

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 39
5317099

BETWEEN RAMESH PRASAD
Applicant

AND BREAKSPEARE
INDUSTRIES LIMITED t/a
COASTLINE PROPERTY
SERVICES
Respondent

Member of Authority: K J Anderson

Representatives: D Hayes, Counsel for Applicant
E Burke, Counsel for Respondent

Investigation Meeting: 19 January 2011 at Hamilton

Determination: 28 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Prasad, claims that he was unjustifiably constructively dismissed, effective from 19th January 2010. Mr Prasad asks the Authority to find that he has a personal grievance and award him various remedies including reimbursement of wages and compensation. But the respondent, Breakspeare Industries Limited (BIL / CPS) denies that Mr Prasad was constructively dismissed and says that he failed to return to work after a period of unexplained absence and he was deemed to have terminated his employment of his own free will.

Background facts and evidence

[2] It is commonly accepted that Mr Prasad commenced his employment with BIL in October 1997. He was employed as property maintenance worker carrying out

gardening, cleaning and general property maintenance on properties for which BIL had contracts to do such work. Mr Prasad reported directly to Mr Simon Colson, a co-director of BIL. At the material times, relating to the matter before the Authority, the terms and conditions of Mr Prasad's employment were provided for by an employment agreement that the parties signed on 23rd October 2001. At the date of the termination of his employment Mr Prasad was being paid a salary of \$38,000 per annum.

[3] On or about 25th September 2009, Mr Prasad had a heart attack. He was hospitalised until 30th September 2009. Following a short period of recuperation, Mr Prasad was fit for work again on 12th October 2009. During Mr Prasad's absence, his duties were carried out by another BIL employee, Mr Doug Parker. The evidence of Mr Colson is that when Mr Prasad returned to work after his illness, Mr Parker continued to work with Mr Prasad to ensure that he did not "overdo things." After approximately two weeks of being accompanied by Mr Parker, Mr Prasad indicated that he was well enough to work on his own again.

Client complaints

[4] Mr Colson says that during December 2009, he received a number of complaints from a client (Chorus) regarding the standard of the ground keeping carried out by Mr Prasad. He contacted Mr Prasad on 3rd December and arranged to meet at the premises of the client the next day to show Mr Prasad examples of what the client was complaining about.

[5] On 4th December 2009 a meeting took place between Mr Prasad and Mr Colson at the Chorus premises. Mr Prasad was shown the unsatisfactory state of the grounds. There is some conflict in the evidence as to the discussion. Mr Prasad says that Mr Colson was "very angry" and accused him of doing "sub-standard work" and that in particular, one job had not been done. In his oral evidence to the Authority Mr Prasad said that Mr Colson was "demeaning" and "personal" towards him. Mr Prasad says that he explained that the poor state of the grounds was because of a "small backlog" caused by his sickness absence. The evidence of Mr Prasad is that Mr Colson then told him that his work would be "cut" to three days (each week) and that Mr Prasad could expect a pay cut of 30%. When asked as to when he believed the

purported changes were to take place, Mr Prasad responded that Mr Colson did not say when.

[6] The evidence of Mr Colson is that the client, Chorus, had specifically asked that Mr Prasad not attend to their grounds anymore at this one particular site. Mr Colson says that he proposed to Mr Prasad that the emphasis of his duties should shift from grounds maintenance to cleaning. Mr Colson attests that cleaning was already a standard part of Mr Prasad's duties and his work schedule, hours and duties had often varied during his employment with BIL.¹ When asked about Mr Prasad's evidence that he was told that his days of work would be cut and that he could expect his salary to be cut by 30%, Mr Colson responded: "I can't say strongly enough how I refute that evidence, it is totally untrue." And later in the investigation meeting Mr Colson said Mr Prasad's evidence about the purported wage cut; "was a pack of lies." Mr Colson also refuted that he was demeaning towards Mr Prasad. Mr Colson says that what was discussed was an alteration to the scheduled work of Mr Prasad and this was something that had occurred often in the last decade. Mr Colson says that he discussed changes to Mr Prasad's work schedule for each week or fortnight. Mr Colson also informed that the scheduled work only accounts for a percentage of the work carried out by Mr Prasad, and there is other project work and "ready response" work that was never mentioned, as this would not change. Mr Colson summarised the situation as being that the client had a problem and this was rectified by removing Mr Prasad from that particular site, having someone else (Mr Parker) do the work there, and rescheduling Mr Prasad's work; and then they "moved on" from there.

