

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 673  
3119992

BETWEEN	RAVI BHOJWANI Applicant
AND	BAKER PROPERTY SERVICES LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Allan Halse, advocate for the Applicant Jessie Laphorne, counsel for the Respondent
Investigation Meeting:	9, 10, and 11 May 2023 at Hamilton
Submissions received:	28 July 2023 from Applicant 9 and 16 August 2023 from Respondent
Determination:	13 November 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Baker Property Services Limited (Baker Property) is an established business providing commercial cleaning primarily to supermarkets. Mr Ravi Bhojwani was employed by Baker Property Services Limited as the Area Manager for the Waikato and Bay of Plenty region, starting on 9 October 2019. Mr Bhojwani was based in Tauranga.

[2] Mr Bhojwani initially worked closely with the owner and director of Baker Property, Mr Peter Baker. In about January 2020, Ms Vanessa Baker, Mr Baker's daughter, returned from leave, and became involved in the running of the business. Mr

Bhojwani found a joint reporting line confusing, and says his emails were not responded to.

[3] In January 2020, Mr Bhojwani discussed his plans for visa renewal with Mr Baker, and Mr Baker indicated the company would support his visa application. The parties disagree about whether or not a pay rise was promised at this point.

[4] In May, Mr Bhojwani then had an argument with Ms Baker in a carpark, which was described as “heated”.

[5] Mr Bhojwani then became concerned about the dispensers used to dilute chemicals, the potential for spills, and what he said were difficulties transporting large containers of diluted chemicals to site for the cleaners to use. Mr Bhojwani also raised concerns about an incident when he was assaulted by a former staff member in November 2019, and what he says is foul language used by Mr Baker and Ms Baker. Mr Bhojwani then sought advice from his advocate, who raised what were described as employment/immigration issues, and a concern that he was being bullied by Ms Baker. Mr Bhojwani spent time off work on sick leave.

[6] Baker Property then arranged for an investigation into Ms Bhojwani’s claims, with a third party investigator. Before this could be completed, Mr Bhojwani resigned on 8 January 2021.

[7] Mr Bhojwani now raises claims for an unjustified constructive dismissal; unjustified disadvantage arising from what is said to be Baker Property’s failures to appropriately respond to concerns and complaints of workplace bullying; and a claim of breach of good faith by virtue of what is said to be the failure of Baker Property to protect Mr Bhojwani from bullying despite being aware of said bullying.

[8] Baker Property denies the claims in full. It says that Mr Bhojwani resigned to take up new employment, and that it responded appropriately to the issues that Mr Bhojwani raised during his employment, including meeting with Mr Bhojwani and his advocate on many occasions, and taking the very serious step of engaging a third party investigator to investigate Mr Bhojwani’s complaints about Ms Vanessa Barker. Baker Property says that no remedies are properly owed.

## **The Authority's investigation**

[9] For the Authority's investigation written witness statements were lodged from Mr Bhojwani, Mr Baker, and Ms Baker. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave written closing submissions and other information.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **The issues**

[11] The issues requiring investigation and determination were:

- (a) Was Mr Bhojwani unjustifiably disadvantaged?
- (b) Was Mr Bhojwani unjustifiably (constructively) dismissed?
- (c) If Baker Property's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act.
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Bhojwani that contributed to the situation giving rise to his grievance?
- (e) Should either party contribute to the costs of representation of the other party.

## **Background**

[12] Mr Bhojwani had nine years of management experience in the cleaning industry as an area manager working in the South Island. He and Mr Baker were put into contact with each other by a mutual acquaintance, as Baker Property was looking to hire an area manager for the Bay of Plenty region, to assist with workload.

[13] Mr Bhojwani was in New Zealand pursuant to a work visa. Mr Baker was aware of this, and was willing to provide employer information to Immigration New Zealand (INZ) to support Mr Bhojwani's application for a work visa. This took some time.

Although Mr Bhojwani and Mr Baker first met in January 2019, it was not until October 2019 that Mr Bhojwani was able to start work for Baker Property.

[14] Baker Property was contracted to clean several supermarkets in the Bay of Plenty. Mr Bhojwani's role was to manage those sites including managing and supervising staff, dealing with staff absences, client liaison, providing the appropriate cleaning fluids and consumables such as cleaning cloths, replaceable pads for the floor buffers etc, and manging cleaning equipment and machinery. In addition, Mr Bhojwani would also provide cleaning services himself, especially during times of short staffing.

[15] When Mr Bhojwani started work in October 2019, he worked closely with Mr Baker, and the two of them would often work together to complete cleaning duties, even though Mr Baker was based in Hamilton. This was because, at that time, Baker Property was short-staffed, and was actively recruiting for more cleaners. The evidence is that both Mr Baker and Mr Bhojwani worked well together and Mr Baker showed Mr Bhojwani the way the business was run during this time.

[16] During this period, Ms Baker was on leave, and was therefore not present or involved in the running of the business.

[17] Mr Bhojwani took the view that his job was to report directly to Mr Baker. This is based partly on his experience during those first few weeks when he and Mr Baker worked closely together, and partly on an organisational chart dated March 2019, which showed a direct reporting line from himself as area manager to Mr Baker as Company Director, with a second reporting line from Mr Bhojwani to Ms Baker who also reported in to Mr Baker.

[18] In about December 2019, Ms Baker returned to work. She began contacting Mr Bhojwani about work matters, particularly issues involving staff, such as attendance issues and the issuing of written warnings. Mr Bhojwani took the view that Mr Baker and Ms Baker were slow to confirm verbal warnings to staff in writing, which he viewed as an undermining of his authority. Ms Baker on the other hand expected Mr Bhojwani to issue written follow-ups to verbal warnings to create a paper trail.

[19] Mr Bhojwani also says he found Ms Baker difficult to contact especially after hours, and said that he found Mr Baker easy to contact and that Mr Baker would always be available to take phone calls from him even as late as 11.00 pm at night. Ms Baker's

evidence was that her role was not primarily office based, and she would not always be available to answer emails or calls by way of real-time replies. She accepts that it would be unusual for her to be available for phone calls later at night, and says that she advised Mr Bhojwani of this on several occasions. Her view was that there should not have been any matters which required her urgent attention significantly outside office hours, and Mr Bhojwani was free to email or text her at any time and she could then respond during her working day.

[20] In about December 2019, Mr Bhojwani says that he was offered another job by a larger company, and he told Mr Baker that. Mr Bhojwani says that he was persuaded by Mr Baker to turn this role down. Ultimately, it was Mr Bhojwani's choice not to take this role, and although it appears that he later came to regret this choice, nothing flows from it.

[21] Mr Bhojwani says that Mr Baker promised him a payrise at this time, by saying that his pay would be reviewed after six month's employment. Mr Baker agrees that Mr Bhojwani mentioned the possibility of pay rise when he disclosed he had received another job offer. Mr Baker says he did tell Mr Bhojwani that his pay would be reviewed after 6 month's service, but that this was not a commitment or agreement to increase Mr Bhojwani's salary, and certainly not by any fixed amount as of any certain date.

[22] Around January 2020, Mr Bhojwani says that he raised with Mr Baker that he would need to apply again for a work visa, as he had only been granted a 1-year visa. Mr Baker said he would support this, and would supply any necessary documents to Mr Bhojwani or his immigration advisor. Mr Bhojwani hired an immigration advisor to assist, and at various times from March onwards, Mr Baker received emails from Mr Bhojwanit's immigration advisor<sup>1</sup> asking for documents on behalf of Mr Bhojwani, which Mr Baker provided.

[23] In early May 2020, Mr Bhjowani again raised the question of a pay rise with Mr Baker. Mr Baker considered the matter and declined to increase Mr Bhojwani's pay. Mr Baker explains that this was a difficult time for the company, as they were just coming out of the Covid-19 lockdowns, and there was a lot of business uncertainty,

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<sup>1</sup> Mr Bhojwani says that he had more than one immigration advisor, and put them in touch with Mr Baker for inquiries. This is not disputed.

which was why he reached the conclusion that the time was not right to increase Mr Bhojwani's pay.

