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## Soares v Fullstop Limited (Wellington) [2018] NZERA 2062; [2018] NZERA Wellington 62 (17 July 2018)

Last Updated: 25 July 2018

### IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 62  
3022724

BETWEEN GIDEON LAWRENCE SOARES Applicant

AND FULLSTOP LIMITED Respondent

Member of Authority: Trish MacKinnon

Representatives: Jaenine Badenhorst and Mikayla Turner, Counsel for

Applicant

Barbara Buckett, Counsel for Respondent

Investigation Meeting: 18 April 2018 at Wellington

Submissions Received: 3 and 29 May 2018, from the Applicant

17 May 2018 from the Respondent

Determination: 17 July 2018

### DETERMINATION OF THE AUTHORITY

#### Employment relationship problem

[1] Gideon Soares was employed in a Front Desk/Design Assistant role by Fullstop Limited for just over three months between April and August 2017. He claims to have been unjustifiably dismissed under the pretext of a restructure and unjustifiably disadvantaged by the restructuring process followed by his employer.

[2] He also says he suffered racial harassment throughout his employment and was unjustifiably disadvantaged by his employer providing malicious references about him to potential employers. He seeks financial remedies and the reimbursement of his legal costs.

[3] Fullstop Limited (Fullstop) denies all of Mr Soares' claims. It says he resigned from his employment on 28 July 2017 and recorded his resignation in writing, which both parties signed. In the alternative, it says the ending of Mr Soares' employment for reasons of redundancy was inevitable if a proposal that was put to him on 27 July 2017 had gone ahead as there were no suitable redeployment options.

[4] Fullstop denies racially harassing Mr Soares and rejects his claims to have been unjustifiably disadvantaged by any of its actions. It opposes the remedies he seeks.

[5] The parties attended mediation but were unable to resolve the differences between them.

## Issues

[6] The issues for determination are:

- a. whether Mr Soares was dismissed; and, if so, b. whether it was unjustifiable;
- c. whether Mr Soares was subjected to racial harassment in the course of his employment; and
- d. whether he suffered disadvantage from unjustifiable actions of his employer in relation to:
  - i. The redundancy process; and/or
  - ii. Post-employment references.

### Was Mr Soares dismissed?

[7] On 27 July 2017 Helen Harrison, the sole director and shareholder of Fullstop, gave Mr Soares a letter and a document headed "Proposal for Organisational Structural Changes" (the proposal document). These documents informed Mr Soares of the proposal to disestablish both his role and Ms Harrison's. The two roles were to be combined into a new managerial position which would incorporate the tasks, duties and responsibilities of them both.

[8] Ms Harrison proposed to meet with Mr Soares on Monday, 31 July 2017, when she would outline how the proposals would impact on his position and discuss

any feedback that he had. Her letter informed him that, if a decision were made to disestablish his position, she was obliged to consider alternatives to termination under the terms of his employment agreement.

[9] The letter said that, as Fullstop was a small organisation, the reality was there would be no suitable re-deployment options available. Although the new manager's position would be advertised, Ms Harrison understood that Mr Soares did not possess the key managerial skills and experience required for that position.

[10] Ms Harrison's letter noted that, if Mr Soares' position were disestablished, that would create a redundancy situation resulting in a termination of his employment on two weeks' notice. Ms Harrison informed Mr Soares he was welcome to bring a support person and/or a representative to the meeting and to seek independent advice about the proposal.

[11] The following morning Ms Harrison invited Mr Soares to join her for coffee off-site. In the course of that meeting, in which both say she did most of the talking, Ms Harrison explained her reasons for putting forward the restructuring proposal. Their accounts of the conversation and what followed it differ in some key respects. They agree, however, to the extent that Ms Harrison told Mr Soares her ill-health had prompted the proposal. After some 28 years of running the business, her health was such that she needed to find someone who could take over the substantial management of the business and allow her to step back from her current duties.

[12] Mr Soares says it was a one-way conversation in which Ms Harrison told him her timeline and her expectations. He was not asked for any suggestions or options that could be considered, and he did not get an opportunity to give feedback on the proposal document. He says Ms Harrison also told him the business was not doing well and that was another reason for the restructuring. Although Ms Harrison denied this, the proposal document she had given him the previous day referred to "a drop in workflow" as well as her health issues, which leads me to prefer Mr Soares' evidence on this point.