[7] Having observed Mr Colson's demeanour, I conclude that it is likely that Mr Colson was somewhat more intemperate towards Mr Prasad than he is prepared to acknowledge. I also conclude that it is more probable than not that Mr Colson did propose rescheduling some of Mr Prasad's duties and that the emphasis would shift from grounds maintenance to cleaning. However, I do not accept Mr Prasad's evidence that he was told that his salary would be cut by 30%. I conclude that at best, this is mere conjecture on his part related to the proposed reduction in scheduled work, and at worst, this is a fabrication by Mr Prasad. I note that when Mr Prasad (via

¹ Indeed, when Mr Prasad was asked about his job title, his evidence was that he had been a cleaner but did other work besides this.

a lawyer²) raised a personal grievance on 25th January 2010, there is no mention of a percentage cut to Mr Prasad's salary, albeit there is mention of his days of work and remuneration being "unilaterally altered" even though Mr Prasad continued to be paid at a rate equivalent to \$38,000 per annum.

[8] Following the meeting on 4th December 2009, it seems that Mr Prasad carried on with more or less the same type of work as usual. On 14th December 2009, he was requested to return the company four wheel drive vehicle and some other materials or equipment, all used on ground maintenance, and swap it for a station wagon. Mr Prasad was going to be working with a Project Manager at Ongaru for some days and the four wheel drive vehicle was required while he was away. Mr Prasad says that on 14th December he was told by Mr Colson that there had been "many complaints" about him. The evidence of Mr Prasad is that Mr Colson told him that upon his return from Ongaru, his job would change and that Mr Parker was going to take over Mr Prasad's job. Mr Prasad says that he asked Mr Colson to put this in writing but this never happened.

[9] Mr Colson's recollection of the discussion on 14th December is that he reiterated how Mr Prasad would fill in his week but he had some reservations about whether Mr Prasad was being "frank" and whether Mr Prasad was "orchestrating something."

[10] Mr Prasad duly went to work at Ongaru from 15th to 18th December 2009 and there is no evidence of any further interaction between him and Mr Colson until 13th January 2010.³ In the meantime, Mr Prasad finished work for the year on 24th December. The evidence of Mr Colson is that Mr Prasad left the company vehicle at the office on 24th December without any comment or explanation. Mr Colson says that he assumed that Mr Prasad was going away over the holiday period and didn't want to leave the vehicle at his home in his absence.

[11] It is commonly accepted that Mr Prasad was due to start back at work again after the holiday break on Monday, 11th January 2010. But Mr Prasad says that he was sick on 11th and 12th January. He says that he contacted Mr Colson to inform about the

² Not Mr Hayes on this occasion. Mr Prasad has had two other lawyers representing him.

³ Though in his email of 18th January 2010, Mr Colson refers to an offer of work made on "Monday December 21."

sickness. Mr Colson's evidence is that he didn't know about Mr Prasad being sick but he says that he is "sure" that there was some discussion about why Mr Prasad wasn't at work for the two days when he met with Mr Prasad at the Melville telephone exchange on 13th January 2010. It seems that Mr Colson arranged to meet with Mr Prasad there because it is close to Mr Prasad's home – for the purpose of taking Mr Prasad back to the office to enable him to pick up the company vehicle for his work use again. Mr Colson attests that Mr Prasad did not want to take the company vehicle and he would not say why, or what his plans were. The evidence of Mr Prasad is that when he and Mr Colson meet at the Melville exchange, he was informed by Mr Colson that: "... my job was not available because of many complaints against me. I again asked for this to be put in writing." Mr Colson says that he reiterated how Mr Prasad would "fill in his week."

[12] Mr Prasad says that he did not return to work as he was "confused" about what the situation was. Mr Prasad continued to be paid (accrued holiday pay) albeit he never returned to work in 2010.

[13] On Saturday, 16th January 2010, Mr Prasad posted a letter to Mr Colson:

RE: EMPLOYMENT

I refer to our verbal conversation on 14th December 2009 and again on 13th January 2010 requesting a copy of my job description due to the enforced changes you have made to date. I have not received any. I now request under official information act that you supply me a true copy of all correspondence, documents and notes made pertaining to the above issue. I now also request that you supply me my current employment contract. I request this at your earliest and not later than seven days from the date of this letter.

