IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 472/10
5303101

BETWEEN	AMEET KUMAR Applicant	
AND	BAYCORP (NZ) LIMITED Respondent	

Member of Authority:	Vicki Campbell
Representatives:	Gregory Bennett for Applicant Emma Butcher for Respondent
Investigation Meeting:	26 July 2010
Submissions Received:	11 August 2010 from Applicant 16 August 2010 from Respondent
Determination:	8 November 2010

DETERMINATION OF THE AUTHORITY

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[1] Mr Ameet Kumar was employed by Baycorp (NZ) Limited ("Baycorp") in June 2008 as a Payroll Administrator. He reported to Margaret Lindstrom, the Payroll Manager.

[2] Mr Kumar has raised three personal grievances with respect to his employment with Baycorp. He claims he has been racially harassed, unjustifiably disadvantaged and constructively dismissed from his employment. Baycorp denies the claims.

[3] The issues for determination are:

- was Mr Kumar racially harassed in his employment;
- was Mr Kumar subject to an unjustifiable disadvantage during his employment;
- was Mr Kumar's resignation actually a dismissal; and

- should Mr Kumar receive any remedies?

Racial Harassment

[4] Mr Kumar claims he has a personal grievance as a result of being racially harassed in his employment. Racial harassment is defined at s 109 of the Employment Relations Act (the Act) as a situation where an employer uses language that directly or indirectly:

> (a) expresses hostility against, or brings into contempt or ridicule, the employee on the ground of 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.

[5] Baycorp has set out in its policy conduct which constitutes Harassment. Its policy defines harassment as:

> Any uninvited and/or unwelcome behaviour that offends, humiliates or intimidates another person, whether or not that effect is intended.
> …
> [Harassment] may be unlawful if it is unwelcome or offensive to the recipient and has the effect of disadvantaging the recipient in his or her job.

[6] In February 2010 Mr Kumar was subject to a six monthly Performance Development Review ("PDR"). The review covered the period from July to December 2009.

[7] Mr Kumar received an overall rating of 3 which means he was consistently meeting the expectations associated with his role. There were comments in Mr Kumar's PDR which gave an indication that there were areas of his performance which needed improvement, for example, Mr Kumar's written skills were noted as needing to be developed, and a comment under "time management" indicates that these skills also were needing improvement. Similarly under the heading of "Payroll compliance" Mr Kumar is noted as "…increasing his accuracy…", and is recorded as "…working at eliminating errors…" under the heading of "Audit standard".

[8] It was common ground at the investigation meeting that Mr Kumar's work was generally always checked by Ms Lindstrom to ensure it was accurate. The evidence before the Authority was that during the checking process it was not uncommon for errors to be detected which then required amendments by Mr Kumar.

[9] In February 2010, in Ms Lindstrom's absence, Mr Kumar processed an employee's final pay following the resolution in mediation of an employment relationship problem raised by the employee. A number of errors were made relating to the final calculations which resulted in the employee being paid an incorrect amount. The error was picked up by Baycorp's Financial Manager and was relayed to Ms Sue Staveley, an HR Consultant who undertakes work for Baycorp (the Warden error).

[10] Mr Kumar says he did have some queries about the tax treatment of the payment but went ahead on what he considered to be Ms Staveley's instructions. Ms Staveley gave unchallenged evidence that Mr Kumar never referred any questions to her about the tax treatment or any other aspect of the payments to be made.

[11] On her return to work Ms Lindstrom was advised of the Warden error. Ms Lindstrom, who had been having misgivings about signing off Mr Kumar's PDR at the level for meeting expectations, met with Mr Kumar on 25 February 2010 to discuss the Warden error. During their conversation Ms Lindstrom says Mr Kumar admitted that he didn't really know what he was doing with regards the calculation and the recording of the final pay and did not know how to handle the PAYE deductions. This acknowledgement by Mr Kumar was very concerning to Ms Lindstrom who decided to seek advice about what she could do to help Mr Kumar improve his knowledge and understanding of his job.

[12] After seeking advice from Baycorp's Australian based HR Manager, Ms Lindstrom met with Mr Kumar on 26 March 2010 and outlined areas of his performance which were concerning to her. Ms Lindstrom says she took pains to ensure she also reinforced to Mr Kumar, positive areas of his performance. Ms Lindstrom advised Mr Kumar that she thought a Performance Improvement Plan (PIP) would be useful to assist in identifying the specific areas for improvement and putting a plan in place to ensure the improvement occurred.

[13] A second meeting took place on 7 April 2010 with Ms Lindstrom. Present also at the meeting was Ms Staveley who was there to provide advice and guidance to Ms Lindstrom, who had not undertaken a PIP meeting previously. It was during this meeting that Mr Kumar says racial comments were made to him which he now considers to constitute racial harassment.

[14] Ms Staveley was asking questions of Mr Kumar with respect to his career ambitions. Included in this discussion was a reference to Mr Kumar's age and likely career progression. Also during this conversation were comments about Mr Kumar's communication skills and in particular, the fact that Mr Kumar spoke better English than some other Indians. It was this comment that Mr Kumar says constituted racial harassment.

[15] During the meeting Mr Kumar was also told he needed to be sure to greet people when they entered into the payroll area. He found this an unusual thing to say as he considered himself to be friendly. While there was no dispute that Mr Kumar was friendly, even according to his own evidence, he has his back to the door when sitting at his desk. He said it would have taken some effort for him to meet and greet those entering into the payroll area. Mr Kumar says that to turn around every time someone enters the payroll office would interrupt his work. Given that payroll was the major focus of his job, and people entering the office were generally only coming to ask questions about their pay, it seems a simple request by his manager that he meet and greet people as they entered his office.