[13] His evidence is that Ms Harrison told him he could finish that day and she would pay him out his two weeks' notice period which would allow him time to find new employment. She would give him a glowing reference and would explain to potential employers his redundancy had been due to the business situation. Mr Soares says Ms Harrison told him he needed to make a decision by 4pm that day.

[14] Ms Harrison denies telling Ms Soares he had to make a decision by 4pm. In her account of the meeting, Mr Soares asked what would happen to him if the restructuring went ahead and she told him she would pay him two weeks' wages and he would not have to work out the notice period. She denies offering him a glowing reference and says she would not have done that as it went against her principles and values. She also says she made it clear to Mr Soares this meeting was not intended to replace the meeting scheduled to take place on Monday 31 July.

[15] After the meeting Mr Soares says Ms Harrison approached him twice, the first time approximately two hours later, and the second time a further two hours after that. Each time she asked if he had made his decision yet, reminding him she needed to know by 4pm. Mr Soares says he felt she had given him an ultimatum. If he did not accept it, he would have to work out the two weeks' notice period and there would be no assurance he would receive the promised glowing reference.

[16] He says he felt under extreme pressure and felt trapped into complying with Ms Harrison's "demand" that he resign that day. For that reason he says he told Ms Harrison he would take the two weeks' pay in lieu of notice. She then told him to type up a letter to say he was resigning.

[17] Ms Harrison's version of events is that a few hours after their coffee meeting on Friday 28 July, "out of the blue" Mr Soares approached her and said he wanted to resign. She says she asked him if he was sure about this and suggested he take more time to think about it and discuss it with his parents over the weekend. She says he was very firm, however, that he wanted to resign and finish that day.

[18] Ms Harrison acknowledges she asked Mr Soares to put his resignation in writing and says she did so because she was "...unsure of how to deal with this sudden reaction and wanted to make sure everything was recorded..." She told him she was happy to pay him notice in lieu of his working it if that made it easier for him.

[19] Mr Soares recorded his termination, and the agreement that he be paid in lieu of working out two weeks' notice, as follows:

"In accordance to the discussions that I (Gideon Soares) have had with Helen Harrison, the two weeks notice of redundancy is in affect from 28th Friday 2017. Helen has volunteered to pay me for the remaining two weeks on Wednesday 2nd August 2017, and does not require me to come in to work for the remaining duration.

Helen Harrison Gideon Soares

Signed: ..... Signed: ....."

[20] Ms Harrison and Mr Soares both signed the document. The date, "28/7/17", was handwritten under Ms Harrison's signature.

[21] Under questioning during the Authority's investigation, Ms Harrison acknowledged that in her meeting with Mr Soares of 28 July 2017 she did not tell him there was an option under which he could remain working for Full Stop. Her evidence made it clear she saw no situation in which he could have remained. She did not regard Mr Soares as a contender for the proposed manager's position, which is realistic given the employment with Full Stop was his first full-time position post-graduation. She says there was no other role available.

[22] Ms Harrison told the Authority she could not have gone on as things were before the restructure. Under re-examination from her counsel, she said that, if the scheduled meeting of 31 July 2017 had gone ahead, she would not have considered the option of Mr Soares working part-time. She said she never for a moment considered he would have worked part-time.

[23] I have considered this, and Ms Harrison's acknowledgement under cross-examination that she found staff issues difficult; disliked confrontation; and was not looking forward to the scheduled meeting of 31 July with Mr Soares. I find it more likely than not that Ms Harrison did ask Mr Soares to let her know by 4pm on Friday

28 July if he wished to take her offer of leaving that day and being paid two weeks without having to work out a notice period.

[24] I am not persuaded, however, that Ms Harrison offered to give Mr Soares a glowing reference. She may have said she would inform potential employers of the business situation that led to his position being redundant but I consider the offer of a glowing reference to be wishful thinking on Mr Soares' part. If she had made such an offer, it is likely Mr Soares would have recorded it on the resignation he wrote at Ms Harrison's request.

[25] It is well established that an employee may be constructively dismissed by his or her employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*<sup>1</sup> held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.

[26] Mr Soares portrayed himself as being in a situation where undue pressure was put on him to resign. If I were to agree that did indeed occur, then I would find elements of the first two scenarios led to his resignation. However, the evidence does not support such a finding.