[24] It was about this time that Mr Bhojwani became very concerned with the fact that INZ in assessing his previous visa application had concluded that Mr Bhojwani held a role which INZ determined was more in line with a "supervisor" role and less like the "manager" role which Mr Bhojwani believed it to be. It was for this reason that INZ had granted Mr Bhojwani only a 1-year work visa, when Mr Bhojwani had applied for a 3-year work visa. This information had been conveyed to Mr Bhojwani in a letter 9 September 2019 by INZ prior to the visa being granted. He had decided not to challenge that ruling at that time, but now wanted to apply for a 3-year essential skills visa.

[25] Mr Bhojwani was very concerned and upset that INZ considered his role to be supervisory rather than managerial. He attributes this to what he says was misleading information supplied by Mr Baker prior to October 2019. This is not accepted by Mr Baker. Mr Bhojwani accused Mr Baker and Baker Property of delaying his visa process.

[26] On 10 May 2020, Mr Bhojwani's advocate Mr Allan Halse wrote to Baker Property advising that Mr Bhojwani was "frustrated" with his "employment and immigration status".

[27] Mr Baker and Ms Baker met with Mr Halse as requested on 20 May. Ms Baker was also in touch with Mr Bhojwani about his attendance at a disciplinary meeting on 21 May 2020 for one of Mr Bhojwani's staff. Mr Bhojwani did not attend that meeting but was able to meet Ms Baker later that afternoon in a carpark, with a view to being updated and collecting some documentation from her.

[28] Ms Baker says that she wanted to reassure Mr Bhojwani that she and Mr Baker fully supported his visa application, and she said this. She went on to say that she did find some of the communication between her and Mr Bhojwani in email and text difficult, in that she felt Mr Bhojwani's emails could come across as too 'aggressive' but that she and the business were committed to helping support and Mr Bhojwani into the best manager he could be. Ms Baker says that when she said this, Mr Bhojwani's body language changed, and he rolled his eyes at her and appeared aggressive. When she asked him why he had rolled his eyes, he made a comment about how he had

experience working at larger companies than this, and then accused her of not being honest with him before walking away.

[29] Ms Baker was worried and distressed by this. She immediately made a handwritten file note of what had occurred.

[30] On 24 May 2020, Mr Bhojwani provided a fulsome written apology via his advocate. He indicated that there were times when he was tired and “that’s the time when I have poor mental strength due to tiring state of mind and may say hurtful things which I never wanted to.” Mr Bhojwani went on to say:

I really like to work with Vanessa as she is very warm and caring person, shows support, check up on me from time to time which just triggered back stabbing memories from the past immediately and I put my guard up by way of aggressive speech and threatening.

[31] Mr Bhojwani went on to say “Peter is a nice guy...”. He then said:

My behaviour on Friday was extremely inappropriate, immature, and lacked the respect Vanessa deserved, and I have no right to spoil her day as she been juggling time to deal with family and work related matter.

In the future, I have every intention of curbing my thoughtless actions and learn to adjust by behaviour befitting the environment and situation....

I hope if Vanessa she can put this matter behind....since I made the mistake, I am the one who need to apologise.

[32] On 6 July 2020, Mr Bhojwani emailed Ms Baker with a revised job description, which he wanted Baker Property to adopt in support of his visa application. There were some changes in language used, and Mr Baker describes those alterations as “removing any reference to directions” from either the General Manager or the Director. The draft proposed by Mr Bhojwani also proposed a change in job title from “Area Manager” to “Customer Manger” and added in new customer liaison duties.

[33] Mr Baker was not willing to adopt this, on the grounds that it was not accurate, there had been no changes in Mr Bhojwani’s reporting lines or duties, and the company did not need the additional proposed duties of a Customer Manager.

[34] Ten days later, on 16 July 2020, Mr Bhjowani went on sick leave, and provided a medical certificate which stated he had raised with his doctor issues of “work stresses”, bullying and long hours. By this time, Mr Baker was actively liaising with

Mr Bhojwani's advocate to attempt to set up a meeting and/or mediation to discuss both Mr Bhojwani's concerns about aspects of his role and Baker Property's concerns about what it considered to be "the manner in which you are undertaking, or refusing to undertake, aspects of your role duties and responsibilities."

[35] On 2 August 2020, Mr Bhojwani raised a personal grievance claim with Baker Property. His representative said in the covering email:

It is extremely unfortunate that you didn't agree to remove Vanessa from the organisation structure and allow Ravi to report directly to you which was the original agreement when Ravi started working...

[36] Mr Bhojwani remained on unpaid leave for some time. He was cleared by his doctor as being fit to return to work from 6 October 2020, with a meeting being held on 30 October 2020 to discuss matters between the parties. This included Mr Bhojwani's allegations of bullying.

[37] It was agreed that Mr Bhojwani would be placed on paid special leave. This continued from 5 October to Mr Bhojwani's resignation on 8 January 2021.

[38] As a result of the 30 October meeting, Mr Baker determined that, due to the small size of the company, and that Mr Bhojwani's bullying complaint was against Ms Baker, it would be appropriate for Baker Property to engage an independent investigator to carry out an investigation into the bullying complaint.

[39] Mr Bhojwani was provided with draft terms of reference for the investigation, and he commented on these, and asked that they be broadened to include an allegation of bullying by Mr Baker as well. This was done. Baker Property then appointed Ms Andrea Twaddle as the investigator. Mr Bhojwani's advocate objected to this, saying that Ms Twaddle was not independent "because she represents bullying employers".<sup>2</sup> Mr Baker concluded (in my view, correctly) that there was no valid reason to be concerned that Ms Twaddle was not independent, and proceeded to instruct her.

[40] Mr Bhojwani provided a lengthy written comment for the purposes of the investigation, but declined to meet with Ms Twaddle. He says at page 10 of his witness statement that "I was never interviewed by Andrea or had any direct communication with her as Allan protected me."

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<sup>2</sup> Closing Submissions of Applicant dated 28 July 2023, paragraph 50.

[41] On 8 January 2021, Mr Bhojwani resigned, claiming that he was constructively dismissed. There was some discussion about the return of the company vehicle and other property including cleaning chemicals and other cleaning supplies held by Mr Bhojwani. In the end it was agreed that Ms Baker and another staff member would travel to Mr Bhojwani's home to pick up the vehicle and supplies and drive it away. Although this was difficult for all at the time, all company property was returned and no matters now arise from this.

[42] Mr Bhojwani then commenced another job. At the investigation meeting, he provided only vague and general answers as to when he had started new employment, and when he had been offered his new employment. The matter is relevant in that Baker Property takes the view that Mr Bhojwani's resignation was in fact motivated by him securing new employment (which goes to the heart of his constructive dismissal claim), and that he suffered no, or almost no, loss of income as his new job commenced immediately. Mr Bhojwani refused to answer questions as to when he had been offered a new job, and despite orders from the Authority that he provide evidence of this of his choice (for example, pay slips, bank records, or visa details), he declined to do so. He stated in oral evidence that he had started looking for a new job months prior to resigning.

[43] He said he thought there might have been up to a week between him ending employment with Baker Property on 8 January 2021, and starting new employment. In addition, his advocate confirmed that he had advised Mr Bhojwani not to resign until he had secured new employment and continuous income. Baker Property indicated that it became unable to access Mr Bhojwani's visa details on Visaview as of 11 January 2021, indicating that his visa had been taken over by a new employer as of that date.

[44] Mr Bhojwani also gave evidence as to the impact on him. He provided a medical certification from his doctor, confirming he had broken sleep, and difficulties getting to sleep, was stressed and "probably adrenalized". In his witness statement<sup>3</sup> Mr Bhojwani stated that he was experiencing "work mental stress" and "Ravi has been prescribed sleeping pills and has been experiencing lack of sleep and lack of appetite". In his in-person evidence at the investigation meeting, Mr Bhojwani did not provide

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<sup>3</sup> At page 41 of that statement.

specific details of his experience, and repeatedly told me that I should refer back to his medical certificates.

