harassment pursuant to HRA, s 63. That section provides:

> **63 Racial harassment**
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> (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.

[47] Mr Goel must establish, on the balance of probabilities, that in the call of 30 December 2016:

[47.1] Mr Barron used language that expressed hostility against Mr Goel or brought into contempt or ridiculed Mr Goel on the ground of his colour, race, or ethnic or national origins; HRA, s 63(1)(a).

[47.2] The language used was hurtful or offensive to Mr Goel; HRA, s 63(1)(b).

[47.3] The language was repeated, or of such a significant nature, that it had a detrimental effect on Mr Goel in respect of the making of an application for employment; HRA, ss 63(1)(c) and 63(2)(a).

[48] These requirements are cumulative, so that if Mr Goel fails to satisfy as to any of the limbs of [47] above, his allegation of racial harassment must fail. For the reasons set out below, Mr Goel has failed to satisfy us that Mr Barron's language was repeated or of the significance required to come within HRA, s 63(1)(c).

Whether the language was repeated or of a significant nature

[49] Pursuant to HRA, s 62(1)(c) Mr Goel must satisfy us that Mr Barron's comments were repeated or of such a significant nature as to have a detrimental effect on Mr Goel in the making of an application for employment.

[50] Turning first to Mr Goel's submissions in relation to whether Mr Barron's language was repeated, Mr Goel invited us to adopt an interpretation whereby "repeated" was met because although the call was a one-off event, the comments were repeated in the call.

[51] In this context, the decision of this Tribunal in *B v Commissioner of Inland Revenue* (1999) 5 HRNZ 521 is of relevance. In that case there was a single telephone conversation in which the words "you are a racist" were repeated several times in the course of that conversation. The Tribunal held that this did not amount to a repetition for the purposes of HRA, s 63, at 524:

> Repetition
>
> It is clear that these proceedings arise as the result of one telephone call between the plaintiff and the officer of the defendant. The plaintiff alleges that the words "you are a racist" were repeated by the officer. He submits that for this reason the requirement of repetition is met. We do not accept that submission. We are of the view that what occurred in that telephone call amounted to one incident. Had there been another call in which those words, or similar words, were repeated, then this requirement would be satisfied.
>
> ….
>
> One incident may be taken to include several behaviours (eg touching and words) but there must be more than one incident for the behaviours to be described as repeated. For these reasons we do not accept that the behaviour was repeated.

[52] This conclusion similarly applies to the call between Mr Goel and Mr Barron.

[53] Mr Goel's submissions were also that a single event can be enough itself and need not be repeated, provided it meets the test of being significant; see *Singh v Singh & Scorpion Liquor (2006) Limited* [2016] NZHRRT 38 (*Singh*) at [77] and [78].

[54] While this proposition was made out in *Singh*, Mr Goel's case is not analogous to that of Mr Singh. In Mr Singh's case there was, against the background of a very unhappy employment relationship which had continued for some months, the deliberate striking of his head with a clipboard to dislodge his turban, a symbol of his faith, and therefore of significance. This assault was witnessed by a number of third parties.

[55] As to whether Mr Barron's conduct was "significant", we are concerned only with language used by Mr Barron. There was no face to face confrontation but a single short cold call (lasting approximately three minutes). There was no physical action on Mr Barron's part. Mr Barron's language was not so much directed specifically or personally against Mr Goel, but rather was derisory of the group he considered Mr Goel to be a member of. The only persons party to the conversation were the maker of the statement and the recipient, so there were no third parties in whose eyes Mr Goel was brought into contempt or ridicule.

[56] The language used was, by Mr Barron's own admission, not desirable. We find the derisory words used, reflecting Mr Barron's stereotyping of Mr Goel as a scammer, in very poor taste. We do not, however, consider Mr Barron's language to be of the significance required to constitute a breach of HRA s 63(1)(c).

[57] Having concluded that there has been no breach of HRA, s 63(1)(c) it is not necessary for us to determine whether the language was hurtful or offensive to Mr Goel, as required by HRA, s 63(1)(b). We do, however, proceed with a brief discussion of HRA, s 63(1)(a).

Use of language that expressed hostility against or brought Mr Goel into contempt or ridicule on a prohibited ground of discrimination

[58] Whether Mr Barron's comments expressed hostility against Mr Goel or brought Mr Goel into contempt or ridicule, on the grounds of Mr Goel's colour, race, or ethnic or national origins, as required by HRA, s 63(1)(a), must be assessed on an objective basis; see *Singh* at [80]. Also, pursuant to HRA, s 92I(4), it is no defence that the breach was unintentional or without negligence on the part of the party against whom the complaint is made.

