

AUSTRALIA / JUDGMENT

Duan v Bridge [2024] NSWCATAD 349

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Duan v Bridge [2024] NSWCATAD 349

Hearing dates: 23 September 2024

Date of orders: 21 November 2024

Decision date: 21 November 2024

Jurisdiction: Administrative and Equal Opportunity Division

Before: L Andelman, Senior Member

S Davidson, General Member

Decision: (1) The Applicant's complaint of racial vilification is substantiated.

(2) The respondent is to pay the applicant \$6,000 within 28 days of the date of this Order.

Catchwords: HUMAN RIGHTS – racial vilification – public act – incite severe ridicule – remedies – damages - apology.

Legislation Cited: Anti-Discrimination Act 1977(NSW)

Cases Cited: Anderson v Thompson [2001] NSWADT 11

Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc (2006) 15 VR 207

Comensoli v Passas [2019] NSWCATAD 155

Dell v Dalton (1991) 23 NSWLR 528

Haas v Hosking [2010] NSWADT 42

Hall v Sheiban (1985) ALR 503

Jones v Trad [2013] NSWCA 389; 86 NSWLR 241

Jones v Toben [2002] FCA 1150; 71 ALD 629

Jones v The Bible Believers' Church [2007] FCA 55

Kane v Church of Jesus Christ Christian Aryan Nations (No 3) (1992) 18 CHHR 268

Kazak v John Fairfax Publications Limited [2000] NSWADT 77

Lamb v Campbell [2021] NSWCATAD 103

Malenha v Sullivan [2017] NSWCATAD 222

Margan v Manias [2015] NSWCA 388

Mitry v Abbas [2013] NSWADT 214

Passas v Comensoli [2019] NSWCATAP 298

R v Ashley (1991) 77 NTR 27

R v D and E Marinkovic [1996] EOC 92-841

Secretary, NSW Department of Communities and Justice v James [2023] NSWCATAP 64

Sunol v Collier (No 2) [2012] NSWCA 44; (2012) 260 FLR 414

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; 262 CLR 362

Texts Cited: Kathrine Gilbert and Luke McNamara, "Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harm Occasioned and the Remedies Provided" (2016) 39(2) UNSW Law Journal 488, 505

Category: Principal judgment

Parties: Xining Duan (Applicant)

Nina Bridge (Respondent)

Representation: Applicant (Self represented)

Respondent (Self-represented)

File Number(s): 2024/00196852

Publication restriction: N/A

REASONS FOR DECISION

1. Mr Xining Duan is Chinese. On Saturday, 13 January 2024 he, together with two sub-contractors, one of whom was Mr Liu, were installing solar panels on the roof of a two-storey house at number 47 in Sylvania, Sydney. Ms Bridge lived next door at number 49. Mr Duan's complaint is in regard to Ms Bridge's conduct from about 4.45 pm to about 6 pm on 13 January 2024.

2. The facts in issue were in significant dispute between the parties. After careful consideration of the evidence before the Tribunal, we are satisfied that the evidence given by Mr Duan and Mr Liu was credible and we accept it. We do not accept substantial aspects of the evidence given by Ms Bridge, particularly that she did not "intentionally" or "consciously" spray water with her garden hose on Mr Duan while he was on the roof of the house or that Mr Duan did not tell her to "stop" in the English language.

The Legislation

1. Section 4 defines "race" as:

"race" includes colour, nationality, descent and ethnic, ethno-religious or national origin.

1. Section 20B defines of "public act" as:

In this Division,

"public act" includes--

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
 - (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
 - (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.
1. Section 20C makes racial vilification unlawful in the following circumstances:
 - (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

Evidence before the Tribunal

1. Mr Duan's evidence consisted of a document which was an amalgam of a statement and submissions, some photographs and a statement from Mr Liu. An interpreter was required by Mr Duan and Mr Liu for the hearing.
2. Ms Bridge filed a bundle of documents including a police brief of an assault charge she is facing in regard to her alleged conduct on 13 January 2024, two character references and some photos.
3. Mr Duan, Ms Bridge and Mr Liu were cross-examined, and the parties had an opportunity to make oral submissions.

