NOTE: This determination contains an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 10
3119397

	BETWEEN	SETH-MICHAEL RAYMAN Applicant
	AND	R&E ELECTRICAL LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Philip Ross, counsel for the Applicant Shelley Kopu, counsel for the Respondent
Investigation Meeting:	7 October 2022
Submissions received:	14 October 2022 from the Applicant and the Respondent
Determination:	13 January 2023

DETERMINATION OF THE AUTHORITY

A. Seth-Michael Rayman was not constructively and unjustifiably dismissed by his former employer R&E Electrical Limited (R&E Electrical or the company). The claim is dismissed.

B. Costs are reserved.

Employment Relationship Problem

[1] Seth-Michael Rayman was employed by R&E Electrical as a DVS installer. He brings a claim of unjustified constructive dismissal against the company. The events

which give rise to this employment relationship problem took place between late May 2020 and 3 August 2020 when Mr Rayman resigned.

Relevant facts

[2] On 4 March 2020, Mr Rayman signed his individual employment agreement with R&E Electrical whose directors and shareholders are Russell Jane and his wife Emma Jane. In addition to being a company director and shareholder, Mr Jane has been a volunteer firefighter for the Waiuku fire service for six years.

[3] Mr Rayman's employment agreement with the company stated that he would be paid at the rate of $20 per hour, was obliged to conduct his duties in the best interests of R&E Electrical, that at its sole discretion the company was to provide Mr Rayman with a mobile device (such as a tablet, iPad and/or phone), that the information contained in and accessed by the mobile device belonged to R&E Electrical; and as the company could monitor Mr Rayman's use of the mobile device—there was no expectation of privacy.

[4] Shortly after Mr Rayman commenced employment with R&E Electrical on 9 March 2020, New Zealand moved to COVID-19 Alert Level 4 in response to the COVID-19 pandemic. Like many businesses at the time, R&E Electrical applied for and was granted the COVID-19 wage subsidy for its employees including Mr Rayman. Social distancing requirements meant that the company could not pair Mr Rayman with another employee and as he was relatively new to role, he was not required to attend work when the country moved down to Alert Level 3. He nevertheless continued to be paid during this time. Business as usual returned for R&E Electrical on 13 May 2020 when the nation moved down to Alert Level 2 which was when Mr Rayman returned to work.

Mobile data and work iPad

[5] Mr Rayman brought to Mr and Mrs Jane's attention the issue with his phone in that he was using a lot of his own mobile data to access the smart trade website which employees used to log and monitor jobs while out in the field. In response, the company provided Mr Rayman a one-off *ex gratia* payment of $100 in compensation and Mrs Jane provided him with an old iPhone 6 to access the smart trade website. However,

the phone proved to be obsolete and could not be updated to the latest operating system at the time.

[6] On 4 June 2020, Mrs Jane met with Mr Rayman at her home. He was not prepared to return to work until the mobile data issue was satisfactorily resolved. He was provided with an iPad which had its own sim card and had been cleared of any previous information. While not particularly happy with being given an iPad instead of a phone, Mr Rayman wished to move on. He and Mrs Jane spent approximately 25 to 30 minutes setting up the iPad.

[7] When it came to setting up the Apple ID profile for the iPad, Mr Rayman stated that he used his own Apple ID because he had an iPhone already. He stated that Mrs Jane had not suggested to him that he use his own Apple ID and he confirmed that this was not required of him by the company. However, he did not know that by linking his Apple ID with the company iPad, his personal photos and videos from his phone would be synced to the device as well.

Work van

[8] Mr Rayman was given an old work van to use as a company vehicle. However, there were problems with the van's demister, clutch, and windscreen wipers. On 14 July 2020 Mr Rayman rang Mr Jane that the window wipers had stopped working during a period of rain and that he had to stop driving for safety reasons. He was advised to return the vehicle to the workshop and to exchange the vehicle for another when it was safe for him to do so.