[14] Given that the letter was posted on a Sunday and that Mr Colson has a post office box in the country, he may not have received the letter until possibly 18th January. In the meantime, on Sunday, 17th January 2010, Mr Colson sent the following email to Mr Prasad:

As discussed earlier, our customers have requested that you no longer attend to their grounds maintenance needs in a number of cases. Accordingly we have filled this role elsewhere. The job available to you as offered before Christmas is to do 2 x days of weekly cleaning, previously completed by yourself, covering the weekly provincial sites and by Doug Parker covering the Urban satellite sites. This could be complemented by completing the local 'Graffiti' ready response jobs. This could amount to an additional day of work on a weekly basis. This would be a regular 2 to 3 days.

Additional work would be available on an as required basis as programmed maintenance and project work dictates.

Your hourly rate would not change from its current level and a work vehicle would be available as required. I would appreciate your response to this by Tuesday Jan 19, or I will make permanent the staff covering for you.

In regard to the last sentence, Mr Colson explained that he had other staff doing the work of Mr Prasad on a temporary basis during his absence. Mr Colson also says that it was an “error” that he used the term hourly rate and he meant “salary.”

[15] Mr Prasad responded via an email dated 18th January 2010. He referred to Mr Colson’s “silly email” and repeated his request as outlined in his letter of 16th January albeit he mistakenly wrote “18th January 2010.” Mr Colson replied the same day querying the “correspondence” that Mr Prasad was referring to and informed that:

I have made you an offer of 2 x days work a week. There is a possible 3rd day weekly. During peak seasonal times there is the potential for more. I made you this on Monday December 14 and again on Monday 21 and again on Monday January 11.⁴ On the first occasion you turned me down. On the second occasion you declined to accept it. On the third occasion you asked for it in writing.

[16] On 19th January 2010 Mr Prasad responded via an email:

There is a genuine dispute here and we are unable to resolve this issue and I do not accept your current proposal, what hourly rate are you suggesting I am on a salary. I now request that we go into mediation with labour department official to mediate and now again request that by law you are required to supply me my current employment contract at your earliest no later than three days.

[17] Next day, Mr Colson responded with a cryptic email:

Can you please explain your absence from work for the past 8 days?

Given that the employment relationship between Mr Colson (via CPS) and Mr Prasad had been in existence more than 12 years, it is regrettable that neither of the men proposed a “face-to-face” meeting to sort out just what the problem was. Rather, Mr Prasad was receiving legal advice at this point; and Mr Colson never saw fit to enter into some constructive dialogue, even though it was clear, following the receipt of Mr Prasad’s email of 19th January, there was a substantial breakdown in the relationship. Mr Colson’s reluctance to take some initiative to resolve matters with Mr Prasad is even more peculiar, as he has acknowledged that Mr Prasad was an asset to the business.

⁴ It seems that this date is incorrect and it is more probable that the date should be Wednesday, January 13.

[18] Then via a letter dated 25th January 2010 (from his lawyer) Mr Prasad raised a personal grievance. The letter claims:

Mr. Prasad has a personal grievance in that he has been unjustifiably disadvantaged in his employment with Coastline Property Services (CPS). Should Mr Prasad resign, he will also have grounds to bring a claim against CPS for constructive dismissal. We conform for clarity that Mr. Prasad is not tendering his resignation at this stage and reserving all options available to him.

In regard to the nature of the alleged unjustified disadvantage, the letter informs:

The basis for unfair and unjustified action causing Mr. Prasad disadvantage and giving rise to this personal grievance is:

1. Reduction in hours:- You have varied the terms and conditions of Mr. Prasad's employment by reducing his hours without adequate consultation, fair process, or Mr Prasad's agreement to this variation. Mr. Prasad's hours have been unilaterally reduced and he has suffered lost income, stress, hurt and humiliation as a result of this.
2. Placement on hourly wage:- You have also varied the terms and conditions of Mr Prasad's employment by placing him on an hourly wage and displacing him as a salaried employee. Again, there was no adequate consultation, fair process or Mr. Prasad's agreement to this variation.
3. Customer complaints:- The alleged customer complaints relating to Mr. Prasad's work have not been shown to Mr. Prasad. Neither was Mr. Prasad told at any point that as a result of the complaints disciplinary action would be taken. Mr. Prasad had no sense of the level of dissatisfaction with his work and the complaints about it. Mr. Prasad was entitled to know about the seriousness of the concerns raised by customers and given the opportunity to comment on and, if necessary, correct the information on which they were based and the opportunity to then change or improve his work practices to the extent that was necessary.

