

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 151
5363617

BETWEEN MICHAEL CORBETT
 Applicant

A N D UDP SHOPFITTERS LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Anna Oberndorfer, Advocate for Applicant
 Roger Brady, Advocate for Respondent

Investigation meeting: 6 June 2012 at Christchurch

Submissions Received: 12 July 2012 from the applicant
 23 July 2012 from the respondent

Date of Determination: 26 July 2012

DETERMINATION OF THE AUTHORITY

- A. The applicant was unjustifiably disadvantaged in his employment.**
- B. The applicant was unlawfully discriminated against in his employment on the grounds of his national origin.**
- C. The applicant was unjustifiably constructively dismissed by the actions of the respondent.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Corbett claims that he was either dismissed or constructively dismissed on or around 8 September 2011 by the owner of the respondent company, Mr Hicks,

during a telephone conversation between the two men after Mr Corbett told Mr Hicks that he had been assaulted by a contractor working for the respondent and had to attend hospital and go onto ACC as a result.

[2] Mr Corbett also claims that he suffered an unjustifiable disadvantage during his employment by reason of bullying and abuse (some of which he claims was racist in nature) from members of the respondent company and from the contractor who assaulted him, which he says the respondent company did nothing to prevent. Mr Corbett also claims that he suffered a disadvantage in employment when he was allegedly assaulted by the contractor working for the respondent company on 7 September 2011.

[3] The respondent denies that Mr Corbett was either dismissed or constructively dismissed, saying that he abandoned his employment. The respondent admits that there was an altercation between Mr Corbett and the contractor on 7 September 2011 but denies that it was an assault. The respondent also denies that Mr Corbett suffered an unjustified disadvantage in his employment by reason of racist or other abuse, claiming that Mr Corbett took an equal part in banter which was no worse than the sort that normally takes place amongst many tradesmen.

The events leading to the termination of the employment

[4] Mr Corbett commenced working for the respondent company as a contractor but became an employee in around June 2011, as part of the shop-fitting team. Mr Corbett hales from Northern Ireland and is a carpenter/joiner by trade. Although Mr Corbett was given a draft employment agreement, he never signed it because he was waiting for more details. The agreement was also not signed by the respondent company.

[5] Mr Corbett's evidence is that the relationship between him and his co-workers was initially satisfactory except that he encountered problems with one of the supervisors, Mr Tobin. In short, Mr Corbett's evidence is that Mr Tobin would swear at him, abuse him and treat him with a lack of respect. Mr Hicks agrees that Mr Tobin "*has a short fuse*" and that he can be blunt when he is not satisfied with a staff member's standard of work.

[6] Mr Corbett's evidence is that when a contractor, Mr Michael Jordan, started working in the company, he started to experience a greater level of hostility. This

hostility came from Mr Jordan and one of the other supervisors, Mr McIntyre. In particular, Mr Corbett says, Mr Jordan would insult him, making derogatory remarks such as referring to him as *fucking Irish*.

[7] Mr Corbett gave evidence that, from time to time, he would speak to Mr Hicks and another senior member of the company, Mr McKernan, about the abuse he was suffering from Mr Tobin, Mr Jordan and Mr McIntyre. He said that Mr McKernan would be generally sympathetic but would always refer him to Mr Hicks.

[8] Mr Corbett said that, on one occasion, he had complained to Mr Hicks about being insulted in respect of being Irish and, on another occasion, about being accused by Mr Tobin of being a "*thieving Irish bastard*". Mr Corbett's evidence was that Mr Hicks said that the men were the way they were and Mr Corbett had to put up with it.

[9] Mr Corbett also said that he objected to being given a nickname, "*Corby*", and not being called by his given name, Michael. Mr Corbett also said that he spoke to the other men but did not engage in banter when it was abusive and did not swear himself.

[10] Mr Corbett's evidence was that, on 6 September 2011, after Mr Tobin had been very abusive to him and to one of the subcontractors, Mr Corbett had complained to Mr McIntyre who had told him to "*suck it up*". Mr Corbett then went to the office where he saw Mr Hicks and said that he was working very long hours (as were all the other staff at that time) and that he did not come to work to be abused. Mr Corbett said that Mr Hicks said that he would "*speak to the guys about it*".