[45] Mr Bhojwani's advocate suggested on day 2 and 3 of the investigation meeting, after Mr Bhojwani had already given his evidence in chief, that Mr Bhojwani experienced suicidal thoughts. This was not something that Mr Bhojwani had said in response to detailed questioning from me. After subsequently hearing his advocate say on multiple occasions that there had been the possibility of suicide, Mr Bhojwani then adopted his advocate's language in a way that was not consistent with what he had said earlier. No contemporaneous medical evidence supports his advocate's claims, whereas the contemporaneous medical evidence does support the claims that Mr Bhojwani was suffering from stress, anxiety, and was prescribed sleeping tablets, as well as being signed off from work for almost three months from 16 July 2020 to 6 October 2020.

### **Analysis**

[46] Mr Bhojwani claims that he was unjustifiably constructively dismissed, and that Baker Property "followed a course of conduct with the deliberate and dominant purpose of coercing" Mr Bhojwani to resign, and/or there was a breach of duty by Baker Property that led Mr Bhojwani to resign<sup>4</sup>.

[47] In addition, Mr Bhojwani claims that he suffered a large number of unjustified disadvantages that occurred throughout his employment.

[48] Mr Bhojwani's claims of unjustified disadvantage can be broadly divided into three categories, which I will describe as follows: claims about his visa status; claims about Ms Baker and to a lesser and later extent, Mr Baker re bullying conduct; and claims about health and safety.

[49] I will first consider the claims of unjustified disadvantage, before considering Mr Bhojwani's constructive dismissal claims and other matters arising.

### **Visa Status Issues**

[50] I will consider Mr Bhojwani's claims in relation to his visa status first, as Mr Bhojwani said to me at multiple times during the investigation meeting that it was very

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<sup>4</sup> As set out at paragraph 5 of the Submissions of Applicant in Reply dated 16 August 2023.

important for me to understand that it was all about his visa. The importance of visa issues to Mr Bhojwani is supported by the initial contact from his advocate on 10 May 2020, where his advocate states that Mr Bhojwani was “very frustrated with his employment/immigration status...”, and “It seems the difficulty started for [Mr Bhojwani] when Immigration NZ (INZ) were told that [Mr Bhojwani] was not in a management role despite the title being Area Manager”.

[51] There were two visa applications made on behalf of Mr Bhojwani with the support of Baker Property. The first was in 2019, which was granted in October 2019, with Mr Bhojwani starting work for Baker Property immediately thereafter. The second was the application process that started in it appears May 2020, culminating in Mr Bhojwani sending a revised draft job description to Mr Baker and asking him to adopt this and provide it in support of his visa application rather than his existing job description. I will deal with each in turn.

[52] Mr Bhojwani’s view on the 2019 visa application is that:

Due to Peter [Barker]’s misleading information, Ravi’s visa tenure was decreased to 1 year as opposed to 3 years and his position assessed as supervisory (low level (level 4) where renewal was not available instead of mid skill level 2 and Ravi had to pay additional visa cost to Immigration advisor to argue the case.<sup>5</sup>

[53] In blaming Mr Barker for being issued a visa that was for 1 year rather than for the three years he had hoped and expected, Mr Bhojwani refers in particular to a letter from INZ dated 9 September 2019, where INZ explained:

From the information provided with your application, it does not appear that you are performing the tasks of a Hospitality, Retail and Service Manager nec....

From these tasks it appears you are not the main Manager and that you are assisting with tasks, and are involved with recruitment but do not appear to be in control of these tasks. Furthermore to this the organisational chart that was submitted with this application shows that you are under the General Manager<sup>6</sup> and Managing Director<sup>7</sup>.

To gain further information around what your position would involve I placed a call with the Director of this company, Peter Baker. During this call it was stated that Vanessa, the General Manager, deals with hiring new staff members for all sites, and Vanessa and/or Peter hold the interviews and sign the Employment Agreements for the new staff members. Furthermore to this

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<sup>5</sup> Mr Bhojwani’s witness statement, pages 14 and 15.

<sup>6</sup> Ms Vanessa Baker

<sup>7</sup> Mr Peter Baker

Peter also stated that both he and Vanessa deal with the rosters for all staff members. Peter also stated that he makes the final decisions in regards to the site that you will be working at.

[54] Mr Bhojwani says that this is wrong or misleading, and in fact, once he had come on board, he did place job advertisements and interview staff for his region, make rosters for the stores he was responsible for, and was responsible for managing the sites/stores in his region.

[55] Ms Baker in particular continued to have involvement with employment agreements and disciplinary matters, and it is clear that Mr Bhojwani kept in contact with Mr Baker about the day to day running of the stores.

[56] Mr Baker denies saying anything untrue or misleading during his conversation with the INZ officer. He point out that INZ asked specifically how these matters (hiring new staff, signing employment agreements, rosters, and site management) were handled “now”. He answered this by saying truthfully that these matters were at that time being handled by himself and Ms Baker. He further says that:

Even though the questions put to me related to how the business operated at the time, it was intended that as Ravi grew into the role, duties such as rostering, hiring of staff, dealing with employee matters would become his responsibility.

The job description states that the role reported to the General Manager (Vanessa) and the Director (me).

While Ravi may have moved into being in charge of recruitment for his sites this was not the case at the time I discussed Ravi’s role with INZ.

[57] When I put to Mr Baker at the investigation meeting, the possibility that the questions put to him by INZ on the phone were intended to refer to how Mr Bhojwani’s role would work, rather than to the current way the company was run, Mr Baker refuted this. He said that he felt it was clear that the questions were focused on how Baker Property were run “now”, and he answered accordingly. Both Mr Baker and Ms Baker, while accepting that Mr Bhojwani had come to perform many of these tasks, referred to Mr Bhojwani as continuing to develop his skills, and that at the end of the day, the ultimate control of the company remained with Mr Baker as Director.

[58] There were also in evidence two different organisational charts, one being dated March 2019, and one being dated August 2019. The March 2019 chart showed Mr Bhojwani’s role of Area Manager with a dual reporting line, to both the Director (Mr Baker) and to the General Manager (Ms Baker), who in turn reported to the Director.

This was the structure that was reflected in Mr Bhojwani's position description, and also in practice.

[59] The August 2019 organisational chart was somewhat simpler. It showed Mr Bhojwani's role reporting only to the General Manager role, with no direct reporting line to the Director. It appears that the August 2019 organisational chart was sent to INZ in August 2019. This is reflected in the September 2019 letter from INZ to Mr Bhojwani. Mr Bhojwani points to this organisational chart to support his claim that Baker Property provided inaccurate information to INZ.

[60] While the organisational chart does not show a direct reporting line from Mr Bhojwani to Mr Baker as Director, the letter from INZ on 9 September 2019 shows that INZ did not rely solely on this document in deciding what visa to grant, but took into account and weighed a variety of information including external information such as ANZCO codes.

[61] On balance, I am not persuaded that Mr Baker or Baker Property acted wrongfully in the information provided to INZ. Mr Baker provided information that was an accurate answer to the questions asked, and did so according to his best knowledge and judgement at the time. This was all that he could have been required to do, and I find that he did so. I further note that by the time this matter came to be raised in the letter of 10 May 2020, some 11 months after the fact, it may well have been the case that Mr Bhojwani had taken over many of those responsibilities over time, although after hearing from both sides, I remain alive to the possibility that Mr Bhojwani's view as to the scope of his role was perhaps wider than the view of his role held by Mr Baker and Ms Vanessa Baker.

[62] I need to also note that the decision as to what visa was granted to Mr Bhojwani was the decision of INZ. Mr Baker and Baker Property were not in control of that outcome, which was never guaranteed.

