

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 37
5362325

BETWEEN	ROBYN MARIE LLOYD Applicant
AND	AV SERVICES (1994) LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	David Becker for the Applicant Peter Stobbart for the Respondent
Investigation Meeting:	24 January 2013 at Wellington
Submissions Received:	24 January 2013
Determination:	26 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination sits with my previous determination between these parties on an adjournment and costs application - [2012] NZERA Wellington 68. The respondent, AV Services (1994) Limited (AV Services), is a small company providing, as its name implies, audio visual services to clients throughout the country. It is owned and operated by Mr Peter Stobbart. Between 2007 and 2011 AV Services employed the applicant, Ms Robyn Lloyd, as its Administration Manager. AV Services also employed a Facilities Manager in charge of operations, together with a small team of audio visual technicians.

[2] Ms Lloyd claims that she was unjustifiably constructively dismissed by AV Services following a number of confrontations with Mr Stobbart, in which she claims he became so abusive that on the last occasion she had no option but to leave and lay

a complaint of threatening behaviour with the Police. Mr Stobbart accepts that his outbursts were unacceptable and has recently apologised for them, but considered that he had been sorely provoked and could have been set up for a personal grievance. He also noted the difficult financial circumstances facing AV Services and that the \$40,000 claimed by Ms Lloyd could lead to the winding-up of the company after 22 years.

[3] Ms Lloyd also claims a penalty under s.64 for the failure of AV Services to retain a copy of her individual employment agreement, because Mr Stobbart had deliberately destroyed it. AV Services denies this claim.

Factual discussion

[4] As Mr Stobbart accurately described in his submissions, there are two sides to every story. It is the Authority's job to determine on the balance of probabilities where the truth lies (i.e. what is more likely to have occurred than not), in situations like this. This is a difficult task given the emotional circumstances for both parties.

[5] I have been most assisted by the evidence of the AV Services' former Facilities Manager, who tried to stay on good terms with both Ms Lloyd and Mr Stobbart, and who was the one witness most likely to be impartial, given that he no longer works for AV Services. Furthermore, I am satisfied that he has been able to balance the views of all of the key players during the relevant periods. I therefore make my factual findings on that basis, wherever there are differences between the parties.

[6] There was evidence that a copy, and probably the original copy of Ms Lloyd's employment agreement, was put through the shredder. Mr Stobbart denied being responsible and there is insufficient evidence for me to conclude that he was. The effect was that AV Services did not then have a signed copy of the parties' employment agreement to retain.

[7] The key background circumstances to the issues that led to Ms Lloyd leaving her job in August 2011 were threefold I conclude. First, both Mr Stobbart and Ms Lloyd could give as good as they got in terms of using bad language and regularly arguing with each other. Neither was inclined to back down from an argument. Due to their senior positions and their strong and opinionated personalities they had a strained relationship in the last year or so of Ms Lloyd's employment.

[8] Second, these matters were exacerbated by Mr Stobbart having to take considerable time off work between September 2010 and February 2011 for a back injury, combined with a major reduction in work due to the recession, particularly in 2011. He was consequently under significant stress during 2011.

[9] Third, in 2011 Ms Lloyd had reached the point where, because things were so bad at work, and for personal family reasons, she was actively looking for a new career. In particular she was looking at the option of running a motel, which indeed she ended up doing in December 2011.

[10] One of the ongoing issues between Ms Lloyd and Mr Stobbart was the signing of cheques. Mr Stobbart regularly insisted on him having to be at least one of the two signatories on cheques. The two other managers, including Ms Lloyd, were the other signatories. However Mr Stobbart was regularly on the road working with customers and was often not in the office for weeks on end. This often coincided with the 20th of the month, when cheques were meant to be signed. This put Ms Lloyd, as the Administration Manager, in a difficult position, because Mr Stobbart quite rightly also insisted that bills be paid regularly. This issue was exacerbated by cash flow problems AV Services was suffering in 2011, which meant that one major supplier of services to AV Services at least had not been paid and was demanding payment.

