



# New Zealand Employment Relations Authority Decisions

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## Hatch v Oceania Care Company (no.1) Limited (Auckland) [2011] NZERA 878; [2011] NZERA Auckland 157 (15 April 2011)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 157  
5285075  
5285086  
5285089

BETWEEN MELANIE HATCH Applicant in 5285075

PHILLIPA MCCANN Applicant in 5285086

FIONA MOONEY Applicant in 5285089

AND OCEANIA CARE COMPANY (NO 1) LIMITED

Respondent

Member of Authority: Dzintra King

Representatives: Kevin Murray, Counsel for Applicants

Rebecca Kroon, Counsel for Respondent

Investigation Meeting: 25 November 2010 at Auckland

Submissions received: 23 December 2010 from Applicant

24 January 2011 from Respondent

Determination: 15 April 2011

**DETERMINATION OF THE AUTHORITY**

### **Employment Relationship Problem**

[1] The applicants, Ms Melanie Hatch, Ms Phillippa McCann and Ms Fiona Mooney, say they have been unjustifiably dismissed by the respondent, Oceania Care (No 1) Limited (“Oceania”). The applicants also alleged they had been unjustifiably disadvantaged and unlawfully discriminated against but these claims were withdrawn at the commencement of the hearing.

[2] All the applicants were employed by the respondent at West Harbour Lodge. Ms Hatch was employed as an administrator, Ms McCann as a cleaner and Ms Mooney as laundry manager.

[3] Oceania owns and operates a number of aged care facilities, of which West Harbour is one.

[4] In March 2008 two organisations, Qualcare and Elder Care, merged to become Oceania. The human resources manager for Oceania, Ms Dione Coleman, said the two organisations were very different and consequently change management was challenging.

[5] Ms Sandy Naidu was appointed as manager of West Harbour in May 2009.

[6] On 20 July 2009 Ms Coleman was contacted by Ms Naidu who said she had received written complaints from two employees, Ms Jessica Sampson and Mr Dave Burt. The complainants alleged that the applicants had made racist and inappropriate remarks about Ms Naidu.

[7] The following day Ms Naidu told Ms Coleman that she had received a third complaint from Ms Taulio Olaagia, which was similar to the two previous complaints.

[8] Ms Naidu also told Ms Coleman that she had received a tape containing examples of racist remarks. She did not know who had given her the tape or when or how it had been recorded. Ms Coleman told Ms Naidu to send out notice of a disciplinary hearing.

[9] Once Ms Coleman saw the complaints and realised that Ms Naidu was the subject of the complaints she removed Ms Naidu from the process and asked Ms Sue Capenerhurst, a manager at another Oceania facility, to assist her in running the disciplinary process.

### **The Complaints**

[10] Ms Sampson complained that since Ms Naidu's appointment four staff (the three applicants and another staff member, Ms Lorraine Jackson, who brought a separate proceedings) had been talking about Ms Naidu (who is a Fijian Indian) hiring Fijian Indians, saying she was a black, prejudiced bitch, that she was running the

place like a prison – Ms Naidu had previously worked in the prison service - and that she hated white people. Ms Sampson made reference to Ms Mooney making comments that had been taped and she alleged that Ms Mooney had said Ms Naidu was a user and a fucking bitch. Ms Hatch had said that Ms Naidu liked to cause drama.

[11] Ms Olaagia said that the applicants and another staff member had said Ms Naidu had maintained she was not going to hire any white people, only Islanders, and that the workplace was no good because there were too many Islanders, and that Ms Naidu was a fucking bitch.

[12] Ms Olaagia also claimed that Ms Jackson had said that when she came into work in the mornings Ms Janice White, the coordinator, asked *where's your red dot and sari?* Ms Olaagia said they joked and laughed about it every morning.

[13] Mr Burt said the applicants had talked about Ms Naidu in a very nasty manner, they had been making jokes about a *red dot special*, saying she had employed Fijian Indians in preference to white people, called her a black bitch and they were very nasty people.

[14] The only specific comments attributed by the complainants to a particular person are comments made by Ms White and Ms Mooney.