[63] I turn now to consider the second visa application, in about May 2020. Mr Bhojwani says that he relied on Mr Baker to "support" his visa application, and that this didn't happen. The issues between the parties came to a head when on 6 July 2020, Mr Bhojwani sent to Baker Property a revised job description, that he wanted Baker Property to adopt and provide to INZ in support of his new visa application. Mr Baker states that:

The job description was different to Ravi's actual role, and tried to remove any reference to directions from the General Manager/Director. It became clear that Ravi believed that the 'status' of the proposed position would enable him to obtain a Essential Skills category visa.

We could not tailor Ravi's job description in a way which inflated...aspects of Ravi's role...To do so would have been misleading<sup>8</sup>.

[64] Mr Baker and Baker Property declined to adopt the new job description, which came with a new job title and changed reporting lines. In the end, this matter was never progressed, and Mr Bhojwani found employment with another company (and it appears, a new visa although he declined to provide any details of this) around 8 January 2021.

[65] I do not accept that there was any breach of obligation in the way that Baker Property approached this matter. The evidence shows that Baker Property responded to Mr Bhojwani's immigration advisor/s and provided documents as requested. Baker Property was under no obligation to change Mr Bhojwani's job description, job title, and reporting lines in the way or to the extent that Mr Bhojwani requested. These changes were relatively significant, and referred to duties that were not in line with the evidence I received from both sides as to the duties Mr Bhojwani was actually performing. Mr Baker was entitled to decline to make changes that he believed were inaccurate.

[66] In addition, a detailed email from Mr Bhojwani's own immigration advisor stated that there were difficulties for applicants such as Mr Bhojwani in circumstances where there was no clear ANZCO code that matched his job as area manager for a cleaning company and no guarantee that INZ would grant a specific type of visa.

[67] I have considered whether the actions of Mr Baker and Baker Property in this respect could amount to an unjustified disadvantage, and I find that they could not. I have found that Baker Property and Mr Baker did not take any unjustified actions or breach any obligations owed to Mr Bhojwani.

[68] For a claim of unjustified disadvantage<sup>9</sup> to be made out, Mr Bhojwani must be able to show that:

- a. one or more conditions of his employment

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<sup>8</sup> Peter Baker's witness statement at paragraphs 28 and 29.

<sup>9</sup> As defined at section 103(1)(b) of the Act.

- b. were affected to his disadvantage
- c. by some unjustifiable action by the employer.

[69] Mr Bhojwani focused strongly on the idea that being granted a 1 year visa by INZ when he had hoped and expected to be granted a visa for a longer term was disadvantageous to him because it incurred greater costs for more frequent visa applications. This may be so, but this is not what is required by the Act to demonstrate that an unjustified disadvantage has occurred in Mr Bhojwani's employment.

[70] I am also not persuaded that the granting of a visa by INZ for a period of time shorter than the duration Mr Bhojwani had hoped and expected is a matter that can be described as "a term and condition of employment". This is a decision that was made by INZ. Baker Property were not in control of the final outcome of Mr Bhojwani's visa application.

[71] In addition, I have found that Baker Property did not take any unjustifiable action in regards to Mr Bhojwani's visa applications. Accordingly, no claim of unjustified disadvantage is made out, and no orders are made.

### **Bullying and other unjustified conduct**

[72] Mr Bhojwani has raised as concerns many examples of matters that he says occurred throughout his employment. Most significantly, these include: communications difficulties with Mr Baker and Ms Baker, what Mr Bhojwani said was Ms Baker acting to undermine him in the issuing of disciplinary warnings; lack of training, confusion as to who staff report to, Mr Bhojwani's own concern about unilateral changes to his reporting line, and use of bad language.

[73] He claims these matters amount to both unjustified disadvantages, and generally that they are breaches of duty by Baker Property that have contributed to his constructive dismissal. I will here assess if these matters amount to a breach of duty, sufficient to found a claim of unjustified disadvantage.

[74] The main thrust of Mr Bhojwani's complaints about on-going issues in the day-to-day employment relationship was his working relationship with Ms Baker, and his desire to report only to Mr Baker and have no contact with Ms Baker. During the investigation meeting, Mr Bhojwani said of Ms Baker that he did not respect or trust

her. He felt she was lazy, inexperienced, knew less than he did about staff management and Baker Property, and that there was nothing he could learn from her. This is consistent with his witness statement where he says:

Vanessa was massively incompetent and...[her role] was given her due to her dad's company (nepotism) not on her merits...<sup>10</sup>

[75] This comment, and the comments Mr Bhojwani made at the investigation meeting about Ms Vanessa Baker are starkly opposed to the comments about her as being a “very warm and caring person, [who] shows support” for him. When I put this contradiction to Mr Bhojwani at the investigation meeting, he freely and openly admitted that the negative views he had expressed about Ms Vanessa Baker were his true opinions, and the nothing he had said in the apology letter of 24 May 2020 was accurate, and he stood by none of it. He made it clear that he could not and would not work with Ms Vanessa Baker due to his negative views of her.

*Split Reporting Lines*

[76] Mr Bhojwani took the view that when he commenced employment in October 2019, he reported solely to Mr Baker, and Ms Baker was not involved in the business. He claims that he wished to return to this, and that being asked to report partly to, and to work with, Ms Baker was a change in his terms of employment that he did not want. In saying this, Mr Bhojwani relies on his experience in the first few weeks of employment, when he worked side by side with Mr Baker in both cleaning and all other tasks, and communicated with Mr Baker alone.

[77] Baker Property says that this was a temporary situation, and was the result of Ms Baker being on planned leave in the first few weeks of Mr Bhojwani's employment. They both point to Mr Bhojwani's job description, which sets out that he is to report in to both Mr Baker and Ms Baker to support this. They also give evidence that right at the start of Mr Bhojwani's employment, he was regularly emailing and reporting to Ms Baker before she went on leave.

[78] In addition, Mr Baker and Ms Baker point out that they had slightly different roles in Baker Property, with Ms Vanessa Baker having responsibility for paperwork including payroll and human resource management, and Mr Baker was responsible for

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<sup>10</sup> Mr Bhojwani's witness statement, page 14.

governance, so it was necessary for Mr Bhojwani to report to and work with them both on different matters.

[79] Mr Bhojwani's claim that he was originally employed to report solely to Mr Baker is not sustainable. It is not what is set out in his position description, which set out the terms he agreed to. While for a short period near the commencement of his employment, Mr Bhojwani worked closely with Mr Baker, this does not represent or dictate the terms of his employment. There were practical reasons for this, including Ms Baker's planned leave happening to coincide with the start of Mr Bhojwani's employment, and Baker Property being temporarily short-staffed. There is no sensible basis for Mr Bhojwani to claim that his written terms of employment were over-ridden by a temporary change driven by absence and short staffing. My view is that it is more likely that Mr Bhojwani's desire to work with Mr Baker only and not Ms Baker was motivated by his expressed lack of respect for Ms Baker.

[80] Mr Bhojwani's terms of employment never allowed him to report solely to Mr Baker, and Ms Baker's temporary absence near the start of Mr Bhojwani's employment was not sufficient to change this. Asking Mr Bhojwani to report in part to Ms Baker and in part to Mr Baker was consistent with Mr Bhojwani's position description. No unjustified disadvantage arises from this. No claim is made out.

#### *Lack of Supervisors and Cleaners in Charge*

[81] Mr Bhojwani claims that Baker Property should have hired supervisors and cleaners in charge at the sites he was responsible for, to manage the staff at those sites. He says that his position description required this, and that Mr Baker verbally promised that supervisors and cleaners in charge would be hired to work under him, but that this promise was never fulfilled.