[11] There were two key incidents that led Ms Lloyd to leave AV Services' employment for good. The first occurred on 5 July 2011, a day when neither Ms Lloyd nor the Facility Manager was very busy. After an absence of more than three weeks Mr Stobbart arrived in the office and directed the two managers to do some cleaning. Neither paid particular attention to Mr Stobbart's direction. He returned to the main office from his own office a few minutes later and told them that if they were not busy to get on with tidying the place up. This led to an argument with Ms Lloyd, who said that her own office was perfectly tidy. This situation was repeated several minutes later - the Facility Manager deflecting Mr Stobbart's anger by stating that he would get around to it when he had some spare time, whereas Ms Lloyd told him that she was not responsible for the mess, that cleaning wasn't part of her job and that she wasn't dressed for cleaning. This confrontation resulted in both swearing at each other. While the language and tone used by Mr Stobbart was unacceptable, even in a robust workplace such as this one, I do not consider that there was any threat of violence from him.

[12] Mr Stobbart then returned to his own office, slamming the doors behind him. Ms Lloyd was not prepared to be spoken to in the way she was by Mr Stobbart, so she approached him in his office. She asked him to retract his behaviour because she was no longer prepared to put up with it. His response was to swear at her and tell her to get out. She refused to leave and stood in the doorway while he was trying to shut the door. Again I do not accept that Mr Stobbart threatened Ms Lloyd with violence, but he did again slam the door (this time in Ms Lloyd's face) as she finally decided to do the prudent thing, which was to remove herself from Mr Stobbart's office.

[13] However, she did not leave, but again told Mr Stobbart (this time through the closed door) that she had had enough of his abuse and was going home for the rest of the day. This simply further enraged Mr Stobbart, who opened the door and told her, using the strongest possible language, to get out, go away and do what she was told. Ms Lloyd returned to her office, followed by Mr Stobbart, who told her again to leave and that she was lazy.

[14] These matters effectively went in abeyance thereafter, until the next month, when Wellington was subjected to an unprecedented several days of snowy and icy weather, causing chaos to Wellington traffic. Ms Lloyd, like many people in Wellington, left work early on Monday 15 August, because of the snow. She did not, however, seek Mr Stobbart's permission first, as that was not her practice, given his regular absences.

[15] On Tuesday conditions were still snowy and Ms Lloyd, who lives in Lower Hutt, sent Mr Stobbart a text at 4.20pm, her finishing time being 5pm, stating:

I am off home, snowing well and truly.

[16] Mr Stobbart, who was nearby, declined to allow her to leave early, stating that it was not snowing where she lived. Ms Lloyd attempted to debate the point, but was told it was not up for discussion. After another call from her son stating that conditions were dangerous in Lower Hutt, Ms Lloyd approached Mr Stobbart again, and he again refused to reconsider his decision.

[17] On arriving home Ms Lloyd then sent Mr Stobbart a photograph of the snow at her house, then one of the road conditions, as well as a text stating that her trip home had been dangerous and that she had skidded half the length of the street. Mr Stobbart

responded with a sarcastic text about Ms Lloyd's son, and she replied that it was her safety that her son was concerned about, and these were the worst conditions in decades. She concluded by stating:

I repeat – thanks.

[18] Mr Stobbart responded stating, amongst other things, *if you don't show up at the office tomorrow I will dock a full day's pay. Management decisions are made by me, not by you and your boy.*

[19] Ms Lloyd texted back asking *are you threatening me? You wouldn't let me go just to get back at me. Decisions on road safety will be made by me in the morning. Icy roads can be deadly*

[20] Mr Stobbart replied by stating *you need help.* Ms Lloyd's response was *this is your employer to employee response – that is abuse. Given this abusive dialogue I think its best I take a days leave tomorrow. I am not comfortable with this.*

[21] Mr Stobbart responded by stating *no pay for you then.* Ms Lloyd replied *I am owed plenty of leave. You are not making responsible decisions about my safety. You were informed of conditions and used it to get at me, that's victimisation.*

[22] Mr Stobbart's response was to the point, using swear words to tell her where to go. Mr Stobbart followed this up with an email on Wednesday the 17th, as Ms Lloyd was absent, stating:

In relation to your general behaviour in the workplace yesterday I need to caution you that outbursts like this will no longer be tolerated.

You are an employee of AVS and all management decisions like sending staff home early will be made by myself only and are not open to the type of nagging debate that you saw fit to deliver at 4.25pm yesterday ...

But the real problem I have is that when I make decision that you don't agree with, you seem to think that it is okay to harp on and on standing at the door of my office and yelling the same protest repeatedly.

I will not be spoken to by any staff member like this and I need to point out that workplace equality goes both ways ... You are not my business partner and you most certainly are not my mother. I will give you the respect you deserve as an employee but that's where it stops. ...

