

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 157  
5445442

BETWEEN            DAYA NAND  
                                 Applicant

A N D                IDEA SERVICE LIMITED  
                                 Respondent

Member of Authority:    James Crichton

Representatives:        Greg Bennett advocate for Applicant  
                                 Paul McBride counsel for Respondent

Investigation Meeting:    1 May 2018 at Auckland

Date of Determination:    11 May 2018

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**SECOND DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**History**

[1]     In my preliminary determination issued as [2018] NZERA Auckland 109 on 29 March 2018, I decided that the original statement of problem filed by Mr Nand could proceed to be investigated but that before the investigation of the substantive matter could be undertaken, it was necessary for me to hear evidence to exclude the possibility that there was any impediment to preclude the subsequent investigation of a personal grievance.

**The investigation meeting**

[2]     By agreement, the parties helpfully agreed to convene an investigation meeting at short notice to consider only the evidence around the termination of the employment on 10 June 2013, together with the subsequent exchange of letters between the parties in August 2013.

[3] I heard evidence about those events from two managers of Idea Services Limited who were personally involved in the dismissal of Mr Nand, together with evidence from Mr Nand himself, and the evidence from those same witnesses about the exchange of correspondence between them in August of 2013.

### **Mr Nand's position**

[4] In his statement of problem filed in the Authority on 17 January 2014 (the statement of problem which I was satisfied could proceed, as I determined in my preliminary determination) Mr Nand alleged that he had been unjustifiably constructively dismissed and in support of that contention, he attached his personal grievance letter dated 5 August 2013.

[5] That letter is absolutely consistent with the pleading in the statement of problem that Mr Nand was constructively dismissed. Amongst other things, the letter says: *“following the disciplinary meeting that resulted from this incident (an allegation that Mr Nand had assaulted a client) I was told that if I did not resign, then Idea would contact the police to report the alleged assault... by then demanding I resign or criminal charges would be laid, I had no choice but to resign and have hence been constructively dismissed.”*

[6] In his oral evidenced before the Authority, Mr Nand persevered with this view of matters and stoutly denied the contentions made by witnesses for Idea.

### **Idea's position**

[7] The evidence for Idea is starkly different. Put shortly, Idea say that they investigated a complaint of assault against a client, reached the conclusion that Mr Nand had assaulted the client, and determined that was serious misconduct which necessitated dismissal from Idea's employment.

[8] Idea say that immediately after the decision to dismiss was communicated to Mr Nand, there was an adjournment and when the meeting reconvened, the union official representing Mr Nand at the disciplinary meeting asked Idea's managers if they would contemplate a resignation from Mr Nand instead of the termination being recorded as a dismissal.

[9] The senior manager involved in the disciplinary meeting was Mr Leopoldo Aguirre. He recognised that Mr Nand had had some serious familial difficulties in the recent past, and he considered that the idea of allowing the termination to be recorded as a resignation had merit. Accordingly Mr Aguirre agreed to record the termination of employment as a resignation rather than as a dismissal and a signed letter of resignation was taken from Mr Nand confirming the resignation.

[10] Mr Aguirre says that when he shook hands with Mr Nand he understood that all matters were at an end, that is, that there was an understanding that in return for the concession that Mr Nand resign, all employment issues between the parties were at an end.

[11] Mr Aguirre's evidence was broadly confirmed by the evidence of another Idea manager who attended that meeting Mr Naga Vindamuri.

### **Discussion**

[12] It is convenient to analyse the elements of Mr Nand's claim. He says that he was constructively dismissed because he was told that if he did not resign the assault matter would be put in the hands of the police. Aside entirely from the fact that the witnesses for Idea have an entirely different view of what happened at the termination of the employment, there is one factual problem with Mr Nand's claim which I think is insuperable for him.

[13] He says that he was forced to resign or face the prospect of Idea reporting the assault to police. It is plain on the evidence that Mr Nand did raise the possibility that he would agree to a resignation if police were not advised of the assault. That is the evidence of both Mr Aguirre and Mr Vindamuri.

