New Zealand Employment Relations Authority Decisions

Lagan v Diane Astle Real (Christchurch) [2016] NZERA 377; [2016] NZERA Christchurch 139 (22 August 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2016] NZERA Christchurch 139
5565529

BETWEEN SEAN LAGAN Applicant

A N D DIANE ASTLE REALTY LIMITED Respondent

Member of Authority: Peter van Keulen

Representatives: Penny Shaw, Counsel for Applicant

Robert Thompson, Advocate for Respondent

Investigation Meeting: 19 May 2016 at Christchurch

Submissions Received: 27 May 2016 in writing from both parties

1 June 2016 orally from both parties

Date of Determination: 22 August 2016

DETERMINATION OF

THE EMPLOYMENT RELATIONS AUTHORITY

A. Mr Lagan was not unjustifiably dismissed from his employment.

B. Costs are reserved with a timetable set for submissions if required. Employment relationship problem

[1] The applicant, Mr Lagan, complains that the respondent, Diane Astle Realty Limited (DARL), unjustifiably dismissed him from his employment. He says that dismissal arose in circumstances where he resigned as a result of a breaches of obligations owed to him by DARL and/or as a result of DARL following a course of conduct that had the deliberate and dominant purpose of coercing him into resigning.

[2] DARL says that it did not breach any duty owed to Mr Lagan in such a way that justified his decision to resign nor did it carry out a course of conduct that had the

deliberate and dominant purpose of coercing him into resigning. It says further that if it did breach any obligations owed to Mr Lagan it is clear that he did not resign in response to any alleged breach of duty and there is no unjustified dismissal.

Factual background

[3] DARL operates a business that specialises in selling real estate and providing property management services.

[4] In February 2010, Mr Lagan began permanent full-time employment with

DARL as a Property Manager.

[5] In his role as Property Manager, Mr Lagan provided services in relation to residential rental properties such as organising and agreeing tenancies, completing inspections as required, collecting or collating rent payments and chasing overdue rent and managing property maintenance.

[6] The terms of Mr Lagan's employment with DARL were set out in an individual employment agreement. Mr Lagan's first employment agreement was dated 19 February 2010. This was replaced by an employment agreement dated

20 December 2012 (the IEA).

[7] The IEA included the following clause:

6. **HOURS OF WORK**

6.1 The hours of work are to be those required to fulfil, the responsibilities of the positon and will be those listed in Schedule A

attached. It is recognised that due to the nature of the Company's

business, it may be necessary to work outside these hours to meet the requirements of the landlords or tenants and to ensure all duties and

targets are met.

...

SCHEDULE A

...

6. Hours of work: Monday to Sunday as needed by landlord or tenant allow time for yourself.

The hours of work for this position will be as required to complete all duties and responsibilities.

Normal working hours will be from Monday to Friday as required for prospecting, landlords, tenants and office duties but some additional hours may be called on as required. Such additional hours will be paid at the above rate of pay. A landlord/tenant may phone outside these hours, or a tradesperson may be needed. Time can be taken for you during slow time through the week.

[8] Mr Lagan worked in excess of 40 hours per week from the commencement of his employment with DARL. Whilst the number of properties he had in his portfolio to manage varied, he said that the work required remained reasonably constant because when he was not managing properties he was prospecting for further work, i.e. looking to secure new properties to manage. There was also extra work required in relation to earthquake damage post the 2010 and 2011 earthquakes in Christchurch.

[9] Mr Lagan calculates the average weekly hours based on his wage and time records for the financial years as follows:

(a) 2010 to 2011 - 49.6 hours; (b) 2011 to 2012 – 49.6 hours; (c) 2012 to 2013 – 49.3 hours; (d) 2013 to 2014 – 46.5 hours; (e) 2014 to 2015 – 44.3 hours.

[10] Diane Astle of DARL noticed the high number of hours of work undertaken by Mr Lagan and decided in early 2013 to employ a further property manager. Janine Shaw was employed to fulfil this role and was paid for 35 to 40 hours per week as a property manager. Janine had a portfolio of approximately thirty properties.

[11] Mrs Astle became concerned that notwithstanding the employment of Ms Shaw to help with the property management portfolio, Mr Lagan's hours continued to stay high through 2014.

