

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 292
3110392

BETWEEN

NEVINS SANDANAM
Applicant

AND

ADT SECURITY LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Maryline Suchley, advocate for the Applicant
Kylie Dunn, counsel for the Respondent

Investigation Meeting: 20 April 2021 at Christchurch

Date of Determination: 9 July 2021

DETERMINATION OF THE AUTHORITY

A. The claim is dismissed.

B. I reserve costs, subject to the timetable set out below.

Employment relationship problem

[1] Nevins Sandanam was employed by ADT Security Limited as a direct sales consultant from 8 June 2016. Mr Sandanam raised various issues with ADT Security at different times during his employment. Mr Sandanam gave notice of resignation on 1 May 2017. ADT Security paid out Mr Sandanam's notice period.

[2] By letter of 30 June 2017, solicitors then acting for Mr Sandanam raised his personal grievance claim of constructive dismissal. The letter set out some history of Mr Sandanam's complaint that he had been bullied and harassed by his manager, prior to the resignation. It

included reference to Mr Sandanam's unresolved concerns about incentive plan changes. Compensation and other monetary remedies were sought.

[3] On 29 June 2020, the advocate acting for Mr Sandanam lodged a statement of problem in the Authority. The application states Mr Sandanam's problems are personal grievances of constructive dismissal and unjustified disadvantage. It also refers to s 110A(1)(c) of the Employment Relations Act 2000 (ERA), good faith, an obligation to be a fair and reasonable employer and s 85 of the Health and Safety at Work Act 2015. There is also reference to s 103(1)(j) of the ERA. Mr Sandanam claims compensation (s 123(1)(c)(i) of the ERA), an apology, a reference/certificate of service and costs.

[4] ADT Security denies that Mr Sandanam was disadvantaged or dismissed. It accepts that Mr Sandanam raised a personal grievance on 30 June 2017. It also says that events prior to 1 April 2017 (90 days prior to the 30 June 2017 letter) set out in the statement of problem are out of time and it does not consent to grievances being raised out of time. ADT Security accepts that Mr Sandanam had raised an unjustified disadvantage with it in February 2017 about changes in an incentive scheme. No action with respect to that grievance was commenced within the three year limit set by s 114 of the ERA.

[5] Actions capable of amounting to a personal grievance, but which were not raised as a personal grievance claim with the employer within 90 days, could be the subject of evidence in support of a different personal grievance action properly before the Authority, if relevant. Similarly, the limit on commencing a personal grievance action in the Authority more than three years after it was raised, does not prevent evidence about those events being brought in support of a different personal grievance claim properly before the Authority. Because it appeared that Mr Sandanam's personal grievance of unjustified dismissal (constructive dismissal) was raised on 30 June 2017 and that action was commenced just within the three year limit, there was little purpose in dealing with limitation matters as preliminary issues.

[6] The following issues arise for determination:

- (a) What happened in July 2016?
- (b) What happened in December 2016 and February 2017?

- (c) What happened from March 2017?
- (d) Was Mr Sandanam constructively dismissed by ADT Security?
- (e) Does Mr Sandanam have another type of personal grievance against ADT Security?
- (f) If yes to issues (d) or (e), what remedies is Mr Sandanam entitled to?

What happened in July 2016?

[7] There is a written employment agreement, signed and dated in May 2016, under which Mr Sandanam started work in Christchurch as a “Direct Sales Consultant” on 8 June 2016. He reported to Jason Carboni, the consumer sales manager. Mr Carboni was based in Auckland and was responsible for 11 sales people based throughout New Zealand. Mr Sandanam travelled to Auckland for some initial training and induction.

[8] Mr Sandanam now describes it as “very basic training” and “basic product training sessions and induction”. Mr Sandanam also says in evidence that when he returned to Christchurch, it took over six weeks to get his own computer and a permanent desk. He says he did not get a company laptop until “months later”. Mr Sandanam told me in evidence that these matters are not part of his grievance claim. It is not necessary to make any findings on these points.