### **The Disciplinary Process**

[15] A letter was sent to all Ms Hatch and Ms Mooney on 20 July inviting them to a disciplinary meetings. Ms McCann was sent a letter on 21 July. The letter, which was signed by Ms Naidu, stated that the applicants may have been involved in the making of racist allegations about Ms Naidu and that they may have been involved in a matter perceived as discriminating against Ms Naidu. No specifics were provided.

### **Ms Hatch**

[16] On 21 July Ms Capenerhurst and Ms Coleman met with Ms Hatch and her support person. Shortly before the meeting, which was attended by Ms Naidu as well as Ms Coleman and Ms Capenerhurst, Ms Hatch was given the complaints. Ms Hatch asked Ms Coleman to play the tape, which she did. Ms Coleman explained to Ms

Hatch that the tape recording could not be used as part of the disciplinary process as it had been covertly obtained. Ms Hatch asked for time to respond to the allegations.

[17] Ms Hatch said she was looking for a positive outcome and had some other issues to address, which were to do with Ms Naidu. Ms Hatch said Ms Naidu had called her into the office and said there were allegations and that she would deal with them decisively; that she had already received one resignation (this from Ms White) which was a good thing. Ms Hatch said she thought that was an awful thing to say. It is clearly an inappropriate thing for Ms Naidu to have said.

[18] Ms Coleman said Oceania would deal with the allegations and that it did not tolerate racial harassment or bullying. She commented that one of the complainants had received threats. Ms Hatch said that was dreadful and she would never threaten anybody and that she would not tell anyone who had made the allegations.

[19] Ms Hatch was being sensible and conciliatory and raising concerns about Ms Naidu.

## **Ms Mooney and Ms McCann**

[20] Ms Mooney and Ms McCann did not hear the tape and the scheduled meetings on 23 July did not go ahead as Oceania wished to carry out further investigations.

### **Further Interviews**

[21] On 21 July Ms Coleman interviewed Ms Sampson who said she had received a threat from Ms Mooney against her and her family. This “threat” had been made during a telephone call, which had been taped by Ms Sampson. At that stage Ms Mooney did not know who had made complaints so her comment about getting her family to deal to whoever had narked was not made with specific reference to Ms Sampson.

[22] On 23 July Ms Capenerhurst and Ms Coleman interviewed all three complainants. Ms Coleman deposed that the information they gave her was consistent but none of them could recall specific statements by specific people.

[23] On 23 July Ms Coleman interviewed Ms Janice White, former acting facility manager of West Harbour, and Ms Shirley Mann, as their names had been mentioned in the interviews with the complainants.

[24] Ms White said she recalled an incident where someone had asked if a new employee who was a Fijian Indian was a relative of Ms Naidu’s and she had heard gossip regarding Ms Naidu talking to a resident about white people being lazy. This appears to have emanated from a conversation overheard by Ms Lillias Scurrah, Ms Mooney’s sister. The gist of the conversation was that Ms Scurrah had overheard Ms Naidu talking to a resident and saying that there was an issue with language but the girls coming in now worked better than Kiwi girls. They worked harder and would work extra for nothing whereas Kiwi girls wanted to be paid.

[25] Ms White had resigned shortly before the interviews with the complainants and said that she had told Ms Naidu about her resignation in confidence but that the confidence had not been kept.

[26] Ms White referred to an incident shortly after Ms Naidu started when the staff put on a morning tea for her. Ms Naidu had put people’s backs up when she said that she had been watching everyone and did not like what she had seen. Ms White said Ms Naidu had said to her that *people will leave this office in tears and they will be out the door.*

[27] Ms Naidu had threatened Ms Hatch twice that she would call Head Office about her and the door was open so confidentiality had not been respected. The second time Ms White had overheard the conversation. Ms White said she did not want to get involved as everyone was talking to her about it.

[28] Ms Mann was not happy about being spoken to and said she had been to a solicitor and did not want to be involved at all. She said it was nonsense, that it was an unpleasant place to work and that everyone was watching their backs. She had heard Irish jokes (substantiating comments later made by Ms Hatch) but had never heard racist comments. She said it was *past petty into pathetic.*

[29] Ms Mann said she had heard some comments. There was lots of grumbling and references to Ms Naidu being a black, prejudiced bitch. That comment had been

made by Ms Jackson and endorsed Ms Mooney. Ms Hatch had also said she was a bitch.