[9] By text message of 19 July 2020, Mr Jane informed Mr Rayman that he had spent some time bringing the van to company standard which included oiling the window wiper socket, adding engine oil, and washing and vacuuming the vehicle inside and out. However, Mr Jane noticed that Mr Rayman had not used his company overalls and dust mask which were lying behind the back of the van unused. Mr Rayman was reminded that it was important that he used the gear for health and safety reasons otherwise it would leave him open to dismissal.

[10] Mr Rayman texted Mr Jane at 7.19 am on 20 July 2020 stating that he had "a bone to pick" with him claiming that he had not been given any training and was

continuously being scolded by Mr Jane for things he did not know. Mr Jane tried to call Mr Rayman back at 8.27 am but his call went unanswered. It was later discovered that Mr Rayman had left the work van unlocked at the workshop with the company iPad on the front seat.

Personal grievance raised

[11] Later that same morning, Mr Jane received a telephone call from Mr Rayman's now former employment advocate in which he was advised for the first time that Mr Rayman had raised a personal grievance of unjustified disadvantage and that he would not be at work for the next few days. Mr Jane subsequently received an email from the employment advocate which included a doctor's medical certificate and patient notes for Mr Rayman (20 July 2020).

[12] The patient notes recorded that he had been having problems with his employer which included driving a broken van without working windscreen wipers and having to use his own mobile data for work. The notes further alleged that Mr Rayman had not been given any training by his employer who had a allegedly abused him over the phone. Mr Jane was informed that Mr Rayman was raising a personal grievance of unjustified disadvantage based on workplace bullying "both by verbal and digital form". The advocate requested that Mr Jane provide him with any information either in digital or paper form which the company had concerning Mr Rayman.

Discovery of photos and videos on the work iPad

[13] In responding to the employment advocate's information request, Mr Jane went through R&E Electrical's files and pulled out Mr Rayman's individual employment agreement and personal correspondence. He also retrieved the company iPad that had been left in the work van and checked it for information relevant to the employment advocate's information request. Mr Jane clicked on the photos app to check for any photos of jobs, house plans, measurements, and job locations. He was able to access the photos and videos on the iPad because these were not password protected.

[14] Mr Jane discovered videos and photos of Mr Rayman with what appeared to be bags of marijuana and other drug-related paraphernalia such as drug scales, a bong, a firearm and significant sums of money. In addition to the photos, Mr Jane discovered

a video of Mr Rayman wearing his work uniform in the work van and acting erratically as well as videos of him of a highly sensitive nature with his former partner. Once Mr Jane realised what he was seeing, he quickly closed the photos tab on the iPad.

[15] Mr Jane was taken by surprise by what he had found. He sought advice from a human resource (HR) consultant and was advised to lock the iPad and secure it so that no one else could see its contents. Based on some of the images Mr Jane had seen (referring to the photos of Mr Rayman with bags of marijuana) he believed that Mr Rayman had potentially been involved in some criminal activity.

[16] By email of 22 July 2020, the HR consultant advised the employment advocate of the discovery and that the most concerning material were the photographs of Mr Rayman with drugs, large sums of money, and a firearm. He was invited to attend a formal disciplinary meeting that R&E Electrical wished to convene after the expiration of his sick leave. He was further advised that due to the extremely concerning nature of the material found, the company was considering taking further action which *may* include involving the Police.

[17] That same day, the employment advocate emailed the consultant to advise that the photos and videos were from Mr Rayman's personal iPhone which had been linked to the work iPad "against his will". As personal property, the advocate stated that the files should not have been accessed and that the "gun" shot only blanks. He was disappointed that the company would involve police. The HR consultant responded later that same day stating that the explanations given did not alleviate R&E Electrical of its concerns and that the disciplinary meeting would continue.