[11] Mr Hicks' evidence on this point was generally in agreement. Mr Hicks said that Mr Corbett had clearly been very tired and stressed and that he could appreciate that Mr Corbett did not want to be abused as well. He said that it had been his intention to speak to the two foremen about Mr Corbett's unhappiness at being abused but he did not intend to do so until after the four projects that the company had been working on at that time were completed. Mr Hicks explained that the respondent company was having to finish the fitting out of four stores (following the Christchurch earthquake in February 2011) and that the men were working very long hours. He said that his intention was not to talk to the men at that point because they were all tired and stressed, but to do so when the jobs were finished in around two days' time.

[12] Mr Corbett's evidence was that the following morning, on 7 September 2011, the men were even more hostile than usual, and that he was called a *dumb Irish bastard* by Mr Tobin, for example. Mr Corbett attributed this to Mr Hicks having spoken to the men about his complaint, which Mr Hicks denies he did.

[13] Mr Corbett said that, later on in the day, which was a very long one, Mr Jordan had thrown screws and off-cuts of wood at him. Mr Jordan agreed in evidence that he had done this, but that it had just been done in fun and that it was no more than light hearted flicking of small pieces of material, rather than anything aggressive. Mr Jordan's evidence was that he generally thought he had got on well with Mr Corbett and that, whilst he may have made reference to him being Irish and abused him, it was all done in the spirit of the banter that everybody took part in. For example, he says that Mr Corbett had once called him a *fat c****, which Mr Corbett denies.

[14] The alleged assault happened during the night of 7 September 2011 after the men had all been working many hours. Mr Corbett's evidence is that they had been working in a confined space in the Hallensteins store in the Palms Mall in Christchurch and that they had been preparing to finish off when Mr Corbett bent down to pick up his drill, hammer and some other bits and pieces that were on the floor. Mr Corbett said that Mr Jordan had been standing by these tools and that Mr Corbett had put his hand on Mr Jordan's back to stop him from stepping back while Mr Corbett bent down. Mr Corbett says that Mr Jordan pushed him and punched him, causing him to fall against the wall.

[15] Mr Jordan's evidence on this point is somewhat different. He said that he had been carrying a heavy wooden panel a few moments before and that, as he passed Mr Corbett, Mr Corbett had *zapped* (jabbed) him in the ribs. Mr Jordan says that this had frustrated him but he had been unable to do anything about it as he had been holding the panel. He says that, when his hands were free, he had pushed Mr Corbett with his elbow causing him to stumble against the wall. Mr Jordan's evidence is corroborated by Mr McIntyre, who was present at the time.

[16] Mr McIntyre's evidence is that the matter had been very trivial and that he had been very surprised when he had heard that this alleged assault had caused Mr Corbett to have to attend hospital later that night.

[17] A slightly different version of events was given by Mr McKernan who said that he had noticed Mr Corbett rubbing the back and sides of Mr Jordan whilst he was holding the panel in place. He says that he had found this odd. He had not witnessed Mr Corbett jab Mr Jordan in the ribs. Mr Corbett denies that he had either rubbed Mr Jordan's back and sides, or jabbed him in the ribs.

[18] Mr Corbett's evidence is that, after the incident, he went out for around 10 minutes to gather his thoughts and then went back in, took his car keys and went home. The evidence of Mr McIntyre, Mr McKernan and Mr Jordan is that Mr Corbett did not leave but carried on working, (tidying up before they all left), and had left alongside the other men without saying anything.

[19] Mr Corbett states that, later that night, he had woken up, been sick and had felt bad enough to go to hospital. He was signed off for the remainder of the week by his GP and put in an ACC claim for a work-related injury. The Authority saw medical evidence to suggest that Mr Corbett had suffered an abrasion of the left shoulder and upper arm, a left side ulnar nerve injury (which needed surgery) and a contusion to the left elbow.

[20] Mr Corbett states that, the following morning, he had called Mr McKernan to tell him that he had been in hospital and that he wished to speak to Mr Hicks. Mr McKernan passed the message on to Mr Hicks who called Mr Corbett back a short while afterwards. Again, the evidence in relation to the content of that ensuing telephone conversation differs between the parties.

