

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 82/10  
5275240

BETWEEN                      NICHOLAS BELL  
   Applicant  
  
AND                                AUCKLAND CITY COUNCIL  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Allan Boyle, counsel for Applicant  
   Katherine Burson, counsel for Respondent  
  
Investigation Meeting:      11 February 2010  
  
Determination:                22 February 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      Nick Bell worked as a building inspector for Auckland City Council (the Council) from 19 March 2007 to 11 May 2008. He resigned from his job on 29 April 2008 giving two weeks notice as required under his individual employment agreement.

[2]      On 25 July 2008, through counsel, Mr Bell raised a personal grievance on the grounds that he "*felt compelled to resign*" over how his team leader Mark Tucker had dealt with two matters. One matter involved a complaint made by Mr Bell about an inspection carried out by another inspector, Martin Reid. The other matter involved concerns over whether Mr Bell's role as President of the Point Chevalier Bowling Club (the Club) created any real or potential conflict of interest with his job as a building inspector.

[3]      Following his inspection of building works at 8 Wainui Avenue, Point

Chevalier on 22 April 2008 Mr Bell issued site instructions for the builder to correct four aspects that he identified as not complying with building regulatory requirements. Mr Bell considered Mr Reid should have identified those aspects in an earlier inspection. On returning to the office Mr Bell complained to Mr Tucker that Mr Reid's earlier inspection was inadequate. Mr Tucker arranged a meeting with Mr Bell to discuss his concerns on the following day. Before the meeting started Mr Bell checked with Mr Tucker whether the meeting was "*formal*" and, having been told it was, arranged for another inspector, Mark Murray, to attend.

[4] In the course of that meeting Mr Tucker talked about what he saw as a 'personality clash' between Mr Bell and Mr Reid. It was not an unfounded conclusion. Mr Bell had previously complained about having to "*follow*" Mr Reid, who had eight years experience at the Council. Mr Bell's own written evidence also confirmed that he had not liked Mr Reid since spending two days on site inspections with him during his first three months at the Council. Mr Bell said he had felt belittled when Mr Reid had corrected him in front of some Council clients.

[5] Mr Tucker talked about what was apparent to him from reviewing the Council's file for the Wainui Avenue building works. He also mentioned a complaint from a neighbour of the Club. The complaint included querying whether Mr Bell's role as both Club president and as a Council officer would affect how the Council dealt with that neighbour's complaints over aspects of the Club's operation in the neighbourhood.

[6] Mr Tucker said that, in those circumstances, he had decided Mr Bell should henceforth do inspections in the eastern sector of Auckland City, rather than in the western sector where Mr Reid worked and where the Club was located.

[7] Mr Bell told Mr Tucker the meeting had been "*a waste of time*" and walked out to carry on with his duties for the day.

[8] After checking some of the information relating to the Wainui Avenue inspections, and whether Mr Reid had appropriately passed some elements of the work on an earlier inspection, Mr Tucker sent Mr Bell an email with the subject heading: "*Outcome of findings from meeting on Thursday 24<sup>th</sup> April*". The email, sent

on the evening of 28 April, set out Mr Tucker's findings, conclusion, recommendations and what he called "*other points to be aware of*".

[9] Earlier on 28 April Mr Bell had carried out a return inspection at Wainui Avenue. He found that three items of improvement he had required on his inspection on 22 April were complete and noted a fourth item as "*not required*".

[10] The following day Mr Bell saw Mr Tucker's email of 28 April. By the end of 29 April he had decided to quit his job and wrote a letter of resignation that he took to work with him the next morning.

[11] After speaking briefly to Mr Tucker Mr Bell left his letter of resignation in the office of Mr Tucker's manager, John Lawrence.

[12] Mr Lawrence spoke with Mr Bell on 1 May. Mr Bell explained the reasons for his resignation and Mr Lawrence formally accepted the resignation later that day.

[13] Mr Bell carried out his normal duties for the remainder of his period of notice – including working in the eastern sector rather than western sector of the City.

[14] After raising his personal grievance Mr Bell developed the view from correspondence with the Council that he had been disadvantaged in his treatment by Mr Tucker and Mr Lawrence. He considered they had acted on information and views about his involvement with liquor licensing and building compliance issues at the Club which they not properly discussed with him.