Invitation to disciplinary meeting

[18] On Monday 27 July 2020, the HR consultant emailed the employment advocate a letter from R&E Electrical which invited Mr Rayman to a formal disciplinary meeting later that week to discuss the explicit and potentially criminal material showing Mr Rayman posing with bags of marijuana and wearing his work uniform and acting erratically inside the work van.

[19] The company's letter which was signed by Mr Jane further stated that he was concerned that the images and videos found on the iPad could have been viewed by any

member of the team and have a potential impact on their psychological safety. Mr Jane was concerned also that Mr Rayman had been photographed using drugs and drug paraphernalia when the company did not condone drug use. In addition, there were images of Mr Rayman with large amounts of cash and a firearm which were potentially of a criminal nature. Given the contents of the photos and videos, Mr Rayman was advised that the iPad and its contents had been secured and not viewed by anyone else except for Mr Jane himself.

Constructive dismissal

[20] On 30 September 2020, the employment advocate advised that it was no longer tenable for Mr Rayman to return to the workplace where other people had viewed the material. It was clear that he was constructively dismissed.

[21] By letter of 3 August 2020, Mr Jane advised Mr Rayman that his non-attendance at the disciplinary meeting and his unwillingness to provide written feedback meant that he and his HR consultant could not discuss matters in a meaningful way. No decision could be made as a result and it was noted that Mr Rayman had decided to resign from his employment. This was unfortunate because Mr Jane wished to meet with him to discuss matters in a constructive manner. However, the company accepted his offer of resignation.

The Authority's investigation

[22] For the Authority's investigation written witness statements were lodged from Mr Rayman, his former partner, Mr Jane and Mrs Jane. All witnesses answered questions under oath or affirmation. I have not named Mr Rayman's former partner in this determination and a non-publication order in respect of her has been granted by consent as she is an innocent third party whose name and details should remain anonymised.[1]

[23] 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.

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[1] Employment Relations Act 2000, Schedule 2, clause 10(1).

The issues

[24] The issues requiring investigation and determination are:

(a) Did Mr Rayman, for the purposes of his employment, have to link his personal Apple ID to the work iPad? Was there no other option?

(b) Was Mr Rayman sexually harassed by R&E Electrical when images and videos of him of a highly sensitive nature were viewed after he had linked his personal Apple ID account to the work iPad?

(c) Mr Rayman alleges that his rights under the Privacy Act 1993 (which was still in force at the material time) were breached by R&E Electrical. If so, what jurisdiction does the Authority have (if any) with respect to breaches of privacy?

(d) In terms of the disciplinary process, was R&E Electrical's actions unjustified and did these cause Mr Rayman to resign from his employment? In other words, was he constructively and unjustifiably dismissed from his employment?

(e) Should either party contribute to the costs of representation of the other party.

Was Mr Rayman required by R&E Electrical to link his personal Apple ID to the work iPad?

[25] In an email from the employment advocate of 22 July 2020, it was alleged that Mr Rayman had linked his personal Apple ID to the company iPad at the company's request and that this was against his will. In a letter (28 July 2020), the employment advocate further alleged that Mr Rayman had not agreed to linking his iPhone to the company iPad. In addition, it had been pleaded in the statement of problem (not by Mr Ross who was engaged later in the proceedings) that Mr Rayman was made to link his personal iCloud account to the work iPad.

[26] When I explored this issue with Mr Rayman during the investigation meeting, he stated in evidence that nobody from R&E Electrical had advised him to link his

personal Apple ID to the company iPad. He agreed that Mrs Jane had not required this of him either.

[27] When I asked how his employment advocate had managed to get this wrong, Mr Rayman acknowledged that his former representative was mistaken and that this was not the narrative he himself wished to push. When I put to Mr Rayman that this was the first time the Authority was hearing this, he stated that he understood the discrepancy and reiterated that the company had not forced him to link his Apple ID to the work iPad.

[28] In light of the multiple and unambiguous answers given by Mr Rayman, the answer to this issue is in the negative—R&E Electrical did not require him to link his personal Apple ID to the company iPad.