[59] Mr Goel says the comments in the call of 30 December 2016 speak for themselves in relation to expressing hostility against him or bringing him into contempt or ridicule. Mr Goel says that he was put in a category of "well-known scammers", who were not to be trusted. Mr Goel also says that the plain meaning of Mr Barron's comment that Mr Goel would be better looked after by his "countrymen", and that he should perhaps talk to them first and see what they can do about it shows contempt or ridicule on the grounds of Mr Goel's ethnic or national origins.

[60] Mr Barron accepted that his comments were embarrassing and said that was not how he wanted to operate. Mr Barron referred to work stress and tiredness, which may have impacted on the way in which he spoke during the call.

[61] In considering whether Mr Barron's comments expressed hostility against Mr Goel or brought Mr Goel into contempt or ridicule we noted that the words "hostility" and "contempt" are used in both in HRA, ss 61 and 63. In *Wall v Fairfax* [2018] NZHC 104; [2018] 2 NZLR 471 (*Wall v Fairfax*) there is a detailed discussion of the meaning to be ascribed to the words "hostility" and "contempt" in HRA, s 61.

[62] By *Minute* dated 30 September 2021 the Tribunal afforded the parties the opportunity to make submissions in respect of the application of the discussion in *Wall v Fairfax,* in the context of interpreting HRA, s 63.

[63] Both parties made submissions on the similarities and differences between HRA, ss 61 and 63. There was little accord between the parties as to the importance of the discussion in *Wall v Fairfax* as an aid to the interpretation of "hostility" or "contempt" in HRA, s 63. Likewise, there was little accord as to the interpretive effect of the additional word "ridicule" in HRA, s 63. Suffice it to say the submissions raised difficult and complex issues, which were not traversed at the hearing. We have not, however, found it necessary to reach conclusions on the issues raised by counsel, and we leave those issues to one side, because of our conclusion above that Mr Barron's words were not repeated or of such significance as to come within HRA s 63(1)(c).

[64] Overall, Mr Goel has not satisfied us, on the balance of probabilities, that he has been the subject of racial harassment.

REMEDY

Second defendant's vicarious liability

[65] Mr Barron is the first defendant and Performance Cleaners is the second defendant. Any liability of Performance Cleaners is vicarious, pursuant to HRA, s 68.

[66] While HRA, s 68(3) allows a defence to an employer who has taken reasonable steps to prevent an employee allegedly breaching the HRA, for the sake of completeness, we note that Mr Barron made no suggestion that his company should not be a defendant by reason of his personal actions and, indeed, the Tribunal would not have accepted any such argument had it been made.

Remedy sought

[67] We have dismissed Mr Goel's claims that Mr Barron and Performance Cleaners breached HRA, ss 63. We have, however, found that Mr Barron and Performance Cleaners breached HRA, ss 22 and 23. We therefore consider the remedies available to Mr Goel.

[68] Mr Goel seeks:

> **[68.1]** A declaration that Mr Barron and Performance Cleaners breached HRA Part 2, s 92I(3)(a).
>
> **[68.2]** Damages of $25,000 for humiliation, loss of dignity and injury to feelings pursuant to HRA, s 92M(1)(c).
>
> **[68.3]** An order that Mr Barron undertakes HRA training as to his responsibilities under the HRA, at the cost of himself and Performance Cleaners, pursuant to HRA, s 92I(3)(f).
>
> **[68.4]** The cost of these proceedings pursuant to HRA, s 92L.

Mr Barron's apologies

[69] Before considering remedies, we address the apologies proffered by Mr Barron to Mr Goel. We do this because, pursuant to HRA, s 92I(4), the Tribunal must take the conduct of the parties into account in deciding what, if any, remedy to grant.

[70] In this case the conduct of the defendants includes the apologies offered by Mr Barron to Mr Goel:

> **[70.1]** The first apology of which the Tribunal is aware was in a letter dated 11 June 2020 from Mr Barron to Mr Goel. This was written over three years after the call of 30 December 2016. In that letter Mr Barron said he was sorry and offered Mr Goel a position with Performance Cleaners. He referred to a change in the business practices of Performance Cleaners and said he was working to ensure that the situation did not occur again.

[70.2] During the hearing, both in Mr Barron's cross-examination of Mr Goel and in his closing address, Mr Barron again apologised to Mr Goel.