[9] Gerhard Venter was the manager responsible for the leadership, operational delivery and financial performance of the part of ADT Security’s business within which Mr Sandanam worked. There was an email exchange between Mr Sandanam and Mr Venter on 24 & 25 July 2016. The exchange refers to discussions between Mr Venter and Mr Sandanam on Friday 22 July and Monday 25 July. Mr Sandanam can be taken as raising a sense of grievance about his relationship with Mr Carboni. The emails do not include details about Mr Carboni’s conduct to cause Mr Sandanam’s view. However, Mr Sandanam stated that he would be happy to continue his employment providing he did not have to report to Mr Carboni. Mr Venter’s response was that the reporting structure would not change but he would facilitate a feedback session with Mr Carboni.

[10] Either Mr Sandanam, by his discussions with Mr Venter and his email, raised a personal grievance claim or he did not. If the July 2016 communications raised a personal grievance, Mr Sandanam did not commence an action in the Authority within three years. If the July 2016 communications did not raise a personal grievance, there is no evidence of any other steps within 90 days from that time taken by Mr Sandanam to properly raise a grievance about Mr Carboni's actions in June and July 2016. On any approach, there is no grievance about the June and July 2016 matters before the Authority. However, I need to consider their relevance to matters properly before the Authority.

[11] Mr Sandanam in evidence says "From the very beginning I was subjected to bullying and harassment by Jason". He says he felt he was "constantly harassed, humiliated, bullied and belittled by Jason on such a regular basis". However, there is little specific evidence of the behaviour by Mr Carboni in June and July 2016 to support these assertions. Mr Sandanam's 24 July 2016 email does not include any specific details. The February 2017 email about the incentive plan grievance does not include any specific details of the June and July allegations. A 15 March 2017 email does not include any specific details of the June and July allegations. Mr Sandanam's 1 May 2017 resignation email refers to Mr Carboni's "behaviour and negative attitude" and Mr Sandanam having been "harassed, bullied, belittled and humiliated", without any specifics. The 30 June 2017 letter does not include any specific details.

[12] There is a statement from Lisa Winders, a former ADT Security employee. Ms Winders left in July 2016. Her statement is mostly about her experience at ADT Security and with Mr Carboni. That information is not relevant to Mr Sandanam's claims. However, Ms Winders states that Mr Sandanam told her he had concerns about how he was being managed by Mr Carboni. Ms Winders says that Mr Sandanam told her that Mr Venter had contacted him, asked him to stay and told him that he would report directly to Mr Venter, not Mr Carboni. It is unlikely that Mr Venter would have told Mr Sandanam that the reporting line would change, given that his 25 July email confirmed that the reporting line would not change. Either Mr Sandanam did not accurately tell Ms Winders what had been said to Mr Venter, or Ms Winders is mistaken about what was said to her. Ms Winders' evidence adds nothing of substance to Mr Sandanam's claims.

[13] The only reasonable view that emerges from the material before the Authority is that Mr Sandanam had some concern about Mr Carboni's management of and communication with him and the sales team, raised that with Mr Venter and expressed his appreciation for Mr Venter's response. Mr Venter described those concerns to Mr Carboni, Mr Carboni had not been aware of the concerns, Mr Carboni reacted positively to the matters being raised and Mr Venter offered to facilitate a session between Mr Sandanam and Mr Carboni. Mr Sandanam accepted in evidence that a facilitation session took place. None of this supports Mr Sandanam's personal grievance claims now. I do not accept that Mr Carboni bullied or harassed Mr Sandanam in June and July 2016.

What happened in December 2016 and February 2017?

[14] There had been some email exchanges between Mr Carboni and Mr Sandanam in November 2016. They arose out of an issue between Mr Sandanam and others regarding ADT Security processes and timeframes to meet customer requirements. The emails were included in material lodged for Mr Sandanam. The messages from Mr Carboni do not substantiate Mr Sandanam's assertion that he was "harassed, bullied, belittled and humiliated" by Mr Carboni.

[15] Mr Venter visited the Christchurch branch on 29 November 2017. He met with Mr Sandanam while there. There is some conflict in their recollections about this. However, it is not necessary to resolve the conflicts. The evidence, even on Mr Sandanam's account, adds nothing to the personal grievance claim properly before the Authority.

[16] ADT Security operated a discretionary incentive plan. It was not a term of Mr Sandanam's employment agreement, but it applied to him. There is no reason to doubt Mr Venter's and Mr Carboni's evidence that the plan was set on a yearly basis. The 2016 plan ended in late 2016. ADT Security introduced a changed plan with adjusted thresholds for incentive payments. It is not necessary to canvass how this was done.