[82] Mr Baker accepts that Mr Bhojwani's position description contains a line stating: "Positions reporting to you: Supervisors, Cleaners in Charge, Cleaners". Mr Baker says that if such roles existed at the sites that Mr Bhojwani was responsible for, they would have reported to Mr Bhojwani in his role as Area Manager. However, he says that "depending on the work site and the shape of the workforce at different times, there weren't always employees at each of these levels".<sup>11</sup> Mr Baker says that some

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<sup>11</sup> Mr Baker's witness statement, 11 April 2023, at paragraph 21.

sites have only one or two employees and there is no need for an intermediate layer of management between the area manager and staff.

[83] Mr Baker refutes that he ever made a promise to Mr Bhojwani that site supervisors and cleaners in charge would be hired for Mr Bhojwani's sites, and points out that the structure and budget of Baker Property at the time simply wouldn't support those types of roles. Rather, it was one of Mr Bhojwani's duties to manage the staff at his sites.

[84] On balance, I prefer Mr Baker's evidence. Mr Bhojwani's position description did provide for staff in the positions of "Supervisor", "Cleaner in Charge", and "Cleaner" to report to Mr Bhojwani in his area. This is not in dispute. However, this does not equate to an obligation on Baker Property to hire more staff than was needed to perform the work available. I also prefer Mr Baker's evidence that he did not promise Mr Bhojwani that Baker Property would hire more and certain types of staff, at a time when the company was in the uncertain aftermath of the first nationwide lockdown. No unjustified disadvantage arises from this. No claim is made out.

#### *Excessive Hours of Work*

[85] Mr Bhojwani claims that he was working seven days a week, and could not take any days off. He went so far as to suggest he was on-call "24/7".

[86] Mr Baker and Ms Baker refute this, saying that Mr Bhojwani was only required to work 40 hours, over 5 days per week, Sunday to Thursday. This is set out in his employment agreement. They explained that there were systems in place so that Mr Bhojwani could forward all calls on his days off, was never required to keep his work phone on him on his days off, there was an 0800 number for staff to use if he was not present, and there was an "Ezitracker" system for staff timekeeping so that Mr Bhojwani did not have to be on site to monitor when employees showed up to work, with the alerts for this system sent to Mr Baker.

[87] Mr Bhojwani's view was that he felt he needed to be on site to essentially keep an eye on staff, who worked 7 days per week. However, he was unable to point to any requirement from Baker Property that he work 7 days a week. Rather the evidence shows that this was not a term of his employment agreement, and there were practical systems in place to ensure that Mr Bhojwani could take advantage of his days off. No unjustified disadvantage arises from this. No claim is made out.

*Communications difficulties with Mr Baker and Ms Baker*

[88] There are two matters raised by Mr Bhojwani that I have grouped under this general heading. First, that he found communicating with Ms Baker unhelpful, because when he communicated with her particularly after hours, she would not respond more or less immediately.

[89] Ms Baker accepted that she would not necessarily be able to respond to Mr Bhojwani “by return” especially after hours. She and Mr Baker also gave evidence that this was not needed, and most matters could be dealt with in office hours, and indeed, would often need to be dealt with in office hours if third party assistance was needed. Examples of this included machinery repair, which even if reported by Mr Bhojwani late at night, could not be scheduled for repair until the technician was available during their working hours, and any disciplinary matters, which would need to be dealt with during standard working hours as a matter of fairness.

[90] The evidence shows that Mr Bhojwani sent multiple emails to Mr Baker and Ms Baker reporting on what was occurring at his sites on a daily basis up until about 11 pm at night. It was not clear that there was any necessity for either of them to respond to Mr Bhojwani at the time he sent those emails. Even in regards to immediate issues like staff not turning up for work when they were scheduled to work, Mr Bhojwani was empowered to bring in replacement staff, and did so. I do not find that a failure to respond in the timeframes that Mr Bhojwani might have preferred amounts to any breach or unjustified action.

[91] Secondly, Mr Bhojwani was very upset and concerned by a particular instance of miscommunication, when he and Ms Baker visited a supermarket in the Bay of Plenty that was not contracted to Baker Property with the a view to tendering for their cleaning work. Mr Bhojwani forwarded information on to both Mr Baker and Ms Baker, and asked them to approve pricing, so that he could follow this up. Neither of them responded, the opportunity lapsed, and Mr Bhojwani reports that he felt frustrated and unsupported.

[92] It was clear that this was a mater which had been overlooked by both Mr Baker and Ms Baker. The difficulty for Mr Bhojwani is that in the end, the decision was not his to make. Mr Baker retained final decision-making powers in relation to Baker Property, and although not following up does not appear ideal, it was Mr Baker’s choice

to make. Mr Bhojwani was not responsible for bringing this matter “over the line” and nor was he held responsible for this.

[93] The evidence shows that no unjustified disadvantage arises from this. No claim is made out.

#### *Issuing of Written Warnings*

[94] Mr Bhojwani raises another claim that Ms Baker acted to undermine him in the issuing of disciplinary warnings. This complaint stems from circumstances where Mr Bhojwani issued verbal warnings, and these were not followed up in writing, which he says meant staff were less likely to take him seriously.

[95] Mr Bhojwani refers to six instances during March and April 2020 where he says that Mr Baker and/or Ms Baker did not follow up his verbal warnings to his staff by issuing confirmation in writing in a timely way.

[96] After discussion in email, this was resolved in early June 2020, with Ms Baker confirming by email to Mr Bhojwani that he could issue his own warning confirmations, and when he queried what he should say, she replied with template wording.

[97] I am not persuaded that this amounted to Mr Baker or Ms Baker acting to undermine Mr Bhojwani as he claimed. Any confusion as to who would be responsible for issuing written warnings to Mr Bhojwani’s staff was resolved in Mr Bhojwani’s favour by email instruction confirming his authority to action this for the staff he managed. In addition, the identifiable instances that Mr Bhojwani complained of occurred during March and April 2020 during New Zealand’s first nationwide lockdown, when there were considerable extra pressures on supermarkets, cleaning workers, and supply chains. I am not persuaded that this represents more than an indication of the confusion and over-work that existed during this unusual period of time.

#### *Lack of Training*

[98] Mr Bhojwani claims that he did not receive adequate training on many aspects of his job, particularly on how to make up the cleaning formulas for his staff to use. Mr Baker responds to this by saying that for the first several weeks of Mr Bhojwani’s employment, he himself accompanied Mr Bhojwani to the various work sites that Mr Bhojwani would be responsible for to introduce him around, show him how to access

the sites, the various cleaners cupboards and storage available, and ended up performing cleaning work with Mr Bhojwani as they actively recruited for more cleaning staff. Mr Baker then remained available as a contact point for Mr Bhojwani.

[99] Mr Bhojwani generally speaks well of Mr Baker and of this period of time when he and Mr Baker worked together. It is clear that Mr Baker personally trained Mr Bhojwani on what work would be required at various sites, as they did that work together. Mr Bhojwani's later complaints as to a lack of training cannot stand in the face of Mr Baker's evidence as to what Mr Baker did, which is not contradicted by Mr Bhojwani. No unjustified disadvantage arises from this. No claim is made out.

#### *Lack of Manuals at a Site*

[100] When Mr Bhojwani complained in July 2020 that there were no manuals available at a particular site in Mt Maunganui, Mr Baker quite properly have replacement copies printed and provided. This did not satisfy Mr Bhojwani, who then said that there had never been any manuals from the time he had started work.

[101] If that was in fact the case, Mr Bhojwani does not appear to appreciate that he himself should have raised this much sooner than July 2020 (by which time the employment relationship had begun to deteriorate and Mr Bhojwani was already on sick leave), pursuant to his own obligations as both an employee and a manager to maintain that site.

[102] While missing documentation is not ideal, Mr Bhojwani contributed to that situation as by his own account, he was aware of the lack of manuals on a site he had long term managerial responsibility for and did nothing to draw this to the attention of Mr Baker. Once this was drawn to his notice, Mr Baker acted promptly to rectify the situation. On balance, nothing flows from this prompt handling of minor matter once it was brought to light. No unjustified disadvantage arises from this. No claim is made out.