[21] Mr Corbett's evidence is that he told Mr Hicks what had happened and that Mr Hicks had called it some "*tomfoolery*". Mr Corbett said that he had told Mr Hicks that he was not feeling well but that Mr Hicks had asked him where he saw himself with the company. When Mr Corbett asked him to clarify what he meant by this, Mr Hicks asked him whether he felt he had a future in the company. When Mr Corbett replied that he did, Mr Hicks said that the guys did not like him, and that it was best if they parted company. Mr Hicks had refused to speak to Mr Corbett face-to-face and had said that, under the "*90 days rule*", he could let him go. Mr Corbett said that Mr Hicks had said that he would pay him for a week and then they would go their separate ways.

[22] Mr Hicks' version of this conversation is that he had asked Mr Corbett to attend a meeting on 14 September as his three month probation was coming to an end and he wanted to review his employment. Mr Hicks' evidence was that he had told Mr Corbett that they would also discuss his complaint about being hit by Mr Jordan during that meeting and that the company's adviser, Mr Brady, would be travelling down from the North Island on 21 September and that, if Mr Corbett wanted to raise a grievance in respect of the alleged assault, he could do so with Mr Brady on that day. Mr Corbett denies that Mr Hicks had made reference to the probation or the meeting with Mr Brady.

[23] Mr Hicks stated that he had left two messages on Mr Corbett's telephone on 13 September to arrange a time for the meeting the following day. (Documentary evidence supported this). Mr Hicks said that Mr Corbett did not turn up for the meeting and that the next contact that the company had had with Mr Corbett was via his legal representative.

[24] Mr McKernan gave evidence that Mr Corbett had sent him a text message on 14 September saying that a friend of his would pick up his tools. His evidence was also that, seven days later, Mr Corbett sent him a text message asking him to pay him his holiday pay.

[25] The evidence of the respondent is that, when Mr Corbett failed to turn up on 14 September and sent the text message asking for his tools, it was assumed that he had decided to leave the company. Mr Corbett's evidence is that he had treated himself as having been dismissed by Mr Hicks' words during the telephone conversation on 8 September.

[26] Unbeknown to the company around this time, Mr Corbett had gone to the Police on 10 September 2011 to report that he had been assaulted by Mr Jordan. The Police interviewed Mr Jordan on 10 October and concluded that the incident was of a "*relatively minor nature*". The Police constable dealing with the matter stated in a letter to Mr Hicks dated 7 November 2011 that she felt that "*the most appropriate course of action was to formally warn Mr Jordan in relation to the incident*". She also said that she was of the opinion that it was a matter that would be more appropriately dealt with at a workplace level.

[27] Mr Hicks produced a written warning addressed to both Mr Corbett and Mr Jordan, dated 28 October 2011.

The issues

[28] The Authority must determine the following issues:

- (a) Was Mr Corbett subjected to bullying and abuse during his employment with the respondent company?
- (b) If the answer to the question at (a) above is in the affirmative, did such treatment amount to unjustifiable disadvantage in his employment?
- (c) Was Mr Corbett subjected to racist abuse during his employment with the respondent company contrary to s.109 of the Employment Relations Act 2000 (the Act)?
- (d) Was Mr Corbett assaulted by Mr Jordan and, if so, was that an unjustifiable disadvantage in Mr Corbett's employment?
- (e) Was Mr Corbett dismissed by the respondent?
- (f) If the answer to the question above is in the affirmative, was that dismissal unjustifiable in accordance with the test set out at s.103A of the Act?
- (g) If Mr Corbett was not directly dismissed by the respondent, was he constructively dismissed?

Was Mr Corbett subjected to bullying and abuse during his employment with the respondent company?

[29] There is no statutory definition of *bullying* on the New Zealand statute books, although there have been various attempts to define bullying by the Authority over the years. See, for example, *Isaac v Chief Executive of the Ministry of Social Development* ERA Auckland AA200/08, 5 June 2008 and *Kneebone v Schizophrenia Fellowship Waikato Inc* ERA Auckland AA31/07, 13 February 2007.