[30] She had heard people speak about Ms Scurrah having heard Ms Naidu telling a resident and the resident’s family that white people were lazy. She said it was a very divided workplace.

### **Notice of Disciplinary Meeting**

[31] On 24 July Ms Coleman sent out further letters asking the applicants to attend disciplinary meetings.

[32] The concerns held by Oceania were:

- *You may have made comments about Sandy, which could be perceived as being racially discriminatory;*
- *You may have encouraged other employees to make inappropriate comments about Sandy that may be perceived as racially discriminatory;*
- *If you have made such comments or been party to a conversation where such comments were made and agreed with them, we are concerned you may be:*

*Inciting/allowing or encouraging racial discrimination in the workplace;*

*Actively undermining and/or judging Sandy based on race;*

*In breach of our code of conduct which does not allow for harassment or abuse of any kind;*

*In breach of the implied terms of trust and confidence that you will always... act in the company's best interests.*

[33] The original complaints and interview notes were attached to the letters.

### **Melanie Hatch**

[34] Ms Capenerhurst and Ms Coleman met with Ms Hatch on 30 July. Ms Kroon attended the meeting via a telephone link.

[35] Ms Hatch submitted a written statement. She stated that on 20 July she had been told that Head Office was being called in and an example was going to be made of her and others. Ms Hatch said Ms Naidu had told her that Ms White had said she was a *pain in the arse*. Ms Hatch stated that she held the company in the highest regard and wished to continue to work for the company. She had never made any racist comments to Ms Naidu.

[36] She complained that Ms Naidu often spoke to her and other staff in a raised voice in public using a derogatory tone. She gave a specific example of this behaviour. Ms Naidu had also questioned her about some notes in her personnel file of which Ms Hatch had no knowledge and had berated her regarding them. Ms Naidu had threatened to deduct previously agreed hours from Ms Hatch but had suggested she would give extra hours to a Fiji Indian girl. An adjournment took place and the meeting resumed on 3 August.

[37] Ms Capenerhurst said the issues raised regarding Ms Naidu needed to be investigated and dealt with but the meeting concerned allegations made about Ms Hatch. This was an unfortunate approach because the manner in which Ms Naidu behaved to staff and the comments made by staff about her were clearly interrelated. The issues regarding Ms Naidu were not dealt with until after the terminations took place. Ms Naidu was treated in a more lenient manner than the applicants.

[38] Ms Hatch said she had not heard the *red dot special* comments nor had she made that remark. She had not heard Ms Naidu being called a *prejudiced black bitch*. She admitted to sending emails with Irish jokes to other staff. Ms Kroon commented that Irish jokes were well understood and bandied about. Ms Hatch said she was not the sort of person to hurt anyone. She admitted she may have referred to Ms Naidu as a *bloody bitch*, but not a *black bitch* or a *prejudiced bitch*.

[39] When Ms Naidu had first started Ms Hatch did not think she was prejudiced but things had happened since then which led her to think she might be. She said upset staff had come to talk to her but she had not discussed that matter with other staff. Her problem was with how Ms Naidu treated people, particularly in front of others, including residents. Ms Hatch had been going to talk to Head Office about the way Ms Naidu spoke to staff. She was basically concerned with the treatment of staff.

[40] Ms Naidu gave the impression that nobody below her had a brain. On several occasions she had *gone off her nut*, she did not listen and just shut Ms Hatch down. She walked past without saying *good morning*. She gave an example of Ms Naidu yelling at a staff member in the dining room. Staff were petrified of Ms Naidu. She felt Ms Naidu was bullying and intimidatory.

[41] Ms Kroon said Ms Naidu had made a statement that she had never felt victimised or noticed any issues with racism.

[42] Ms Hatch acknowledged she should not have referred to Ms Naidu as a *bloody bitch*. She said didn't always see eye to eye with other managers but was open to talking and wanted to hear others' perspectives.