#### *Confusion as to Staff Reporting Lines*

[103] Mr Bhojwani claims as further evidence that he was undermined, the possibly of confusion in who staff report to. This claim is made on the basis that some staff working for Mr Bhojwani had employment agreements which indicated that they were to report to the Operations Manager, a title previously held by Ms Baker. Mr Baker rejects this, saying that he personally took Mr Bhojwani to all the sites Mr Bhojwani

was to manage, to introduce him to staff and clients as the manger. Mr Baker says he was never aware of any confusion in practice, and all staff in the Bay of Plenty area did in fact report to Mr Bhojwani.

[104] Mr Bhojwani does not provide any evidence from staff as to their confusion, not does he provide in his own evidence any examples of situations where he says confusion arose. His claim stems from particular wording in employment agreements, which wording was later changed as Baker Property updated its template documentation.

[105] I accept Mr Baker's evidence on this point, which is not contradicted by Mr Bhojwani. There is a lack of evidence that any confusion existed, and evidence that staff were advised to report to Mr Bhojwani and did so. No unjustified disadvantage arises from this. No claim is made out.

#### *Use of Bad Language*

[106] Mr Bhojwani says that Mr Baker and Ms Baker would use bad language in front of him, which he found unprofessional and which made him uncomfortable. Mr Baker in particular recollects and accepts that he used the word "bullshit" in conversations with Mr Bhojwani. There is no indication that this word was used in circumstances where it was directed at Mr Bhojwani. The evidence also shows that this was a workplace with a wide variety of staff using a wide variety of language, with emails from Mr Bhojwani using similar language.

[107] I am willing to accept that this type of language may have caused Mr Bhojwani a level of discomfort. However there is no indication that he brought the matter to the attention of Mr Baker or Ms Baker in a timely way, so that they could have the opportunity to address it as part of the employment relationship going forward. Given that Mr Bhojwani used similar language himself in email correspondence on occasion, there was no reason to suppose discomfort. Taking all this into consideration, no claim is made out.

#### **Health and Safety Concerns and Related Matters**

[108] Under this heading, I have grouped a variety of topics not already covered above, including: an assault on Mr Bhojwani, concerns with the dispenser and chemical storage; lack of company manuals provided in a timely way; and Worksafe notices and other similar matters.

*Assault at work*

[109] On 28 November 2019, Mr Bhojwani experienced an assault at work when a staff member who had not confirmed he would be working that evening, arrived at a work site anyway. When Mr Bhojwani asked him why he was there, he pushed Mr Bhojwani and “started abusing me with all the nasty words”.<sup>12</sup> Mr Bhojwani remained calm, and the person left the site.

[110] Mr Bhojwani promptly reported this to Mr Baker, saying in his email:

I did mention to ness [Ms Baker] a few weeks ago he had mental issues/mentally unstable man – for which ness had different thoughts – but the fact is he indeed has mental issues – you would be aware he was in the lock up last week as he beaten his niece in front of police...

Just wanted to know if I can lodge police complaint as his definite intentions were to fight or can you get someone to remove him from site as sending our staff will be just risky...

[111] Mr Baker replied that same day saying: “Sorry to hear of the incident this morning...this is very serious.” Mr Baker suspended the staff member. On 3 December 2019, Mr Baker dismissed the staff member.

[112] Mr Bhojwani says that this is insufficient, and that the staff member should have been dismissed before he assaulted Mr Bhojwani, on the basis of the information about him that Mr Bhojwani had provided as above. Mr Baker and Ms Baker take the view that it would not have been proper to dismiss someone on the basis of Mr Bhojwani’s speculation as to that person’s mental state and a report about an incident that happened outside work which neither of them had direct knowledge of.

[113] In short, when Mr Baker was informed by Mr Bhojwani that Mr Bhojwani had been pushed and verbally abused by a staff member, Baker Property took action by removing that staff member from the workplace and promptly terminating their employment. All of this was to Mr Bhojwani’s support and benefit. I do not accept that there was any obligation on Baker Property to terminate the staff member’s employment at an earlier stage based on general details of a completely separate incident that happened outside the workplace and did not involve any details of the incident. No claim is made out.

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<sup>12</sup> As described by Mr Bhojwani in his email to Mr Baker of this same date.

### *Issues with Dispenser*

[114] Mr Bhojwani raised a number of concerns with the fitness for purpose of the dispenser he was required to use, and chemical storage. Baker Property provided various specific types of cleaning fluids for its staff to use. These were provided in small 2 litre containers and needed to be diluted for use. Mr Bhojwani would collect these concentrates from Baker Property's depot using the work vehicle provided to him and would take them to site. There, he would use a tool called a dispenser, which was a type of specialty mixing valve, to be attached to a water tap allowing the concentrate to be mixed with water to achieve the required dilution. The dilute cleaning fluid would then be provided in 20 or 25 litre containers for staff to use.

[115] Mr Bhojwani complained in June 2020 that the dispenser he had been provided back in October 2019 was not working properly. As a result, he had been required to dilute the chemicals at his house. He said this made a foaming mess, which upset his landlord, and then had to transport the much heavier and unwieldy 20 or 25 litre containers to site.

[116] When this was brought to Mr Baker's attention, he immediately arranged to meet with Mr Halse (which was what was requested), and he demonstrated to Mr Halse the proper use of the dispenser, provided photos of the taps available for cleaner's use at each of Mr Bhojwani's sites, and gave details of various tap fittings (eg, the hardware installed at the sites) that might need to be navigated.

[117] Mr Halse provided these photos back to Mr Bhojwani saying in an email dated 17 June 2020:

I had Peter explain in great detail how the chemicals should be handled and other than him acknowledging that there weren't great tap fittings in some of the 6 sites you service, their process seems perfectly reasonable to me.

You carry the small containers of concentrate in your vehicle and using the process shown in the attached photo, you fill the 25-litre containers that remain on site in the cleaning cupboard/room.

[118] On 18 June 2020, Mr Halse wrote again to Mr Baker asking: "Can you please ensure there are appropriate tap fittings at each of the six sites... There may be a couple of leaking hose/fittings that may need replacing but that seems a minor detail."

[119] This raises the question of what obligations Mr Bhojwani says have been breached by Baker Property. After hearing evidence from both parties, I am not

convinced that Mr Bhojwani was required to dilute the concentrates at home, or that the creation of what Mr Bhojwani refers to as a “foaming mess” was inevitable. The sites all had a tap and cold water available, meaning that this task could have been performed on site, and the possibility of foaming overflow prevented by a slow fill rate and care. The true problem appeared to be that some sites used different tap fittings and/or had different tap positioning that made access less convenient. This is something that could have been alleviated by the provision of intermediary fittings for those taps, which is in fact what Mr Halse asked Baker Property for, and what Baker Property had already provided.

[120] I am also not convinced that Baker Property required Mr Bhojwani to use a faulty dispenser. Mr Baker gave evidence that:

When Ravi commenced employment, I provided him with a dispenser for chemical refills. Ravi had difficulty using this particular dispenser so I provided him with the dispenser I had been using. Ravi was still unable to use my dispenser and added a number of incorrect fittings to it, making it unusable, so I provided him with the original dispenser along with additional fittings to help with fitting the various tap configurations, and showed him how to use it correctly.<sup>13</sup>

[121] To summarise, Mr Bhojwani was provided with hand-on training about how to use the dispenser. When he complained about it, Mr Baker replaced it. Mr Bhojwani altered the replacement dispenser, and complained about that also. Mr Baker again replaced it, and provided additional fittings. Each time Mr Baker became aware that Mr Bhojwani was not satisfied with the dispenser, he promptly provided replacement, alternatives, more fittings, and more trainings. The only exception was a period of 6 or 7 months between approximately November 2019 and June 2020, where Mr Bhojwani did not indicate there were any continuing problems with the dispenser.

[122] In responding promptly to resolve concerns as they were raised, Mr Baker and Baker Property fulfilled their obligations to Mr Bhojwani. No claim is made out.