[30] One essential element to be determined in this case is whether the actions that Mr Corbett was subjected to were part of banter he willingly took part in, or whether they were unwelcome by him. This is an important distinction in this case, and is one

that is recognised in the definition of bullying and harassment published by the respected UK body, the Advisory, Conciliation and Arbitration Service; namely, *something that has happened that is unwelcome, unwarranted and causes a detrimental effect.* (*Bullying and harassment at work, a guide for managers and employers*, ACAS, October 2010).

[31] It has not been easy to determine exactly what occurred between Mr Corbett and the other men during his employment because of the conflict of evidence. One witness for the company, Mr McKernan, whom I found to be particularly credible, had not witnessed any abuse of Mr Corbett, but was largely office based so would have been unlikely to have done so anyway. However, Mr Hicks' evidence persuades me that Mr Corbett was subjected to abuse by his work co-workers which was unwanted by him, and which fell outside of acceptable banter. In his oral evidence to the Authority Mr Hicks said that Mr Corbett *may have referred to the abuse*, that Mr Corbett *may have said he was sick of the banter while he was under stress*, that *the atmosphere was horrendous in terms of the stress* and that Mr Hicks could see *where he [Mr Corbett] was coming from*. I take that evidence to be a confirmation that Mr Corbett had complained about being abused.

[32] I find it unlikely, as Mr Corbett asserted, that he never took part in banter himself save to rib Mr Hicks about supporting a certain rugby team. However, even if Mr Corbett did take part in the banter, the evidence I heard from Mr Corbett, which I accept, is that the actions of his co-workers went beyond what could be reasonably expected of an employee in his workplace and that he was targeted to an extent by his co-workers and his supervisors. I therefore conclude that Mr Corbett was subjected to abuse and bullying which went beyond an acceptable range of banter prevalent in many workplaces such as the respondent's.

If Mr Corbett was subjected to bullying and abuse, did such treatment amount to unjustifiable disadvantage in his employment?

[33] Section 103 of the Act states that, for the purposes of the Act, a personal grievance means:

Any grievance that an employee may have against the employee's employer or former employer, because of a claim that the employee's employment or one or more conditions of the employee's employment ... was ...affected to the employee's disadvantage by some unjustifiable action by the employer.

Section 103A sets out the test of justifiability:

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[34] The test requires that the employee's employment be affected to the employee's disadvantage by some unjustifiable action by the employer. Therefore, on its face, bullying by fellow employees (rather than by the employer or agents of the employer) cannot amount to an unjustified disadvantage. However, there are two considerations in this case which do import liability to the respondent in my view. First, the bullying and abuse complained of by Mr Corbett was prolonged and, for the most part, caused Mr Corbett distress. In my view, save for when he was called *Corby*, which I cannot find to have been offensive to a reasonable person of normal robustness, it was reasonable for Mr Corbett to have found the abuse unacceptable and, therefore, to his disadvantage. The fact that such an atmosphere of abuse and bullying existed in the workplace of the respondent, whether caused by the pressures of work or not, created an unsafe workplace for Mr Corbett which was unjustifiable. It is the responsibility of the employer to ensure that its employees are working in a safe environment, and the respondent unreasonably failed to do so in Mr Corbett's case.

[35] Secondly, Mr Hicks admitted that Mr Corbett had spoken to him about the abuse, but had decided not to do anything about it immediately. If he had, it may have prevented the bullying and abuse that had occurred on 7 September 2011. Mr Hicks explained, however, that he did not want to bother the men when they were working so hard. However, it appears that it was because they were working so hard and were so stressed that they were targeting Mr Corbett.

[36] It is my finding in the light of these factors that Mr Hicks' failure to ensure that Mr Corbett was working in a safe environment in the first place, and his second failure to step in and prevent the bullying when Mr Corbett complained, were not the actions that a fair and reasonable employer could have taken in all the circumstances.

Was Mr Corbett subjected to racist abuse during his employment with the respondent company contrary to s 109 of the Employment Relations Act 2000 (the Act)?

[37] Section 103 (1) (e) of the Act includes as a personal grievance a claim that the employee has been racially harassed in his employment.