[17] There is an 8 December 2016 email from Mr Carboni to his direct reports advising them all of the new commission threshold targets for December 2016. Mr Carboni also sent an email to Mr Sandanam telling him that as he had not signed the new incentive plan, he would not be entitled to commission for his December sales. Mr Sandanam replied that he was seeking advice and would respond in due course. Several days later, Mr Carboni advised that he and

Mr Venter were going to be away shortly until mid-January so if Mr Sandanam was going to sign the incentive plan, he needed to send it to Mr Carboni before close of business on 16 December. Mr Carboni said that if it was not signed, Mr Sandanam would not qualify for commission on his December sales onwards.

[18] In response to Mr Carboni's email, Mr Sandanam forwarded his earlier message about seeking advice and said "It appears as though you are not reading your emails". Mr Carboni replied, confirming that he was reading his emails and repeated the request for an update from Mr Sandanam about his incentive plan by close of business next day. There was then a phone call between the two men. Later, Mr Sandanam sent an email. He said he did not appreciate the phone call about the incentive plan. He said he regarded it as pressure, not help. He said he would "file a complaint" if it continued. He asked that all communication on the issue be by email. Early the following morning, Mr Carboni by email took issue with Mr Sandanam telling him during their phone call to "get it through my thick head". Mr Sandanam replied:

Hi Jason

If you don't want to be spoken to that way, then may I suggest that you start talking to people with courtesy, politeness and respect and then in return everyone will speak to you in a polite, courteous and respectful manner.

...

After working with you for over 6 months it has become crystal clear to me that you are the weakest member in the transactional sales team.

[19] In February 2017, Mr Sandanam specifically raised a personal grievance with ADT Security regarding the incentive plan issue. I make no findings about whether Mr Sandanam had a valid personal grievance. Mr Sandanam's concerns about the incentive plan were raised with ADT Security in February 2017. No action in relation to that personal grievance claim was commenced in the Authority within three years of it being raised. It is not suggested that ADT Security had no right to amend the previous incentive scheme. It is not a matter before the Authority for determination.

[20] The best understanding now about the interactions between Mr Sandanam and Mr Carboni over the incentive plan issue can be gained from the email exchanges in December. Mr Carboni's messages could not reasonably be construed as bullying, harassing or intimidating. His December messages were a reasonable follow-up on an important issue, given his impending absence on leave. They drew a combative response from Mr Sandanam. There

is nothing of substance in Mr Sandanam's replies to support the contention that Mr Carboni applied "pressure" or spoke without "courtesy, politeness and respect" to Mr Sandanam.

[21] The interactions over the incentive plan to February 2017 do not support Mr Sandanam's current personal grievance claim.

What happened from March 2017?

[22] Although Mr Sandanam raised issues in July 2016 and a grievance in February 2017, he took no further action to resolve those employment relationship problems.

[23] Mr Sandanam says that matters came to a head in early March 2017 at a sales meeting. His evidence is that ADT Security had not done an installation for his customer. He is critical of Mr Carboni's response to the customer's complaint, claiming that Mr Carboni "appeared to be trying to cover up or dismiss the complaints without addressing them". Mr Sandanam says "It was clear that there was further action by Jason to intentionally undermine my performance and to set me up to fail and then get rid of me".

[24] This led to Mr Sandanam's 15 March 2017 call and email to Tanya Meyers, ADT Security's HR manager. Mr Sandanam says in evidence that specifics are in the email, headed "Formal Complaint". I will summarise it. The email refers to the July 2016 "formal complaint" and Mr Sandanam's December 2016 email where he "warned" Mr Carboni to stop harassing and bullying him about the new incentive plan. It says that, following the July complaint, Mr Venter "twisted" Mr Sandanam's arm to stay on. It mentions discussions with the HR manager, Mr Venter, Mr Carboni and Mr Sandanam at the time. The 15 March email description adds nothing specific to the understanding of the July and December events canvassed above.