The remedies sought for the alleged grievance were \$7,000 compensation and loss of wages "owing to the reduction in Mr. Prasad's hours."

[19] The lawyer for BIL responded on 3rd February 2010, refuting the claims that Mr Prasad had grounds for a personal grievance and highlighting that he has continued to be paid his usual salary of \$38,000 per annum on a fortnightly basis. The letter also informed (summarised):

1. Though Mr Prasad is "technically" on an hourly rate, he was paid the same amount each week, regardless of the hours he worked, "effectively a salary."
2. Mr Prasad's actual hours of work varied according to the work schedules set by Mr Colson. The schedules were determined by customer demand. In December 2009, Mr Prasad was not working a 40 hour week but was paid for 40 hours nevertheless. The scheduled hours were: Monday, part day Tuesday,

part day Wednesday and Thursday. The second week: work Monday and Tuesday, part day Wednesday and Thursday.

A key extract from the letter is:

Due to the complaints received from customers about Mr Prasad's work, Mr Colson was unable to put Mr Prasad back onto various properties doing maintenance work. Mr Prasad was not disadvantaged by this action, he was paid the same amount, but was required to do less work. Mr Colson could have chosen to pursue disciplinary proceedings with Mr Prasad, but felt that it was fairer to him to simply change his schedule and to provide him other work to do."

This is essentially the position that Mr Colson has conveyed to the Authority. Mr Prasad says that he is sceptical that Mr Colson would simply reduce his hours and not reduce his pay too, but the evidence is that until the termination of Mr Prasad's employment on 5th February 2010, he continued to be paid at the rate of \$38,000 per annum or \$1,461.53 per fortnight.

[20] The letter concludes:

CPS remain concerned that Mr Prasad has abandoned his job. There is a job available to Mr Prasad should he wish to return to it. CPS are currently covering his duties with temporary staff, a situation which cannot continue indefinitely. Mr Prasad is requested to confirm his intentions as to whether he wishes to return to work by Friday 5 February 2010 at 4pm. If he does not do so, he will be presumed to have resigned and his employment will terminate on that basis.

[21] The response on behalf of Mr Prasad, via a letter dated 5th February 2010, was to inform that mediation assistance had been requested and to request a copy of Mr Prasad's employment agreement.

[22] Via a letter dated 8th February 2010, BIL informed that as Mr Prasad had not indicated his intentions about returning to work, he is regarded as having resigned from his employment and that the company was not prepared to attend mediation. Mr Prasad was paid up to 5th February 2010.

Was Mr Prasad constructively dismissed?

[23] Upon being asked by the Authority to identify when it was that Mr Prasad says that he was allegedly constructively dismissed, Mr Hayes pointed to the email of 17th January 2010 from Mr Colson to Mr Prasad. Mr Hayes says that because Mr Prasad was required to make a response by 19th January 2010, it is this date that Mr Prasad's existing job finished and new conditions were imposed. But there is a substantial, and

in my view, insurmountable, flaw in that proposition. This is because in the letter of 25th January 2010, the (then) lawyer for Mr Prasad informed that:

Should Mr Prasad resign, he will also have grounds to bring a claim against CPS for constructive dismissal. We confirm for clarity that Mr. Prasad is not tendering his resignation at this stage and reserving all options available to him.
[Emphasis added.]