### **Issues and investigation**

[15] The issues for resolution for determination by the Authority are:

- (i) Whether Mr Bell's resignation was really a constructive dismissal resulting from the Council breaching his terms of employment; and
- (ii) Whether Mr Bell was unjustifiably disadvantaged by how the Council dealt with (a) his connection with the Club; and (b) relationship issues between Mr Bell and Mr Reid; and
- (iii) If unjustified actions are found, what remedies are due to Mr Bell?

[16] Mr Bell also claimed the Council discriminated against him on the grounds of political opinion. This was said to relate to Mr Bell's role in matters concerning liquor licensing between the Club and the Council-operated Auckland District Licensing Agency. That claim was abandoned in closing submissions.

[17] For the purposes of the Authority's investigation written witness statements were lodged by Mr Bell; Mr Murray; Sandra Dempsey, a neighbour of the Club; Mr Tucker; Mr Lawrence; Mr Reid; Greg Bellam, a Council team leader for its building inspectors working in the residential east sector; and Auckland District Licensing Agency inspector Andre Phillips. Each witness, under oath or affirmation, confirmed their statements. Mr Phillips was asked no questions but the other witnesses each answered questions from either the Authority member or the parties' counsel. Counsel each gave oral closing submissions, speaking to a written synopsis.

### **Evidential issues**

[18] There were stark differences between the evidence of Mr Bell, on the one hand, and Mr Tucker and Mr Lawrence, on the other, over the content and occurrence of certain discussions and meetings. As Mr Bell's counsel submitted, questions of credibility and circumstantial evidence were key to whether his claim succeeded.

[19] Having closely reviewed the written and oral evidence of the witnesses, along with the available relevant documents, I generally prefer the evidence of Mr Tucker and Mr Lawrence on those points of factual difference.

[20] One reason for this view is that Mr Bell's evidence – particularly his written witness statement – relied too often on what he believed or felt might be true, without establishing its factual foundation. One example was his supposition that Mr Lawrence waited until Mr Tucker had gone on holiday before talking to Mr Bell about his resignation. However Mr Lawrence spoke to Mr Bell on 1 May, only one day after the letter of resignation was left in his office. I accept Mr Lawrence's evidence that, as a manager, he generally met with any staff member who gave notice of resignation but waited a day or so waited before doing that and the reason was unrelated to whether or not Mr Tucker was, by then, away on leave.

[21] The decisive factor in generally preferring the evidence of Mr Tucker and Mr Lawrence was Mr Bell's recall of the inspection document he had written and signed on 28 April on revisiting 8 Wainui Avenue. More than a page of his second written witness statement – provided in reply to written statements of Council witnesses – sets out an elaborate contention that two lines of writing were not his and implying that additional writing (made to look just like his) must have been added after he handed in the form. It was essentially an allegation of deliberate deception carried out by some unnamed person in the Council. In answer to questions from the Authority he withdrew the allegation. He accepted the handwriting was his. The handwritten words had stated that the issues he identified were “*all OK now*” and that one of the four items he had identified earlier was “*not required*”.

[22] This aspect of the evidence is particularly important because Mr Bell's case is essentially that the items he had identified were so important – as matters of safety and regulatory compliance and which Mr Tucker had not been taken seriously enough – that Mr Bell felt he could not continue in the job. He described this as Mr Tucker “*not going by the book*” and not putting right a safety issue. But despite its supposed importance to him at the time of deciding to resign, he appeared to have forgotten what he approved at Wainui Avenue on 28 April 2008.

[23] In light of what this evidence revealed about the accuracy of Mr Bell's recall on matters he considered important to him, I also prefer the evidence of Mr Tucker and Mr Lawrence as more likely than not to be true on the following points:

- (i) In February 2008 Mr Bell – on recovering from a leg injury suffered while on leave in January – was moved from working on eastern sector inspections to working on western sector inspections. This was arranged by Mr Tucker for two reasons that he discussed with Mr Bell. Firstly it made it easier for Mr Bell if he needed to visit his doctor's surgery in Point Chevalier. Secondly it made it easier for Mr Bell to attend appointments on Club matters if he needed to do so during the working day. There was no agreement that the arrangement was permanent. Mr Bell denied any such reasons were given for the arrangement and insisted the move was meant to be permanent.