[25] In the email, Mr Sandanam repeats his opinion that Mr Carboni was the "weakest link" in the sales team. He describes Mr Carboni's attitude in general as "appalling", claiming that he has "provoked" staff and Mr Sandanam. He says that sales meetings are "a joke", that the sales force does not respect Mr Carboni and that the sales force is disgruntled. Mr Sandanam says he sought to maintain harmonious relationships and was "speaking up" and would not put up with that behaviour. His view was that the management team were not upholding company values, which Mr Carboni violated on a "daily basis". Mr Sandanam was critical of

Mr Carboni's people skills and his treatment of women. He expresses surprise that Mr Carboni was still employed after such an "appalling track record". Mr Sandanam sought a full investigation and was "happy" to continue his current position if he did not have to report to Mr Carboni or would accept a transfer to another division. The email states that two other emails were attached.

[26] The printout of the 15 March email produced in evidence did not show the other emails as attachments. Mr Sandanam told me that one of the "attached" emails was his 24 July 2016 email to Mr Venter. He could not identify in evidence the second attached email. I assume that Mr Sandanam intended to attach a February 2017 email or the December 2016 emails. Mr Sandanam did not suggest that the unidentified email was not part of the evidence before the Authority.

[27] Mr Sandanam sent a follow-up email to Ms Meyer's at 5.51am on 21 March. It states that there had been neither an acknowledgement nor a response to his 15 March email. In evidence, Mr Sandanam confirmed that on 15 March Ms Meyer had told him that she would need to speak to Mr Venter about his "Formal Complaint" and that Mr Venter was on leave, due to return on 20 March. In evidence, Mr Sandanam says he "had to follow it up" as he had heard "nothing further", to explain his 21 March email. I asked Mr Sandanam why he sent the 21 March email when he already knew that Ms Meyer would not respond until she had spoken to Mr Venter on his return. Mr Sandanam replied by being critical of ADT Security for not arranging another manager to deal with the matter. He said in evidence that he had disputed the reason for the delay when told of it by Ms Meyer on 15 March. I do not accept that evidence. Mr Sandanam would probably have referred to that objection in his 21 March email, if it had been voiced at the time. I do not accept there was an unreasonable delay by Ms Meyer or ADT Security, deferring its substantive response until after Mr Venter's return from leave.

[28] Mr Sandanam consulted his doctor on 23 March. Medical notes have been produced in evidence. The notes record Mr Sandanam telling his doctor that he was being bullied at work, and that he had reported it. However, the medical certificate that Mr Sandanam gave to ADT Security at the time just certified him as medically unfit for work from 23 March and fit to return on 10 April. Mr Sandanam's evidence is that nothing specific happened on 21 or 22 March to precipitate his visit to the doctor and nothing of relevance happened during his

absence on sick leave. Mr Sandanam saw his doctor again on 6 April and for “medical reasons” was certified as needing more time off, but able to return to work on 12 April. The 6 April note records “Has Lawyer involved to negotiate working agreement/terms at work”.

[29] On 10 April ADT Security placed an advertisement on the Seek website. It advertises for an “ADT Authorised Security Representative” in Christchurch. Interested candidates are given an email address, phone number and contact person. There is no reason to doubt Mr Sandanam’s evidence that he saw the ad while he was on sick leave. His evidence is that it was his position being advertised and that he saw it before he returned to work. Although Mr Sandanam formed the view it was his position being advertised, he did not raise that point with ADT Security before his resignation.

[30] Mr Sandanam returned to work on 12 April. His evidence is that Mr Carboni started to bully and harass him again by the manner in which Mr Carboni spoke to him and by micro-managing him. Mr Sandanam sought an “urgent teleconference” with Ms Meyer and Mr Venter. The evidence is that there was a call on 13 April. Mr Sandanam told me that this was a reasonable response to his approach to Ms Meyer. Mr Sandanam’s evidence is that the specifics of his complaint were set out in the 12 April email exchange with Mr Carboni.

[31] The 12 April email exchanges were produced in evidence. At 6.10am Mr Carboni welcomed Mr Sandanam back and asked for him to phone around 10am to discuss sales and quotes during his absence. Shortly before 10am, Mr Sandanam replied, apologised for the delay, referred to laptop connections problems he had been experiencing that morning, said that the meeting rooms were booked and suggested a call on 13 April. Mr Carboni in response agreed to a call on 13 April, but needed to talk that day about “a few things”. He suggested 12pm. In a second email at 11.22am Mr Carboni also required Mr Sandanam to email his “activity spreadsheet by COB today”. Mr Sandanam by email at 12.01pm agreed to talk about sales and quotes while he had been away “and you agree to speak to me in a polite and respectful manner during our conversation”. Mr Carboni at 12.06 said he needed to conduct a return to work interview as well as go through sales and quotes. He also said “I see you are at home so I would like to know why you aren’t at the office today?”