[27] I find Mr Soares came to the decision to resign on terms proposed by Ms Harrison of his own volition. I consider he realised it was extremely likely his position would be disestablished the following week. He then decided it was better to leave sooner rather than later with two weeks wages paid in lieu of notice than risk having to work out that period following the end of the restructuring process that was in train.

[28] Mr Soares did not have to resign and could have rejected Ms Harrison's offer, preferring to go through the scheduled meeting with her on Monday 31 July. There is evidence from Mr Soares and his father that they, and his mother, intended to

talk over the intervening weekend to prepare his response to the restructure proposal.

[29] I am not convinced Ms Harrison subjected him to undue pressure, although I accept it is likely she asked him once or twice following their 10am coffee meeting if he had decided what he wanted to do yet. I do not accept Ms Harrison's evidence that his resignation was unexpected. Nor do I accept she asked Mr Soares if he was sure he wanted to resign, or suggested he take the weekend to think it over. I find it more likely she hoped he would take the offer and thus curtail a process that was stressful

for both of them.

1 [\[1985\] 2 NZLR 372](#), (1985) ERNZ Sel Cas 136 (CA)

[30] While this was a finely balanced situation, I find on reviewing the evidence that Mr Soares has not established he was in a situation where he was coerced to resign, or where he had no option other than to resign. He had an option of participating in the restructuring consultation process, but chose not to do so. I dismiss his claim to have been constructively dismissed.

### **Was Mr Soares racially harassed during his employment?**

[31] [Section 103](#) of the [Employment Relations Act 2000](#) (the Act) lists the grounds for an employee to bring a personal grievance against their employer or former employer. Racial harassment is one of the grounds.<sup>2</sup> Section 109 of the Act provides, in the employment context:

...an employee is **racially harassed in the employee's employment** if the 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 ground 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.

[32] Mr Soares' evidence is that he experienced racial harassment from the director of the company for the latter two thirds of his employment. He gave a number of examples of this, of which I will refer to only two. The first was that he was frequently referred to by Ms Harrison in front of other staff and customers in racially demeaning language such as "Injun".

[33] The other example was an occasion when Ms Harrison, in front of other employees, ridiculed how "Indians bobbed their heads in their conversations". She put on a You Tube video clip that made fun of Indians doing that. Ms Harrison had no recollection of this incident but Mr Soares' evidence was confirmed by a former employee of Full Stop who gave evidence, albeit reluctantly, under summons. That

person, whom I do not consider it necessary to identify, had been present when the

<sup>2</sup> Section 103(1)(e) of the Act.

You Tube video incident occurred, and had heard Ms Harrison use racist terms at that time.

[34] The former employee did not find Ms Harrison's comments or the video funny but did not wish to engage with Ms Harrison on the issue at the time and did not do so. Despite saying that Ms Harrison made racist comments, the former employee did not consider Ms Harrison to be racist because she employed an ethnically diverse workforce.

[35] Ms Harrison said Mr Soares had never brought up any complaint of racial harassment, during his employment. She professed a love of India and Indian people and said she had no idea the term "Injun" was offensive as she had heard it used in India many times. In her view Mr Soares had joined in the banter and said:

"...when I referred to him as my little Injun he then referred to

himself as my 'Chai wallah' (a tea/coffee maker), a term some people consider derogatory."

[36] Ms Harrison produced an email from Mr Soares in which he had referred to himself as her "chaiwallah".

[37] Mr Soares acknowledged he did not raise with Ms Harrison his discomfort over her language and behaviour towards him. He said that, although he found Ms Harrison's racism offensive as well as deeply hurtful and humiliating, he was very aware his employment agreement contained a 90 day trial clause which led him to believe his employment could be terminated very easily.

[38] Mr Soares referred to Ms Harrison's authoritarian way of running the business as another reason for not speaking up about his discomfort with her treatment of him. It was his perception that she had no tolerance for being challenged. Mr

Soares said he did raise his concerns about Ms Harrison's racist comments with the Senior Designer, whom he regarded as the person he reported to in relation design matters. It was his evidence that the Senior Designer, who did not attend the Authority's hearing, told him it was not worth raising the issue with Ms Harrison and that it would be easier to put up with the racist comments.

[39] Ms Harrison says she was mortified at Mr Soares' claim of racial harassment and she had never intended to hurt or offend him. During the Authority's investigation she apologised to Mr Soares for any offence she had unwittingly caused.