*Company manuals not provided in a timely way*

[123] Mr Bhojwani raises a claim that he was not provided with certain company policies or manuals until July 2020, some nine months after he started work. This is partly illustrated by the incident discussed earlier, when around 8 July 2020 Mr

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<sup>13</sup> Mr Baker’s witness statement dated 11 April 2023 at paragraph 39.

Bhojwani told Mr Baker that the site documents for one of the sites he serviced were not there, and Mr Baker arranged for these to be replaced.

[124] This concern mainly arose from an email conversation between Mr Bhojwani and Mr Baker in June 2020, where Mr Bhojwani said that he had not seen three policies for “Chemical Storage and Handling”, the “Quality Plan”, and “OSH – hazardous substances” before. Mr Baker replied saying “Yes I agree, you would not have seen all documented systems yet, but those systems of delivering, decanting, and how to use the dispensing system were demonstrated to you.”<sup>14</sup> Mr Baker then went on to list 18 other company documents that Mr Bhojwani had been provided with, including relevantly the MSDS<sup>15</sup> (site specific documents held at each site), the Company Standing Rules, Worksafe Accident Investigation Form, Hazard Report Forms, Incident/Accident Forms, and the Cleaners Induction and Training Guide.

[125] Mr Baker’s view is that he personally showed Mr Bhojwani how to safely and appropriately work with the cleaning chemicals, on a site by site basis. In addition, there were site specific documents held at each site which were relevant and available. Baker Property does not accept that there was any meaningful failure to share relevant health and safety protocols or instructions with Mr Bhojwani in those circumstances. Mr Baker points out that Baker Property was in the process of reviewing its template documentation and policies in February 2020, and that this process was only able to recommence later in the year due to the impact of lockdown, which was when he began talking about these specific policies with Mr Bhojwani.

[126] I have considered whether Baker Property failed in any obligations it owed to Mr Bhojwani by having some older policies that it appears were not shared with him in a timely way. Site specific documents were available on site. While in certain circumstances, this might amount to a breach of duty, I am not persuaded that this was in reality a separate and distinct matter from Mr Bhojwani’s other complaints about the use of the dispenser, and his decision to dilute the concentrates at home and then transport the larger volumes to sites using his work ute.

[127] Mr Baker actively worked with Mr Bhojwani to train Mr Bhojwani in how to manage and handle the cleaning chemicals used in the job. Mr Bhojwani speaks well

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<sup>14</sup> Email from Mr Baker to Mr Bhojwani dated 19 June 2020.

<sup>15</sup> MSDS in this instance stands for Material Safety Data Sheets.

of his time spent working with Mr Baker. Mr Baker provided in-person and hands-on instruction, and was supportive and responsive when Mr Bhojwani raised concerns. Mr Bhojwani also had an obligation, as an employee of Baker Property, to raise any concerns he had about safety protocols and practices, or the absence of same. Mr Bhojwani never raised concerns to this effect. Taking all this into consideration, my view is that this is not a separate breach, and even if it were, there is no evidence of any detriment to Mr Bhojwani. No claim is made out.

#### *Maintenance of Machinery*

[128] Mr Bhojwani claims that Baker Property did not repair machinery when it was broken. This was discussed at the investigation meeting, and Mr Baker and Ms Baker gave evidence that machinery (including floor buffers and vacuum cleaners) would break down from time to time, but that Baker Property had relationships with repair technicians and would arrange for any broken machinery to be repaired by the appropriate technician.

[129] At the investigation meeting, Mr Bhojwani explained that he found it frustrating when there was a machinery breakdown, and his view was that Baker Property should buy new machinery instead of repairing old machinery.

[130] Repairing machinery through the use of qualified technicians is common practice. Baker Property is not obliged to purchase new machinery as Mr Bhojwani suggests. No claim is made out.

#### *Worksafe Notices*

[131] Mr Bhojwani makes reference to the fact that Baker Property received formal improvement notices from Worksafe, in September/October 2020. Mr Baker explains that these notices related to the way that cleaning fluids held at the Baker Property depot were labelled, and that this was a direct result of purchase from overseas suppliers, who provided their own labels. In the instances identified, Baker Property was able to comply with Worksafe's requirements by marking up the relevant bottles themselves. I also understood that in the case of one product, the supplier then updated its own labelling meaning that this was no longer required.

[132] Mr Baker points out the concerns held by Worksafe as set out in the relevant improvement notices were not the same as, or relevant to, the quite different concerns raised by Mr Bhojwani. I agree. Nothing arises from this in terms of Mr Bhojwani's

claims. Baker Property was asked to change a specific aspect of its practice and did so. This does not indicate any wider or systemic problems as Mr Bhojwani seems to be suggesting.

[133] At this point, I need to mention that Mr Bhojwani also mentions correspondence with the Labour Inspectorate, which asked Baker Property to take certain steps with regard to holiday pay. Such matters are far from unique to Baker Property. These matters have no relevance to Mr Bhojwani's employment, nor has he claimed this.

[134] Both the Labour Inspectorate and Worksafe audited Baker Property following complaints made to them by Mr Bhojwani. Mr Bhojwani has referenced this to suggest that Baker Property was not fulfilling its legal obligations in other areas. I do not consider that any negative conclusion need be drawn in all the circumstances, and more directly, the issues raised by the regulators were not the same as the concerns raised by Mr Bhojwani. No findings are made.

### **Constructive Dismissal**

[135] I turn now to consider Mr Bhojwani's claim that he was constructively dismissed. The reasons for this claim are set out in Mr Bhojwani's resignation letter dated 8 January 2021, effective as of that same day, which says:

You have left me with no option but to resign because of your bullying tactics, biased behaviour, and running of a sham Investigation process by involving corrupt lawyers...

YOU targeted and ganged up on me with your daughter and thus failed miserably/fell extremely short in your obligation as an employer to provide me with a safe work environment...

Throughout the time of my job duration, you continued to mislead me about my role, days off, training, reporting, organisational structure, company's policy and procedures, chemical storage & preparation, moreover you intentionally withheld crucial information, documents, and fooled me to sign induction without completing it exposes your bad intentions and set up plan...

You mislead Immigration NZ intentionally...As discussed, several times, my reduced work visa status, specifically mentions the misleading/Untrue comments you made to Immigration Officer which created a massive problem in getting new employment...

You went too far to bring frivolous claims/complaints against me and initiated an unjustified forced disciplinary meeting for locking me out of the workplace...you pushed me to suicide ideation by stopping my wages when I was in depression...

[136] These are serious claims. To found a claim for constructive dismissal, there must not only be a breach of duty by the employer, but also the breach must be of such character as to make the employee's resignation reasonably foreseeable.<sup>16</sup>

[137] Not every breach of contract will lead to constructive dismissal. There must be "a breach of a sufficiently serious nature to bring a reasonable employee to the conclusion that the employer does not intend to be bound by the contract and, therefore, cannot be relied upon to perform it fully or consistently in the future."<sup>17</sup>

[138] When considering whether any of the claims that Mr Bhojwani raises are breaches of duty by Baker Property, my view is that overall, they are not. Many of these issues I have already considered above. I have found that Mr Bhojwani's claims in relation to "training, reporting, organisational structure, company's policy and procedures, chemical storage & preparation" have not been made out. Similarly, I do not accept that Mr Bhojwani was "fooled" into signing an induction form without completing an induction in light of the personalised training and working relationship that he enjoyed with Mr Baker at the time.

[139] I have found that Baker Property and Mr Baker did not "intentionally mislead" INZ, as Mr Bhojwani has claimed.

[140] Mr Bhojwani also refers to "bullying tactics", "biased behaviour" and the idea that Mr Baker and Ms Baker "ganged up" on him. The definition of workplace bullying is: repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.<sup>18</sup>

[141] I have considered if Mr Baker and Ms Baker engaged in "repeated and unreasonable behaviour" towards Mr Bhojwani. The evidence does not support a claim that this occurred.