[32] Mr Sandanam responded at 12.14pm:

Hi Jason,

Please get your facts straight. I was in the office at 9.00 am this morning and I am in the office now.

Did you not read my email below that I was trying to get connected to the network in the office.

I went home briefly to get my jacket because I had forgotten to bring it in this morning. I was feeling cold in the office.

[33] There was a reply by Mr Carboni at 12.19pm:

Nevins,

Please understand that I am going from the tracker report which said you were home at 11.23...I was delayed sending the email to you so the information was redundant. You clearly drove back to work whilst I was delayed.

Yes I did read your email hence why I asked you to call me..

Please call me now so we can go through this report.

[34] Mr Sandanam replied by email at 12.47pm:

Jason,

It absolutely surprises me that the tracker report informed you that I was home for a few minutes however it failed to inform you that I was in the office this morning and that I was back in the office soon after.

I will not tolerate you bullying and harassing me.

[35] Mr Carboni's response at 12.57pm was:

Nevins,

I am not bullying you nor am I harassing you.

Yes you were at the office and then left at 10.30am. I was concerned as you were home between 10.51 and 11.10am and then again at home between 11.22am to 11.33. You arrived back to the office at 11.53.

Hence why I asked why you weren't at work.

[36] After these exchanges, Mr Sandanam spoke with and sent an email to Ms Meyers on 12 April. I will set it out as it led to the meeting with Mr Venter and Ms Meyers the next day:

Hi Tanya,

Further to our phone conversation earlier please find below the email trail with Jason since I returned back to work today.

This is not a misinterpretation by Jason as you were trying to make out during our conversation. This is bullying and harassment and I don't appreciate being bullied and harassed by Jason like this. This is unacceptable.

I was feeling cold in the office this morning and I drove home to get myself a jacket. Jason has never had an issue with me working from home in the past and also working from home early in the morning or late at night. It seems a bit strange that he seems to have an issue with it today. There has never ever been an issue either with me working back late at night in the office or when I have had to visit customers.

It is very obvious that I am being targeted.

There is a discrepancy with the time I was at home as well. I would like a copy of this GPS tracker report released to me.

He states that he is concerned however never bothered to email or find out while I was off sick.

Can you please get back to me with details in relation to the process moving forward.

[37] There is an email from Ms Meyers to Mr Sandanam copied to Mr Venter at 4.33pm on 13 April with a list of “Agreed Actions from our meeting today”. Mr Sandanam told me that it accurately records what had been agreed during the 13 April meeting. To summarise: Mr Venter asked Ms Sandanam to complete an ADT Security complaint form with specific examples of Mr Carboni’s behaviour; Ms Meyers was arranging confirmation of and would draft terms of reference for an independent investigator; and any meetings between Mr Carboni and Mr Sandanam would include Mr Venter and Ms Meyers. A time was set for Mr Sandanam, Mr Venter and Ms Meyers to meet soon after Easter following these other actions. Ms Meyer’s email included ADF Security’s harassment policy, its ethical conduct guide and a “Discrimination or Harassment Complaint Form”.

[38] The ethical conduct guide extends to “Bullying, abusive language, physical aggression, intimidating or violent behaviour or disparaging comments”. Such conduct is not tolerated. The guide includes reference to “Speak Up Resources”. I take the harassment policy as applying also to bullying type complaints in addition to the other types of harassment expressly defined in it. ADT Security aims for a working environment “free from harassment and where ...staff are treated with courtesy and respect”; to provide an effective complaints procedure; and to treat all complaints in a sensitive, fair, timely and confidential manner. ADT Security has a responsibility to treat complaints seriously and take immediate action to investigate and resolve the matter. Employees have an obligation to take either informal or formal action, if being harassed. A written or oral complaint requires a prompt and thorough investigation. All complainants should complete the Harassment complaint form. This gives context to Mr Venter’s request during the 13 April meeting for Mr Sandanam to complete the form that was attached to Ms Meyer’s email, and Mr Sandanam’s agreement to do so. The form itself seeks a description of “any specific incidents that show you were ...harassed? Please describe exactly what occurred, when it happened, and who else saw or heard it happen”.