[43] Ms Hatch said that Ms Olaagia's complaint was what Ms Olaagia had said to

Ms Hatch.

[44] The meeting was adjourned.

### **Fiona Mooney**

[45] Ms Mooney also tabled a written response at the meeting on 30 July. The meeting was adjourned so Oceania could consider the response.

[46] Ms Mooney denied making any racist comments regarding Ms Naidu. She said Ms Naidu often spoke to her and other staff in a raised voice and used a derogatory tone in public. Ms Naidu by passed her in her role as laundry manager and would complain when Ms Mooney was unaware of what was going on as a result of having been bypassed. She felt bullied by Ms Naidu.

[47] A further meeting was held on 3 August. Ms Capenerhurst acknowledged that complaints had been made about Ms Naidu but that was a separate matter.

[48] Ms Mooney was asked about the *red dot special*. She said she had heard reference to saris but the *red dot special* was with reference to the Farmers' sale. She also said that Ms White had asked her one morning whether she had her red dot and sari and that they needed their red dots and saris.

[49] Ms Mooney accepted that she had referred to Ms Naidu as a *bitch*, but not as a *black, prejudiced bitch*. Ms Mooney explained the circumstances regarding her referring to Ms Naidu as a *bitch*. This had to do with Ms Naidu calling Ms Mooney into her office on 17 July together with Ms White. After that meeting Ms Mooney told Ms McCann that she had been in the *fucking bitch's* office and that Ms Naidu had yelled at her and Ms White and blamed them for four missing flannels. She said they would have to go through the rubbish bags each morning to make sure flannels had not been thrown away. Ms Naidu had told her off in front of a registered nurse and said *bloody hell, sort it out*.

[50] Ms Mooney acknowledged that when she found out that there were likely to be problems because someone had made a complaint about her she had said she and her family would deal with whoever had narked. Ms Sampson had complained about the threat. At the stage it was made, Ms Sampson was, unbeknown to Ms Mooney, taping a mobile phone conversation with Ms Mooney, in the course of which Ms Sampson acknowledged egging Ms Mooney on to make inflammatory comments. Ms Mooney did not threaten Ms Sampson directly as she did not know who had made the complaints. Ms Mooney said she was angry because someone had complained and that Ms Sampson had agreed with her that action needed to be taken regarding the complainants. Ms Mooney said she was angry and disappointed when she discovered Ms Sampson was a complainant but she was at the meeting to discuss it.

[51] Ms Mooney said they all bitched and moaned about work and that Ms Sampson also did so.

[52] Her representative, Mr Buckingham, asked whether Ms Naidu was undergoing disciplinary action. Ms Kroon replied that everything would be investigated.

[53] At the second meeting on 3 August Ms Mooney denied that she had made any racist remarks about Ms Naidu but did admit to hearing a comment about a red dot and sari made by Ms White but said she did not know what it meant. She admitted to calling Ms Naidu a *bitch* behind her back and to making threats about the complainants, even though she was unaware of who the complainants were at the time of making the threat. Ms Coleman said she found Ms Mooney very angry and intimidating.

### **Phillipa McCann**

[54] The process for Ms McCann was the same. Ms McCann said the comment *red dot special* had been bandied about the workplace but it was in relation to the Farmers Red Dot sale. The comment emanated from Ms White and she had thought it was funny. Ms Coleman said she did not understand why a comment about a sale would be funny and raised this with Ms McCann who simply said she found it funny. Ms McCann said there had been discussions at West Harbour about race issues in the workplace but nothing like that alleged by the complainants. She denied having anything to do with those comments.

[55] Ms Coleman said it was obvious that there was racial tension and that comments had been made at work by each of the applicants. It was clear that inappropriate comments about red dots and saris had been made as well as gossip and nasty innuendo about Ms Naidu's employment practices and the number of Fijian Indians employed under her management.

### **Dismissals**

[56] After the meetings on 3 August Ms Capenerhurst and Ms Coleman met again with the complainants, specifically to discuss their reasons for making the complaints and whether there had been any collusion. Ms Coleman was satisfied that none of them had any reason to fabricate or to collude.