Mr Duan's account

1. Mr Duan claimed in his application to the NSW Anti-Discrimination Board (ADB) that on 13 January 2024, while he was installing the solar panels on the roof of a two-storey house, Ms Bridge approached him from her back yard at about 4.45pm and they had a conversation to the following effect - Ms Bridge said: "Stop working" and Mr Duan said "Sure. I will put the tiles back and finish the work in two minutes".
2. Within one minute of this conversation, Ms Bridge started spraying her water hose at him. Mr Duan said "stop". Ms Bridge continued to spray the water hose at him. Mr Duan ran to the other side of the roof, slipping as he did so. He continued to engage with Ms Bridge. He said to her "stop attacking me, otherwise I will fall off the roof and have serious injury".
3. Mr Duan was concerned that water from the hose would damage the property as the tiles were pulled aside, so he returned to the place he had been working to try to put the tiles back on. Water from Ms Bridge's hose hit Mr Duan's face and he could not open his eyes because of the spray, he lost his balance and nearly fell off the roof. As he was holding on to the tiles, he continued to ask Ms Bridge to stop but she continued to spray him with the hose. Ms Bridge said "I don't care. Aren't you Jackie Chan jumping off the roof?"
4. Later in the afternoon, Mr Duan told Ms Bridge that he would call the police. In response, she said words the effect of "I don't understand your English" and made "funny sounds" to mimic his accent.
5. At the hearing, Mr Duan stated around 4.45pm he saw a woman from the next house, whom he now knows to be Ms Bridges, spray water from her hose and hit Mr Liu and the electrical meter box.
6. Soon after, Ms Bridge approached him from her backyard while he was on the roof and said to him words to the effect that "it is almost five and you need to finish up" and he replied in words to the effect of "I will finish in two minutes". However, after about one minute, Ms Bridge started to spray him with the hose, including spraying water in his face.
7. Mr Duan stated that following the incident on the roof, during an interaction with Ms Bridge, he said to her "I will call the police and sue you".

Mr Liu's Account

1. Mr Lui has a limited knowledge of the English language. In his evidence, Mr Liu stated that he felt water hitting his skin at about 4pm as he was working at the electrical meter box. He heard Mr Duan speaking loudly in English. He heard a woman in the yard of the next house, now known to him as Ms Bridge. He saw that Mr Duan was talking to her. She was standing near the dividing fence. He saw Ms Bridge point her hose at Mr Duan and spray him with water. He quickly returned to the electrical meter box and closed the lid so it would not be damaged. Due to the ground being wet and slippery, he lost his balance and fell to the ground and hurt his wrist.

2. He saw Ms Bridge spray Mr Duan again, causing Mr Duan to lose his balance, slip and fall on the roof. He saw Mr Duan lying on the roof continuing to say to Ms Bridge "stop, stop".
3. He saw Mr Duan move to another side of the roof and eventually return to the area of open tiles and Ms Bridge commenced to spray water at him again. This went back and forth about three times. He observed Mr Duan's clothes soaked with water and that the job could not be finished.
4. Mr Lui had a conversation with Mr Duan following the incident and he asked Mr Duan why Ms Bridge was spraying water at them. Mr Duan said words to the effect that Ms Bridge told him to finish work and he told her that they would be finished in two minutes.

Ms Bridge's Account

1. At the hearing, Ms Bridge's evidence was that prior to going out to water her garden, she spoke to a person across the fence at the front of the house. This person was working on the house at about 5pm and may have been the foreman. She said to him words to the effect of "please pack up and go home" and he said to her words to the effect of "no worries...I'll tell the boss", and then left.
2. Ms Bridge's stated that about 5pm she was in her backyard watering the plants. There had been building work on her neighbour's house all day and she had a migraine from the noise. She saw a worker, whom she now knows was Mr Duan, working on the roof of the house. Suddenly, Mr Duan started to yell and shout at her in a language she did not understand. He was "belligerent". His tone, body language and hand gestures were hostile. She asked him repeatedly to "pack up and go home", and on numerous occasions repeated the words "bye bye" and "see you Monday". She told him that she did not understand what he was saying.
3. Ms Bridge stated:

His actions were quite theatrical at one point, yelling at me, gesticulating rapidly and I did make a comment about Jackie Chan. I deeply regret saying this. I understand that this gentleman was deeply offended by this for which I sincerely apologise. It was a mistake that I deeply regret and I will not repeat. I am sincerely very, very sorry.