[40] It was submitted on behalf of the respondent that Mr Soares was not racially harassed in his employment; that Ms Harrison had not intended to give offence; and that the grounds of s.109 were not met. I accept that Ms Harrison may not have intended to give offence but otherwise reject that submission.

[41] Section 109(b) makes clear that Mr Soares was not obliged to bring to his employer's attention the offence and hurt he experienced at the language used to, and about, him in the workplace. His not doing so, but raising it with the Senior Designer, which I accept he did, is understandable in circumstances where he believed himself to be subject to a 90 day trial provision.

[42] Mr Soares acknowledged under cross examination that he had participated in office banter. He said he did so in an attempt to take the sting out of the racist language and comments. I understood from Mr Soares' answers he felt worn down by his employer's language to the extent that he couldn't combat it and felt he had to join in. Mr Soares said sometimes the comments were made to him in a light hearted way and at other times they were made seriously, depending on Ms Harrison's mood. I accept the comments were always offensive and unwelcome to him.

[43] Mr Soares was asked about jokes he himself had made about Indians on social media. He responded by distinguishing between communications with close friends with whom he had a shared culture, and communications with his employer with whom he had a professional relationship only, and no shared culture.

[44] I found Mr Soares' evidence to be credible about the effect on him of his employer's language to him, about him, and about Indian people in the You Tube video referred to above. Ms Harrison may not have intended to cause offence but I have no doubt Mr Soares was offended and hurt by her constant use of demeaning language to describe him and others of his race and culture.

[45] Mr Soares was exposed, throughout the majority of his relatively short employment, to language from his employer that brought him into contempt or ridicule on the basis of his race. He was offended and hurt by that language and I accept his evidence that the ongoing nature of his employer's use of that language affected his enjoyment of his job.

[46] It was clear to me from Mr Soares' evidence that he enjoyed the work he did at Full Stop, in particular the design elements, but he did not enjoy the racist comments from his employer. The three elements of s.109 of the Act are satisfied and I find Mr Soares has a personal grievance for racial harassment under s.103 (1)(e).

### **Was Mr Soares unjustifiably disadvantaged by his employer's actions in relation to the redundancy process?**

[47] Mr Soares claims remedies on the basis that the redundancy process was not conducted in good faith, did not consider options, and was aimed at him personally.

[48] There was no disagreement from witnesses, including Mr Soares, that Ms Harrison suffered from ill-health. I accept there were genuine grounds, based on her health, for her proposal to restructure the business.

[49] I reject Mr Soares' claim that the process was not conducted, as far as it had gone by the time of his resignation, in good faith. Mr Soares had been informed of the proposal and would have had the opportunity to provide feedback on it both orally and in writing on 31 July had he not decided to resign on 28 July.

[50] The restructure document contained a proposed timeline that was very short. However, it was noted on the document that this could change and was a matter on which feedback could be provided. That being so, I do not find the short timeframe proposed for the consultation and implementation of any decision to have been disadvantageous to Mr Soares.

[51] Nor do I accept Mr Soares' claim that the restructure was aimed at him personally. Some comments made by Ms Harrison suggested she was not completely satisfied with Mr Soares' performance, but there was insufficient evidence to support his claim that the main focus of the restructure process was terminating his employment. Ms Harrison denied performance issues played any part in the restructuring proposal and I am inclined to accept her evidence on that matter given the health issues I have accepted as being the reason for her wish to restructure.

[52] It was evident during the Authority's investigation that Ms Harrison had identified no option other than redundancy for Mr Soares and she discounted both redeployment and working part-time. Had the meeting with him eventuated on Monday 31, I consider it highly likely that Mr Soares would have been given notice of

the termination of his employment on 3 August 2017, in accordance with the proposed timeline in the restructure document.

[53] It could be argued that Ms Harrison's closed mind approach to any option other than Mr Soares' redundancy constituted a disadvantage to him inasmuch as it resulted in her making the offer to him to resign at an early stage in the restructuring process. However, having determined that Mr Soares' resignation was of his own volition, I am not inclined to pursue that approach.

[54] I dismiss his claim to have been disadvantaged in his employment by Ms Harrison's actions in relation to the redundancy process.

