



and bullying were dealt with by the giving of final employment warnings to the perpetrators.

[3] The issues are:

- Was the disadvantage grievance raised within the 90 day period?
- Did the respondent follow up on the harassment and bullying in a fair and reasonable manner?
- Did Ms Bhana raise what she says were continuing concerns about harassment and bullying after May 2007?
- Was there a constructive dismissal?

### **Background**

[4] Creative Field Marketing Limited is a company providing field marketing programmes in Australia and New Zealand. Ms Bhana commenced employment on 1 September 2005 as a Junior Programme Manager and ultimately became responsible for the development and delivery of the Mystery Shopping and Auditing Australasia brand in New Zealand.

[5] Ms Bhana said that from late 2006 the atmosphere in the office changed and became unpleasant. She attributed this to resentment by Mr Simon Coombes towards actions Mr Stephen Barnes, the General Manager for New Zealand, had taken regarding another staff member with whom Mr Coombes was having a relationship. Her close working relationship with Mr Barnes had a follow on effect on her as there was a view in the office that she and Mr Barnes were having a relationship. She noticed that Mr Jason Darbyshire, Mr Coombes and also Ms Genevieve Ward would be regularly involved in conversations excluding other staff. Whenever Ms Bhana entered the room they would break up and end the conversation. It would often be accompanied by rolling of eyes, giggling or a grin. She found those actions deeply upsetting as it was clear to her that she was the subject of those conversations. She said that she started to be excluded from after-work drinks and tended to become isolated from lunch or coffee that would normally have included the whole team. At various times there would be coughing noises or comments such as "*you've got that right mate*". These would generally be accompanied by some typing. This would

often occur when Ms Bhana entered or left the room. She said there were also allegations about a relationship between her and Mr Barnes and embarrassing questions regarding that.

[6] The unpleasant behaviour included attempts by Mr Coombes in late March 2007 to exclude her from a senior group organised by Mr Barnes. The group was set up to align business opportunities across the divisions within the business. She said Mr Coombes ridiculed her experience and questioned her ability due to her age. He was aggressive and suggested he could only be part of this group if she was excluded from it. Mr Coombes did not make these comments directly to Ms Bhana; he made them to Ms Lara Haydon (the Human Resources officer for New Zealand) who reported them to Ms Bhana.

### **Raising of Concerns**

[7] In March 2007 Ms Bhana raised her concerns with Mr Barnes. He agreed to observe the behaviours of the individuals they concerned and to discuss further resolution with Ms Haydon. In March 2007 she also raised her concerns with Ms Haydon. She said that at that time Ms Haydon said she had similar concerns, but was scared to raise them as they were of such magnitude.

[8] Mr Barnes made a complaint on her behalf to Ms Jo Beehag, National Systems and Operations Manager, when she was in New Zealand in late April 2007. It was in May 2007 that Mr Barnes discovered the emails that became the subject of Ms Haydon's complaint. He showed those emails to Ms Haydon and Ms Bhana.

[9] On 25 May 2007 Mr Barnes and Ms Haydon contacted Ms Bettina Kelly, CFM's HR Manager who was based in Australia, to seek guidance as to the next step, given the seriousness of the emails and the nature of the discrimination. During that conversation, Mr Barnes expressed concern about his safety, and that of Ms Haydon and Ms Bhana once the complaint became known to Mr Derbyshire and Mr Coombs. He said the overall response from Ms Kelly was to question his sanity. The emails complained of contained terminology and references that were clearly racist and sexually derogatory. They constituted improper use of the company's email system. The emails make racist comments, contain abusive nicknames for other staff and make derogatory comments about other staff.

[10] In addition to these emails I was provided with an email sent from Mr Darnyshire to Mr Coombes on 18 April 2007 which stated: “*Refrigerator treatment seems to be having the desired effect*”. This email was located by Mr Barnes and produced to me after there had been a discussion during the hearing about Ms Bhana complaining that Mr Coombes and Mr Darbyshire had been deliberately keeping the air-conditioning control away from her and manipulating the temperature so that it was very cold. The company representatives at the hearing seemed disinclined to accept the veracity of Ms Bhana’s complaint.

[11] Ms Kelly provided a brief of evidence but did not appear at the hearing. I subsequently interviewed her by telephone on a conference call. In her brief Ms Kelly stated that she had received an email from Mr Barnes in late May. His email attached the inappropriate emails which he had found after Ms Bhana had complained to him about the behaviour of Mr Coombes and Mr Darbyshire.

[12] In her oral evidence Ms Kelly said she sent this email to Mr Bruno Maurel, the Managing Director of CFM, and that the communication from Mr Barnes was the first time she was aware of the matter.

