



## **Employment relationship problem**

[1] Mr Andre Balcour Van As was employed as a maintenance engineer by Auckland Airport Kiwi Hotel Limited (Kiwi Hotel) from 1 November 2010. He resigned and his employment ended on 11 October 2012.

[2] Following termination, Mr Van As raised a personal grievance alleging he was harassed during his employment. The specific incidents of harassment were:

- Refused time off on weekends
- Threats to kick him out
- Threatening behaviour in heated discussions
- Assaulted three times
- Frosting placed on windows at his accommodation at the Hotel
- Real estate agents entering his accommodation at the Hotel
- False accusations of theft
- General Mistreatment

[3] Mr Van As alleges these incidences form a pattern of harassment resulting in his resignation. Kiwi Hotel denies the incidents occurred or if they did were not intended to be harassment.

[4] Mr Van As claims he is owed additional wages for being required to work Saturdays and overtime. He alleges he was allocated excessive duties which meant he had to work a 48 hour week. Kiwi Hotel denies this. It believed Mr Van As was to only make himself available on Saturdays to complete work he was unable to do within the five day working week and be on call for “emergency maintenance work”, i.e. unexpected events requiring emergency maintenance work to be undertaken immediately.

[5] Mr Van As also seeks wages arrears for bereavement, statutory days he worked, unpaid holiday pay and work on room renovations.

## Issues

[6] The following issues arise:

- a) Was Mr Van As constructively dismissed?
- b) What wage arrears are owed?

### Was Mr Van As constructively dismissed?

[7] Mr Van As resigned on or about 11 October 2012. The issue is whether this amounts to constructive dismissal. He alleges a pattern of harassment that breached express and implied terms of his employment contract causing him to resign.

[8] Constructive dismissal includes cases where a breach of duty by the employer causes an employee to resign.<sup>1</sup> The essential questions are:<sup>2</sup>

- (a) What were the terms of the contract?
- (b) Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

[9] In answering the first question, the Authority must examine “*all the circumstances of the resignation*” not merely the terms of the notice or other communication whereby an employee has tendered the resignation. If there was a breach, the next question is “*whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.*”<sup>3</sup>

[10] It is an implied term of employment agreements employers’ provide a safe workplace and that not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.<sup>4</sup> This includes providing a workplace free from harassment.

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<sup>1</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

<sup>2</sup> *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 112–113 referring to *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59 (AC) (Hepi’s case)

<sup>3</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers’ IUOW Inc* [1994] 1 ERNZ 168 (CA)

<sup>4</sup> See above

[11] There is a substantial conflict of evidence between the parties which requires express findings about the credibility of the evidence.<sup>5</sup> Relevant factors in assessing credibility here are:

- (a) Inconsistencies and contradictions of all kinds<sup>6</sup>;
- (b) Prevarication<sup>7</sup>;
- (c) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence<sup>8</sup>.
- (d) An assessment of the evidence within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?<sup>9</sup>

[12] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.<sup>10</sup>

#### *Refused time off on Saturdays*

[13] Mr Van As alleges he was refused time off on Saturdays to attend family functions. At the hearing he stated this happened one or two times. He alleged if he did not work Saturdays, it was deducted from his pay. The three pay slips dated 24 July, 4 September and 2 October 2011 allegedly show these deductions.

[14] Mr Ajay Soeny, a director of Kiwi Hotel and Mr Van As' manager, denied threats to deduct wages for refusing Saturday work. He conceded he did expect Mr Van As to work 6 days up until the 5 March 2011 when they amended the employment agreement reducing the hours to 5 days per week. Following the

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<sup>5</sup> *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6

<sup>6</sup> *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252

<sup>7</sup> *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108]

<sup>8</sup> See above at [110]

<sup>9</sup> See above at [111]; *Corbett v National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10

<sup>10</sup> *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

amended hours, Mr Soeny only expected Mr Van As to work Saturdays to finish his weekly tasks and to do emergency work. He would call Mr Van As on weekends to do emergency jobs but if unavailable would have gotten someone else.