### **Was Mr Soares unjustifiably disadvantaged by references given by Ms**

#### **Harrison?**

[55] Section 103(1)(b) of the Act provides as a ground for a personal grievance against an employee's employer or former employer:

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[56] Two witnesses gave evidence of telephone conversations they had with Ms Harrison in the context of obtaining reference checks regarding Mr Soares. One witness, Tony Heyward, was the Director of a recruitment agency. He had interviewed Mr Soares for a position in his own company and had concluded, subject to reference checks, that Mr Soares was the right person for the role.

[57] Mr Soares had confirmed Mr Heyward was welcome to contact Ms Harrison for a reference check and he did so. By his account, Ms Harrison's feedback with regard to Mr Soares' technical ability, motivation and dedication was negative and her comments were generally unfavourable to Mr Soares. Mr Heyward said, on the basis of that reference check he was not prepared to offer Mr Soares employment.

[58] The second witness was Mr Clyde Soares (Mr Soares Snr) who is Mr Soares' father. Mr Soares Snr, at Mr Soares' suggestion, contacted Ms Harrison purporting to be a potential employer and using a false name. He produced what he said were

contemporaneous notes of the telephone conversation which record a number of negative comments about Mr Soares' employment with Full Stop.

[59] Ms Harrison recalled the first of these reference checks but claimed to have no recollection of the second, involving Mr Soares Snr in the guise of a potential employer. She acknowledged under questioning it was possible she had spoken with him but did not recall it. Given Ms Harrison acknowledged during the Authority's investigation she had memory loss issues, I prefer Mr Soares Snr's evidence that the telephone conversation did take place.

[60] However, I have already noted I do not accept Mr Soares' claim that Ms Harrison offered to give him a glowing reference to potential employers. While I have had reason to doubt Ms Harrison's memory, I have no reason to doubt her evidence that it would go against her principles to make such a promise.

[61] That being so, and as Mr Soares' employment agreement with Full Stop contained no condition that a reference to be provided post-employment, there was no obligation on Ms Harrison to provide any reference, let alone a glowing one, to potential employers.

[62] Mr Soares cannot have been disadvantaged in his employment as that had ceased several weeks before Ms Harrison agreed to talk with either Mr Heyward or "Josh" as Mr Soares Snr identified himself to her. Accordingly I find Mr Soares has no grounds for a personal grievance based on the answers his former employer gave to Mr Heyward or Mr Soares Snr in response to their questions. I dismiss that claim.

### **Remedies and contribution**

[63] I have dismissed Mr Soares' claims to have been unjustifiably dismissed or disadvantaged in his employment by his employer's restructuring process. I have found he was racially harassed during his employment and it is appropriate that he be awarded remedies for that personal grievance under s. 123 of the Act.

[64] That section provides that, where the Authority determines an employee has a personal grievance, it may provide for one or more of a number of specified remedies. Section 123(1)(b) provides for:

the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the

employee as a result of the grievance:

[65] Mr Soares did not lose wages due to the racial harassment he suffered and no remedies are due under that section.

[66] Section 123(1)(c)(i) of the Act provides one of the specified remedies the Authority may award for a personal grievance is the payment of compensation by the employer to the employee for humiliation, loss of dignity and injury to the feelings of the employee.

[67] I accept Mr Soares' evidence of the humiliation he felt on an ongoing basis over the racial harassment he experienced in his employment. It was an unacceptable and demeaning way to treat Mr Soares and I consider his request for compensation of

\$10,000 to be warranted.

[68] In determining remedies I am obliged to consider the extent to which Mr Soares' actions contributed towards the situation that led to the personal grievances and, if necessary, reduce the remedies accordingly.<sup>3</sup>

[69] In this instance I do not consider Mr Soares contributed in any way to the situation that led to his racial harassment. Accordingly there will be no reduction of the remedy I have awarded.

### **Determination**

[70] Mr Soares was not dismissed or disadvantaged by unjustifiable actions of his employer. He was racially harassed during the majority of his employment.

[71] Full Stop Limited is ordered to pay Mr Soares, without deduction, the sum of

\$10,000 under s.123(1)(c)(i) of the Act for the hurt, humiliation and injury to feelings he sustained as a result of the racial harassment.

3 Section 124 of the Act.

### **Costs**

[72] The issue of costs is reserved.

Trish MacKinnon

Member of the Employment Relations Authority