[57] Ms Coleman said there was clearly a lot of gossip and bitching and that much of this was directed at Ms Naidu. It was clear the applicants believed Ms Naidu was making decisions based on race and that this unfounded belief had been perpetuated by employee gossip and discussion about her employment practices. This seemed to have escalated to a level where it was unhealthy and the complainants felt they had no choice but to complain and were clear that the applicants had been involved in making specifically racist remarks, although she could not identify which comments were made by whom.

[58] Ms Coleman and Ms Capenerhurst considered two courses of action: a final written warning with facilitation or summary dismissal. They had lost trust in the applicants and felt their behaviour had exposed Oceania to unnecessary and serious risk and incited racial discrimination among other employees. When I asked Ms Coleman about the nature of the serious risk she said she was referring to the under

swell, the backlash of what was going on, the whole site was in uproar and the tension was palpable.

[59] Ms Coleman said she did not believe that facilitation would have improved the applicants' behaviour given the nature of their conduct and attitudes in the disciplinary meetings and that termination was the only way to eliminate a repetition of the behaviour.

[60] Ms Coleman said that when she and Ms Capenerhurst considered their options they did consider each of the applicants separately but they also felt it was necessary to consider them as a group as it was the group behaviour and mentality,

together with encouragement that created the racial tension and gossip in the workplace. They felt it was vital to take the same action against all the applicants as each had played a role in inciting racial discrimination and tension on the workplace. It was their actions, individually and collectively that created an unhealthy and unsafe workplace.

[61] The applicants had engaged in serious misconduct by inciting and allowing racial harassment in the workplace. They had undermined Ms Naidu based on her ethnicity by engaging in inappropriate conversations about Ms Naidu's race and perceived actions based on race. They had breached the implied terms of trust and confidence by creating an environment of discrimination based on perception and assumption not fact. Ms Coleman said they were discriminating against Ms Naidu by talking about her. They felt that what was happening was dangerous to Ms Naidu's employment.

### **Were the dismissals justified?**

[62] This requires an assessment of the circumstances of each applicant, which was, unfortunately, not done by the respondent. The dismissal letters all stated:

*During this process, no one has been able to provide us (to any degree of certainty) that a specific comment was made by a specific employee at a specific time. We concede that this has made the process difficult for everyone involved. However, all the participants in this process (both complainants and those employees subject to a disciplinary process) have conceded the fact that such comments are made among staff and three*

*employees have attested that you were an active participant in such conversations.*

...

*The allegations in the complaints are serious and corroborated and we find it unlikely that they are fabricated – particularly in light of the clear racial tension within the workplace.*

[63] The letters conclude by saying (the wording may differ slightly for each applicant) but the tenor is the same:

*We have also been informed that there has been recent discussion among employees (no names were provided to us) that you, [and the other applicants] have been 'targeted' for this disciplinary matter because you are*

*'white'. It is therefore our view that this behaviour has continued throughout this disciplinary process. It is your perception (and the voicing of this perception by you to other employees) that has assisted in creating an unhealthy environment for Ms Naidu and other Fijian Indians employed within West Harbour. This is unacceptable. Such a perception (without any factual basis) when shared with other employees:*

*Does incite and allow racial discrimination; Undermines Ms Naidu based on her ethnicity; Breaches our code of conduct;*

*Breaches the implied terms of trust and confidence that you will always act in the company's best interest.*

[64] It is unclear whether the *perception* being referred to is the perception that the applicants have been selected for disciplinary action because they are white; or whether it refers to broader matters such as that Ms Naidu is making decisions based on race.

[65] The dismissal letter attributes the existence of racial tension within the workplace to employee perception that Ms Naidu is making race based decisions and that this is due to comments made by the applicants.

[66] Going back to the allegations that were put to the applicants in the letters asking them to attend the second disciplinary meeting, the first of these was that they

had made comments about Ms Naidu that could be perceived as racially discriminatory.

[67] Such comments relate to a perception that Ms Naidu was employing staff based on a preference for Fiji Indians and that white people were lazy. Ms Capenerhurst said she was familiar with Ms Naidu's employment practices and the allegation of favouring Fiji Indians was baseless.