- (ii) In March 2008 a Council team leader in the District Licensing Agency had expressed concerns to Mr Lawrence about potential conflict between Mr Bell's role as a building inspector and Club president. Mr Lawrence met with Mr Bell and Mr Tucker to discuss this concern. Mr Lawrence made it clear that there was no difficulty in Mr Bell continuing as Club president as long as he took care not to let any conflicts arise, such as influencing any building approvals required for the Club. Mr Bell denied any such meeting or discussion took place.
- (iii) On April 23 Mr Bell made angry comments to Mr Tucker about Mr Reid's work. While Mr Bell says he referred to Mr Reid as a "bloody idiot", I accept he probably used a more extreme phrase referred to in Mr Tucker's evidence.
- (iv) On April 24 Mr Bell had referred to the prospect of resigning when he walked out of the meeting with Mr Tucker and on April 30 Mr Tucker had – in the course of a brief conversation with Mr Bell – asked him to "think about it" before handing in his resignation.

### **Legal framework**

[24] Constructive dismissal, of the type alleged by Mr Bell, occurs where a breach of duty by the employer leads a worker to resign.<sup>1</sup> He must establish there was a breach of an express or implied duty owed to him by the Council and the breach was sufficiently serious to make it reasonably foreseeable to the Council that Mr Bell would not be prepared to continue working in all the circumstances.<sup>2</sup>

[25] The analysis required has been described this way:<sup>3</sup>

*It is essential to examine the actual facts of each case to see whether the conduct can be fairly and clearly said to have crossed the border line which separates inconsiderate conduct causing some unhappiness and resentment to the employee from conduct dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.*

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<sup>1</sup> *Auckland Shop Employees IUOW v Woolworths (NZ) Limited* (1985) ERNZ Sel Cas 136, 139.

<sup>2</sup> *Auckland Electric Power Board v Auckland Local Bodies Officers IUOW* [1994] 1 ERNZ 168, 172.

<sup>3</sup> *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cas 95, 104.

[26] In respect of Mr Bell's disadvantage claim, the Council's actions are to be measured against the statutory test of justification at s103A of the Employment Relations Act 2000 (the Act): whether what the Council did, and how it did it, was what a fair and reasonable employer would have done in all the circumstances at the time.

[27] Throughout the actions of the Council and Mr Bell are also to be considered in light of the statutory duty of good faith: s 4(1) and (1A) of the Act. This required them to be active, constructive, responsive and communicative in maintaining a productive employment relationship.

### **Did the Council breach its duties to Mr Bell?**

[28] Mr Bell alleges the Council breached duties of fair and reasonable treatment, trust and confidence, and good faith. The breaches were expressed in what he described as a "*triple whammy*" involving incorrect criticism of his relationship with Mr Reid, failing to seriously consider his concerns identified in the Wainui Avenue inspections, and criticising his role at the Club without seeking his views on it. A further breach is alleged arising from Mr Tucker's decision to put Mr Bell on eastern sector inspections.

[29] I find that Mr Bell fails to establish a breach of duty to him by the Council on any one of those counts.

[30] I accept the evidence of Mr Tucker which established there was a problem in the relationship between Mr Reid and Mr Bell. Mr Bell told him that he was sick of following Mr Reid. Mr Bell used extreme language about Mr Reid and doubted the quality of his decisions as an inspector.

[31] I have closely reviewed all witnesses' evidence about the technical aspects of the disputed site instructions and whether Mr Reid had properly passed each item. I need not set it out here as the important point is this. Mr Tucker, following the 24 April meeting, had conducted further investigation of the documents available. He had fairly identified that there were inadequacies in how both Mr Reid and Mr Bell had written up their inspections. In his 28 April email setting out his findings Mr

Tucker agreed with some of Mr Bell's criticisms of Mr Reid's work.

[32] It may even be that Mr Bell's interpretation was entirely correct and Mr Tucker's was wrong. But that is not enough to amount to a breach by the Council of its duties to Mr Bell. The interrelation of various aspects of the legislation, regulations and by-laws for building requirements will mean there is inevitably some room for interpretation and even error. However an error by a manager would not, of itself, be enough to establish a breach of duty in these particular circumstances. What was required was that Mr Bell be given an opportunity to have his concerns fairly heard and seriously considered. That occurred in the arrangements for the 24 April meeting. Despite Mr Bell walking out of that meeting Mr Tucker had, properly, conducted some further investigation and advised Mr Bell of this in the email of 28 April, along with his decisions as a manager on what should happen next.