[15] Given Mr Soeny's concession regarding expectations about Saturday work it is more likely than not Mr Van As was required to work Saturdays from 27 December 2010 until 5 March 2011. He believed the contractual arrangements required Mr Van As to work 6 days per week until 5 March 2011. Saturday work in these circumstances does not appear to be harassment but a matter of his belief regarding the employment contract.

[16] Between 7 March and 30 April 2011 Mr Van As worked 48 hours for 6 out of 8 weeks. The two weeks either side of Easter weekend he finished his work within 40 hours. There is no explanation why this was possible in a 5 day week and during a busy holiday period. There is no description of what the excessive work was. Given the lack of detail and the inconsistencies, the truth or otherwise of Saturday work during this period cannot be proved on the balance of probabilities.

[17] In May 2011 the parties entered into an agreement for room renovation work. This was to be done in addition to Mr Van As' normal duties and continued until termination. There is no separate record of his time spent on room renovations. It can be inferred Mr Van As would have had to work Saturdays to finish his normal duties as a consequence of this agreement. Saturday work in these circumstances does not appear to be harassment, but a necessity.

[18] The payslip dated 24 July refers to 4 days leave without pay. Mr Van As accepts he took 3 days leave but not 4. More confusingly the payslip records payment of \$1,495.58 including a room renovation payment of \$500. This equates to payment for 7.3 days.<sup>11</sup> There is an overpayment of 1.3 days if 4 days leave without pay was taken.

[19] The payslip dated 4 September 2011 shows a payment of \$2019.23 for 14.17 days ordinary time and 0.83 days annual leave including an additional payment of \$500 for room renovations. Deducting the room renovations, Mr Van As received

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<sup>11</sup> The usual gross fortnightly pay was 10.00 days @ 134.61538 (\$1,346.15). This payslip gross fortnightly pay of \$1,495.58 less \$500 room renovation payment is 995.58/134.61538 equates to 7.3 days.

\$1,519.23 – well in excess of the \$1,346.15 fortnightly pay he ordinarily received. It does not show any deduction. Rather it shows an overpayment of \$173.23.

[20] The payslip dated 2 October 2011 does show a deduction of 0.83 (\$111.73) which Mr Van As alleges was due to his refusal to work Saturday. The deduction appears to be for part of a day. There is no legal basis for this deduction. It does not of itself prove it was a deduction for refusing Saturday work or harassment. All of the above payslips evidence the payroll system was erratic and possibly error ridden. This deduction can be dealt with below in the wages arrears claims.

[21] Given the above, the Authority dismisses the allegation.

#### *Threats to kick him out*

[22] Mr Van As alleged Mr Soeny threatened to kick him out if he refused to work Saturdays. These threats were relayed to him in a conversation with another employee, Mr Hasish, on or about 3 July 2011. Mr Hasish did not give evidence. This is hearsay evidence and of little weight. The actual conversation between Mr Van As and his employer records Mr Soeny's comment "*work is more important than family*" but no threatening behaviour. Mr Soeny denies making threats. The evidence falls below the standard of proof required. This allegation is dismissed.

#### *Threatening behaviour in heated discussions*

[23] Mr Van As alleged he was threatened by heated discussions with Mr Soeny in 2011. Both parties accept a discussion occurred and became heated. Mr Van As conceded he threatened Mr Soeny with a complaint to the Department of Labour. Mr Soeny then told him to "*take his stuff and go home.*" He felt threatened by Mr Soeny's tone of voice, body tension and his constant complaints about the quality of the work he was doing. Mr Soeny walked out and slammed a door shut which could have hit him but did not. He alleges he was then chased home by Mr Soeny. Mr Van As complained to the Department of Labour whom investigated the incident but took no action.

[24] From the evidence it appears both parties were angry and responsible for the heated discussion that occurred. The actual words used do not appear to be threatening. The direction Mr Van As leave and Mr Soeny's departure (albeit abruptly) was sensible and a means to defuse tension. It was not put to Mr Soeny he

could have hit Mr Van As with the door. The allegation he was chased home seems illogical if Mr Soeny had already left. The evidence is inconsistent and falls below the required standard of proof. The allegation is dismissed.

