New Zealand Employment Relations Authority Decisions

O'Hagan v Waitomo Adventures Limited AA512/10 (Auckland) [2010] NZERA 932 (15 December 2010)

Last Updated: 23 December 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 512/10 5274874

BETWEEN

AND

BRENT O'HAGAN Applicant

WAITOMO ADVENTURES LTD
Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received

Determination:

Dzintra King

Applicant in Person
Roger Clarke, Counsel for Respondent

10 and 11 August 2010 at Hamilton

24 August and 21 September 2010 from Applicant 7 September 2010 from Respondent

15 December 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Brent O'Hagan, says that he has been unjustifiably disadvantaged and constructively dismissed by the respondent, Waitomo Adventures Ltd ("WAL"). He also says that he has not been paid his wages and that he is owed holiday pay.

[2] He seeks payment of unpaid salary and holiday pay and payment of compensation for hurt and humiliation and reimbursement of lost income.

[3] Mr O'Hagan also asked in his submissions that Mr Nicholas Andreef be joined personally as second respondent. I decline to do so. This application was made in Mr O'Hagan's closing submissions. Mr Andreef was not Mr O'Hagan's employer. He was the director of WAL.

[4] The respondent denies that there was a constructive dismissal and has filed a counterclaim. The respondent asserts that Mr O'Hagan paid himself a travelling allowance which had not been agreed, that he had paid sums of money to his company, Coral Agencies Ltd, ("CAL") which payments were not authorised and that he had given himself salary increases which were

also not authorised.

[5] The company seeks the repayment of these monies.

Individual Employment Agreement

[6] Mr O'Hagan was employed as the company's accountant and signed an individual employment agreement on 5 April 2004. Pertinent clauses in the employment agreement include the clause setting out the duties, clause 5.2, which reads:

The Employee will carry out the duties specified in this agreement in relation to the affairs of Waitomo Adventures Ltd; Skyjump Ltd, Jump Technics Ltd; Waitomo Waterhole Ltd and any related businesse(s) at the direction of the Employer.

[7] Clause 6.0 provides that:

The duties are to be performed principally at the employer's premises at Waitomo Caves Village, at Sky City on Victoria Street in Auckland and other places as may be directed by the Employer from time to time.

[8] At the commencement of employment Mr O'Hagan was paid a salary of $55,000. This salary was to be reviewed annually at a time agreed by the parties. A relevant factor was the level at which duties were performed.

[9] Clause 12.3, Payment of Wages, provides:

The Employee consents to the Employer deducting from wages any amount owing for unreturned property including any uniform, any amount owing for goods supplied, and for any other debt owing to the Employer.

[10] Clause 12.4 provides:

The Employer will reimburse any agreed costs including travelling costs from Waitomo to Auckland at the same time as payment of wages once these costs have been claimed by the Employee and provided acceptable evidence of expenditure it provided to the Employer by the Employee.

[11] Clause 13 deals with termination of employment. Clause 13.1 provides:

This agreement may be terminated by either party upon four week's [sic] written notice.

[12] Clause 13.2 provides:

The Employer may elect to pay to the Employee wages in lieu of notice for all or part of the notice period.

Background

[13] Mr O'Hagan was a member of the Institute of Chartered Accountants of New Zealand (ICANZ).

[14] Waitomo Adventures operates caving trips in the Waitomo District and pays to the respective landowners of the caves a royalty based on turnover. It was part of Mr O'Hagan's duties to calculate the royalties owed and provide the landowners with statements of payments and amounts due. A report was prepared by the Reservations Manager, Ms Kim Hunt, from data collated from the bookings computer. This information was password protected and Ms Hunt was the only person who had the password. At the end of the month she transferred the information to a USB and then emailed it using another computer to Mr Andreef and Mr O'Hagan. At this stage the information was not password protected.

[15] Normally Ms Hunt emailed the information to Mr Andreef and then to Mr O'Hagan. Mr O'Hagan attached sinister significance to this but there is nothing untoward about the director of the company wanting to check the material before it was released to Mr O'Hagan. If Mr Andreef was not available Ms Hunt emailed the information directly to Mr O'Hagan.

[16] Mr O'Hagan contended that Mr Andreef was altering the figures that had been emailed to him prior to Ms Hunt emailing them to Mr O'Hagan. The alleged purpose of this alteration was to reduce the amount of cash paid to the company. Mr O'Hagan believed Mr Andreef was deliberately not putting a significant amount of cash through the company's books, resulting in false GST returns and incorrect royalties being paid to the landowners. Mr O'Hagan believed Mr Andreef had access to the password and was unaware until the hearing that this was not the case.

[17] Mr O'Hagan said that early in 2009 he become aware of possible irregularities in the company's accounting. His view was that not all cash receipts were being banked into the company's bank account and that accounting data was being manipulated to cover this up. He decided to investigate further and if possible obtain evidence. He said that in the earlier months he had only been able to sight and note down weekly totals of combined Eftpos and cash takings.

[18] Mr O'Hagan believed that in May he was able to establish a shortfall in the banking of $12,054.00. Mr O'Hagan said that only Mr Andreef and Ms Hunt had access to both the sales data being altered and to the safe containing the cash, and he did not believe any other employee was involved. He ruled out Ms Hunt

12 May 2009

[19] On 11 May he wrote a letter which he delivered to Mr Andreef on 12 May. This letter reads:

Nick,

For sometime I have been concerned that cash takings may have been short banked, thereby making the GST return, royalty calculations and other accounting reports prepared under my name incorrect.

Figures I have seen for April seem to confirm these concerns, therefore I deemed it appropriate I draw your attention to the Code of Ethics of the Institute of Chartered Accountants that I am bound by, and I attach extracts of appropriate clauses.