[68] I accept there was a perception that Ms Naidu was prejudiced. I had no evidence that the respondent had followed up on the conversation that Ms Scurrah allegedly overheard during which Ms Naidu is said to have complained about the sloth of Kiwis. This conversation was the basis of comments passed by or in the hearing of the applicants.

[69] At no point in Ms Mooney's or Ms McCann's disciplinary meeting were they told that their perception that Ms Naidu was hiring Fiji Indians was incorrect.

[70] In the course of Ms Hatch's interview Ms Kroon said Ms Naidu had made a statement that she had never felt victimised or noticed any issues with racism.

[71] The second allegation was that the applicants may have encouraged other employees to make inappropriate comments

about Ms Naidu which could be perceived as racially discriminatory. There was no evidence that any of the applicants had done this. At most, they had expressed their concerns to each other during their tea breaks. No witness deposed that he or she had been encouraged to make inappropriate comments.

[72] The third allegation was that if the applicants had made racially discriminatory comments or been party to a conversation where such comments were made and agreed with them, the applicants could be inciting, allowing or encouraging racial discrimination, undermining Ms Naidu on the basis of race and be in breach of the code of conduct and the implied term of trust and confidence.

[73] The behaviour of the applicants does not meet the criteria for racial harassment set out in either the [Employment Relations Act 2000](#) or the [Human Rights Act 1993](#). None of them were in a position to discriminate against Ms Naidu; they were not in a position of authority in regard to her nor were they representatives of the

employer. According to Ms Kroon Ms Naidu was not adversely affected by what had been said. There was no evidence that it had a detrimental effect on her.

[74] The cause of the problem would appear to have been Ms Naidu's abrasive manner.

[75] The respondent accepted that it could not pin down particular remarks to particular people at specific times and dates.

[76] In terms of the process, Ms Naidu should have had no involvement in the disciplinary process as she was the subject of the alleged comments and dissatisfaction.

[77] I understand that the respondent had a problem in the workplace and needed to deal with it. It is the manner in which it was dealt with, which resulted in the summary dismissal of three staff members, that is at issue.

[78] [Section 103](#) (A) provides that a dismissal is justified if it was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[79] Ms Hatch raised a number of concerns regarding Ms Naidu's behaviour. She accepted responsibility for emailing Irish jokes and saying Ms Naidu was a bloody bitch. She expressed a desire to continue working with the company and to resolve matters. There was nothing in her behaviour and comments that would have led a reasonable employer to conclude that the issues with Ms Naidu were unlikely to be susceptible to a mediated resolution.

[80] She had been intending to take her and other employees' concerns to Head Office but had been pre-empted by the disciplinary proceedings.

[81] In her submissions Ms Kroon said that the derogatory comments made by Ms Hatch caused an under swell against Ms Naidu, that residents were being affected and there was a financial risk. There was no evidence of an under swell against Ms Naidu, nor was there any evidence that residents were being affected or any evidence regarding an adverse financial impact.

[82] She also claimed that Ms Hatch had a deliberate intention to incite others to feel the same way as she did. There was no evidence of an intention to incite anyone.

[83] She also asserted that Ms Hatch did not believe the comments she was making to other employees had any impact on Ms Naidu or her management of the facility. There was no evidence that Ms Hatch had any such belief or made any such assertions.

[84] With relation to Ms McCann, Ms Kroon submitted that she had referred to red dots and saris and that the comments were snide and sarcastic. Ms McCann denied that any reference to red dots had to do with Ms Naidu but related solely to the Farmers sale. Even if Ms McCann did associate the red dot with the tikka and there was also an association with saris, and Ms McCann found the association amusing, that does not make it snide and sarcastic. Ms Kroon submitted she was back chatting about Ms Naidu's race and undermining her authority. Ms Coleman said the back chat undermined Ms Naidu's authority on the site. There is no evidence of undermining.

[85] Ms Kroon submitted that undermining a manager based on her ethnicity constitutes serious misconduct. As a theoretical proposition that may well be correct. The problem again is that there is no evidence of Ms Naidu being undermined.