1. She said Mr Duan became increasingly agitated with his body language. He became increasingly angry. Ms Bridge could not understand what his intentions were, he was yelling and screaming, and she felt threatened.
2. Mr Duan's bottom was getting closer to the roof tiles and that "he was going on and on". Ms Bridge stated that at this time, she decided to ignore Mr Duan and continued to water her garden until about 5.25pm because she could not understand his language. He was yelling, he was aggressive and she found his behaviour quite offensive.

3. Ms Bridge stated that she said words to the effect of "so what now, you think you are Jackie Chan?" in circumstances where Mr Duan was being "theatrical" as she felt like he was trying to communicate with physical action, doing something, like "putting his bottom on the tiles and gesticulating that he might fall".
4. Ms Bridge stated that the comment about Jackie Chan was inappropriate and she held remorse for saying it. However, Mr Duan was very aggressive in communicating with her as he was yelling and screaming. He was not speaking English. Ms Bridge found this very intimidating, and this triggered her anxiety and depression. Ms Bridge also stated that she made the comment in the heat of the moment at the end of a very long day of extreme noise. She stated that Mr Duan had no safety equipment and had he fallen from the roof of a two storied building, he would have ended up in her yard.
5. Ms Bridge stated that she heard Mr Duan talking in English to the police later that afternoon as he was standing outside her house. She was astonished as he did not speak in English with her when he was on the roof and she said words to the effect "oh, you can speak English now". Ms Bridge denied that she was sarcastic or provocative in making this remark. She was not criticising or laughing or mocking him or his accent or his capacity to speak English. She said she was frustrated, as previously he only spoke in a language she did not "clearly" understand.

Other Evidence

1. In evidence, there were witness statements taken by the police on the day from Mr Duan and Mr Lui and statements from police officers at the scene. Ms Bridge did not provide a witness statement to the police but she denied that she used the garden hose to spray water on Mr Duan.
2. Ms Bridge relied on a character reference from her neighbour, Ms Grove. Ms Grove did not give oral evidence. Ms Grove's statement did not state that she was aware of the allegations made against Ms Bridge in these proceedings. She described the "incident" as Ms Bridge being yelled at and verbally abused. Ms Grove did not see or hear the incident.
3. In her reference, Ms Grove stated that she saw Mr Duan and his wife at about 7pm on the road. She also saw the police arrive. She stated that Mr Duan's wife was very upset and was shouting words to the effect that Ms Bridge was a racist and had attempted to murder her husband.
4. Ms Grove stated that Ms Bridge told her that the building work noise was "driving her crazy". She stated that she lived across the road from Ms Bridge's house. Ms Grove stated that "she had a very clear view" of both Ms Bridge's house and the house next door from the front of her house and her balcony. Ms Grove stated that "It was clear that solar panels were being installed on the roof" of the house next door to Ms Bridge. She stated that the "tradesman arrived before 7am and were still there well after 5pm." Ms Grove also stated that she does not have a "bird's eye view" of the houses and could not see into Ms Bridge's backyard.

5. Ms Bridge also tendered a character reference from Ms Prunty, which also made no mention of these proceedings or the allegations made by Mr Duan. Ms Prunty stated that she is half Chinese and is a relative of Mr Bridge's husband. She had seen Ms Bridge twice in the last 13 years but in the past found her to be respectful to everybody regardless of their race.
6. Ms Bridge also relied on a letter from solicitors in regard to a personal injury matter. The letter refers to an appointment Ms Bridge had with Dr Khan sometime prior to 14 May 2024. The letter includes an opinion that Ms Bridge requires at least six months comprehensive mental health treatment. Another document from icare suggested that Ms Bridge had no work capacity as she had an anxiety disorder.