[33] Mr Bell's managers had dealt with him openly about his role at the Club. It was not a secret. Mr Bell had referred to his role at the Club during his job interview with Mr Lawrence. Mr Lawrence had spoken with Mr Bell in March when he heard concerns in relation to dealing with liquor licensing and building issues. I also accept Mr Tucker's evidence that it was Mr Bell who told him about problems raised by a neighbour of the Club. That discussion occurred at the Club as Mr Tucker was also a member at the time and had suggested Mr Bell talk with Mr Lawrence about the issue.

[34] Mr Tucker's decision in April 2008 to move Mr Bell to eastern sector work was one he was entitled to make. Mr Bell had previously worked in the eastern sector. The move to western sector work has not been agreed as permanent. No change of location of base office was required – only the location of site inspection work. Its primary reason was to deal with the tension between Mr Bell and Mr Reid. Having made that decision, Mr Tucker also referred to how it would assist with any perceived conflict of interest arising from his role with the Club. However that was an ancillary reason and did not amount to any breach of duty owed to Mr Bell.

### **Was resignation nevertheless foreseeable?**

[35] If I were wrong in respect of the conclusion on the breach of duty, I also consider Mr Bell would nevertheless fail to establish the alleged breaches were

sufficiently serious that the Council managers should reasonably have foreseen his resignation in the circumstances.

[36] In closing submissions his counsel asked whether Mr Bell was too hasty in making up his mind that his standards had been compromised and deciding to resign. The answer, I find, is yes.

[37] Mr Bell's complaint to Mr Tucker about Mr Reid's inspection was the first one of that type that he had made. Having received what he considered an unsatisfactory reply on 24 April and 28 April, he made no further attempt to discuss the matter with Mr Tucker or to dispute his findings and recommendations. Neither did he attempt to discuss the matter with the next manager 'up the line', Mr Lawrence, or seek advice from the Council's human resources advisors on how his concerns could be dealt with.

[38] Mr Bell's concerns, and his manager's decisions about them, were not at that stage so serious as to be irremediable by discussion.<sup>4</sup> While Mr Bell had referred to the prospect of resigning before he walked out of the 24 April meeting, he had since revisited the Wainui Avenue site and signed it off three items of remedial work done as satisfactory and one as not required. From Mr Tucker's detailed email of 28 April he could also see his concerns had been seriously considered if not entirely agreed with. In those circumstances the Council's managers could not have reasonably foreseen that Mr Bell would suddenly resign rather than continue to seek to resolve any residual concerns. This is particularly so in light of Mr Tucker writing in his 28 April email that Mr Bell was "*a valued & up and coming building inspector, with potential that is recognised*" and there was "*always ... [a] place*" for him in the team.

### **Was Mr Bell disadvantaged by how his managers treated him?**

[39] Mr Bell's closing submissions described the direction to work in the eastern sector as an unjustified disadvantage because it was "*less convenient*" and damaged his dignity.

[40] However, for the reasons already given, I accept Mr Tucker was entitled to

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<sup>4</sup> *Harrod v DMG World Media (NZ) Limited* [2002] 2 ERNZ 410, 424.

make that decision. Mr Bell had a Council vehicle for travel to and from work, along with a fuel card, so suffered no material loss from the change apart from additional time spent driving during the working day.

[41] I also do not accept he suffered any unjustified disadvantage from how Mr Tucker and Mr Lawrence dealt with his connection with the Club. Mr Lawrence had no problem with that role provided – as with all officers subject to the Council’s conflict of interest policy – care was taken in avoiding actual or perceived influence on Council decisions affecting the Club. And Mr Tucker’s decision in February to allow Mr Bell to work in the western sector showed that he was prepared to accommodate the role rather than taking a negative view of it.

[42] Neither was there any disadvantage to Mr Bell in the arrangements for, and conduct of, the meeting of 24 April. It was not a disciplinary meeting. Mr Bell had asked on 23 April to speak to Mr Tucker about his concerns and what followed was a meeting on work issues.

### **Determination**

[43] For the reasons given Mr Bell does not have a personal grievance and his application is dismissed.

### **Costs**

[44] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, the Council may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Bell will then have up to 14 days from the date of service to lodge a reply before the Authority determines costs. No application will be considered outside this timeframe without prior leave.