[12] In November 2014, Mrs Astle met with DARL's accountant Peter Davidson and he told Mrs Astle that he thought Mr Lagan's hours were not commensurate with his portfolio i.e. he thought Mr Lagan's hours of work were too high. Mrs Astle also spoke to a peer in the industry who advised that he thought a portfolio of properties of the size Mr Lagan had could be managed with 35 hours work per week.

[13] Mrs Astle says she met regularly with Mr Lagan to discuss his hours as she thought they were too high. In particular, she met with Mr Lagan following the meeting with Mr Davidson.

[14] Mrs Astle was also concerned that Mr Lagan was not doing a certain amount of administration work requiring the administrator employed by DARL to undertake work that Mr Lagan should be doing. And she says she regularly discussed this concern with Mr Lagan.

[15] I questioned Mrs Astle about the inconsistency in those two positions, i.e. that she thought Mr Lagan was working too many hours yet he was not doing all that he should be doing. Mrs Astle said that she thought Mr Lagan might not have been working all of the hours that he was recording and that the high number of hours was unnecessary or not representative of the work being done.

[16] Mr Lagan says that there were discussions around the amount of work he was undertaking in respect of the administration tasks, but these were infrequent and there was no real discussion around the high number of hours and that he should not be working as many as he was. He does accept there was a discussion in November

2014 when Mrs Astle advised him that Mr Davidson had told her the costs were too high. Mr Lagan says that Mrs Astle said they would need to tighten up but there was no mention of reducing hours.

[17] I am satisfied that, in the course of 2014, there were some discussions between Mrs Astle and Mr Lagan about the hours that he was working. I believe Mrs Astle was dissatisfied with the high number of hours that Mr Lagan was doing, particularly in light of the work that she perceived was being undertaken by him. However, I am not satisfied that there was sufficient discussion between Mr Lagan and Mrs Astle to the extent that Mr Lagan fully understood the concern about hours worked and the completion of administration tasks such that he should have known to modify his work as a result.

[18] Against this backdrop of concern over the number of hours and Mr Lagan's administrative work; an incident occurred at the end of 2014 in relation to a tenancy tribunal hearing.

[19] There was a lot of conflicting evidence between Mr Lagan and Mrs Astle as to the events leading up to and after the tenancy tribunal hearing. Much of that evidence is not relevant for my determination so I will not refer to it or make any decisions about what actually occurred other than what is necessary.

[20] The short point is that both Mr Lagan and Mrs Astle were involved in a

tenancy tribunal hearing for one of Mr Lagan's clients in November 2014. On 27

November 2014, the tenancy tribunal made an order in favour of the tenants awarding penalties of $800.00 for failure to repair and wrongful termination. The result was that DARL had to pay the penalties and Mrs Astle thought that Mr Lagan should pay half of this.

[21] In January 2015, Mrs Astle discovered that Mr Lagan would not pay half of the fine awarded in the tenancy tribunal matter; Mrs Astle had expected he would pay half of the fine.

[22] On 14 January 2015, Mrs Astle told both Mr Lagan and Ms Shaw that in future if there were any tenancy tribunal fines imposed against DARL clients then the responsible property manager must pay half of the fine. There was no discussion over this direction, it was presented to them both in a meeting and they were asked to sign a letter dated 14 January 2015, which recorded this. Despite not agreeing with this nor believing it would be enforceable against him, Mr Lagan did not protest and signed the letter.

[23] Late in evening of 14 January 2015, Mr Lagan sent text messages to Mrs Astle. It is not clear what the exact content of the text messages were as they were subsequently deleted but Mrs Astle described the text messages as *drunken text messaging*. Whatever the content, Mrs Astle was not happy with the tone of the text messages.

[24] On morning of 15 January 2015, Mrs Astle gave Mr Lagan letter. That letter stated:

Following your texts last night, I am very disappointed with the texts you sent me.

Following the arbitrations decision on 1/12 Dover St Christchurch we held a meeting, discussed the case and talked about the $800 fine imposed. I strongly believe we agreed we would pay $400 each. I believe I was very generous with my decision to do that. You are well aware that our insurance excess is $5,000.

I always have an open door policy for all staff and sales people as you know and this situation was never discussed with me until after the event.

It appears you believe if you do something wrong on your own

accord, she'll be right Dianne will pay for it.

This fine arose from a situation that had not been discussed with me until after it had happen, also a reasonably size hole in the side gable was never boarded up for the tenants while waiting for EQC work to fix it.

When I was finally told I said it was wrong, over the course of several arbitration hearings you were confident you would win. In fact it occurred an $800 fine.