[16] I find that while a comment made in the meeting about Mr Kumar's lack of an accent, may have caused him some offense, I am satisfied that the comment was made in a positive way. With regard to s 109 of the Act I am satisfied the comment was not done in a hostile or contemptuous way and it did not ridicule the Indian race or Mr Kumar. I find also that with regard to the Baycorp Policy Mr Kumar has not established to my satisfaction that the comment made to him had the effect of disadvantaging him in his employment.

Unjustified disadvantage

[17] Mr Kumar says his employment was disadvantaged by an unjustifiable action of Baycorp when he was put onto a performance improvement plan.

[18] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Baycorp's actions disadvantaged Mr Kumar in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.[1]

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[1] *Mason v Health Waikato* [1998] 1 ERNZ 84

[19] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Baycorp can establish justification for a disadvantageous action, there is no grievance.[2]

[20] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.[3]

[21] Mr Kumar attended a third meeting with Ms Lindstrom on 14 April 2010 at which time he was provided with a copy of a completed Performance Improvement Plan (PIP). The PIP identified areas where Mr Kumar was not meeting the expected standard of performance and set out actions to achieve:

- improvement in verbal and written communications;
- more consistency in the accuracy of daily tasks; and
- analytical reports which were meaningful and relevant.

[22] Ms Lindstrom took Mr Kumar through the document and explained what the areas were that needed improvement. Ms Lindstrom told the Authority that during the meeting Mr Kumar agreed that improvements were necessary if he wished to progress his career.

[23] Mr Kumar was invited to take the document away and return a signed copy of it to Ms Lindstrom. Mr Kumar was concerned that the PIP process was being implemented because of the mistakes made in the Warden error and when he asked Ms Lindstrom, she acknowledged that this was one of the reasons for the PIP. Mr Kumar returned the signed document soon after the meeting ended.

[24] Mr Kumar was absent the next day, 15 April 2010 and the day after. Late in the afternoon of 15 April Mr Kumar emailed a copy of a medical certificate which stated that Mr Kumar would be absent for 10 days.

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[2] *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

[3] *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

[25] On 16 April 2010 Baycorp received notification that Mr Kumar had some possible employment issues, and a request was made for a copy of Mr Kumar's personnel file. Before Baycorp had an opportunity to respond to the first letter, a second letter was received that same day raising a personal grievance and advising that fuller details would be provided in the statement of problem.

[26] Mr Kumar says the implementation of the PIP process was unjustified and was being used to make him resign from his employment. The PIP process was not disciplinary in and of itself. However, Mr Kumar says that if he had not met the performance indicators in the PIP then he would have been subject to disciplinary measures and ultimately dismissed. I think that is a long bow to draw. Firstly, Mr Kumar signed off the PIP without any pressure from Ms Lindstrom, who was surprised he returned it so quickly after the meeting. The PIP process was set up to ensure Mr Kumar improved in his performance in a structured way and did not put his employment in jeopardy.

[27] Mr Kumar says that he should not have been subject to the PIP process given that his PDR, which had been signed off in February, had indicated he was meeting expectations.

[28] I am satisfied that while Ms Lindstrom had rated Mr Kumar as meeting expectations for the period July to December 2009, her view changed on reflection and taking into account the Warden error. Ms Lindstrom had genuine concerns about Mr Kumar's performance which she was entitled to address with him.

[29] Ms Lindstrom discussed her concerns with Mr Kumar and the prospect of entering into a PIP process twice before she took the step of drafting the PIP document which she then discussed in detail with Mr Kumar on 14 April 2010. Mr Kumar had a full opportunity to have input into the PIP process and the measurements set out in the document. He did not raise any concerns with Ms Lindstrom about the process or the document. Rather, he signed the document on 14 April 2010 indicating that he agreed with the performance indicators and outcomes set out in the document.

[30] Mr Kumar has failed to establish to my satisfaction that one or more conditions of his employment were affected to his disadvantage as a result of the PIP process being put in place.

Constructive dismissal

[31] Since lodging his original statement of problem in the Authority, Mr Kumar has resigned from his employment and now claims that his resignation was a constructive dismissal.

[32] A constructive dismissal is a resignation of employment alleged to be, in reality, a termination of employment at the initiative of the employer. Circumstances that can constitute a constructive dismissal include a fundamental breach or breaches by the employer of the employment agreement, an ultimatum delivered to the employee to resign or be dismissed, and circumstances of that sort.

[33] Mr Kumar alleges Baycorp breached a duty owed to him when it subjected him to racial harassment during the meeting on 7April 2010. Mr Kumar also alleges that Baycorp's actions with regards the PIP process also constitutes a breach of duty. He says that the actions on 7 April and 14 April culminated in a situation where he lost trust and confidence in Baycorp.

[34] Mr Kumar also alleges Baycorp followed a course of conduct with the deliberate and dominant purpose of coercing him to resign.

[35] I have already found that Mr Kumar has not established that he was subject to racial harassment or that one or more conditions of his employment were affected by a disadvantage.

[36] It follows therefore, that Mr Kumar's allegation of constructive dismissal can not be made out. I find there has been no breach of duty of the part of Baycorp. Mr Kumar's resignation was not reasonably foreseeable as a result of the PIP process and the evidence does not suggest Baycorp embarked on the PIP process with a view to either making Mr Kumar resign, or to dismiss him. I am unable to be of any further assistance to Mr Kumar.

Costs

[37] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Baycorp (NZ) Limited may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Any submissions in reply must

lodged within 14 days of receipt. I will not consider any application outside that timeframe without the prior leave of the Authority.

Vicki Campbell
Member of Employment Relations Authority