[38] Section 109 of the Act states that:

An employee is racially harassed in the employee's employment if the employee's employer or a representative of that employer uses language (whether written or spoken) or visual material, or physical behaviour that directly or indirectly:

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

[39] Section 103 (2) of the Act states that, for the purposes of Part 9 of the Act, a representative, in relation to an employer and in relation to an alleged grievance, means a person who is employed by that employer and who has either authority over the employee alleging the grievance or is in a position of authority over other employees in the workplace of the employee alleging the grievance.

[40] Although Mr Corbett did not raise expressly a breach of s 109 in his statement of problem, s 160 (3) of the Act provides that the Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described. Section 122 also states that nothing in Part 9 of the Act prevents a finding that a personal grievance is of a type other than alleged. I am therefore able to consider whether there was a breach of section 109 of the Act in light of the allegations made by Mr Corbett.

[41] I am satisfied that being either Irish or Northern Irish falls within the definition of national origin. I find, on balance, that Mr Corbett was abused in terms of his national origin by Mr Tobin and Mr Jordan. (Mr Tobin was not present to give

evidence to the Authority, and I find no reason to disbelieve Mr Corbett in his account of how Mr Tobin behaved towards him).

[42] It is my view that calling Mr Corbett *a thieving Irish bastard*, referring to him as *fucking Irish*, and calling him a *dumb Irish bastard* are examples of hostility and bringing him into contempt and ridicule on the grounds of his national origins. If Mr Tobin and Mr Jordon had had concerns about Mr Corbett's work, they could have told him so in terms that did not make reference to his national origin. The fact that they did so brings their abuse into the scope of section 109 (a) in my view.

[43] Furthermore, Mr Corbett and his wife both gave evidence, which I accept, of how upset Mr Corbett was by the abuse. Section 109 (b) is also satisfied therefore. Finally, I am satisfied that, both by its nature and through its repetition, the abuse had a detrimental effect on Mr Corbett's job satisfaction.

[44] Whilst Mr Jordan was not a representative of the employer for the purposes of Part 9 of the Act, being a contractor, Mr Tobin, an employed foreman with authority over Mr Corbett, was. Therefore, I find that Mr Corbett had been racially harassed in his employment contrary to s 109 of the Act.

Was Mr Corbett assaulted by Mr Jordan and, if so, was that an unjustifiable disadvantage in Mr Corbett's employment?

[45] Even on Mr Jordan's own evidence, in layman's terms at least, he *assaulted* Mr Corbett by elbowing him. Whether intended or not, this caused Mr Corbett to fall against the wall and hurt himself. On balance, I believe that Mr Jordan probably did elbow Mr Corbett as a reaction to what he perceived as a provocation of some sort. This action by Mr Jordan, in itself, does not amount to an unjustified action by Mr Corbett's employer, however, as Mr Jordan was an independent contractor.

[46] The unjustified action by Mr Corbett's employer arises, in my view, from Mr Hicks' failure to investigate the matter. Although his evidence was that he was going to ask Mr Brady to investigate the matter, I prefer Mr Corbett's evidence on this point and do not believe that Mr Hicks made that intention at all clear to Mr Corbett. Rather, I accept Mr Corbett's evidence that Mr Hicks downplayed the incident.

[47] Therefore, I believe that the respondent did not take the complaint of assault by Mr Corbett seriously, and that this failure caused a disadvantage in Mr Corbett's

employment, as it caused him to believe that no action as going to be taken by his employer.

[48] Furthermore, the disadvantage was unjustified because that failure was not the action of a fair and reasonable employer in all the circumstances that prevailed at the time the action occurred.

Was Mr Corbett dismissed by the respondent?