[39] Mr Sandanam was off work over Easter, between 14 April and 17 April. Nothing of relevance happened over that period.

[40] Mr Sandanam returned to work on Tuesday 18 April. His evidence is that Mr Carboni was in the front meeting room when he arrived at work. Mr Sandanam kept his distance from Mr Carboni. His evidence is that he was instructed to that effect by Mr Venter. However, Mr Venter's evidence is that it had been agreed for him to be copied into emails between Mr Sandanam and Mr Carboni, but there was no specific instruction for Mr Sandanam (and Mr Carboni) to keep their distance from one another. Mr Carboni says he was not given such an instruction. Mr Venter and Mr Carboni both took care in their evidence to be specific about what they recalled, what they did not recall and what they agreed with or disputed. Mr Sandanam was not so careful when giving his evidence. Mr Venter's and Mr Carboni's evidence on the point is more reliable. It is also likely that an instruction like that, if given, would have been included in Ms Meyer's "Agreed Actions" email. I do not accept that there was an instruction to Mr Sandanam and Mr Carboni to keep their distance from one another.

[41] Mr Sandanam's evidence is that on 18 April Mr Carboni came and sat at a desk facing him, something "he never usually did" when in Christchurch. He says that Mr Carboni later followed him to the lunchroom and the toilet. Mr Carboni's evidence is that he sat near Mr Sandanam. The person who usually occupied the desk happened to be away. Mr Carboni's evidence is that he has no idea whether he was in the lunchroom or the toilet at the same time as Mr Sandanam more than four years ago. However, Mr Carboni denies that he was bullying Mr Sandanam by following him around the workplace.

[42] Mr Sandanam told me that he did not report the "following around" assertions to Mr Venter or Ms Meyers. They were not mentioned in Mr Sandanam's 1 May 2017 resignation email. The documents show they were first raised on 30 June 2017. If Mr Carboni had behaved as claimed, it is likely that Mr Sandanam would have specifically made that claim at the time or when he resigned. I compare the absence of that complaint to Mr Sandanam's email early on 18 April 2017 raising concern about heating in the office and earlier unsuccessful attempts to resolve the heating concern. The 18 April email demonstrates that Mr Sandanam promptly and expressly raised matters that concerned him. Similarly, Mr Sandanam referred his concerns about the 12 April email exchange to Ms Meyer.

[43] Mr Sandanam's evidence is that, before he resigned, he had requested a copy of CCTV footage. His evidence is that he told the person why he wanted the footage. However, he then

contradicted that by telling me that he had not given the reason for wanting the footage at the time of his request. The 30 June grievance letter does not refer to Mr Sandanam having made a request on 18 April. I find that Mr Sandanam probably did not request any CCTV footage.

[44] Mr Sandanam says “a few of my colleagues” witnessed Mr Carboni’s conduct on 18 April. However, Mr Sandanam did not produce any evidence from these colleagues.

[45] On balance, I prefer Mr Carboni’s account of the events on 18 April. Mr Carboni was present in Christchurch as a normal part of attending to his responsibilities. I do not accept that Mr Carboni bullied or harassed Mr Sandanam during the Christchurch visit.

[46] Mr Sandanam left work at some point that day. He obtained a medical certificate that he was medically unfit for work from 18 April and should be fit to return to work on 25 April 2017. Mr Sandanam obtained a further certificate on 24 April certifying him as medically unfit from 18 April and should be fit to return to work on 2 May 2017. The notes produced in evidence include:

Lawyer suggesting to tender resignation with compensation.
Planning to tender resignation next week
Requesting med cert to cover until next week, then will be handing in resignation
Reports: company has advertised for replacement.
Currently and has been actively job searching for alternative

[47] Mr Venter wrote to Mr Sandanam on 28 April 2017, following on from their 13 April exchanges. Mr Sandanam’s evidence is that he did not receive the letter until after his resignation. There is no reason to doubt that evidence. The correspondence could not have contributed to Mr Sandanam’s decision to resign, so it is not necessary to set it out or summarise it.