From my reading of these requirements, if these concerns cannot be resolved satisfactorily, then I have no option but to seriously consider my continued employment with Waitomo Adventures Ltd.

I request you consider the matters raised and arrange a time to discuss further.

Given the seriousness of the situation, it would be appropriate for me to have a support person attend any employment related discussions, as is my right, however, I acknowledge that sensitive and confidential information is involved, so in the first instance, I am prepared to discuss the matter on an 'without prejudice' basis, without a third party in attendance.

[20] Mr O'Hagan made notes of his meeting with Mr Andreef. These notes state:

After brief exchange of pleasantries, I said to Andreef there was no easy way to do this, and handed him the letter, which he then read. His initial response was, 'it's a historical thing, and maybe it was time to stop'. He asked how I came to my conclusions; I said it was reconciling the daily figures from the booking system with the amount of cash banked.

He asked; 'why did I need to see the daily figures anyway? Why did I need to try to do reconciliations of figures from booking systems for the accounts'.

I said it was an accounting thing. He stated: 'if it (the fraud) had been discovered, they (IRD?) would come after him, so it didn't concern me.

He told me he had been evaluating an online booking system that would greatly reduce the cash sales.

I asked Andreef to look at the extracts from the Code of Ethics that I attached to the letter, he was reluctant to do so, so I outlined the requirements to stop and rectify or I would have to consider my ongoing employment.

I expressed concern over the April royalties (these were due to be paid on 14th May) - I had calculation summaries with me. He instructed me to pay them, as 'I did not know they were wrong'. While I knew the totals had been manipulated, I had no way of knowing which trip sales had been altered or how much each landowners sales had been altered.

I don't believe Andreef was surprised by the contents of my letter; his response of 'it's a historical thing, maybe it is time to stop' was to me, an admission, I do believe however he was a bit taken aback that I raised the matter.

[21] During the hearing Mr Andreef said he agreed with some of the contents of the notes and that he had been shocked and was not in a position to respond at the time. Mr O'Hagan had with him documents that he considered provided evidence of his concerns but he did not show these to Mr Andreef. Mr Andreef said some of his comments were taken out of context, for example, Mr O'Hagan's reference to the comment *perhaps it is time to stop* was a reference to the discussion they had previously had that there was a need to review the whole of the accounting system and that they would be doing that; and this would be an opportunity to assist with the reconciliation of the inconsistencies that from time to time were generated at the front desk. He said it was not a reference to a suggestion that he had been carrying out improper practices that should be stopped.

[22] Mr O'Hagan agrees that there was a brief discussion about changes to the accounting system. Mr O'Hagan did not provide the documents to Mr Andreef because Mr Andreef had appeared to admit responsibility and did not ask for any other information. Mr Andreef said the reference to matters being *historical* was nothing more than comment that the whole accounting system and reservations system had been in existence for sometime and had developed as the company had grown.

[23] The parties did not meet again until 27 May, but prior to that there were some telephone calls and exchange of emails.

Skyjump Issues

[24] At the time Mr O'Hagan joined WAL that company and Skyjump Ltd were each owned 50/50 by the Andreef and Weidmann Family Trusts. Mr Stephen Weidmann was also a director of WAL. Mr O'Hagan took over the accounting for Skyjump in February 2005. This was pursuant to clause 5.2 of the employment agreement. Between 2007 and 2008 several shareholding changes occurred resulting, in April 2008, with Mr Andreef owning 100% of Waitomo Adventures and Mr

Weidmann owning 100% of Skyjump Ltd.

[25] These changes were acrimonious and it is clear that there was an acrimonious and dysfunctional relationship between Messrs Weidmann and Andreef. Despite that, Messrs Weidmann and Andreef agreed that Waitomo Adventures would continue to carry out the accounting work for Skyjump Ltd. Mr O'Hagan asserted that while there was no formal agreement regarding the provision of those services there was a clear understanding that he would be the only person to access the Skyjump accounting information. That contention is, unsurprisingly, disputed. Skyjump paid a fee for the accounting services provided to it by WAL to WAL.

[26] Also in contention is the basis upon which Mr O'Hagan was to be remunerated for carrying out the accounting services for Skyjump. Mr O'Hagan said Mr Andreef sought his agreement to continue doing the Skyjump accounts as it could no longer be seen as part of his normal duties (Skyjump no longer being a related company) and Waitomo Adventures was not in the business of providing accounting services to third parties. He said Mr Andreef offered him 50% of any fee increase that was negotiated over and above the $15,000 per annum being charged at the time. The fee was settled at $25,000 meaning that the profit share to Mr O'Hagan would be $5,000 per annum. That was to be payable for the duration of the provision of services.

[27] Clause 5.2 does not expressly require that the specified companies be "related companies". If the word *other* had been inserted in that clause then Mr O'Hagan's interpretation would be correct. There was no requirement for Mr Andreef to renegotiate the basis on which Mr O'Hagan was paid for doing the Skyjump accounting work.

[28] Mr Andreef has asserted that this payment was a discretionary bonus. Mr O'Hagan denies that.

[29] There was some discussion about Mr O'Hagan doing the Skyjump work on a direct contract basis. Mr O'Hagan said that he discussed doing the Skyjump accounting with Mr Weidmann, who said he had not considered changing the accounting from its present basis but if a change was implemented by Mr Andreef Mr Weidmann would be open to discussing with Mr O'Hagan the possibility of his doing the Skyjump work on a contract basis. He said he was concerned about the security of the information.