[49] The respective evidence of Mr Corbett and Mr Hicks was in direct conflict as to how the employment ended, the conversation between the two men on 8 September 2011 being crucial. Mr McKernan, whose evidence I found to be credible, said that he had overheard part of the conversation, although his evidence in that regard is not conclusive. Of note, however, is Mr McKernan's evidence that Mr Hicks had told him after his conversation with Mr Corbett that Mr Hicks had asked Mr Corbett what role he had in mind with the company as they needed foremen *i.e. someone who was self managing and as he couldn't work with Darryl [McIntyre], Peter [Tobin] and Michael Jordan which is everyone on the tools, where he saw himself fitting in if he couldn't work with everyone.*

[50] Mr Hicks confirmed to the Authority during his oral evidence that he had asked Mr Corbett where he saw himself fitting in and that he did not see Mr Corbett as foreman material. Trying to reconcile the different strands of evidence, I believe that Mr Hicks probably did ask Mr Corbett to attend a meeting on 14 September but that he had said enough to Mr Corbett to lead him to believe that he was no longer wanted in the respondent company because he did not fit in. Therefore, faced with this message, together with the past failure on Mr Hicks' part to stop the abuse and bullying, Mr Corbett concluded that his employment with the respondent company was no longer viable, and he decided to leave.

[51] Therefore, I do not find that the respondent actively dismissed Mr Corbett.

If Mr Corbett was not directly dismissed by the respondent, was he unjustifiably constructively dismissed?

[52] To succeed in a claim of constructive dismissal Mr Corbett has to show that he resigned following a course of conduct by the respondent which either had the dominant purpose of forcing Mr Corbett to resign or which amounted to a breach of

duty sufficiently serious that it would be reasonably foreseeable that Mr Corbett would have no choice but to resign.

[53] I do not believe that the respondent deliberately followed a course of conduct that had the dominant purpose of forcing Mr Corbett to resign. However, it is my view that the combination of the abuse and bullying that Mr Corbett suffered at the hands of some of his co-workers, including the assault by Mr Jordan, combined with the failure of Mr Hicks to address these issues in any effective manner, and the clear message from Mr Hicks that Mr Corbett did not fit in, cumulatively amounted to a significant breach of trust and confidence by the respondent that was so serious as to be a repudiation of his employment agreement. I also believe that this combination of factors made it reasonably foreseeable to any reasonable observer that Mr Corbett would resign.

[54] The advocate for the respondent referred to several well known New Zealand and English authorities which have developed the law on constructive dismissal over the years. Having reviewed Mr Brady's submissions, I am content that this is a case where the high hurdle that an applicant must jump over to prove constructive dismissal has been satisfied.

[55] It is worth mentioning at this point that the respondent appeared to believe that the *90 days rule* operated to prevent Mr Corbett from raising a personal grievance. As no employment agreement had been signed, however, any wording that may have imposed a valid trial period pursuant to ss 67A and 67B of the Act in an employment agreement did not operate to prevent Mr Corbett from raising his personal grievance.

[56] In summary, I believe that Mr Corbett was unjustifiably constructively dismissed by the respondent's actions and failures.

Remedies

[57] Mr Corbett does not seek reinstatement. I therefore turn to the question of sections 123 (b) and 128 of the Act. Mr Corbett said that he had suffered loss of remuneration as a result of his constructive dismissal. I am satisfied that he made reasonable efforts to find a replacement position, and he found permanent employment, on a higher wage, from 13 October 2011.

[58] S 128 (3) provides that the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that provided in subsection 128 (2), namely the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. However, in light of the fact that Mr Corbett was employed by the respondent for only three months, and that the respondent had concerns about his performance on the job, which could have led to his dismissal in due course in any event (assuming a fair process would have been followed) it is not appropriate to exercise a discretion to order the respondent to pay Mr Corbett more than a sum equal to his actual lost remuneration or three months' ordinary time remuneration.

[59] The period of loss claimed is from 8 September 2011 until 12 October 2011 inclusive. During his employment with the respondent, Mr Corbett earned an average of \$1,090 net a week, including overtime. As the respondent was very busy and it was not disputed that Mr Corbett was willing to work overtime, I conclude that there was a good likelihood that he would have continued to have earned overtime in the period between resigning and finding higher paid permanent work, had he remained working at the respondent. I therefore believe that it is appropriate to take into account the overtime payments in averaging out the weekly earnings.

[60] It took Mr Corbett five weeks to find permanent employment on a higher wage, and in that period earned a total of \$2,289 net. This equates to a loss of net earnings during the five week period of \$3,161.