You were warned yesterday that if you did not show up for work today you would be docked a full days pay. You had told Adrian this morning that you had told me you had taken a days annual leave, however, this is a straight out lie and besides you must request annual leave with no less than 2 weeks notice. You will be docked a full days pay and I would like to see the calculation of this before any payment is made into your account this week.

[23] Ms Lloyd responding upon her return to work on Thursday 18 August by email:

The abusive language which you delivered to me by text crosses the line and constitutes abuse in the workplace contrary to the Health and Safety Act which stipulates that you are required to provide a stable and comfortable work environment free from mental, emotional and physical abuse. ...

I am tired of the verbal abuse, victimisation and at times physical intimidation and if it doesn't cease immediately I will lay a formal complaint to the Department of Labour. ...

I am tired of the verbal attacks from you ... I do not speak to you in this manner and I do not expect to be spoken to by my employer in such a way and the law prohibits you from doing so.

[24] Ms Lloyd then sought Mr Stobbart's approval to have the previous day off as annual leave. Mr Stobbart's response was:

...The response you got from me after a barrage of texts that were nothing short of constant provocation until you got the response you wanted. Robyn you use the word ... in your daily vocabulary so to claim that I verbally abused you is ridiculous ... You will lose a full days pay for not following these [ie the employment agreement's] terms.

[25] This set the scene for a final argument between Ms Lloyd and Mr Stobbart that day. Late in the morning Ms Lloyd approached Mr Stobbart's office and asked for a decision on how much should be paid towards monies owing to a particular creditor. He told her to sort it out herself. She said that she needed him to decide on a particular figure, and he yelled at her to just go and do it. When she did not immediately move off he wagged his finger at her and told her not to *push his buttons* by standing there. He then came up to her and yelled at her to leave, using swear words, and slammed the door in her face.

[26] Ms Lloyd retreated to the kitchen where the Facilities Manager was. Mr Stobbart continued the discussion over the debt, which was described by the

Facilities Manager as them *squabbling like children*. Mr Stobbart was told by Ms Lloyd that it was his decision because he was the owner, while Ms Lloyd was told by Mr Stobbart that it was for her to decide because she was the finance person. Amongst other things Mr Stobbart told Ms Lloyd that she was just being a silly woman, she should get back to her desk, do her job, just do what she was being paid to do and that she had *pushed his buttons*, all the time swearing.

[27] The Facilities Manager had heard enough of the argument and called *time out* to Mr Stobbart, which he had to repeat, before Mr Stobbart left the kitchen and went out on a job. Ms Lloyd then telephoned her son in tears. He advised her to ring the Police, which she did. Their advice was for her to leave immediately and make a statement to them.

[28] Ms Lloyd's son then came in to work in a very angry state. The Facilities Manager tried to calm him down, but an altercation between Mr Stobbart and Ms Lloyd's son followed, involving verbal attacks by both sides, but with no threats of violence on either side, I conclude.

[29] At the Police Station Ms Lloyd laid a complaint of threatening behaviour and was advised that she should not return to work if she genuinely feared for her safety, as she had told the Police she did. She did not return to work and sought legal advice on Monday, 22 August.

[30] When Ms Lloyd did not return to work on that Monday the Facilities Manager was asked to contact her about her absence and was told that Ms Lloyd was *waiting on legal advice*. On Thursday 25 August Ms Lloyd's representative raised a personal grievance claiming actual or constructive dismissal. This letter was received on 29 August. AV Services' response was that Ms Lloyd had never been told that her position was terminated and that it had been waiting for her to attend work, although it was clear to it now that she had abandoned her employment. It therefore sought a return of company property. There were various disputes over the return of property and payment of Ms Lloyd's final pay, but these matters were later all resolved.

[31] Despite mediation the employment relationship problems as set out above have not been settled, and it therefore falls to the Authority to make a determination.

The law

[32] While the new s.103A does not specifically provide for the concept of constructive dismissal, it is a matter that can be taken into account by the Authority under s.103A(4), in the context of the principles of existing case law. The test to be applied, using these principles, is that the question of whether a dismissal was justifiable must be determined on an objective basis, by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[33] The concept of constructive dismissal has been described as where the initiative for an employee's leaving comes from the employer, not the employee. The Court of Appeal considered whether a resignation constituted constructive dismissal, where there had been a breach of duty by the employer causing an employee to resign, in *Auckland Electric Power Board v. Auckland Local Authorities IUOW* [1994] 1 ERNZ 169. It held 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 substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

Determination

[34] The claim for a penalty must fail on the facts as I have found them above. The only failure by AV Services was not to retain a copy of Ms Lloyd's employment agreement, but this has not been shown to be the fault of AV Services, and at the relevant times Ms Lloyd was its Administration Manager. This event took place in 2007 and while it meant that Ms Lloyd did not have an original copy of her signed employment agreement it caused no substantial difficulties for the parties. In these circumstances it would not be appropriate to award a penalty even had I concluded that Mr Stobbart was responsible for AV Services' failure to meet the requirements of s.64 to retain a copy of Ms Lloyd's individual employment agreement.