[24] The stark reality is that Mr Prasad never informed that he was resigning. But even if he had resigned, I conclude that such resignation could not have been converted to a constructive dismissal. While one can accept that Mr Prasad may have been apprehensive about his ongoing conditions of employment and the intentions of Mr Colson, the evidence is that while Mr Colson was proposing to provide less scheduled work to Mr Prasad, he says that Mr Prasad would have continued to receive the same remuneration, as well as other work as it arose. While Mr Prasad obviously took a cynical view of whether there would be such generosity of spirit on the part of Mr Colson, until such time as it was proved otherwise, the remuneration and general terms and conditions of Mr Prasad remained intact, apart from a proposed reduction in hours of scheduled work coupled with other work that arises. It has also been shown that Mr Prasad didn't always work a full week in any event, as the availability of work fluctuated. Furthermore the employment agreement at subclause 7c) provides:

- i) The hours and days of work in subclause b) i) and the usual start and finish times in subclause b) ii) may be varied by the employer at any time to meet operational requirements or the needs of the employer's clients.
- ii) Where practicable, notice shall be provided to the employee at the earliest possible time of any variations to the hours or days of work.

[25] I cannot help but conclude that Mr Prasad was either foolhardy or badly advised, as the wiser course of action for him to take would have been to return to work on 13th January 2010 and then make an assessment in the following weeks as to whether or not his employment had been affected to the extent that he could no longer continue.

[26] The onus is upon Mr Prasad to show that a constructive dismissal exists. Given that Mr Prasad did not resign, nor was he sent away and the evidence does not support a conclusion by Mr Prasad (or the Authority) that BIL intended to or did repudiate Mr Prasad's employment agreement. And I cannot find that there was a breach of the terms of Mr Prasad's employment terms and conditions that was serious enough to warrant Mr Prasad refusing to return to work. Further, I do not find that Mr

Colson followed a course of conduct with the deliberate and more dominant purpose of coercing Mr Prasad to resign. Nor do I find that there was a breach of duty on the part of Mr Prasad's employer that would have caused him to resign.⁵

[27] I have to say that it is regrettable that Mr Colson did not see fit to make a little more effort to clarify matters for Mr Prasad, particularly given the length of the employment relationship, but Mr Colson presented as a pragmatist by nature and it also appears that there was a mutual loss of trust that may not have been easy to overcome. In summary, I can see no merit in the proposition that Mr Prasad was constructively dismissed.

[28] Finally, there is another aspect relating to the refusal of Mr Prasad to return to work. The employment agreement contains an abandonment of employment provision at clause 10:

Where an employee is absent from work for a continuous period exceeding two days without consent of the employer, or without good cause, the employee shall be deemed to have abandoned their own employment without notice.

While BIL has alluded to the possibility that Mr Prasad may have been seen to have abandoned his employment, consistent with the above clause, there does not appear to be a reliance on it. I also raised the application of the clause with the parties at the investigation meeting. But as Mr Hayes submitted, there are two conditions or caveats to the clause. Firstly, the employee must be absent from work (for a continuous period exceeding two days) "without the consent of the employer." Mr Hayes submits that because Mr Prasad continued to be paid until 5th February 2010 (albeit holiday pay), he had the consent of the employer to be absent. Further, as Mr Colson informed that there were staff "covering" for Mr Prasad during his absence, there was consent for it. I accept those submissions. The second caveat is; "or without good cause." Mr Hayes submits that the changes to Mr Prasad's scheduled hours of work constituted "good cause" for Mr Prasad to be absent. I do not accept that this is so. There was no good reason or cause for Mr Prasad to remain absent from work after 13th January 2010 without a valid explanation. Nonetheless, it seems to me that there is a conflict between the two conditions in that once it is established that there is consent for the absence; and I find that there was until 5th February 2010, the alternative "without good cause" condition is negated.

⁵ *Auckland Shop Employees IUOW v Woolworths* [1995] ACJ 963 (ERNZ) Sel Cas 136 (CA).

[29] However, Mr Prasad was given notice on 3rd February 2010⁶ that if he did not confirm by 4:00p.m. Friday 5th February 2010, that he wished to return to work, then he would be deemed to have resigned and hence his employment was terminated. Mr Prasad failed to indicate that he wished to return to work; hence BIL deemed him to have resigned. I find that BIL was entitled to arrive at that conclusion and that the termination of the employment of Mr Prasad was justified.

Determination

[30] For the reasons set out above, I find that Mr Prasad was not constructively dismissed. Rather, he refused to return to work and that such refusal was justification for the termination of his employment. Mr Prasad does not have a personal grievance and his claims are dismissed.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority

⁶ Via the letter from the lawyer for BIL of this date.