*Assaulted three times*

[25] Mr Van As alleges he was assaulted on three separate occasions in 2011 by Mr Soeny. At the beginning of 2011 Mrs Sybil Van As states Mr Soeny said her husband had been talking to other women and offered to hit him for her. Mr Soeny approached Mr Van As and hit him on the shoulder. Mr and Mrs Van As state the hit was fairly hard. The second time was during a South African match in the Rugby World Cup 2011. The third time was in the Hunter Block in 2011.

[26] Mr Soeny accepts the first two incidents occurred but denies it was harassment. He states he was teasing Mr Van As. He accepts he may have given him a friendly pat. He denies touching him in the Hunter Block. No medical attention or permanent injury resulted from these assaults.

[27] Assault is defined as “*the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly.*”<sup>12</sup> Mr Soeny accepted he touched Mr Van As twice. Mr Van As corroborated by his wife on one occasion says this hurt. The Authority accepts Mr Van As was hit hard enough to cause pain on two previous occasions.

[28] The third occasion in the Hunter building is insufficiently detailed for the Authority to determine its truth or otherwise to the required standard of proof. This allegation is dismissed.

*Frosting placed on windows at his accommodation*

[29] There was no dispute frosting had been applied to Mr Van As’ accommodation windows. Mr Soeny believed Mr Van As had been consulted which he denied. Mr Soeny apologised and stated the window frosting was to protect his privacy as they looked into a public area and to “smarten up” the Hotel for sale. He denies this was done to harass Mr Van As.

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<sup>12</sup> Summary Offences Act 1981 s2(1)

[30] Mr Soeny's reasons for the frosting seem logical and fit within the context of other evidence of Real Estate visits below. There is no evidence of harassment. This allegation is dismissed.

*Real estate agents entering his accommodation*

[31] Similar to the above allegation, the parties accept Real Estate agents visited the Hotel for the purposes of its sale. Mr Soeny again assumed Mr Van As had been consulted and apologised if he had not. The Real Estate Agents visits were part of the sales process and not intended to be harassment.

[32] Mr Soeny's reasons for the Real Estate agents visits seem logical and fit within the context of other evidence about the smartening up of the Hotel above. There is no evidence of harassment. This allegation is dismissed.

*False accusations of theft*

[33] Several thefts occurred at the Hotel where the Police were involved. Other staff told Mr Van As he was a suspect. Another person was eventually arrested for the thefts.

[34] There is no casual nexus between the staff speculation and his employer. This allegation is dismissed.

*General mistreatment*

[35] The accusations of general mistreatment are the refusal to supply a uniform and exclusion from staff events. Mr Soeny states they offered Mr Van As a black uniform which he refused. Mr Van As refers to overalls and safety boots.

[36] The employment agreement does not require provision of a uniform or other equipment. There is little detail of the staff events he was excluded from or the reasons why. This allegation is dismissed as the evidence fails to meet the standard of proof required.

*Was there a breach of the terms of the employment contract?*

[37] The two assaults in 2011 are the only matters which have been proven to have occurred on the facts. Assaults would constitute a breach of the implied term an employer provide a safe workplace.

*Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?*

[38] None of the above matters were raised with his employer until after termination. The assaults occurred in 2011 – 1 year prior to them being raised. There was no opportunity for the employer to address the concerns regarding the assaults halting any alleged “pattern” of behaviour. The assaults were relatively minor. There was no lasting injury or medical treatment required. Mr Van As did not report the matter to the Police. Mr Soeny denies he intended to apply force. His explanation appears consistent with Mr Van As’ lack of action regarding the two incidences at the time.

[39] An employee has an obligation to raise with an employer any concerns he or she has about health and safety in the workplace<sup>13</sup> including workplace assaults. Delays of over 1 year in raising grievances have been fatal to claims of constructive dismissal.<sup>14</sup>

[40] Kiwi Hotel could not have foreseen this behaviour was unwanted because it did not know. It could equally have not known it would lead to Mr Van As’ resignation.

[41] Given the employers inability to foresee the resignation as a result of assaults 1 year prior to resignation, the Authority determines Mr Van As was not constructively dismissed.