On Wednesday 14/1/15 a property management meeting was held at the office. My accountant had spoken to me regarding the property management figures, I then spoke to a property management owner about a portfolio of 100. I was told by a very experienced owner that a listing portfolio of 100 with no property management administrator would be no more than 35 hours work a week.

On 14/1/15 you had a 64 listing portfolio plus I do employ a property management administrator, so I explained the listings and hours of work did not marry up as said by my accountant and the other PM owner.

At several meetings I had asked you to do your own admin work but Jennie told me up until this week you still give her your work. Again I ask that you do your own admin work and record all noted regarding each property into the computer and property file. Jennie will still pay the owner's, do receipts, charge inspections, bill payments, monthly accounts and bonds for the company. As well as help Robyn on the sales side.

I will not be taking the $400 from your pay but should you wish to pay the $400 as agreed I would appreciate it.

With the current listings at 64 please do not work over 35 hours per week. These hours can increase when more managements come in.

Remember, I have always said due to the nature of the work and call outs at the weekend, time should be taken off during the week. Please then fill in your work sheet as to how the hours are worked.

Sean, I reiterate I am very disappointed with your behaviour. My door is always open for discussion.

[25] From 15 January 2105, Mrs Astle undertook closer management of Mr Lagan's work. This essentially amounted to Mr Lagan being required to fill in time records as set out in the 15 January letter and Mrs Astle attempting to obtain more information or updates about the work Mr Lagan was undertaking.

[26] Mr Lagan says that from 15 January 2105 his relationship with Mrs Astle changed, she became more distant and he felt that the work environment was uncomfortable and unpleasant and work was not a happy place. Mr Lagan could not

give me any examples of any actions by Mrs Astle that caused him to feel this way. He said it was more the *vibe* from Mrs Astle.

[27] On 1 February 2015, Mr Lagan resigned. In his resignation, nor prior to it, Mr Lagan did not raise any disagreement with the imposition of the requirement to pay half of any tenancy tribunal penalties, the reduction in hours imposed by Mrs Astle, Mrs Astle's closer management of his work or the vibe he was feeling from her.

[28] Mr Lagan was happy to work his required four weeks' notice and did so

without raising any issues.

The issues

[29] The first issue for any personal grievance for unjustified dismissal is, was there a dismissal.

[30] If there was a dismissal then the second issue is, can the employer justify the dismissal?

Discussion

[31] In the case of constructive dismissal, there is no actual dismissal by the employer but rather a resignation that the employee alleges is in response to some action by the employer. That action being such that the resignation should be treated as a dismissal. In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd1* the Court of Appeal held that constructive dismissal includes, but is not limited to, resignations where:

a. An employer gives an employee a choice between resigning or being dismissed;

b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

c. A breach of duty by the employer causes an employee to resign.

1 [1985] 2 NZLR 372 (CA) at 374-375

[32] In this case, there was never any ultimatum given to Mr Lagan by DARL that he should reign so the first limb in *Woolworths* does not apply here.

[33] I am satisfied that DARL did not undertake a course of conduct with the deliberate and dominant purpose of coercing Mr Lagan into resigning. It is clear that Mrs Astle believed she needed to have more control of, or at least a better understanding of, Mr Lagan's hours and work. This was to ensure he was doing his job effectively. This was entirely acceptable and logical.

DARL had concerns over Mr Lagan's hours, which two independent people had verified. There had been no change in Mr Lagan's work patterns despite concerns having been raised over the hours and the administrative tasks being done by others. And DARL had further concerns about Mr Lagan's work as a result of a tenancy tribunal hearing.

[34] This was a course of conduct carried out by a manager and owner of a business designed simply to manage and control an employee's work from a service and cost perspective. The second limb of *Woolworths* does not apply here.

[35] However, notwithstanding DARL's concerns about Mr Lagan's work the unilateral imposition of maximum working hours per week was a breach of duty owed to Mr Lagan. I do not accept that this was a justified action. At the very least DARL should have consulted more effectively with Mr Lagan over the reduction in hours from the position in the IEA where *hours of work are to be those required to fulfil, the responsibilities of the positon* to a maximum number of hours significantly less than Mr Lagan's average weekly hours. The third limb of *Woolworths* is relevant.