[71] In relation to the relevance of an apology a materially similar provision to HRA, s 92I(4) exists in s 102(3) of the Privacy Act 2020 and in s 85(4) of the Privacy Act 1993. In considering the relevance of an apology under s 85(4), the Tribunal in *Williams v Accident Compensation Corporation* [2017] NZHRRT 26 said:

> [38] An appropriate and timely apology can be taken into account under s 85(1)(4) of the Privacy Act when considering whether the defendant's conduct has ameliorated the harm suffered as a result of the breach of privacy. See *AB v Chief Executive, Ministry of Social Development* [2011] NZHRRT 16 at [37]:
>
> > … an appropriate apology given at the right time is a matter that can be taken into account under s.85(4) of the Act in considering whether and to what extent the defendant's conduct has ameliorated the harm suffered as a result of an interference with privacy. In this case, however, we think the apology came far too late to have been of any value in that respect.
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> [39] In that case the defendant took one year to acknowledge the breach and another year to apologise for it. The Tribunal considered the apology had no mitigating effect, describing it as having been provided at the "eleventh hour", after proceedings had been commenced and was considered to be motivated by litigation concerns.
>
> [41] The apology cannot "erase" the humiliation, loss of dignity or injury to feelings caused by the interference with privacy. Nor is it a "get out of jail free" card. The question in each case is whether and to what degree the emotional harm experienced by the particular plaintiff has been ameliorated. While this is a fact specific inquiry it can be said that ordinarily an apology must be timely, effective and sincere before weight can be given to it. It is not inevitable an apology, even if sincerely and promptly offered, will ameliorate the emotional harm experienced by the plaintiff. Much will depend on who the particular plaintiff is and the particular circumstances of the case.

[72] This case is similar to that described in *AB v Chief Executive, Ministry of Social Development* at [71] above. The written apology of June 2020 was not made until after Mr Goel had filed his statement of evidence and Mr Barron and Performance Cleaners had filed evidence in reply. That apology, being over three years after the events in question and then only after the matter was ready for hearing, came too late to have been of any value in ameliorating harm suffered by Mr Goel or to have any mitigating effect.

[73] The same applies to Mr Barron's subsequent apologies made during the hearing. These apologies were made nearly four years after the phone call and have no value in ameliorating harm suffered by Mr Goel.

Declaration

[74] We first address the question of a declaration. In *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kos J, Ms SL Ineson and Ms PJ Davies) at [107] and [108] it was held that while the grant of a declaration under the Privacy Act 1993, s 85(1)(a) (now Privacy Act 2020, s 102(2)(a)) is discretionary, the grant of such declaratory relief should not ordinarily be denied and there is a "very high threshold for exception". Given that the jurisdiction to grant a declaration under HRA, s 92I(3)(a) is indistinguishable from the remedy possessed by the Tribunal under the Privacy Act, we see no reason why the same principle should not apply; see also *MacGregor v Craig* [2016] NZHRRT 6 at [131].

[75] On the facts of this case there is nothing that could justify the withholding from Mr Goel of a formal declaration that Mr Barron and Performance Cleaners have committed

a breach of HRA Part 2, in that Mr Goel was unlawfully discriminated against in breach of HRA, ss 22 and 23.

Damages for humiliation, loss of dignity and injury to feelings

[76] The Tribunal may award damages for a breach of HRA, Part 2 in respect of humiliation, loss of dignity and injury to feelings; see HRA, s 92M. Mr Goel is seeking damages of $25,000, inflation adjusted. Such an award would be in the middle band as set out in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 (*Hammond*). The general principles relating to an assessment of damages for humiliation, loss of dignity and injury to feelings were summarised in *Hammond.* Those principles are adopted in this case.

[77] There must be a causal connection between the breach of HRA, ss 22 and 23 and the humiliation, loss of dignity and injury to feelings suffered; see *Singh* at [100]. Once a causal connection is established damages must be such as to adequately compensate the plaintiff for the behaviour to which he has been subjected rather than to punish the defendant; see *Singh* at [101]. Any award of damages imports a subjective element to its assessment.

[78] Mr Goel said that he was shaken and humiliated by the call. His evidence was that he stayed awake thinking about the call and talking about it with his wife, who was at that time not in the country. Mr Goel also attended a doctor's appointment on 10 January 2017 and reported feeling anxious, angry and suffering from insomnia as a result of the phone call with Mr Barron.

[79] We accept that Mr Goel suffered humiliation, loss of dignity and injury to feelings and that there was a causal connection between the comments of Mr Barron in the call of 30 December 2016 and the humiliation, loss of dignity and injury to feelings experienced by Mr Goel.