Was Mr Rayman sexually harassed by R&E Electrical when images and videos of him of a highly sensitive nature were viewed?

[29] It was pleaded in Mr Rayman's statement of problem that the inappropriate sexual content viewed by the employer constituted sexual harassment. This aspect was not well pleaded. To be clear, sexual harassment is unlawful discrimination under s 62 of the Human Rights Act 1993 and a personal grievance under s 103(1)(d) of the Act.

[30] Sexual harassment in this jurisdiction is defined by s 108(1) which states that the use of language (whether written or spoken) of a sexual nature, the use of visual material of a sexual nature, or the use of physical behaviour of a sexual nature, may constitute sexual harassment.

[31] Upon finding the photos and videos on the company iPad, it was fair and reasonable of R&E Electrical to seek from Mr Rayman an explanation as to why these images were found on a company device. This is not harassment. This part of Mr Rayman's claim is not made out.

Was there a breach of Mr Rayman's privacy?

[32] The Authority has no originating jurisdiction under the Privacy Act 1993 which at the material time was still in force. Even so, there remained an obligation on the part

of R&E Electrical to deal with Mr Rayman in good faith.[2] Mr Ross submitted that the employment agreement did not assist the company because the work iPad was not "used" to take the photos and videos that were subsequently discovered. While I accept that there is nothing to indicate that Mr Rayman had used the iPad in this way, the employment agreement made clear that there was no expectation of privacy which includes anything new that may have been subsequently added to the device.

[33] It was submitted by Mr Ross that Mrs Jane was aware that when Mr Rayman linked his Apple ID to the work iPad, his personal photos and videos from his phone would be linked to company iPad. However, even so, she would not have known that he would have on his iPhone the images that concerned the company particularly those of Mr Rayman behaving erratically in the work van in his uniform and posing with marijuana, drug scales and other drug paraphernalia.

[34] It does not matter that Mr Rayman did not appreciate that adding his Apple ID would transfer all of his phone's content to the device as his employment agreement is silent regarding actual knowledge or intent on his part. Nor did the company require his permission to monitor his usage of its device.

[35] While it was fair and reasonable for the company to monitor usage of the iPad, the safety valve for Mr Rayman was his right of reply to provide further comment. While Mr Rayman chose not to attend the disciplinary meeting, had he availed himself of that opportunity to explain in person that the images on the iPad had their genesis from his personal iPhone, I am satisfied that Mr Jane would have found this plausible.

[36] Mr Jane acknowledged this as much during the investigation meeting and conceded that he did not believe the images were added to the device "on purpose". It follows that had Mr Rayman not resigned, the employment relationship may well have continued especially as his original personal grievance was relatively minor in nature.

[37] Having inadvertently come across the photos and videos, R&E Electrical was still required to treat Mr Rayman fairly and with dignity. I am satisfied it has done so. First, in its written correspondence with Mr Rayman, the company went no more than

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[2] Employment Relations Act 2000, s 4(1).

what was necessary to describe what was found so that he could adequately respond. Second, Mr Jane gave consistent evidence that upon viewing the images, he locked the iPad away in a secure place and that he was the only person who saw the videos and photos in question.

[38] Both Mr Rayman and his former partner doubt that the disclosure of the photos and videos was limited to Mr Jane only. Mr Rayman concedes however that he is not able to prove this. Although correspondence from the HR consultant may have implied that she had seen the images, there is no direct evidence of this. Moreover, in a letter from R&E Electrical of 27 July 2020 to the employment advocate, it was made expressly clear to Mr Rayman that no one apart from Mr Jane had viewed the photos and videos.

[39] If it is any consolation to Mr Rayman, when I questioned Mr Jane regarding the steps he took after coming across the images on the company device, he stated that he had been a volunteer firefighter for the Waiuku fire service for six years. He further stated that he would not have disclosed the videos and photos to anyone unless he received a court order. Mr Jane further stated that after Mr Rayman's resignation, the iPad was reset to its factory settings. I accept that Mr Jane's previous knowledge as a volunteer firefighter has informed his approach in the handling of the iPad after the photos and videos were innocently discovered. That information was treated appropriately and with discretion given the circumstances.