Consideration

Finding of facts

1. The issues in dispute for the Tribunal to determine are:
 1. Whether Ms Bridge's conduct constituted a "public act" within the meaning of s20B of the Act;
 2. If so, whether Ms Bridge's public act incited severe ridicule towards Mr Duan;
 3. If so, whether the public act incited severe ridicule on the ground of Mr Duan's race; and
 4. If so, what, if any, remedies the Tribunal should order.
1. In this case there is a significant divergence in the evidence. At the hearing, both Ms Bridge and Mr Duan gave evidence consistent with the written statements they made to the ADB.
2. On the one hand, Mr Duan stated that Ms Bridge deliberately used her garden hose to spray him while he was on the roof and that he repeatedly said to her "stop" and they had a verbal exchange in English, that she saw him lose his balance and slip and nearly fall off the roof, and that it was in this context that Ms Bridge said words to the effect of "I don't care. Aren't you Jackie Chan jumping off the roof?".
3. On the other hand, Ms Bridge stated that she did not spray Mr Duan with her water hose or, if she did, it was "unintended" or "unconscious". She did not hear him say "stop", she did not see him lose his balance and nearly fall off the roof, and she said words to the effect of "so you think you are Jackie Chan" in circumstances where she was not using her hose to spray water at him. She states that she said those words because he was being theatrical with his body and because he was shouting at her.
4. Ms Bridge and Mr Duan agreed that they had a further interaction while Ms Bridge was standing at her front door and Mr Duan was standing on the street in front of her property. Both agree that there was reference in the conversation to Mr Duan calling the police and him subsequently making the call. There is disagreement about words being said by Ms Bridge. Mr Duan claimed that Ms Bridge said words to the effect of: "I don't understand your English" and made sounds mimicking his accent. Ms Bridge claimed that she said words to

the effect of "oh, you can speak English now" and did not mimic him.

5. Having observed Mr Duan, Mr Lui and Ms Bridge give evidence we make the following observations. We find that Mr Lui gave his evidence carefully and directly. We accept his evidence as a true account of what he saw and heard on the afternoon of 13 January 2024. Mr Lui's evidence is broadly consistent with the evidence given by Mr Duan and is contrary to the evidence given by Ms Bridge.
6. We found Ms Bridge's evidence that she did not spray water at Mr Duan with her hose "intentionally" or "consciously" as she was watering her garden to be implausible and unconvincing as we have found that there was a significant amount of water sprayed at Mr Duan on numerous occasions. Mr Duan was on top of a two-storey building. We do not accept Ms Bridge's evidence that she was watering plants in her garden, including trees and could have sprayed Mr Duan without her knowledge or intent. We also reject her evidence that Mr Duan did not tell her to stop when she was spraying him with the hose.
7. We accept Mr Lui's evidence that he heard Mr Duan speaking loudly in English to Ms Bridge from the roof, that he saw Ms Bridge spray water at Mr Duan with her hose on a number of occasions, that he saw Mr Duan slip and fall on the roof, that Ms Bridge continued to spray water at Mr Duan while he was lying on the roof communicating with Ms Bridge in English, and that he heard Ms Bridge say the words "Jackie Chan".
8. We accept Mr Lui's evidence that he fell and injured his wrist as a result of being sprayed by the water hose and that he was shocked and scared by Ms Bridge's conduct.
9. We accept that, in answer to Mr Liu's question as to why this was happening, Mr Duan said to Mr Lui that he heard Ms Bridge say "it's almost five" to which he responded that they were finishing work in two minutes. We accept that Mr Lui believed that Mr Duan was shocked and scared and that he saw Mr Duan's clothes - like his own - were soaked with water.
10. Mr Lui was not present during the conversation between Ms Duan and Ms Bridge later in the afternoon and he did not understand much of the earlier conversation between Mr Duan and Ms Bridge, as he did not have strong English skills. He did not recollect the exact words or the gist of the words surrounding the reference to Jackie Chan.
11. In regard to the second interaction between Ms Bridge and Mr Duan, we accept Mr Duan's evidence that Ms Bridge did say the words, or words to the effect of, "I don't understand your English" and mimicked his accent.
12. This finding is consistent with our other finding that Mr Duan spoke in English to Ms Bridge while he was on the roof, that she had difficulty understanding what he was saying because of his accent, and that she spoke to Mr Duan in a mocking and deriding manner.