Compensation for humiliation, loss of dignity and injury to feelings

[61] Mr Corbett and his wife (Ms Newnham) gave evidence of the effect upon him of the treatment he suffered, although much of Ms Newnham's evidence related to how hard Mr Corbett had been working, which does not form part of his complaint, and which Mr Corbett did willingly. However, I am satisfied that Mr Corbett did suffer humiliation, loss of dignity and injury to his feelings when his employer failed to take action in respect of his complaints about being bullied and abused, and in respect of the racial harassment he suffered from Mr Tobin.

[62] I am also satisfied that Mr Corbett suffered humiliation, loss of dignity and injury to his feelings when he understood from Mr Hicks on 8 September 2011 that he

was regarded as not fitting in, and that his complaint about being assaulted was not to be taken seriously. However, as the course of treatment suffered by Mr Corbett and the respondent's continuing failure to act reasonably in respect of it essentially form a continuous act, including the respondent's actions on 8 September 2011 which led to the constructive dismissal, I shall treat them all as a continuing series of actions and shall not attempt to artificially divide up the compensation between the different acts.

[63] Taking into account Mr Corbett's evidence, I find that a global award under S123 (1) (c) in the sum of \$10,000 is an appropriate sum to compensate Mr Corbett for all instances of the disadvantage suffered by him and for his constructive dismissal.

Contribution

[64] S 124 of the Act requires me to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[65] I find that Mr Corbett did take part in the banter that occurred in the workplace. However, I find also that what Mr Corbett experienced went beyond what an employee can reasonably be expected to put up with, even in the comparatively relaxed and occasionally heated atmosphere of a busy building site or similar environment. In addition, no matter what the conventions are within a given industry or employer, when an employee complains in good faith about being abused, the employer must, under the law, take urgent steps to prevent further incidents. The respondent failed conspicuously to do so in this case.

[66] Although I believe that Mr Jordan did react to a perceived provocation when he elbowed Mr Corbett, the disadvantage arises from Mr Hicks not taking the complaint by Mr Corbett seriously, to which Mr Corbett did not contribute.

[67] In view of this, I do not find that Mr Corbett contributed to the abuse that he suffered, nor to the failure of the respondent to take steps to address his concerns, which I find were entirely legitimate. I have also seen no evidence to support the contention that Mr Corbett did not *fit in* through any fault of his own. Therefore, I believe that it is not appropriate to reduce the awards made in this determination under s 123 (1) (b) and (c).

Orders

[68] I order the respondent to pay to Mr Corbett;

- a. The net sum of \$3,161 in respect of lost wages; and
- b. The sum of \$10,000 in respect of compensation for humiliation, loss of dignity and injury to his feelings.

Recommendations

[69] Section 123 (d) of the Act provides where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any one or more of the following remedies:

if the Authority or the court finds an employee to have been sexually or racially harassed in his or her employment, recommendations to the employer—

(i) concerning the action the employer should take in respect of the person who made the request or was guilty of the harassing behaviour, which action may include the transfer of that person, the taking of disciplinary action against that person, or the taking of rehabilitative action in respect of that person:

(ii) about any other action that it is necessary for the employer to take to prevent further harassment of the employee concerned or any other employee.

[70] I recommend that the respondent carry out the following measures to prevent further racial harassment in the workplace:

- a. Senior management should urgently become familiar with its responsibilities under the Employment Relations Act 2000 and the Human Rights Act 1993 towards individuals of various races, colour or ethnic or national origins;
- b. As soon as practicable, senior management should develop and implement a training session for all existing and new staff, including contractors, to ensure that they understand that expressing hostility against, or bringing into contempt or ridicule others on the grounds of their race, colour or ethnic or national origins may be unlawful and will be treated as a disciplinary matter; and

- c. At the same time as recommendation (b) above is implemented, a written company policy document should be made available to all existing and new staff which sets out appropriate standards of conduct to prevent racial harassment of others.

Costs

[71] The parties should seek to agree between themselves how costs are to be dealt with. If the parties cannot agree, any claim for costs by Mr Corbett should be made by lodging and serving a memorandum within 28 days of the date of this determination, and the respondent shall have a further 28 days to lodge and serve any reply.

David Appleton
Member of the Employment Relations Authority