[40] I note here that it was Mr Jane's evidence that he found the photos and videos under the iPad's photo tab or icon. The evidence does not support the contention that he was "trawling" through Mr Rayman's personal content on the iPad which was accessible to anyone with knowledge of the device's four digit pin. The pictures and videos themselves were not password protected. When I consider the circumstances, I find that the photos and images were accidently disclosed to R&E Electrical. Once discovered, the iPad was secured and the content was appropriately handled with all due care by Mr Jane. I find no breach of duty by the company in terms of Mr Rayman's privacy or in its obligation to deal with him in good faith as an employee.

Was R&E Electrical's actions unjustified and did it cause Mr Rayman to resign from his employment?

[41] Mr Ross challenged R&E Electrical's process on the ground that the images that concerned Mr Jane did not amount to a criminal offence. It was submitted that the photograph of Mr Rayman with marijuana and what appeared to be bong could have been taken outside New Zealand at a location where the possession of cannabis was not unlawful. However, without more, the submission is nothing more than an intriguing hypothetical.

[42] It was not necessary for Mr Jane to be satisfied beyond a reasonable doubt that a drugs offence had occurred. The photographs of marijuana, marijuana-related paraphernalia, large sums of money, and a firearm was *prima facie* evidence of a potential criminal offence. In any case, the company stated in its correspondence with Mr Rayman that it *may* involve the Police. This was not a guarantee that it would involve the Police who were never involved in the end.

[43] I do not find the mention of police involvement in the company's correspondence with Mr Rayman evidence of 'blackmail'. There is nothing express or implied in the correspondence that Mr Rayman was required to do something in order to avoid a stated action by the company. Nor was the Authority provided with any evidence to support Mr Rayman's assertion that he received threatening text messages from Mr Jane.

[44] It was submitted that Mr Rayman was constructively dismissed from his employment. In *Auckland Shop Employees Union v Woolworths (NZ) Limited*, the Court of Appeal said constructive dismissal includes cases where:[3]

(a) an employer gives an employee a choice of 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; and

(c) a breach of duty by an employer leads an employee to resign.

[3] *Auckland, etc, Shop Employee, etc, IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

[45] The leading case in constructive dismissal is the decision of the Court of Appeal in *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc*.[4] There the Court of Appeal stated:[5]

> 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.

[46] Mr Ross submits that R&E Electrical breached its duty to Mr Rayman with respect to his privacy and consequently he felt it was no longer tenable for him to return to work. However, for the reasons given above, I find no breach of duty on the part of R&E Electrical and while Mr Rayman felt embarrassed by the predicament in which he found himself, this was not a situation of the company's making but his alone by linking his personal ID to the device. The company's discovery of the photos and videos was by accident and not by design.

Conclusion

[47] Having had the benefit of all the evidence particularly that of Mr Rayman and Mr Jane, had Mr Rayman attended the disciplinary meeting and explained how the photos and images ended up on the iPad, he will have found a sympathetic ear in Mr Jane. That did not happen because of the resignation. Attendance at the disciplinary meeting would have also given Mr Jane the opportunity to impress upon Mr Rayman that no one else but himself had seen the videos and photos. It has not been established that Mr Rayman was constructively dismissed. His claim is declined.

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[4] *Auckland Electric Power Board v Auckland Provincial Local Authorities Industrial Union of Workers (Inc)* [1994] 2 NZLR 415, [1994]).
[5] At p 172.

Costs

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

[49] If they are not able to do so and an Authority determination on costs is needed R&E Electrical may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Rayman 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.

[50] 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.[6]

Peter Fuiava
Member of the Employment Relations Authority

[6] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108]. See also www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.