[13] On 28 May 2007 Ms Haydon sent Ms Kelly a lengthy email complaining about the behaviour of Mr Coombes and Mr Darbyshire. She included copies of and made reference to offensive emails sent between the two men regarding and referring to both Ms Haydon and Ms Bhana and other employees.

[14] Mr Maurel said that Ms Kelly sent him the complaint from Ms Haydon, not the communication from Mr Barnes. When Ms Kelly was asked why she waited until she had received the complaint from Ms Haydon before communicating with Mr Maurel she said she had sent him the Barnes complaint and the matter was already being dealt with by the time Ms Haydon’s complaint was received. However, Mr Maurel’s evidence was that the first time he was aware of the issues regarding Ms Bhana was when he received a copy of Ms Haydon’s email.

[15] I think it more likely that Mr Maurel’s recollection is correct.

### **Action Taken By Employer**

[16] Mr Maurel said he considered the situation to be extremely serious and arranged to fly to New Zealand immediately.

[17] On his arrival at the Auckland office he spoke to Mr Coombes and Mr Darbyshire. They did not deny the allegations that had been made about them, so Mr Maurel said he did not consider it necessary to conduct any further investigations. Such behaviour could not be justified, nor would it be tolerated. He prepared letters issuing both people with a final warning and asked them to sign the letters. The letters are dated 1 June. Mr Darbyshire signed his on 31 May and Mr Coombes on 1 June.

[18] The letters stated that a final warning was being issued “*in relation to misuse of Company email and workplace bullying and harassment*”. Mr Maurel referred to the fact that the emails contained “*obscene, abusive and sexually explicit language*”. The letters stated that harassment and bullying was unacceptable and that a repetition would result in termination of employment.

[19] Mr Maurel deposed that he had decided that a final warning and not dismissal was appropriate, firstly because the behaviour seemed to have gone on for some time and had not been properly addressed by the Auckland office; and secondly because by this time he was aware that there were serious issues relating to the very poor performance of the office and staff were saying they could not get access to Mr Barnes, that there was no leadership from him and that they had no respect for him. Mr Maurel said he was concerned that in all of those circumstances it would not have been fair to Mr Darbyshire and Mr Coombes if he summarily dismissed them.

[20] When I asked Mr Maurel how those conditions could have led to the behaviour exhibited by Messrs Darbyshire and Coombes, he was unable to answer me.

[21] Mr Maurel subsequently met with Mr Barnes and Ms Haydon at the Auckland office. He had the warning letters on the desk in front of him. He explained to Mr Barnes that he had issued final employment warnings and that the letters he had were the letters that had been given to the two people. Mr Maurel said he had no doubts that Ms Bhana also became aware of the final warnings. Mr Maurel, however, did not speak to Ms Bhana himself nor did he put in place any monitoring or follow up system.

[22] Mr Barnes was having difficulties with CFM and on 4 June emailed a resignation to Mr Maurel. The resignation was to take effect on 31 July. Mr Maurel

said he decided to put Mr Barnes on garden leave but Mr Barnes disputed that this had ever been communicated to him. One of the concerns held by the company was the belief that Mr Barnes and Ms Bhana had a personal relationship.

[23] Ms Bhana said that Ms Haydon made an inquiry with Ms Kelly for access to counselling for her and for Ms Bhana. Ms Kelly told Ms Haydon that this was not something CFM was willing to do and she needed to get back to work and get on with it. Ms Haydon did not give evidence. When I asked Ms Kelly about this, she said she and Ms Haydon had at one stage had a conversation about the company considering provision of an EAP type service but this was in general terms. I accept Ms Kelly's evidence.

[24] Mr Barnes said he had a further discussion with Ms Beehag in early June 2007 raising the concerns again on Ms Bhana's behalf. Nothing was heard back from Ms Beehag. Ms Beehag did not give evidence. I accept Mr Barnes' evidence.

[25] On 13 June 2007 Ms Bhana herself called Ms Beehag to discuss the bullying that had become worse. She was being ignored by Mr Darbyshire, Mr Coombes and Ms Ward, making it impossible for her to do her job effectively. They were visibly laughing about the effect they were having on her. Ms Bhana said she was in tears during the telephone conversation with Ms Beehag.

[26] She got to the point where she suggested working from home as the environment was having a significant effect on her and her health. She wanted to work from home or from the meeting room. Ms Beehag refused this. She needed to raise the concerns with Ms Kelly and would get back to Ms Bhana. She said Ms Beehag was completely unsympathetic.

[27] Ms Kelly said she did not recall Ms Beehag speaking to her about a call from Ms Bhana. However, it is more likely than not that Ms Beehag did speak to Ms Kelly because Ms Kelly did not deny having a conversation with Mr Barnes about Ms Bhana within this timeframe.