[35] It is clear from Mr Stobbart's own evidence that his behaviour towards Ms Lloyd in mid August 2011 was quite unreasonable, even if he had been provoked into it. He accepted that his outbursts constituted unacceptable behaviour and offered a sincere personal apology at the investigation meeting. It is a pity that he did not do so at the time. Indeed there was evidence that the parties had had a number of arguments (although perhaps not of this severity) in the past, and an apology from Mr Stobbart had resolved matters to all parties' satisfaction.

[36] However, probably because of stress from a number of sources (which to a degree included Ms Lloyd's behaviour in that she did not simply bow to his wishes, unlike the Facilities Manager - but far more importantly primarily relating to the state of the business, given the recessionary environment) Mr Stobbart's behaviour was such that Ms Lloyd could not be expected to put up with it any more. From her perspective things were getting worse, to the point where she feared for her safety. While I do not consider that Mr Stobbart would ever have physically assaulted her, there is no doubt she felt threatened, and that this was not an unreasonable belief given the recent escalation in Mr Stobbart's behaviour. Furthermore, in the face of the Police advice not to return to work Ms Lloyd really had little other option than to leave her employment for good.

[37] AV Services was also on sufficient notice that this sort of behaviour from Mr Stobbart would not be tolerated, as Ms Lloyd had clearly so warned, both orally and in writing, on a number of occasions in the days leading up to the final incident.

[38] In all the circumstances of the case therefore the initiative for Ms Lloyd's resignation came from AV Services through Mr Stobbart's behaviour. Ms Lloyd was therefore unjustifiably constructively dismissed.

Remedies

[39] Ms Lloyd is entitled to three months lost remuneration, namely \$12,000 gross (being one quarter of a years salary), from AV Services. While she did not take possession of the motel she manages until four months later, I consider that three months remuneration is sufficient compensation, given that it would have been difficult for her to stay on in her employment within a month of having to start her new business venture in December 2011, as significant preparatory steps were required.

[40] I am satisfied that Ms Lloyd has mitigated her loss. She looked for alternative employment and was successful in creating her own business opportunity within four months. She was also available for temporary work and registered with several temporary work employment agencies.

[41] Ms Lloyd was badly affected by the way she was treated by AV Services towards the end of her employment, and this was clear from both her evidence and that of her son. She was also upset at having to take up alternative employment sooner than she had intended, and having to cope with no income over a four month period.

[42] In all the circumstances I consider compensation in the sum of \$10,000 is appropriate, taking into account the concerns I have about the difficulty AV Services may have in making a payment of \$22,000, with costs to follow. The parties can consider payments over time as an option should this be too large a burden for AV Services to carry financially.

[43] I must also consider the extent to which Ms Lloyd's actions contributed to the situation that gave rise to the personal grievance, and if required reduce any remedies accordingly. For any reduction there must be blameworthy behaviour by Ms Lloyd. No doubt Ms Lloyd was stubborn and lippy. However, Ms Lloyd should not be criticised harshly for simply standing up for issues she believed in, even if it seemed unwise in hindsight to have done so. There was no evidence that her behaviour was abusive, either by the tone or personal nature of her swearing towards Mr Stobbart, or in her physical behaviour towards him. It would be inappropriate to consider behaviour by an employee, in standing up over matters that she felt would put the business in a better position, as contributory fault, because that is not blameworthy behaviour. Even though there are two sides to every story, I do not consider that Ms Lloyd should be penalised by way of reduction for contributory conduct in all the circumstances of this case.

[44] I therefore order the respondent, AV Services (1994) Limited, to pay to the applicant, Ms Robyn Lloyd, the sum of \$12,000 gross in lost remuneration and \$10,000 compensation under s.123(1)(c)(i).

Costs

[45] Costs are reserved.

G J Wood
Member of the Employment Relations Authority