13. We accept Mr Duan's evidence that Ms Bridge initiated the conversation with him while he was on the roof of the house and that she told him to finish up working. We reject Ms Bridge's evidence that Mr Duan, without any warning or previous interaction with her, commenced to shout and scream at her. Ms Bridge's evidence in regard to this was implausible.
14. Ms Bridge did not cross-examine Mr Duan in regard to many of the key issues in dispute. Specifically, she did not cross-examine him regarding his claims that she used a hose to spray water on him, the context of the statement regarding Jackie Chan, or the conversation she had with him later in the evening. However, we do not place any weight on this as Ms Bridge was self-represented. Mr Duan also failed to cross-examine Ms Bridge on a number of key points.
15. Ms Bridge's evidence and cross-examination was focused on an assertion that when Mr Duan was on the roof he was not complying with health and safety standards and put himself in danger, was knowingly working past the permitted time period (which she stated was 3pm on Saturdays), that he was attempting to sabotage her case by not agreeing to an adjournment, that he was dishonest as his statement to the police did not include reference to interactions with two neighbours following the alleged incident and lying about why he needed an adjournment. Ms Bridge submitted that Mr Duan had a cruel and evil intent in ignoring her requests for an adjournment.
16. We do not consider that Ms Bridge's assertions that Mr Duan was not complying with health and safety standards, was putting himself in danger, and was knowingly working past the permitted time period of 3pm on Saturday, are relevant to the claim before the Tribunal. Ms Bridge's assertion that Mr Duan was reckless and could have fallen off the roof because he did not have a harness stands in stark contrast to her insouciant attitude that she could have caused him to be in danger by spraying him with water from her hose. Ms Bridge's submission that spraying Mr Duan with water while he was on the roof did not pose a danger to him is difficult to justify and in the opinion of the Tribunal reflects a dismissive attitude to Mr Duan's concerns for his safety. Ms Bridge's assertions that Mr Duan was dishonest and was sabotaging her claims were unfounded.
17. We find that Ms Bridge did spray water at Mr Duan with her hose. She did it because she was angry and frustrated after a long, noisy day of building work on her neighbour's house. We are satisfied that Ms Bridge had a clear view of Mr Duan on the roof and saw him slip and fall on the roof after she sprayed him. She characterised this as him being theatrical and placing his bottom near the tiles. It was when he was in danger of falling off the roof that she made the comment about Jackie Chan.
18. While neither party made any submission as to the identity of Jackie Chan, the Tribunal takes it as uncontroversial that Jackie Chan is a famous Asian actor and in his movies he performs comedic martial arts style fighting.

Racial vilification

1. In ascertaining the meaning of racial vilification, the text in s 20B and s 20C is to be given its natural and ordinary meaning. Regard must be had for the context of the Act as a whole, as well as its purpose; SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; 262 CLR 362 at [14].
2. During the Second Reading Speech: New South Wales, Parliamentary Debates (Hansard) Legislative Assembly, 4 May 1989, Attorney General Mr Dowd at pg. 7488 stated that legislation against racial vilification must involve a balancing of the right to freedom of speech and the right to a dignified and peaceful existence free from racial harassment and vilification, and the intention of the legislation was not to cover "matters of a trivial nature" pg. 7489; Jones v Trad [2013] NSWCA 389; 86 NSWLR 241 ("Trad") at [27].
3. The onus of proving all of the elements of s 20C rests on Mr Duan.