[48] Mr Sandanam sent his resignation email early on 1 May 2017 to Mr Venter and Ms Meyers. I will summarise it. Mr Sandanam says he was harassed, bullied, belittled and humiliated by Mr Carboni and mentions the July 2016 and March 2017 complaints. He says he was being positive and trying to deal with Mr Carboni professionally and diplomatically, but Mr Carboni did not have the same skills. Mr Sandanam says that the management team were not supportive during his formal complaints and describes the response as “nothing but a series of lame excuses” and “inadequate”. He says that other staff had complained about Mr Carboni,

but he remained employed. Mr Sandanam states that he had seen his job advertised recently, despite Mr Carboni having told him that another sales consultant would not be appointed in Christchurch. Mr Sandanam says that this failure to consult with him beforehand and the timing of the advertisement “says it all”. He refers to the unresolved February grievance about the incentive plan and the considerable impact on his income. These reasons caused him to lose trust and confidence in ADT Security to keep him free from being bullied and to treat him fairly and reasonably and in good faith, hence his resignation. Mr Sandanam was positive about his work and the feedback he had received, but outlined his understanding of the branch’s underperformance and staff turnover, summarised as “There appears to be a culture of setting people up to fail rather than to succeed”. Mr Sandanam said that it had all caused him tremendous stress and anxiety. He did not want to work or deal with Mr Carboni during his notice period, offered assistance to his replacement before his departure, wished Mr Venter and the company “all the best” and asked for an acknowledgement.

[49] There is no reason to doubt Mr Venter’s evidence that the advertisement was for a vacancy in a different team, not Mr Sandanam’s position.

[50] Mr Venter wrote on 2 May, accepting Mr Sandanam’s resignation, confirming that notice would be paid with Mr Sandanam’s resignation effective immediately, and advising about final pay and company property arrangements.

[51] In evidence, Mr Sandanam said there was a problem with his final pay. However, he confirmed that there is no claim for the Authority to determine.

[52] Solicitors then instructed by Mr Sandanam wrote to ADT Security on 30 June 2017 raising his personal grievance of constructive dismissal. The letter outlines the July 2016 matter, the December 2016 and February 2017 incentive plan matter, says that Mr Sandanam felt “targeted” after lodging the incentive plan grievance, outlined the March sales issue followed by Mr Sandanam’s 15 March formal complaint, Mr Sandanam’s needing to take 2 weeks off “unpaid”, the events of 12 and 13 April, Mr Sandanam’s discovery that his job had been advertised, the events of 18 April and the subsequent certification that Mr Sandanam was medically unfit to work. The letter concludes that Mr Sandanam’s resignation amounted to a constructive dismissal because:

As a result of all the above, particularly ADT's continued failure to address his complaints of bullying and harassment, its advertisement of his job while he was absent on sick leave, and Mr Carboni's denial that ADT was looking for further staff, Nevins felt he could no longer rely on ADT to treat him fairly and reasonably and to act in good faith towards him. He had lost all trust and confidence in ADT as an employer and he had no choice but to tender his resignation. He did that on 1 May 2017. It was accepted immediately, and ADT paid Nevins his notice in lieu.

[53] There was a request for information. Remedies in respect of the grievance were claimed.

[54] Some December 2017 correspondence with the solicitors was produced. Matters remained unresolved.

[55] The present action was lodged in the Authority on 29 June 2020.

Was Mr Sandanam constructively dismissed by ADT Security?

[56] Mr Sandanam's 1 May 2017 resignation email was not produced in evidence until the investigation meeting, despite both parties having access to it. Ms Suchley then submitted that the 1 May email constituted the raising of a grievance by Mr Sandanam. If that is correct, the present action, commenced on 29 June 2020, is barred by the three year limit set out in s 114(6) of the Employment Relations Act 2000. There is no power to enlarge the statutory time limit for personal grievance proceedings.¹

[57] I accept that Mr Sandanam by his resignation email on 1 May 2017 made ADT Security sufficiently aware of some concerns since April 2017 for it to be able to respond to and know how it should address those concerns. To the extent that the 1 May email conveyed complaints, they would be matters within the statutory definition of a personal grievance set out in s 103(1)(b) of the Act. Elements of the complaint would fall within the definition of a personal grievance under s 103(1)(c)² of the Act. However, the contention that Mr Sandanam's resignation amounted to a constructive dismissal by reference to events on 18 April, against the background of his earlier complaints, was not raised sufficiently by the 1 May email. I accept

¹ *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128.

² By reference to s 104(1) and s 107(1)(e) of the Employment Relations Act 2000.

that the constructive dismissal grievance claim was first raised by the 30 June 2017 letter from Mr Sandanam's lawyer who was then acting.