[30] At the time of handing Mr Andreef his letter of concern regarding the Waitomo Adventures' accounting, Mr O'Hagan said he was concerned that Mr Andreef's reaction could result in his immediate dismissal which would have resulted in serious security issues regarding Skyjump accounting data, about which he had given a personal assurance to Mr Weidmann. He raised his concerns with Mr Weidmann and Mr Weidmann gave him full authority over Skyjump accounting records. Mr O'Hagan then removed Skyjump's records from the Waitomo Adventures' computer and told Mr Andreef that was what he had done.

[31] Mr O'Hagan said that with hindsight that may not have been the correct action to take but he believed he had a duty of care about the records in what was a most unusual business arrangement. Mr Andreef insisted that Mr O'Hagan return the Sky Jump data to Waitomo Adventures. Mr Weidmann said he was not do so and after some email exchanges the contracting arrangement between the two companies was terminated.

[32] In an email of 17 June 2009 Mr Weidmann referred to an arrangement for payment. He states:

As you well know my agreement for the increase in Waitomo charges for the accounting services for Sky Jump was on the condition that Brent received half of that increase directly himself. I believe this has been the case for the last year with your full knowledge and approval. I have been extremely satisfied with the accounting services provided by Brent and do not understand your reasons for now withholding that payment to him.

[33] There is a dispute about the veracity of this statement. There is a statement in a letter by Mr Gurnell, who was acting for the company at that stage, that no such arrangement had taken place at the time of the share transfers, to which he had been a party. There is certainly no written record of such an arrangement.

[34] On 13 May Mr O'Hagan emailed Mr Andreef saying that he had had discussions with Mr Weidmann about doing the work on a daily contract basis and telling him that he had removed the accounting data to his home.

[35] On 15 May Mr Andreef emailed Mr O'Hagan saying that he believed that there was little option but to revisit the direct contracting option and that he would like to think that it could be worked out in good faith. As this would involve changes to Mr O'Hagan's work Mr Andreef suggested that they needed to work out his new contract and that perhaps KPMG would have some suggestions about how that happened.

[36] Mr O'Hagan replied saying he was not willing to discuss any changes to his contract until his concerns about ethical issues raised on 12 May had been resolved.

[37] On 15 May Mr Andreef emailed Mr O'Hagan saying:

My I interrupt payroll for a brief catch up on Monday. I suspect I can allay your various concerns. It reminds me about the 'be careful what you wish for you might just get it'.

As you will see from Steve's email he is open to employing your services directly - so I think it would be healthy to also progress the other matter before you head away.

[38] The reference to *heading away* is a reference to Mr O'Hagan's attending an accounting course.

[39] On 18 May Mr O'Hagan replied to Mr Andreef saying he had not received the message until that morning. He had picked up a chill over the weekend and had a doctor's appointment. He said *perhaps you could email me your thoughts on contract provisions for me to consider while I am away, I am stuffed with the cold so don't really want to get into discussions while I am feeling so lousy.*

[40] Mr Andreef replied:

Really all I wanted to say this morning was:

1. Since you are the one who has raised both these issues at this time and since you are the company accountant - surely you have got some idea of how you would like to see them resolved ie what do you wish. May I request at this point that over the next week you give thought to this and we aim to tidy things up on your return.

27 May Meeting

[41] Mr Andreef said that at the 27 May meeting he had some evidence of possible wrongdoing by Mr O'Hagan - he had looked at his computer - but was not sure if there was enough to make an issue of and realised if he were to do so it would need to be a proper employment meeting with a support person present before he could proceed with putting his allegations.

[42] Mr O'Hagan said from this point on there was nothing to be done because Mr Andreef had admitted it and refused to rectify.

[43] Mr O'Hagan said that at the meeting Mr Andreef indicated he was prepared to cease the activity going forward but he categorically refused to rectify the unlawful acts that Mr O'Hagan had discovered or those that Mr Andreef implied had been carried out earlier. He said that after initially saying he did not know what the issues were, Mr Andreef attempted to justify his actions. He tried to blame the accounting system.

[44] Mr O'Hagan's notes of the meeting on 27 May are as follows:

I asked Nick if he had considered the issue and what his thoughts were - <u>he asked me to explain exactly what the issue was as he was at a loss as to what the problem was.</u> [My emphasis]

I stated it was fraud and I was implicated.

I went over the issues, and the requirements to rectify it, he stated he was not prepared to rectify, I responded that in that case I could not work for him.

He questioned repeatedly that there was some personal home problems that I had that had caused me to be thinking this way - suggesting maybe he could help.

At one stage he denied the fraud, I reminded him he had previously admitted it - it was historical and had stated maybe it was time to bring it to an end.

He blamed the accounting system -1 could fix that -1 said it was not the accounting system; it was the abuse of it.

He repeatedly said he did not want me to leave - he was sure if the systems were changed it would be ok.

I said the only way I could stay ethically would be if I resigned from ICANZ - he asked me if I would -1 said no way.

He tried to justify his actions, as over the years the landowners had screwed him.

I didn't know what was happening in his private life, but implied there was something that justified it.

*I stated we were at the end of the road, it was a matter of negotiate or **PG***

In discussions on my loss of income - I stated based on expectations of career time ahead of me, told him my loss of income would be between $400,000 and $600,000.

He stated he didn't have a spare $400,000 -1 said I wasn't asking for that. After some debate he asked me what I wanted for my loss of office -1 said $250,000 - he said that was blackmail.

I stressed the point that there was little opportunity of mitigation.

He said his thinking was more like three months salary, as that is all the EC would give. I said the EC makes other awards on top

of that.

After some further discussion he told me to take the PG option. I said that option had fish hooks in it for him - (EA hearings are public).