[36] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc2*. The Court of Appeal stated at [172]:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a

2 [1994] NZCA 250; [1994] 2 NZLR 415 (CA)

substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[37] Therefore, in order to determine if Mr Lagan has been constructively dismissed I must consider:

a. Was there a breach of duty by DARL that was repudiatory;

b. Was that breach of duty sufficiently serious that it was reasonably foreseeable that Mr Lagan might resign in response to that; and

c. Did Mr Lagan resign in response to that breach of duty?

[38] I accept that the unilateral imposition of maximum hours was, in the circumstances a repudiatory breach by DARL.

[39] I also accept that it was foreseeable that Mr Lagan might resign in response to this breach. He had, prior to this breach, worked considerably more hours per week and despite what DARL might think, he did so because that is what he felt was required to fulfil his role. I do not accept Mrs Astle's suggestion that Mr Lagan was putting more hours down than he was working. I accept that there may have been issues about his productivity and it was clear that others considered that his role could be done on significantly less hours but he was working the hours he thought were required to fulfil his role.

[40] The reduction in hours would therefore have two consequences, first Mr Lagan might be unable to perform his tasks in the time allowed or feel pressure in doing so and second there was a significant reduction in wages. It is foreseeable that Mr Lagan might resign as a result of this or simply because of the way in which the change was imposed upon him.

[41] What is not clear to me is that Mr Lagan resigned in response to the breach. His resignation did not mention the breach or the other issues he may have had. He did not raise or discuss the breach or any other issues with Mrs Astle prior to his resignation or at any time during his notice period. He worked the notice period of four weeks and said in evidence he was happy to do so.

[42] When asked about why he resigned Mr Lagan said he resigned because things

at work did not get better. This was a reference to Mrs Astle's approach to him and

the *vibe* he was getting. Any change in Mrs Astle's approach to Mr Lagan was not a breach of duty by DARL, it was a limited change with Mrs Astle seeking to understand what hours were being worked (through the time sheets) and some basic questions or requests for updates.

[43] So, on balance I am not satisfied that Mr Lagan resigned in response to the repudiatory breach. In fact what Mr Lagan's actions amount to is acceptance and affirmation of the breach before resignation.

[44] For constructive dismissal an employee need not resign immediately in response to a repudiatory breach by an employer but continuing to work after a breach may amount to affirmation. The Employment Court in *Premier Events Group Limited*

*and Others v Malcolm James Beattie and others*3 stated (footnotes omitted):

[188] Dealing with a further contention that the employees concerned had affirmed their contracts by continuing to work for several weeks after rejection of their claims to tax liabilities and only resigned after that period had elapsed, the Court of Appeal relied on the observations of Browne-Wilkinson J (as he then was) in *WE Cox Toner (International) Ltd v Crook* as follows:

Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence with the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his right to accept the repudiation ... such further performance does not prejudice his right subsequently to accept the repudiation.

[189] As Judge LJ observed in *Cantor Fitzgerald*, "the ultimate question is one, not of law, but of fact" including in circumstances from which the Court is invited to draw inferences about whether the contracts of employment were affirmed.

[45] From the breach by DARL on 15 January 2015 until Mr Lagan's resignation on 1 February 2015, Mr Lagan:

a. Worked two weeks on reduced hours; and

3 [2014] NZEmpC 231 at [188]

b. Did not raise any issue about the reduced hours or even discuss the performance of his role with DARL.

[46] In these circumstances, I believe Mr Lagan accepted the breach and affirmed the employment relationship.

[47] Therefore, because Mr Lagan did not resign in response to the repudiatory breach and because he affirmed the IEA, there is no dismissal for the purposes of the unjustified dismissal grievance.

[48] There is no need for me to consider justification.

[49] In conclusion, I also note one other point about Mr Lagan's claim. I have already recorded that the reduction in hours was an unjustified action and this might have supported an unjustified action causing disadvantage grievance. However, Mr Lagan did not raise a grievance within 90 days of the unilateral change in hours occurring (15 January 2015) and counsel has rightly not pursued a grievance for unjustified action causing disadvantage in the Authority.

Determination

[50] Mr Lagan was not unjustifiably dismissed from his employment.

Costs

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

[52] If they are not able to do so and a determination on costs is needed either party seeking costs may lodge, and serve, a memorandum on costs within 28 days of the date of this determination. The other party will have 14 days from the date of service of that memorandum to lodge, and serve, any reply memorandum.

Peter van Keulen

Member of the Employment Relations Authority