Public act

1. There is no definition of the word "public" in the Anti-Discrimination Act. Questions have arisen as to the distinction between public and private acts and whether it covers instances where the person who is being vilified is alone with the villifier - that is, whether the public act must be observed by a third person or whether it is sufficient for the act to be observable.
2. The word "public" has been found to include the possibility of being overseen or overheard by the public, even if the act took place on private property, in the cases cited below.
3. In R v Ashley (1991) 77 NTR 27 at 30 it was held that public includes the possibility of being overheard by or visible to passersby, even if the act took place on private property.
4. In Kane v Church of Jesus Christ Christian Aryan Nations (No 3) (1992) 18 CHHR 268, it was held that display of signs, swastikas and burning crosses on the private property of one of the respondents was held to be a display "before the public" as the displays were easily visible to passersby. It was held that "public" did not necessarily mean the whole public and that it was "before the public" even though it was held on private property. "Public" was defined to mean "open to general observation, done or existing in public".
5. In R v D and E Marinkovic [1996] EOC 92-841 the Equal Opportunity Tribunal held that the placing of a note on the complainant's front door constituted a "public act" even though the block of units was not open to the public at large and was accessible only to residents and their visitors.
6. In Anderson v Thompson [2001] NSWADT 11, the Tribunal held that abusive words spoken on the stairwell of a block of units constituted a form of communication to the public. Although there were no eyewitnesses, the words were spoken with such force they could be overheard by other residents.

7. In *Haas v Hosking* [2010] NSWADT 42, the Tribunal held that no 'public act' under section 20B was committed by the respondent when, in the context of a dispute about the boundary between rural properties owned by the respondent and the applicant, the respondent made statements allegedly constituting racial vilification in the presence of two witnesses. The Tribunal found at [77]-[78] that the statements were made in a private conversation in conversational tone and were not intended to be overheard by anybody.
8. In *Malenha v Sullivan* [2017] NSWCATAD 222 the parties were neighbours. The Tribunal found at [46] that the conduct of shouting "Portuguese pig" was a public act capable of inciting hatred, severe ridicule or serious contempt for the applicant.
9. In *Comensoli v Passas* [2019] NSWCATAD 155, the applicant draped a rainbow flag outside his window after the "Yes" vote to marriage equality. His neighbour said to him that he should not be permitted to marry until he could have children and breastfeed. The respondent spoke loudly, the applicant's flatmate heard the words said by the respondent.
10. In *Lamb v Campbell* [2021] NSWCATAD 103, the respondent was on private property when he said the words in question. The applicant did not enter the respondent's property.
11. In the present case, Ms Bridge spoke the offending words to Mr Duan as he was working on a roof of a two-storey house, as she was spraying him with water from her hose. She had no pre-existing relationship with him, the other two sub-contractors working with Mr Duan were in close proximity, and Mr Lui heard some of the offending words and saw the incident. There may have been other people working on the house at the time of the incident. Ms Grove, a neighbour, had a clear view to the roof of the house at number 47. There was no suggestion that the offending words were said in a private or confidential manner. There was no domestic or private relationship between Ms Bridge and Mr Duan. The words spoken by Ms Bridge were said with some volume as they were heard by Mr Lui.
12. Section 20B is an inclusive and non-exhaustive definition of a "public act". The first limb of the definition is in very broad terms "any form of communication to the public". The width of the definition is such that it would encompass the circumstances of this claim, as would the second limb, which is "any conduct observable to the public".
13. We find that Ms Bridge's conduct was a "public act" within the meaning of s20B(a) and s20B(b) of the Act.

Incite severe ridicule

1. In *Sunol v Collier (No 2)* [2012] NSWCA 44; (2012) 260 FLR 414 (*Sunol No 2*), Bathurst CJ at [41] (Allsop P and Basten JA agreeing) concluded that the construction of the words in s 49ZT (which is a similar provision in regard to homosexual vilification) stated:
 - (a) Incite means to rouse, to stimulate, to urge, to spur on, to stir up or to animate and covers conduct involving commands, requests, proposals, actions or encouragement.