After a lot of to ing and froing (including saying I was nuts to take the stand I was) the message finally got through to him that there was no long term relationship going forward and that it was matter of how we settled it.

Going back to the $250,000 I said it was just an opening bid and he was welcome to counter it, he declined but kept pressuring me to make a reduced bid which I declined.

He talked about doing Skyjump accounts and the possibility of doing at least some Waitomo Adventures stuff by contract, but after consideration came to the conclusion, the same ethical issues remained but a member/client basis - may be possible to do one-off type work that was not general accounting.

I pointed out that a negotiated settlement left room for more amicable notice period and perhaps somehow later (eg answering questions on the annual accounts from outside accountants etc), whereas a notice/PG option would be acrimonious, with no later help.

Towards the end, he said the fact he could not rectify the past, (the information required had been destroyed) - how did that alter things. I said his first answer - the flat refusal to rectify stood.

We parted on the basis the ball was in his court to make a settlement offer, otherwise I would have to resign, the Institute ethics demanded it. [My emphasis]

[45] What is clear from Mr O'Hagan's own notes is that Mr Andreef said he was unsure what Mr O'Hagan's problem was. If he had admitted it at the meeting on 12 May his now making this statement makes no sense.

[46] It is also clear that Mr O'Hagan had not resigned and wanted a settlement offer to be made.

[47] On 28 May Mr Andreef told Mr O'Hagan that he was trying to obtain information that would enable Mr O'Hagan to change his mind. In a reply email on 28 May Mr O'Hagan said:

I would also like to clear up the point you raised re payment towards my Australian trip. WAL did not pay for my ticket, payment was made to Coral Agencies Ltd, Coral Agencies in turn paid for my trip of which, a portion was claimed as a tax deduction. Coral Agencies treated the payment from WAL as taxable income, so there was no avoiding of tax on my part.

[48] This is a reference to a part of the conversation that was had on 27 May when Mr O'Hagan said he raised concerns about private matters being put through the company's books. It is somewhat naive for Mr O'Hagan to assert that WAL did not pay for his ticket when the payments were made to a company owned very largely by his wife.

[49] On 29 May Mr Andreef emailed Mr O'Hagan. The email was headed "resignation arrangements". It reads:

Dear Brent

Firstly, I wish to reiterate that I do not wish you to leave the company and urge you one more time to reconsider your position on this matter.

You have alleged that you feel there are problems with the company's accounting procedures which mean you can't continue with your position. If this is truly the root of your problem, then I am willing to make whatever reasonable improvements to transparency of banking and reporting that you wish to recommend.

As far as historical matters are concerned, so far you have merely raised a general query alleging short banking of sales. I apologise if I have appeared a bit unsure in trying to address these concerns, but it would of course be enormous help if you were able to share with me the information that has caused you to raise these queries. Once I have seen that, we may be able to find a way that we can address specific issues.

As you are aware the company has been audited by the IRD in recent years and there have been no issues with the company's accounting system. You have not raised this issue with me before. This is the first I have become aware of the issue, and indeed it has taken me by surprise. I do not feel there is any basis to the claim, or indeed a claim that you have been constructively dismissed. I consider our accounting system to be fine. I am more than willing to look into your concerns however. If, as you have already indicated, there is no possibility of you continuing in your position, and you feel you must leave the company, then I wish you well and hope that we can at least part on reasonably amicable terms.

You have asked for compensation on the basis that you have been constructively dismissed. You initially asked for a compensatory payment of $400,000, which you subsequently reduced to $250,000. The company does not have any liability to make any form of payment. We have never had an issue with our accounting system as far as I am aware. Our IRD audits did not

disclose any issue. I have had no idea of your concerns until you have raised them now. The company cannot be deemed to have required you to do something you are uncomfortable with, and therefore be deemed to have constructively dismissed you, and the company was not aware you had concerns. As stated above I am more than happy to look into these matters and would like you to stay on with the company.

Finally, (and I know you have already denied this), but if there is some other problem in your personal life that is influencing your thinking in this conflict, then even at this late stage I am willing to discuss and assist in any way that I can.

[50] Mr O'Hagan emailed Mr John Davies of the New Zealand Institute of Accountants about the situation. He indicated that he had been telephoned by Mr Andreef and that he had asked Mr Andreef to reconsider and the resignation had not been confirmed in writing as contractually required. Mr O'Hagan wrote:

My lawyer seems to want to go along with it - I am not so certain, I believe the constructive dismissal case is established and why pass over the evidence for him to find ways to refute [my emphasis]-realise you will get it in time, but now is too soon.

I also feel the changes would only last until he found another way to exit me.

[51] On 3 June Ms Kate Hall of Swabrick Beck McKinnon acting for Mr O'Hagan wrote to Mr Andreef stating that Mr O'Hagan was raising a personal grievance for unjustified disadvantage and, if he were to resign, for constructive dismissal. Ms Hall wrote:

We confirm for the sake of clarity that Brent is not tendering his resignation at this stage and is reserving all options open to him.

[52] Mr Andrew Gurnell, acting for Mr Andreef, replied on 15 June stating that Mr Andreef was more than happy to look into any concerns that Mr O'Hagan had but they could only be looked into once Mr O'Hagan disclosed the issues. Mr Gurnell also raised other concerns held by Mr Andreef that impacted on the relationship of trust and confidence. These were the demand to be paid $400,000 and the statement that there would be fish hooks if a personal grievance claim were pursued. He noted that Mr O'Hagan had without authorisation removed WAL's accounts to his home and made copies of the accounts, that he had without authorisation removed and refused to return accounts for Skyjump Ltd (which was considered to be a breach of a lawful and reasonable instruction), that Mr O'Hagan had been denied access to sales data for security reasons ie the separation of various parts of an accounting process among different people despite which he had been observed to obtain unauthorised access to that date using the central reservations computer. Mr Gurnell said that WAL wished to hear any comments Mr O'Hagan might want to make in relation to those matters, and his failure to provide acceptable responses might affect Mr O'Hagan's ongoing employment.