[28] The following day Ms Bhana had not heard back. At about 4 or 5pm she phoned again and left a message. There was no response. The following day she called Ms Beehag on the cell phone. Ms Beehag said she had raised the concerns with Ms Kelly. However, Ms Bhana heard nothing from Ms Kelly and nothing further from Ms Beehag. The same day she made a phone call to Mr Barnes. He said he had

spoken to Ms Kelly who had told him that she shouldn't complain any more and he had been told to quieten her down. Mr Barnes said Ms Kelly told him that Ms Bhana had been irrational and disruptive.

[29] Ms Kelly denied telling Mr Barnes to quieten Ms Bhana down and said that given she knew of the relationship between Mr Barnes and Ms Bhana she would not have said that.

[30] Neither Ms Beehag nor Ms Kelly contacted Ms Bhana.

### **Appointment of Ms Harrison**

[31] In early June 2007 Ms Kim Harrison started in the Auckland office in the position of Group Programme Director. Ms Harrison was charged with improving the culture in the office. Ms Harrison said she had not seen the emails that were the subject of the complaint. This was a pity as it meant that Ms Harrison was unable to place subsequent events in context. The respondent should have ensured that Ms Harrison had all the necessary information to enable her to rectify the situation (insofar as it was able to be rectified).

[32] After Ms Harrison started Ms Bhana said she raised her concerns a number of times. Ms Harrison denied that that had taken place. It was, however, agreed that a meeting took place in June or July 2007 after an email Ms Bhana had received from Mr Coombs. Ms Harrison said that Ms Bhana did not tell her that she found the meeting unhelpful. It was evident that Ms Harrison did not understand Ms Bhana's reluctance to meet with Mr Coombes or her desire to bypass him in the course of her employment.

[33] On 25 June 2007 in an email to Mr Barnes Ms Haydon commented how horrible "*those people*" were, noted that she had been the only person to lay a formal complaint and that Mr Barnes "*[could] get past it too*". She said "*Remember water off a duck's back*". It is very clear from this email that while Ms Haydon may have decided that she could cope with what had happened and was getting on with it, that the problems that had motivated the complaints and concerns were still continuing.

[34] After giving her resignation, Ms Bhana conducted an exit interview with Ms Simone Heath of OB & Farrell. She said the interview lasted for about an hour, it was

done on the telephone and Ms Bhana covered all of her concerns, complaints and the chain of events that led to her to feel pressured to resign.

[35] Mr Maurel and Ms Harrison said that if there had been anything noteworthy in the exit interview it would have been passed on to them. Ms Bhana said that the exit interview did not reflect fully and thoroughly the concerns that she had raised with Ms Heath. In response to the question “*Why are you leaving the company?*” she said “*She felt that certain people didn’t want to get along with her. No amount of money was going to compensate me for the environment I was placed in.*”

[36] In answer to the question “*How would you describe the workplace?*” Ms Bhana said “*Culturally very negative except when people from Australia are in the office. There is a lot of racism/segregation.*” In answer to the question “*Is the workplace free of harassment and bullying?*” Ms Bhana said it was not and that “*A few individuals made the workplace uncomfortable. The segregation/discrimination continues*”. Towards the end of the exit interview when she is asked for an overall comment, she said “*I would never put anybody forward in a position within the company.*”

[37] Even though Ms Bhana said that the interview notes were not full, it is evident to me that there was sufficient in that exit interview to indicate that there were matters of concern.

[38] Ms Bhana said that at no time did anyone from senior management, to whom she had made her concerns known, make any attempt to contact her regarding them. No one offered her counselling or support and in fact rejected the suggestion of counselling. Even after calling for help in tears she was ignored. I asked Ms Bhana whether before she had been shown the email, she was aware of any difficulty. She said she felt like she was segregated from the group, she felt they were bullying her; there was a lot of discomfort.

[39] Mr Barnes was supportive but he had his own difficulties with the company and was not in a position to affect the company’s response to Ms Bhana.

[40] She said Mr Coombes and Mr Darbyshire would come over to where she was sitting and joke about her behind her back. They would walk and stand over her and make comments about her age and experience. It felt like they were ganging up on her.

[41] In June 2007 Mr Coombes became Group Programme Director, a level above Ms Bhana. Mr Darbyshire was National Programme Manager, the same level as Ms Bhana.

[42] After being given the warnings, Mr Coombes was effectively given a promotion. This meant that Ms Haydon had to report directly to him. Ms Bhana said she felt he was being rewarded for his bad behaviour. Mr Maurel agreed that the movement of Mr Coombes to the Group Programme Director's position was a promotion and said that he did not have any difficulty in reconciling that promotion with the warning given earlier.