- (b) It is not necessary for a contravention that a person actually be incited.
 - (c) It is not sufficient that the speech, conduct, or publication concerned conveys hatred towards, serious contempt for, or serious ridicule of homosexuals; it must be capable of inciting such emotions in an ordinary member of the class to whom it is directed.
 - (d) It is not necessary to establish an intention to incite.
 - (e) For the public act to be reasonable within the meaning of s 49ZT(2)(c) it must bear a rational relationship to the protected activity and not be disproportionate to what is necessary to carry it out.
 - (f) For the act in question to be done in good faith, it must be engaged in bona fide and for the protected purpose.
1. In *Margan v Manias* [2015] NSWCA 388 the Court of Appeal adopted the findings in *Sunol No 2* and noted that the identification and nature of the audience are essential for the purpose of determining objectively whether an ordinary member of that audience would be likely to be incited by the public act at [78] and that there can be no incitement in the absence of an audience, at [76]; see also *Trad* at [54]-[55], and *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207 at [16].
 2. In the context of vilification provisions, the question is whether an ordinary observer could understand from the public act that he/she is being incited to severe ridicule of a person on the ground of race. The conduct must be capable of inciting such emotions in an ordinary member of the class to whom it is directed.
 3. The words "severe ridicule" are to be given their natural and ordinary meaning: *Passas v Comensoli* [2019] NSWCATAP 298 at [13]. The words "severe" and "ridicule" are defined in the Australian Oxford Dictionary Second Edition (2004) as
 1. Severe: 1 rigorous, strict, and harsh in attitude or treatment. 2 serious, critical. 3 vehement or forceful. 4 extreme (in an unpleasant quality).
 2. Ridicule: Subjection to derision or mockery, make fun of, subject to ridicule, laugh at.
 1. The issue, then, is whether the words spoken, in their context, would or could have the capacity to incite a reasonable member of the public to be roused to severely deride a person from an Asian background. We are satisfied that the words used in the context in which they were spoken, and in the particular circumstances, are capable of inciting severe ridicule. Ms Bridge's conduct could "encourage or spur others" to mock, deride or laugh at Mr Duan's physically precarious situation. Because of the apparent danger to which Mr Duan was subject as a result of Ms Bridge's conduct, the ridicule was severe. We find that this element is satisfied.

2. A further issue we must determine is whether Ms Bridge's words later in the afternoon, and the mocking sounds made by Ms Bridge, were "severe ridicule". We do not consider these words to be "severe". While we do not consider it trivial to mock a person's accent, we do not consider that it reached the level of severity required to satisfy this element of the provision.

On the ground of the race of the person

1. The applicant identified as Chinese. We are satisfied that Mr Duan is a person who identifies as Chinese and is of Chinese descent. Chinese descent constitutes a 'race' for the purpose of s20C.
2. Race does not need to be the sole reason for the severe ridicule. The expression "on the ground of" means that race must be one of the real, general or true reasons for the incitement: Jones at [98]. There must be a causal connection between the race of the person and the feeling of severe ridicule which is incited by the public act.
3. The motive or intention of the respondent is not a necessary element to the question of whether vilification has occurred for the purposes of s20C of the Act; Sunol No 2 at [30]-[31]. As Bathurst CJ, explained, if it was otherwise, ignorance and/or prejudice could seek to be excused on the basis that there was "no intention" to vilify.
4. We consider that the words "I don't care. Aren't you Jackie Chan jumping off the roof" was made on the ground of Mr Duan's race. Ms Bridge did not deny that the reference to Jackie Chan was made because Mr Duan was of an Asian appearance.

Conclusion

1. The mischief that s20C is directed towards is the effect of incitement on the relevant audience, judged objectively and not on the intention or motive of the alleged inciter or the person to whom the conduct was directed. The "on the ground" element of the vilification provisions relates to the relationship between race and severe ridicule.
2. Mr Duan has satisfied the Tribunal that the words spoken by Ms Bridge "I don't care. Aren't you Jackie Chan jumping off the roof" was made as he slipped on the tiles of a roof because Ms Bridge was spraying him with water from her hose. We accept that the conduct was made on the ground of Mr Duan's race and that it constituted a public act capable of inciting severe ridicule towards Mr Duan.
3. Mr Duan has not satisfied the Tribunal that the comment made by Ms Bridge "I don't understand your English" and making sounds mocking his accent were "severe ridicule".

Remedy

1. Pursuant to s108(2) of the Act, the Tribunal has discretion to make orders if the Tribunal finds the complaint substantiated in whole or in part.

2. Mr Duan seeks orders pursuant to s 108(2)(a) and (d) of the Act that Ms Bridge pay him damages by way of compensation for loss or damage suffered by reason of her conduct and/or a publication of an apology or a retraction in respect to the evidence and submissions made by her in the ADB and in the Tribunal.