[53] Mr Gurnell went on to say that since the allegations had been made by Mr O'Hagan some issues had been uncovered including questionable practices carried out by Mr O'Hagan. These were that there had been unauthorised payments to the company Coral Agencies Ltd and irregular salary payments had been made by Mr O'Hagan personally that might be excessive. Mr O'Hagan was asked to provide a complete reconciliation of his remuneration during his employment to demonstrate that the payments were correct. Mr Gurnell said that if these issues were substantiated they could be considered to serious misconduct and disciplinary action up to and including the possibility of terminating his employment would be considered.

[54] Mr Gurnell suggested a meeting to deal with the issues raised and asked for a letter providing a response to the matters set out in his letter prior to the meeting. That same day Mr O'Hagan sent an email to Mrs Andreef stating:

Wages in 1PMT as per attached.

You will notice a difference in my salary amount - I have added my SJ accounting allowance into my salary (last year it was done as a contract PMT,) and backdated from 01.04.09.

[55] Later that day Mr Andreef emailed Mr O'Hagan saying he had put a hold on his wages because the Skyjump payment to which he referred was not his as of right: it was a discretionary bonus for satisfactory handling of the Skyjump work which was not the case at the moment. That was a reference to the transferring of the accounts to Mr O'Hagan's home. Mr Andreef said that wages should be paid to Mr O'Hagan directly and not to his company which he as a chartered account should know. He was also asked to provide a reconciliation of his remuneration in the current financial year including any payments, authorised or not, to entities associated with Mr O'Hagan.

[56] Mr Andreef said once it was clear what the amount would be he would be prepared to pay the role component of his wages. He went on to say:

I will make this payment, but on the further proviso that you also supply before the next pay day (MON 29 June 2009) a full reconciliation of your remuneration over the entire period of your employment as there appear to be a number of anomalies, including several unauthorised payments to your company, in the account.

I have also now observed your company has invoiced and taken payment from Waitomo Adventures Ltd for a 300megabite data storage device - which I have been unable to locate at Waitomo. Please advise where the drive is now - if it is at your residence, I require that it be returned immediately to your place of employment.

My solicitor will also be in touch shortly regarding other aspects of this dispute.

[57] Mr O'Hagan replied saying he disputed that the Skyjump payment was a discretionary bonus. It was part of his salary which was paid for ongoing provision of his services.

[58] Mr Andreef emailed Mr O'Hagan on 15 June stating that he would be more than happy to pay his salary for the past fortnight. However Mr O'Hagan as the company accountant was the only person able to advise the amount to be paid. He asked him to deduct what he had added for the bonus and advise the figure to be paid, and he would make the payment.

[59] Mr O'Hagan replied saying that the normal amount excluding the Sky Jump content net pay was $1,959.57 He also stated:

From my point of view, failure to rectify the issue at hand leaves me no option but to move on, and feel that some compensation for loss of office is justified.

[60] He proposed meeting on a without prejudice basis providing this was at a neutral venue. Mr Andreef agreed and reiterated that while not being to verify the amount of salary he would nonetheless arrange for the payment that night.

[61] Mr O'Hagan replied stating that there didn't seem to be much point to a meeting unless Mr Andreef was prepared to negotiate realistically.

[62] On 17 June Mr O'Hagan obtained a medical certificate saying that he was unfit to resume work for 14 days from 15 June.

[63] On 17 June Ms Hall replied to Mr Gurnell's letter of 15 June. Ms Hall provided explanations regarding some of the matters raised and suggested that they arrange mediation.

[64] On 19 June Mr Gurnell said the letter did not address the concerns that the company had and that a disciplinary meeting would still be required. Mr Gurnell stated:

The continued failure to disclose details of the alleged problem indicates a lack of good faith by your client in attempting to genuinely address the issues. My client has on a number of previous occasions asked for specific details of your client's concerns. My client again requires that your client provide full details of the problems your client alleges exist with the system so that any issues with the accounting system can be addressed.

[65] In a letter dated 23 June Ms Hall replied to Mr Gurnell asking for the specific allegations against Mr O'Hagan and why the responses in the letter of 17 June did not satisfy the company. She also asked for the information the company intended to rely on in making any decision that was likely to affect Mr O'Hagan's employment and what the potential implications of the meeting would be. She stated that payments made to or through Mr O'Hagan's company were specifically approved by Mr Andreef from the outset and when later discussed with Mr Andreef the option was left open to Mr O'Hagan. She said:

Regarding the company's request for specific details of Mr O 'Hagan's concerns, Mr O 'Hagan has expressed his concerns as plainly as possible to Mr Andreef during their meeting on 27 May. Specifically, his concern is that the sale data which is transferred from the booking computer is altered before it is sent to the accountant for the purpose of reporting royalty payments. Further, cash that is banked does not tally with the cash recorded on the booking computer.

[66] Ms Hall also said:

Mr O'Hagan has put on hold his decision to resign based on Mr Andreef's advice.

[67] Mr Gurnell replied stating that the letter of 12 May made only general accusations and did not contain any details. He again asked for the provision of evidence of the purported irregularities. He said:

My client's initial impression was that perhaps there were some relatively minor inconsistencies and that if that was the case the system might have to be tightened up and the relatively simplistic approach to banking, might have to stop.