[80] Turning then to an appropriate amount of damages, the Tribunal was invited to consider, as a useful comparison, the case of *Singh*. In that case, the plaintiff suffered an incident of racial harassment in employment. Mr Singh was particularly vulnerable. He was given medication to treat depression and anxiety. He suffered severely strained personal relationships and had difficulty trusting other Fijian Indians. He was made to feel as though his identity as a Sikh had been compromised. Mr Singh was awarded $25,000 for humiliation, loss of dignity and injury to feelings.

[81] While in this case we have not found racial harassment, we have found that Mr Goel has been discriminated against in employment. There are, however, some notable differences between Mr Singh's case and that of Mr Goel.

[82] Mr Goel had only one telephone interaction with Mr Barron, while Mr Singh had interaction in an unhappy employment situation over a considerable period of time. Mr Goel made a cold call to try to get work, rather than having a job from which he was dismissed. Unlike Mr Goel, Mr Singh was physically assaulted. Mr Singh's treatment was witnessed by a number of third parties, while there was no witness to the phone call between Mr Barron and Mr Goel. Unlike Mr Singh, Mr Goel did have support from his community. It is his evidence that somebody in the community assisted him by subsequently paying for his wife and family to come to New Zealand.

[83] In determining the damages to be awarded to Mr Goel we have taken into account Mr Goel's evidence as to his subjective reaction to Mr Barron's comments. We have also

considered respective facts and damages awards in *Singh, Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51 *and McClelland v Schindler Lifts NZ Limited [2015] NZHRRT 45,* referred to us by counsel for Mr Goel.

[84] Considering all of the evidence and our findings in this case, an appropriate response to what happened to Mr Goel is an award of damages in the top end of the lower band discussed in *Hammond.* We award Mr Goel $9,000 for humiliation, loss of dignity and injury to feelings.

Training order

[85] Mr Goel is seeking an order that the defendants undertake training in order to assist or enable the defendants to comply with the provisions of the HRA. Mr Goel says the defendants appear to employ many people throughout the country, who may be vulnerable to the attitude of Mr Barron.

[86] In considering whether to grant a training order, the Tribunal has taken into account the written evidence of Ms Louise Taylor, an employee of Performance Cleaners.

[87] Her evidence was that following the complaint by Mr Goel, Performance Cleaners reviewed and updated its policies and procedures. Ms Taylor's evidence was that questions about the right to work in New Zealand are now framed as "Could you please confirm if you are a resident, citizen or on a work permit" and further, that if an applicant specifies they are on a work permit there is a follow-up question "What is the expiry of your work permit" or "What are the parameters of your work permit".

[88] Performance Cleaners has taken steps to avoid a repeat of the HRA breaches that occurred with Mr Goel. Mr Barron has also acknowledged his "wrong choice of words". In this case we decline to make a training order.

FORMAL ORDERS

[89] For the foregoing reasons the decision of the Tribunal is that:

> **[89.1]** A declaration is made under s 92I(3)(a) of the Human Rights Act 1993 that Mr Barron and Performance Cleaners All Property Services Wellington Limited committed a breach of s 22(1) of the Human Rights Act by unlawfully discriminating against Mr Goel by reason of his ethnic or national origins, which includes nationality or citizenship.
>
> **[89.2]** A declaration is made under s 92I(3)(a) of the Human Rights Act that Mr Barron and Performance Cleaners All Property Services Wellington Limited committed a breach of s 23 of the Human Rights Act by making an inquiry of or about Mr Goel as an applicant for employment which indicated, or could reasonably be understood as indicating, an intention to commit a breach of HRA, s 22.
>
> **[89.3]** Mr Goel's allegation of a breach of s 63 of the Human Rights Act is dismissed.
>
> **[89.4]** Damages of $9,000.00 are awarded on a joint and several basis against Mr Barron and Performance Cleaners All Property Services Wellington Limited under ss 92I(3)(c) and 92M(1)(c) of the Human Rights Act for humiliation, loss of dignity and injury to the feelings of Mr Goel.

COSTS

[90] Costs are reserved. Unless the parties come to an arrangement as to costs, the following timetable is to apply:

[90.1] Mr Goel is to file his submissions within 14 days after the date of this decision. The submissions for Mr Barron and Performance Cleaners All Property Services Wellington Limited are to be filed within a further 14 days with a right of reply by Mr Goel within seven days after that.

[90.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.

[90.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Ms GJ Goodwin	**Mr IR Nemani**	**Dr NR Swain**
Deputy Chairperson	**Member**	**Member**