[58] Constructive dismissal includes cases where the employee is given a choice of resignation or dismissal, where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign and where a breach of duty leads an employee to resign.³ The statement of problem includes the assertion that ADT Security failed to provide a safe workplace, giving rise to a constructive dismissal. This invokes the third category of constructive dismissal. It is necessary to consider whether the resignation has been caused by a breach of duty by the employer. If yes, it is then necessary to consider whether the breach of duty was of sufficient seriousness to make it reasonably foreseeable that the employee would not be prepared to work under the prevailing conditions.⁴

[59] For the reasons set out earlier, I do not accept that Mr Sandanam was bullied or harassed by Mr Carboni in June and July 2016. I do not accept that Mr Carboni's exchanges with Mr Sandanam between December 2016 and February 29017 were bullying, harassment or intimidation. I do not accept that Mr Carboni did anything improper to cause Mr Sandanam's 15 March 2017 call and email. I do not accept that ADT Security breached an obligation owed to Mr Sandanam by not responding before he went on sick leave. I do not accept that Mr Carboni's emails on 12 April amount to him bullying, harassing or intimidating Mr Sandanam. I do not accept that Mr Carboni behaved improperly on 18 April 2017. In summary, Mr Sandanam has not established that ADT Security breached any duty owed to him so as to cause his resignation.

[60] Mr Sandanam had a statutory right, subject to limitation issues, to pursue the claims and initiate proceedings in respect of the claims he raised in July 2016 and February 2017. He did not. I do not accept that ADT Security breached any obligation owed to Mr Sandanam by not taking further steps to resolve the July and February claims, absent further steps by Mr Sandanam. ADT Security responded to the March 2017 issues by offering an independent investigation, but Mr Sandanam did not provide specifics of his complaint. Mr Sandanam did

³ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] ACJ 963.

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Inc* [1994] 2 NZLR 415.

not like working under Mr Carboni's management, but to the extent that he raised complaints, they lacked substance. Mr Sandanam resigned on notice, as he was entitled to do. ADT Security elected to pay out his notice period, as it was entitled to do. Mr Sandanam's personal grievance claim of constructive dismissal does not succeed.

[61] I am referred to s 110A(1)(c) and s 103(1)(j) of the Employment Relations Act 2000. Properly understood, these provisions are not relevant to this matter. By effect of s 110A(1)(c), an employer engages in adverse conduct for a prohibited health and safety reason by subjecting the employee to detriment in circumstances where other workers are not subject to the detriment. This section must be read with s 110A(2), so the conduct comprising the detriment is actionable if engaged in by the employer for a reason described in s 89⁵ of the Health and Safety at Work Act 2015. Section 89 of that Act covers workers exercising powers and functions under the Health and Safety at Work Act 2015. Section 103(1)(j) gives an affected worker the right to make a personal grievance claim if the employer engages in adverse conduct for a prohibited health and safety reason. The gist of s 103(1)(j) is that workers have access to the statutory personal grievance claim if they suffer detriment in their employment because they have exercised health and safety powers and functions. Mr Sandanam did not exercise any powers or functions under Health and Safety at Work Act 2015.

[62] I assume the intention was to argue that ADT Security's alleged breach of health and safety obligations owed to Mr Sandanam gives rise to a personal grievance under s 103(1)(b) of the Employment Relations Act 2000. Mr Sandanam has not proven any breach of obligation on the part of ADT Security, such as would amount to a constructive dismissal. Even if I had found some substance to his complaints but the breaches were not sufficiently serious to support the constructive dismissal claim, Mr Sandanam raised these grievance claims by his resignation email on 1 May 2017. The proceedings lodged on 29 June 2020 were too late.

Summary

[63] As explained above, I do not accept there was any breach of duty. Mr Sandanam's personal grievance claim of constructive must be dismissed.

⁵ The statement of problem refers to s 85 of the Health and Safety at Work Act 2015.

[64] No other grievance claims were lodged in the Authority within time so as to comply with s 114(6) of the Employment Relations Act 2000.

[65] I am asked to reserve costs. Any claim should be made by lodging and serving a memorandum within 28 days. The other party may then lodge and serve a memorandum in reply. I will then determine costs.

Philip Cheyne
Member of the Employment Relations Authority