Given your client's apparent concern, my client did nothing more than assure your client that he had no risk if there were any issues and that my client as the principal would bear any liability. Your client has taken the comment very much out of context.

My client again reiterates he is not aware of any problems with the accounting system. As has been outlined previously there has been a full and detailed audit undertaken by the Inland Revenue Department, which could no doubt have detected any issues if there were any. My client has not stated that he has no intention of rectifying historical errors. The correspondence bears this out. My client is more than happy to investigate the issues and errors once they are known. However it is not possible to rectify historical errors unless it is known what the historical errors are. Your client continues to withhold details of the issues and errors.

If your client has information that is inconsistent with the accounts then the only way to address this is with your client's honest cooperation, which quite clearly is not forthcoming.

[68] Mr Gurnell stated at para.12:

There was no such arrangement agreed that WAL would continue to provide your client's services to Sky Jump and that your client would be paid 50% of that increase (the writer was party to all negotiations as part of the Sky Jump WAL buy-out transaction and can attest to this).

The suggestion that the arrangement was dependant upon your client completing the accounts is entirely untrue. If there was any such arrangement it would obviously have been a term important enough to have been recorded in writing, which it was not. My client's payment to your client last year was nothing more than a discretionary bonus. WAL charge to Sky Jump for undertaking the bookkeeping services was to provide a better recovery of the costs to WAL ofproviding of services.

[69] Mr Gurnell asked specifically:

As you client has evidence of the cash sales being banked and the figures being falsified, please provide this evidence.

[70] In this letter Mr Gurnell also noted that it had become apparent that Mr O'Hagan had paid himself an allowance totalling $8,400 which he had described as a vehicle allowance in the period from 1 March 2006 to 1 March 2009. Those payments were not authorised.

[71] There was also a question regarding mileage charges totalling $596.60. Mr Gurnell said:

My client has taken all reasonable steps to get to the bottom of issues your client states are concerning him, and continues to be wishing to undertake the investigation. Your client however is refusing to disclose the evidence that he refers to that is causing inaccurate records. In the absence of being provided with this evidence, it is impossible for my client to be able to resolve any issues your client may have.

Your client has claimed that he has a constructive dismissal claim (although it is noted that he has not yet resigned) [my emphasis]that he is being required to undertake tasks which are in breach of the Accounting Code of Ethics. At no stage prior to this has your client ever raised any issues, at no point during this matter has he made genuine attempts to resolve any issues.

[72] Mr Gurnell concluded by saying that WAL required a disciplinary meeting to be held and asked Ms Hall to advise when Mr O'Hagan would be returning to work, when he would be available for a disciplinary meeting and when he would provide the evidence that showed irregularities in the accounting system.

[73] Ms Hall emailed Mr Gurnell on 26 June stating:

Our client is suffering from severe stress as a result of the company's actions and its refusal to enter into any meaningful discussion with our client with a view to resolving the matter fairly and reasonably. Because of this, our client feels he has no option but to tender his resignation. [my emphasis] As he is unfit to attend work, we ask that the company provide him with four weeks pay in lieu of his notice period, as well as all other statutory and contractual entitlements that are payable on termination of employment.

[74] Mr Gurnell responded that he would be paid in accordance with the contract, less the money owing to the company in accordance with clause 12.3. There was a sum of $8,400 owing for unauthorised travel allowances and other amounts which also appeared to be misappropriated which were being looked at. The amount due had been offset against the sum of $8,400 owed for the travelling allowance.

[75] There remained money owing despite the offset and that recovery of those sums was required. He asked that Mr O'Hagan provide a reconciliation of his salary payments and leave as previously requested.

[76] Mr Hall responded by saying there were no unauthorised travel allowances. Mr O'Hagan had been paid $100 per fortnight vehicle allowance as part of his 2006 salary increase. The amount was split between a taxable and non-taxable allowance and the arrangement was made with Mr Andreef's knowledge and approval.

[77] In an email dated 13 July regarding allegations and misappropriation of funds, Mr O'Hagan stated:

All the payments in question had been made electronically, Westpac bank would be able to verify that, I have never had internet banking access to any of Waitomo Adventures Ltd's bank accounts.

[78] This assertion was untrue.

[79] On 15 June Mr Gurnell emailed Mr O'Hagan stating that a meeting would be the first step towards resolution and *in relation to the internet banking, my understanding is that you made the payments on behalf of the company. Are you saying this is incorrect?*

Was There a Constructive dismissal?

[80] Mr O'Hagan had an intention to resign on 27 May. However, it is clear from the correspondence between the parties that the actual resignation did not take place until 26 June. It is evident from Mr O'Hagan's evidence that he had determined, despite his assertions to the contrary during the hearing, that Mr Andreef had committed fraud. Nothing would sway him from that conclusion, although much of Mr O'Hagan's stance that Mr Andreef was the person responsible is predicated upon his view that Mr Andreef had access to the password. However, Ms Hunt confirmed that this was not the case and she was the only person who has access to the password. This still did not satisfy Mr O'Hagan.

[81] Mr O'Hagan refused to provide information as requested by the employer and in so doing he breached the obligations of good faith in s.4 to be responsive and communicative. A refusal to supply the information upon request is fatal to Mr O'Hagan's claim of constructive dismissal.

[82] In *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 the Arbitration Court referred to *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59 and stated that the essential questions to be addressed in constructive dismissal cases were: what were the terms of the contract and was there a breach of those terms that was serious enough to warrant the employee leaving?

[83] In *Auckland Electric Power Board v. Auckland Provincial District Local Authority's Officers Union* [1994] NZCA 250; [1994] 1 ERNZ 168 at 172 the Court of Appeal stated:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation.

If the question of causation is answered in the affirmative the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantive risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[84] There was no breach of duty by the employer.