3. In the ADB Complaint, Mr Duan stated that:

At the point of the attack I was panicking and scared as I was afraid that she was trying to kill me by making me fall off the roof. When I went home, I could not fall asleep. When I did, I had nightmares of me falling off the roof. I could not breathe and think properly because of her attack. I'm afraid to go back to work or leave my house due to the fear of being randomly attacked by stranger because of my racial background.

1. In a statement attached to the ADB Complaint, Mr Duan stated that he felt "threatened and scared, especially after I told her that she was putting my life at risk...I felt humiliated by being mocked just because of my racial background."
2. We accept Mr Duan's evidence that as a result of Ms Bridge's conduct, Mr Duan has suffered an adverse psychological impact.
3. In the Tribunal, Mr Duan stated that he had lost \$8000. He stated that he went to see his General Practitioner and was issued with a medical certificate that he was unable to work from 15 January 2024 to 17 January 2024. Mr Duan stated that he was given a referral letter to seek help from a psychologist to manage his anxiety. He also included a table in which he itemised his losses as \$3500 for the loss of two days' work, \$1500 for cancellation of the work for a co-worker, \$110 for NAATI translation of Mr Lui's statement and \$3000 for his wife's stress and cancellation of at least ten coaching sessions so that she could provide him with support.
4. There is no actual evidence for the loss claimed. We accept that there was a fee for the NAATI translation, and that Mr Duan was unable to work on 15 to 17 January 2024.
5. We accept that the effects of vilification can be wide ranging and long lasting. Vilification affects the person directly impacted and can also have broader ramifications or modifications of public behaviour; Kathrine Gilbert and Luke McNamara, "Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harm Occasioned and the Remedies Provided" (2016) 39(2) UNSW Law Journal 488, 505.
6. The purpose of the remedy provisions is to compensate the individual and to discourage further vilification which can result from allowing such conduct to be disseminated in the community. In the circumstances of this case, there is no need to regard the broader ramifications of the vilification as the conduct was not publicly disseminated.
7. We consider that an apology is not appropriate in this case as Ms Bridge strenuously denied the conduct alleged by Mr Duan and there would be no utility in making an order to such an effect; *Jones v Toben* [2002] FCA 1150; 71 ALD 629 at [106]; *Jones v The Bible Believers'*

Church [2007] FCA 55 at [65]. While Ms Bridge admitted to saying the words Jackie Chan and offered a sincere apology to Mr Duan for using these words, she denied entirely the context in which those words were said. It is the context in which these words were said, as well as the words themselves, that the Tribunal found as amounting to incitement to severe ridicule.

8. We accept Mr Duan's evidence that as a result of the racial vilification he had become fearful, intimidated and felt excluded. We accept his evidence that the impact on him has been long lasting and that he continues to feel disturbed by Ms Bridge's conduct. This was not disputed by Ms Bridge.
9. In *Secretary, NSW Department of Communities and Justice v James* [2023] NSWCATAP 64 at [189] and [190] the Appeal Panel stated that: "It is notoriously difficult to assess damages for a non-economic loss. The injury may be intangible and difficult to measure". Determining the appropriate amount of damages is not a scientific task. Each case must be assessed in light of its own circumstances.
10. Assessment of non-economic loss involves matters of "impression, speculation, and estimation, calling for the exercise of common sense and judgment": *Dell v Dalton* (1991) 23 NSWLR 528 at 533. However, simply because damages for injuries to feelings, distress, humiliation "are not susceptible to a mathematical calculation" is not a good basis to ignore these items: *Hall v Sheiban* (1985) ALR 503 at 543.
11. We find that compensation for non-economic loss is warranted in this case. An award of compensation is not a punishment. It is designed to remedy the effect of the respondent's conduct.
12. We find that it is appropriate, pursuant to s108(2)(a), to make a payment of a lump sum for compensation for loss and damage suffered by Mr Duan for economic and non-economic loss. We consider that the appropriate sum is \$6000, to be paid by Ms Bridge to Mr Duan within 28 days of the date of this decision.

Order

1. The Tribunal makes the following orders:
1. The Applicant's complaint of racial vilification is substantiated.
2. The respondent is to pay the applicant \$6000 within 28 days of the date of this Order.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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