[142] While Mr Bhojwani makes a large number of claims, stretching across his employment with Baker Property, there is no suggestion that the incidents he complains of form a pattern of similar behaviour. Rather, they are characterised by the way in which they are all different.

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<sup>16</sup> See *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140, (2011) 8 NZELR 604.

<sup>17</sup> *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* (1990) ERNZ Sel Cas 791 (LC) at 803.

<sup>18</sup> Worksafe's Guide to Preventing and Responding to Bullying at Work, March 2017, page 8.

[143] Fundamentally, the contemporaneous email correspondence between the parties shows that Mr Baker and Ms Baker communicated with Mr Bhojwani in a way that was supportive, respectful, recognised his managerial position, generally agreed with his judgements, and were willing to offer practical solutions to identified problems.

[144] I acknowledge this is not the view held by Mr Bhojwani. His view is that he went above and beyond for Baker Property, working later at night, doing his best to look after his staff, and even source more work. From his perspective, when he reported back to the Bakers, his hard work was not properly acknowledged, and they did not reply to him in ways he consider adequate. At the same time he was, understandably, depending on Baker Property to help support his next visa application. On realising that the support that Baker Property was able to provide was not the same as the type of support he believed he needed (of which the revised position description is an example), he found this (again understandably) distressing.

[145] However, this is not enough for a claim of constructive dismissal to be made out. Constructive dismissal requires breach/es of a sufficiently serious nature to make Mr Bhojwani's resignation reasonably foreseeable.

[146] Considering the totality of the employment relationship, and having regard to the contemporaneous correspondence between the parties, my view is that no breach of this type occurred. I have not found Baker Property committed any breaches, much less breaches of the type that would indicate to a reasonable employee that the employer did not intend to continue to honour the employment relationship.

[147] With regards to the communications failures alleged, both Mr Baker and Ms Baker continued to keep in touch with Mr Bhojwani, including texting him, meeting with him, and discussing work matters with him. Communication continued to be relatively frequent, substantial, and practical. It is significant that Mr Bhojwani made complaints about slow communication during March and April 2020, when the country was in lockdown and there was significant pressure on both supermarkets and cleaners as essential service providers. Again, I acknowledge that Mr Bhojwani wanted more, and there were instances of slowness in responding, but this period was not indicative of the employment relationship as a whole.

[148] I also take into account the length of time that elapsed between these claimed breaches and Mr Bhojwani's resignation. Mr Bhojwani resigned on 8 January 2021.

By this stage, he had been aware of the circumstances that he said led to his resignation for between 9 and 16 months. In addition, Mr Bhojwani did not resign until he had secured new employment, and by his own account suffered no more than one week's delay between the immediate ending of his employment with Baker Property and the start of a new job. Indeed, given that he resigned on 8 January 2021 and his visa was transferred to another employer on 11 January 2021, it seems that there was only a three-day delay before Mr Bhojwani was able to start new employment.

[149] The initiative for dismissal must come from the employer. None of these factors support Mr Bhojwani's claim that he was constructively dismissed. Overall, this claim is not made out.

### **Other Matters**

[150] Mr Bhojwani refers to further matters in his resignation letter of 8 January 2021 that I need to consider, although as per s 174E of the Act, I have not recorded all evidence or submissions received.

[151] Mr Bhojwani refers to "the running of a sham Investigation process by involving corrupt lawyers" and bringing "frivolous claims/complaints against me and initiated an unjustified forced disciplinary meeting for locking me out of the workplace".

[152] Mr Bhojwani gave feedback on both the draft terms of engagement for the investigation (which terms were updated to include further issues raised by Mr Bhojwani) and also gave a substantive written response to the investigator. Despite this, he maintained to Baker Property that he believed the investigation was a sham, saying in a letter dated 17 November 2020 that: "It's all just a "sham process"...with a premeditated decision...that Vanessa has done nothing wrong and will throw the entire blame on me."<sup>19</sup>

[153] There is no evidence that the investigation process commenced by Baker Property was a sham. The evidence establishes that Baker Property took appropriate steps to hire third party expertise to respond to Mr Bhojwani's complaints, and based on Mr Bhojwani's feedback on the proposed terms of engagement, added to the matters under investigation and included Mr Baker as a respondent to that process at a late

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<sup>19</sup> At page 2 of Mr Bhojwani's letter of 17 November 2020.

stage. No claim is made out. Mr Bhojwani's references to "corrupt lawyers" are without foundation, and apart from noting such, no further comment need be made.

[154] Mr Bhojwani also refers to Baker Property bringing "frivolous claims/complaints against me and initiated an unjustified forced disciplinary meeting for locking me out of the workplace". Mr Bhojwani was not locked out of the workplace. As previously noted, it was agreed between the parties with the involvement of their respective representatives that Mr Bhojwani would remain on paid special leave following his doctor's advice that he was fit to return to work, and the parties and their representatives continued to discuss matters, including particularly Mr Bhojwani's bullying complaint.

[155] Baker Property did write to Mr Bhojwani saying that it wanted to meet with him to discuss some concerns it had with his management style that had been brought to its attention by certain staff members. Mr Bhojwani raised/continued to raise his own concerns, and Baker Property decided to have Mr Bhojwani's claims independently investigated. While Mr Bhojwani takes the view that these concerns were frivolous and/or unjustified, an employer is justified in raising concerns that it has about conduct in the workplace with an employee. This point was accepted by Mr Bhojwani at the investigation meeting. In the end, matters were overtaken by Mr Bhojwani's resignation. Nothing further arises from this, and no claims are made out.

[156] In Closing Submissions at paragraphs 52 and 53, Mr Halse says that Mr Baker "used his influence to prevent the applicant obtaining other employment in the commercial cleaning industry". Mr Halse refers to an email to another company dated 30 April 2021, some time after the ending of Mr Bhojwani's employment on 8 January 2021. In that email, Mr Baker writes: "I do feel that there would be a conflict whilst Ravi has a matter that requires the Employment Relations Authority to adjudicate (claims of bullying etc)...I do feel that I need to operate at arm's length with any dealings that Ravi Bhojwani may be involved. Regretfully we will not be able to price the above job for you."

[157] This email does not indicate that Mr Baker "used his influence" to prevent Mr Bhojwani gaining other employment. The email shows that Mr Baker declined to tender for a particular job when he became aware this was at a site Mr Bhojwani was already working at. This claim is not made out.

[158] Mr Halse also states: “It is our view that the respondent attempted to have the applicant’s visa removed.” It is not explained how this might have occurred, nor is any evidence presented in support. On these grounds, I cannot consider the matter any further.

### **Breach of Good Faith**

[159] Mr Bhojwani claims that Baker Property acted in breach of its good faith obligations, as well as in breach of its obligations under the Health and Safety at Work Act 2015 by “failing to protect” him “despite being aware of the bullying in the organisation, and despite the Applicant raising concerns with the Respondent”.<sup>20</sup>

[160] I do not accept that this is an accurate description of what occurred. When Mr Bhojwani provided a medical certificate to the effect that he was suffering from workplace stress, he was placed on sick leave, in July 2020. Baker Property continued to liaise with his advocate, including attending mediation with the assistance of Mediation Services. When it became clear that Mr Bhojwani was raising bullying claims against the Bakers, an agreement was reached that he would be put on special paid leave and would not need to return to the workplace, and an independent investigator was hired to assist.

[161] Baker Property took appropriate actions as Mr Bhojwani’s concerns became clear. This included providing a significant amount of paid leave, ensuring he was not required to return to the workplace which arrangement continued until the ending of his employment, and ensuring his claims were looked into by an appropriately qualified third party. No claim is made out.

### **Orders**

[162] Mr Bhojwani’s claims against Baker Property Services Limited are not made out. No orders are made.

### **Costs**

[163] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

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<sup>20</sup> As set out at paragraph 3 of the Amended Statement of Problem dated 24 June 2021.

[164] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[165] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>21</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>21</sup> Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>