[85] *In Honda NZ Ltd v NZ Boilermakers Union* (1990) ERNZ Sel Cas 855 the Court of Appeal stated when a serious charge provided justification for a dismissal the evidence in support of it needed to be as convincing in its nature as the charge was grave.

[86] The Labour Court had held that the proof had to be convincing because the more serious the misconduct alleged, the more inherently unlikely it is to have occurred and the more likely the presence of an explanation at least equally consistent with the absence of misconduct.

[87] Mr O'Hagan made a very serious allegation. The principle in *Honda* must also apply to a situation where an employee makes a serious allegation about an employer and then claims a constructive dismissal.

[88] I have considered Mr O'Hagan's view that Mr Andreef admitted he had been taking cash and falsifying records. There are a number of reasons why I do not accept this. I consider it highly unlikely and improbable that Mr Andreef would admit taking cash which totalled tens of thousands of dollars without any evidence having been presented and then ask how he had been found out. There was evidence that the amount of cash takings had remained consistent after Mr O'Hagan's allegations. If the allegations were correct, one would expect a significant increase in the cash takings.

[89] In his brief Mr O'Hagan stated that at the meeting on 12 May Mr Andreef had tried to blame the accounting system. It does not make sense for Mr Andreef to place blame on an accounting system if he has admitted taking cash and falsifying records.

[90] Mr O'Hagan tended to interpret matters in a manner favourable to himself. This often led to assertions that were not strictly speaking accurate. When it was claimed that he had failed to provide the information upon which he was relying, he said those were delays not a continued failure to provide the information and that the delay was caused by the respondent's failure to agree to attend mediation. Mr O'Hagan told me had wanted mediation so he could hand over the documents in a safe environment in the presence of witnesses. When I asked why he could not have given them to a solicitor I did not receive a satisfactory response. He said *To claim I have failed to disclose evidence to the respondent is clearly untrue.*

[91] A perusal of the correspondence shows a very clear failure to provide the information upon which Mr O'Hagan was basing his personal grievance. It was more than three months before the information was supplied.

[92] Mr O'Hagan stated that he did not have internet banking access. This was untrue.

[93] In the email quoted at para [48] Mr O'Hagan, referring to payment for his trip to Australia, says that WAL did not pay for

it: Coral Agencies did. Given that WAL made the payment to Coral Agencies to assert that WAL did not pay for the trip is not a fair representation of the situation.

[94] Mr O'Hagan accepted that the car allowance was simply a tax avoidance device and that there was no real justification for his being paid such an allowance. I note that despite being in receipt of the allowance on four occasions Mr O'Hagan claimed mileage.

[95] Mr O'Hagan was not constructively dismissed. **Counterclaim and Salary**

[96] As a rationale for the making of salary payments to Coral Agencies Mr O'Hagan said the salary increases took him into the top tax bracket and Coral Agencies had a tax loss. However, if the money was part of his salary it should have been paid as such. If it was money paid for marketing and therefore a legitimate payment to Coral Agencies holiday pay should not have been charged on the payments.

[97] To not get authorization for payments made to himself or his company is very bad practice.

[98] Mr O'Hagan accepted that he did not have express approval to make payments to CAL. He said they were made with a genuine belief that he had been given a general approval to do so.

[99] There is also the matter of the CAL payments being classed as miscellaneous and not being specifically identified. This practice runs the risk of looking as if there was deliberate concealment.

[100] In April 2005 Mr O'Hagan received a $5,000 salary increase. This took his salary to $60,000.

[101] In December 2005 he received a $3,000 bonus.

[102] In April 2006 Mr O'Hagan says they agreed he would receive a $5,000 salary increase. This was to be split between a salary increase of $2,400 and a non-taxable car allowance of $2,600. Mr Andreef agrees there was a $2,400 salary increase but denies there was an agreement regarding a car allowance. He said travel was covered in the contract. Mr Andreef says the salary was now $62,400. Mr O'Hagan says it was $65,000. The correct situation is that there was an agreed increase of $2,400 only.

[103] In December 2006 Mr O'Hagan received a $3,000 bonus.

[104] In April 2007 Mr O'Hagan says he was given a $3,000 salary increase which took his salary to $68,000. Mr Andreef denies that an increase was given. Mr O'Hagan did not pay this increase as a salary. He paid it in a lump sum to CAL on 31 May for marketing support services in Australia.

[105] In December 2007 he was paid a bonus of $3,000. He also added what he said were annual leave payments for the 2006 and 2007 years which had not been added to the amounts he had paid CAL.

[106] In April 2008 the parties agree there was no salary increase. Mr O'Hagan again paid the $3,000 salary increase from 2007 to his company as a lump sum payment, adding in annual leave.

[107] In December 2008 he received a $3,000 bonus.

[108] In April 2009 there was no review but Mr O'Hagan applied the 2007 $3,000 "increase" to his fortnightly pay instead of paying to CAL.

[109] He also started to pay himself the contested $5,000 Skyjump bonus on a fortnightly basis adding holiday pay to the amount claimed.

[110] Mr Andreef produced a summary of what he said were his jottings regarding Mr O'Hagan's salary arrangements. This information was only produced after a Privacy Act request had been by Mr O'Hagan and after I had instructed Mr Andreefs lawyer to produce any available records relating to Mr O'Hagan. Mr Andreef said it had taken him a while to locate the notes as they were on the records of another company of his, Waikato Management Limited.

[111] Mr O'Hagan said it was curious that the heading on the notes was the same as that on his email asking for details. I asked Mr Andreef about this but did not receive any cogent explanation. Given that Mr Andreef did not seem to be in the habit of keeping personnel records for his staff I do not intend to attach any weight to these notes when considering the conflicts in evidence regarding salary increases.