[14] The problem with this aspect is that the police had already been advised. The dismissal meeting took place on 10 June 2013; the assault was on 4 June 2013 and it emerged at the Authority's investigation meeting that police had been told of the assault on the very day it happened. Mr Nand's own advocate confirmed to me that police were advised on 4 June 2013 and indeed he showed me the police document recording that fact.

[15] Moreover, the minutes of the dismissal meeting (the meeting dated 10 June 2013) record the disposition of the assault to the police in these terms:

*We have also reported this assault/incident to Police last week...they will do their own investigation.*

[16] What that quoted passage means then is that the week before the week that the 10th June fell in the year 2013, police were advised of the assault.

[17] So I think I can take judicial notice of the fact that the police were advised on 4 June 2013 that there had been an assault on a client in which Mr Nand was implicated and so there was no possible basis on which he could attempt to negotiate the terms under which he left the employment in return for the employer not notifying police, because they had already done so.

[18] That seems to me to completely unravel Mr Nand's claim because his allegation that he was constructively dismissed by being made to resign in order to stop police becoming aware of the assault is fatally undermined by the fact that the police already knew about the assault; they had been told of the assault on the day it happened. That makes it difficult to accept his contention that he was told that if he did not resign, Idea would contact police.

[19] That conclusion is available even before I consider the credibility of the oral evidence because we know that police were advised of the assault on the day it happened. That makes any possibility of the deal Mr Nand is talking about six days later entirely implausible.

[20] Moreover, it is difficult to avoid the conclusion that the evidence advanced by Mr Aguirre and Mr Vindamure for Idea Services Limited has greater internal consistency than the evidence for Mr Nand. In particular, Mr Aguirre's evidence and Mr Vindamure's evidence support each other, although they express the same conclusions in different words but more importantly, their oral evidence at my investigation meeting was consistent with the minutes of the disciplinary meeting on 10 June 2013 and the letter from Mr Aguirre to Mr Nand dated 22 August 2013 responding to his personal grievance letter of 5 August 2013.

[21] Put very simply then, I am not satisfied that Mr Nand's pleaded claim of constructive dismissal (being forced to resign to prevent police being advised of the assault) can stand up to any reasonable scrutiny. This is because the gravamen of that claim is the contention that by resigning his employment (albeit allegedly under duress) he prevented police from investigating the assault. That cannot be right because police already knew about the assault if so the whole basis of Mr Nand's claim must fall away.

[22] That conclusion is supported by my preference for the evidence of Mr Aguirre and Mr Vindamure when they talked about what had happened at the disciplinary meeting on 10 June 2013, plus the fact that Mr Aguirre and Mr Vindamure both gave evidence which was consistent with the minutes of the meeting and the letter Mr Aguirre had sent to Mr Nand in response to Mr Nand's own letter.

[23] Further and finally, the minutes of the 10 June 2013 disciplinary meeting refer very clearly to the sequence of events at the end of the meeting being as Mr Aguirre represented they were, namely Mr Aguirre telling Mr Nand that he was dismissed, there being a short break, followed by Mr Nand returning and submitting his resignation "*supported by union rep*".

### **Determination**

[24] I have not been persuaded that Mr Nand's claim of having been unjustifiably constructively dismissed has any merit because I am satisfied that the elements of that claim simply cannot be proved. To put the same point in different language, I am satisfied that Idea Services Limited would have a complete defence to Mr Nand's claim if it were to proceed to investigation.

[25] For those reasons, I decline to investigate Mr Nand's alleged personal grievance further as I am satisfied that it cannot be proved on the balance of probabilities.

[26] It follows from the foregoing that this matter, insofar as the Employment Relations Authority is concerned, is now at an end, save for any issue of costs that may arise.

**Costs**

[27] I urge the parties to try to resolve costs on their own terms. If Idea Services Limited do seek an award of costs against Mr Nand, they are to file and serve an application seeking costs to be fixed. Mr Nand is to have fourteen days from the receipt of that application to file a response. I will then fix costs on the papers.

James Crichton  
Chief of the Employment Relations Authority