[86] To undermine means to weaken by wearing away a base or foundation, to subvert or weaken insidiously or secretly, to weaken or ruin by degrees. To undermine someone is to make that person become gradually less effective, confident or successful.

[87] The experiences the applicants had of Ms Naidu undermined their confidence in her. No one else deposed that their confidence in Ms Naidu had been undermined by any comments purportedly made by the applicants.

[88] Ms Kroon submitted that the comments were not made simply because the applicants did not like Ms Naidu's

management practices but because they wished to undermine her based on her ethnicity. That proposition was not put to the applicants.

[89] The applicants were not given the opportunity to comment on the sanction of dismissal.

smoking breaks. I accept that some colleagues took exception to the nature of the comments. It is also clear that there was insufficient information to enable the employer to ascertain who had said what when.

[91] Does what happened constitute serious misconduct? Serious misconduct is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship: *Northern Distribution Union v BP Oil NZ Ltd* [1992] NZCA 228; [1992] 3 ERNZ 483 (CA). In *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2

ERNZ 311 at 319 Goddard CJ said:

*That kind of misconduct will generally involve deliberate action inimical to the employer's interests. It will not generally consist of mere inadvertence, oversight or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.*

[92] The actions of the applicants were foolish and inappropriate; and careless in that they did not take care to ensure that other employees did not overhear their personal conversations. None of the remarks were made directly to Ms Naidu. These were not actions that were intended to be inimical to the employer's interests, nor were they.

[93] Regarding the red dot and sari remarks, Ms Coleman said the fact that the applicants regarded them as funny made them racist. She went on to say that the implication was that difference was bad. When I asked her about that implication she said she had drawn that inference from the reported comments and from the demeanour and attitude of the applicants during their interviews. It was not put to any of the applicants.

[94] The failure to investigate Ms Naidu's behaviour prior to dismissing the applicants constitutes a major difficulty for the respondent. In failing to carry out that investigation the employer limited the information to which it had access; and that information was relevant in making an assessment of the applicants' behaviour.

[95] The dismissals were unjustified.

## **Remedies**

[96] At the time of the investigation Ms Hatch was still unemployed. She had looked for work and sent her CV to a number of employers. She was paid \$18.50 per hour for a 35 hour week. Her only income was a day's work in September 2010 when she earned \$84. She seeks reimbursement and compensation of \$20,000.

[97] Ms Mooney had been on the DPB and had done some work related courses. She said she had suffered depression and had been unemployed until 13 September

2010. Her pay rate at Oceania was \$13.90 for a 40 hour week. Ms Mooney sought wages reimbursement and compensation of \$20,000. I have no medical evidence supporting Ms Mooney's state of ill health.

[98] Ms McCann said she had sought other employment. She said she had been stood down by WINZ for four months and had had no income until she obtained a benefit on 9 December 2009. She commenced new employment on 10 June 2010. She seeks reimbursement and compensation of \$20,000.

[99] Apart from Ms Mooney, there was little evidence of the effects of the dismissals. While I accept that all three applicants were adversely affected by the termination of their employment, in the absence of strong evidence compensation awards will be moderate. Ms Mooney is to be paid the sum of \$4,000 pursuant to s

123 (1) (c) (i). Ms Hatch and Ms McCann are to be paid \$3,000 each pursuant to s

123 (1) (c) (i).

[100] Ms Mooney deposed that she had done work related courses while on the DPB with a view to gaining employment. Ms Mooney is to be reimbursed for 13 weeks' lost wages. The amount of the reimbursement is \$7,228.00.

[101] Ms Hatch is to be reimbursed for a period of 13 weeks. The amount to be reimbursed is \$8,417.50.

Ms McCann is to be reimbursed 13 weeks' loss of earnings. If there is any difficulty calculating these leave is reserved to return to the Authority.

## **Contribution**

[103] The employer did not carry out a full investigation so I am unable to conclude that the applicants contributed to the

situation giving rise to the personal grievances.

### **Costs**

[104] Costs are reserved. If the parties are unable to resolve the issue of costs the applicants should file a memorandum within 21 days of the date of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicants' memoranda.

Dzintra King

Member of the Employment Relations Authority

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