[112] Mr O'Hagan says his salary was $73,000. WAL says it was $62,400. The difference in the figures is due to the $2,600 car allowance, the $3,000 salary increase in 2007 and the $5,000 Skyjump bonus. The Skyjump bonus was not an entitlement.

[113] Mr O'Hagan resigned on 26 June 2009 with immediate effect. He was paid until 14 June. That leaves a payment shortfall of 10 days.

[114] Mr O'Hagan claims payment in lieu of notice. There is no contractual entitlement to this.

[115] He claims the car allowance at $10 per day. There was no agreement that this be paid.

[116] Regarding the Skyjump allowance Mr O'Hagan says only Mr Weidmann could say whether his performance had been satisfactory. There are a number of problems with this. Mr Weidmann was not Mr O'Hagan's employer. I have no evidence that Mr Andreef agreed that Mr Weidman would be the arbiter of his employee's performance.

[117] Mr O'Hagan says that his performance on 15 May was said to be fine but a month later it was not satisfactory. Mr O'Hagan overlooks the fact that in the interim he had removed the records from his employer to his home without getting his employer's consent. While Mr Weidmann clearly had an interest in his company's accounts he had handed over the doing of those accounts to WAL, which employed Mr O'Hagan to do them. This was an inappropriate action for Mr O'Hagan to take.

[118] The respondent has sought the repayment of all monies invoiced to CAL. While I accept that it was improper for Mr O'Hagan to have paid money that was due to him as an employee to CAL, some of the payments were ones he could - and should - have legitimately paid to himself as an employee of WAL.

[119] The reimbursing payments were payments Mr O'Hagan would have received in the course of his employment. I decline to order him to pay back those payments. These are payments for invoices 34068, 34070, 34084 and a $365 component of

34083.

[120] I am satisfied that the car allowance was not agreed. Mr O'Hagan is to reimburse WAL the $8,400 he paid himself as a car allowance.

[121] The Skyjump bonus (invoice 34090) should not have been paid. Mr O'Hagan is to reimburse the amount of this invoice - $6,075 - to WAL. This amount comprises the allowance, holiday pay on the $5,000 and GST on the total of $5,400.

[122] The invoice no 34081 for marketing support in Victoria 31 May 2007 was approved by Mr Andreef. I decline to order reimbursement of the amount of this invoice but will not treat it as a salary increase.

[123] Invoice 34083 has a holiday pay component for the 2007 "increase" of $240. GST has been charged on this amount. The $240 plus GST of $30 is to be reimbursed

to WAL.

[124] Invoice 34008 31 December 2008 was for the 2007 "increase" paid in 2008 plus holiday pay and GST. The amount of this invoice is to be reimbursed to WAL -

$3,250.

[125] Invoice $34073 for $580 was for an airfare to Australia. Although this should not have been paid to CAL I accept the payment of the airfare was agreed.

[126] The silent days issue - that Mr O'Hagan did not actually work on some days because he sent no email messages - is not one that merits great scrutiny. Mr O'Hagan provided explanations for a number of the days when there were no emails from him and was able to say where he had been.

[127] He accepted that there was an issue with regard to some days taken as holidays which he had not entered as holidays and he agreed these was to be deducted from his holiday pay claim.

[128] Mr O'Hagan's holiday pay and final 10 days' wages have not been paid.

[129] Mr O'Hagan's correct salary was $62,400. The invoice for the purported salary increase of $3,000 in 2007 was for marketing services in Australia at a time when Mr O'Hagan was on annual leave. This payment was authorised by Mr Andreef but I do not take this payment to be a $3,000 salary increase as such a payment should have been paid as salary to an employee and not for services rendered on a contractor basis.

[130] I have looked at the Labour Inspector's calculations of holiday pay. I have recalculated these on the basis that the salary was $62,400. I have also taken account of the additional week's leave for the years 2004 to 2006 and have deducted the 7 days' leave that was not entered into the system. The holiday pay owed to Mr O'Hagan is $7,185.60 gross.

[131] The two weeks' pay owed to Mr O'Hagan is $2,400 gross. [132] The total owed to Mr O'Hagan is $9,585.60.

[133] Mr O'Hagan says the employment agreement does not apply to the deductions made by the employer as the debt was not an agreed one.

[134] In *Amaltal Fishing Co Ltd v Morunga* [2002] NZEmpC 132; [2002] 1 ERNZ 692 an employer paid a hotel the cost of making

good the damage that had been done by employees and deducted that cost from their wages. Goddard CJ held that the employer had breached the Act, saying at para [35] that wages had to be paid in money and not partly in money and partly by discharging debts which seemed valid to the employer but the existence or amount of which the employee might wish to dispute or at least to control the timing of their payment having regard to other commitments and needs.

[135] Although the employment agreement authorises deductions for debt Mr O'Hagan disputed that there was a debt at all. In such circumstances deductions should not have been made.

[136] The respondent is to pay Mr O'Hagan the sum of $9,585.60.

[137] Mr O'Hagan is to reimburse the company the sum of $17,995. This sum comprises the following:

- $8,400 car allowance;
- $6,075 Skyjump bonus - invoice 34090;
- $240 holiday pay on 2007 "salary increase" plus GST of $30 - invoice 34083;
- $3,250 2007 "salary increase" plus GST paid in 2008 - invoice 34008. **Costs**

[138] If the parties are unable to agree the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the memorandum. If the applicant wishes to file a memorandum in reply this should be done within 7 days of receipt of the respondent's memorandum

Dzintra King

Member of the Employment Relations Authority