[43] Ms Bhana said Ms Harrison was aware of the warnings but told Ms Bhana the past was the past and she was there to work on the culture of the office.

[44] Ms Bhana said she had fortnightly meetings with Ms Harrison. She told her that Mr Coombes still had an issue with her about the warning and she felt that she was exposed. She told her that their behaviour still continued and that the promotion seemed unsupportive. Ms Harrison said she had arranged some after work team outings, but that Ms Bhana did not come. Ms Bhana said she did not want to associate with Mr Coombes or Mr Darbyshire outside work, particularly where alcohol might be involved and it was late at night. She did not feel comfortable. This is understandable.

### **Raising of the Disadvantage Grievance**

[45] Ms Bhana complained to Ms Haydon and to Mr Barnes. She went to the appropriate people in the Auckland office and complained about the bullying and harassment. This was before Mr Barnes found the emails. Mr Barnes conveyed her concerns to Ms Beehag. I do not accept the submission that the complaints were not from Ms Bhana. When Mr Barnes found the emails he showed them to Ms Haydon and Ms Bhana. Mr Barnes and Ms Haydon spoke to Ms Kelly about the emails before Ms Haydon sent her complaint. The fact that Mr Maurel came to New Zealand and issued employment warnings after he was made aware of the emails indicated that he was well aware that there was a problem that needed to be dealt with. Ms Haydon complained on her own behalf and Mr Barnes did so on Ms Bhana's behalf. The issue is whether the complaint made by Mr Barnes on Ms Bhana's behalf constitutes the raising of a personal grievance,

[46] Ms Bhana did not raise a personal grievance. She conveyed her concerns about the behaviour of fellow staff towards her but that does not constitute the raising of a personal grievance.

### **Follow Up**

[47] Although Ms Bhana did not raise a personal grievance at the time the employment warnings were issued the employer was aware that Ms Bhana was concerned about what had been happening in the office and that she had been the subject of offensive and discriminatory emails. Ms Kelly was made aware of this by Mr Barnes who was talking to her on Ms Bhana's behalf.

[48] I asked Mr Maurel what steps he had taken to ensure that no repetition of the unpleasant and improper behaviour occurred. No process was put in place. He did appoint Ms Harrison but she was not fully aware of the relevant circumstances.

[49] His failure to speak to Ms Bhana left her feeling unsupported. He knew she was aware of the content of the emails. There was no suggestion that an apology be forthcoming from the perpetrators or from the employer.

[50] There was no monitoring of emails to ensure that the behaviour had ceased.

[51] Mr Coombes and Mr Derbyshire could have been dismissed. However, having made the decision not to dismiss, the employer then had responsibility towards other members of staff which were not covered simply by the issuing of the final employment warning. It should have been made clear to Ms Haydon and to Ms Bhana that the employer would be supportive; processes should have been put in train to ensure that if any difficulties arose they knew who to report to and what the process was. Counselling should have been offered.

### **Raising of Concerns after May**

[52] Both Mr Barnes and Ms Bhana said concerns about the continuation of the behaviour were raised with Ms Beehag in June 2007. I accept their evidence.

[53] Ms Bhana said she raised concerns with Ms Harrison. I think she did raise concerns but because Ms Harrison was not fully aware of the background she failed to understand the impact of matters such as Mr Coombes' seemingly – to her –

innocuous email; and also Ms Bhana's reluctance to participate in team building and social activities.

### **Constructive Dismissal**

[54] The employer had an obligation to provide a safe workplace. The employer failed to ensure that there was a safe workplace in that the bullying and harassment continued. Ms Bhana's complaints to Ms Beehag were ignored.

[55] The employer was aware of the concerns held by Ms Bhana and failed to act on them.

[56] Had a process been put in place for ensuring that no repetition of the offensive behaviour took place and had Ms Bhana's concerns been properly addressed and not minimized she would not have resigned.

[57] I accept Ms Bhana's evidence that she told Ms Harrison that she was leaving because she had had a job offer from a previous employer (although this was false) because she wanted to maintain some dignity surrounding her departure and did not want Mr Coombes and Mr Darbyshire to feel they had won.

[58] Ms Bhana was constructively dismissed.

### **Remedies**

[59] Ms Bhana worked out her notice period. This should not be held against her. I accept that Ms Bhana was distressed and humiliated by what had taken place. The respondent is to pay Ms Bhana the sum of \$4,000.

[60] Ms Bhana is entitled to recoup any lost remuneration for a three month period. If there is any difficulty in calculating this leave is reserved to return to the Authority.

[61] There is no issue of contribution; there will be no reduction in the remedies awarded.

**Costs**

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

Dzintra King  
Member of the Employment Relations Authority