## **Wages arrears**

### *Saturday Work and Overtime*

[42] There is insufficient evidence to support a claim for extra payment for Saturday work and overtime. This is because:

- a) The employment agreement does not provide for payment of overtime (clause 6.1).
- b) Both parties agreed at hearing the normal duties of a maintenance engineer could be done within 40 hours.

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<sup>13</sup> *Whitehead v Metallic Sweeping (1998) Ltd* ERA Auckland AA6/09, 9 January 2009

<sup>14</sup> *Barry v Anoop Investments Ltd* ERA Auckland AA11/07, 18 January 2007

- c) There is no evidence of what were the alleged excess duties requiring overtime and Saturday work.
- d) The timesheets provided show Mr Van As could complete his duties within a 40 hour working week even when there were public holidays.
- e) The excessive duties cannot be emergency work as the timesheets show it was infrequent.
- f) Mr Van As made an agreement to undertake room renovations from June 2011 in addition to his normal duties. It is likely this contributed to the need to work Saturdays as a consequence.

[43] The evidence falls below the required standard of proof. These claims are dismissed.

*Underpayment for Room Renovations*

[44] In May 2011 the parties reached a further agreement relating to room renovations. Kiwi Hotel was renovating the hotel for an expected influx of guests due to the Rugby World Cup. There had been problems with contractors and Mr Van As offered to undertake some room renovations. The parties reached the following agreement:

- (a) Mr Van As would undertake the room renovations during his working week and on weekends on the basis he completes his maintenance work as well.
- (b) Mr Van As would be paid \$250 for each room renovation completed (later increased to \$300 per room). Payment was processed through the payroll system including deduction of PAYE.
- (c) Kiwi Hotel would supply the building materials required.

[45] Mr Van As claims underpayments for room renovations as follows:<sup>15</sup>

- a) May to December 2011 \$1,750
- b) December 2011 to October 2012 \$1,200

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<sup>15</sup> Unpaid Room Renovation Claim Email L Darroch 20 November 2012

[46] Kiwi Hotel was given an opportunity at the conclusion of the hearing to file submissions on the room renovation underpayments. No further submissions were received.

[47] Accordingly the Authority determines the sum of \$2,950 is due and owing for the additional work on the room renovations.

*Bereavement and holiday pay*

[48] Mr Van As claims 3 days bereavement leave but only took 1 days leave on Saturday 27 August 2011. He alleges he was required to work Sunday. The relevant payslip dated 4 September 2011 also shows an overpayment of \$173.23 (see paragraph [21]) which would account for 1 days bereavement leave. There is no basis to claim 3 days bereavement leave when only 1 day was taken. Given the above this claim is dismissed.

[49] Mr Van As claims payment for statutory holidays he worked on 27 to 28 December 2010 and 3 to 4 January 2011. The payslips dated 19 February 2012 and 4 March 2012 contain the note “0.5 wages paid for 27<sup>th</sup>, 28<sup>th</sup> of Dec 2010 & 3<sup>rd</sup>, 4<sup>th</sup> Jan 2011 as Alternative Holidays. 4 day in lieu accrued”. They also record payment of 6.0 days alternative holidays @ 134.61538 totalling \$807.69. This equates to payment of time and half for the 4 statutory holidays claimed. The evidence does not support this claim and it is dismissed.

[50] The wage and holiday records show at termination Mr Van As was entitled to 288 hours annual leave. His final pay slip dated 11 October 2012 records payment of 153 hours annual leave at 18.00875 per hour. He is due the difference of 135 hours annual leave at 18.00875 per hour totalling \$2,431.18.

[51] The payslip dated 2 October 2011 shows a deduction of 0.83 (\$111.73). There is no legal right to make unilateral deductions from Mr Van As’ pay. The sum of \$111.73 wages arrears is owed.

[52] Kiwi Hotel was given an opportunity at the conclusion of the hearing to file submissions on the annual leave owed. No further submissions were received.

[53] Accordingly the Authority determines the total wages arrears owed are \$5,492.91.

[54] The Authority further determines Mr Van As is entitled to interest on the judgment sum of 5 % from the date of termination being 10 October 2012 until payment.

[55] Costs are reserved. Submissions are to be filed by **3 pm 18 March 2013**.

T G Tetitaha  
Member of the Employment Relations Authority