



[5] ATA denies that Mr Thompson was unjustifiably constructively dismissed from his role, or that Mr Thompson was unjustifiably disadvantaged by ATA.

[6] ATA further denies that there are any outstanding commission payments owed to Mr Thompson.

### **Issues**

[7] The issues for determination are whether:

- Mr Thompson was unjustifiably constructively dismissed by ATA.
- Mr Thompson was unjustifiably disadvantaged in his employment.
- Mr Thompson is owed outstanding commission payments for the financial year ended March 2008

### **Background Facts**

[8] ATA is a private training establishment, registered and accredited by the New Zealand Qualifications Authority (NZQA). ATA, which is privately owned by Mr Hedayaty and his wife, Mrs Faezah Hedayaty, who are joint shareholders and directors in ATA, provides a variety of IT training courses and trade courses aimed at domestic and international students.

[9] Mr Hedayaty, who resides in Australia, stated that as Managing Director he is actively involved in ATA's business, visiting New Zealand several times each year, participating in important meetings and decisions, and that he has a direct link into ATA's on-line and banking systems.

[10] Mr Hedayaty said Ms Jazbani was originally employed in 2003 as General Manager. At that time ATA was a bigger business; it had five campuses and a number of employees in senior management roles.

[11] During the succeeding four years, Mr Hedayaty said Ms Jazbani was appointed as CEO and she worked with him to change ATA's structure to focus on core activities and to

improve ATA's financial position. Mr Hedayaty explained that during this time ATA reduced to four campuses and substantially reduced the senior management team.

[12] When Ms Jazbani resigned in 2007, Mr Hedayaty said they had decided that the streamlined business which had approximately 20 employees at that stage, no longer required a CEO, and therefore the recruitment process undertaken to replace Ms Jazbani was for an Operations Manager.

[13] Mr Thompson said on or about 14 September 2007 he had been introduced to Mr Hedayaty and following an interview had been offered the position of Operations Manager at ATA. Mr Thompson said that he had understood from the interview that the position involved the day to day management of ATA's business, which included managing all the operational and financial aspects of the business.

[14] Mr Thompson was provided with an offer letter dated 21 September 2011 and an employment agreement, both of which clearly designated the position as Operations Manager. Mr Thompson had signed and dated the offer letter on 21 September 2007 to indicate that he had accepted the offer of employment, having read and understood the terms of employment as set out in the offer letter and the attached employment agreement.

[15] Mr Thompson said that after he had commenced his employment at ATA, he had been told by some of the other employees about Ms Jazbani's former role in the business. Mr Thompson from this information, he understood that he was performing all the functions Ms Jazbani had previously performed.

[16] Without any reference to Mr Hedayaty, Mr Thompson had arranged to set up his business cards and email sign-off as CEO/Operations Manager. Mr Hedayaty said that he had become aware of this, and considered such action to be a result of an important status concern for Mr Thompson. Mr Hedayaty said he had advised Mr Thompson that he did not think the semantics of his title name mattered provided Mr Thompson carried out the duties of the Operations Manager role he had been employed to do.

[17] Mr Thompson said he had autonomous control over the management of ATA in that:

- He was the head contact person for NZQA and similar bodies involved in funding, accreditation and registration aspects of the business;

- He had authority, without any recourse to Mr Hedayaty, to spend up to \$5,000.00 for necessary items for ATA, and had cheque signing authority in conjunction with Ms Ruby Laing, a tutor and part-time accounts administrator for ATA;
- He was involved in discussing budgets with each department;
- He dealt with staff matters including the appointment and termination of employees and disciplinary matters; conducted performance appraisals, with the only involvement Mr Hedayaty had being in respect of determining the appropriate salary levels;
- Mr Hedayaty did not interfere in his daily running of ATA, although Mr Hedayaty would make occasional suggestions to him which he would take on board.

[18] Mr Hedayaty disputed that Mr Thompson had autonomous control over the management of ATA. Mr Hedayaty said as Managing Director, he was directly responsible for overseeing the business, he had a direct link to the business accounting system and bank accounts, and was in constant contact with the business, by way of the banking/accounts system.

[19] Mr Hedayaty said he looked over the bank transactions on a daily basis and received regular feedback in terms of the student numbers, intervening whenever necessary; moreover because Mr Thompson had a restriction on the level of spending he could authorise and the business operations were straightforward, Mr Hedayaty said he did not need to intervene very often.

[20] Mr Hedayaty said he had expected Mr Thompson to be the contact person for ATA's funding bodies, but that NZQA referred to both Mr Hedayaty and Mr Thompson in its reports.

[21] Mr Hedayaty stated that he did not agree that Mr Thompson had autonomous control over the appointment and termination of employees, as he expected to be consulted and directly involved in respect of senior positions. Mr Hedayaty denied that his role was limited to determining the salary levels.

*Programme Manager Position*

[22] Mr Thompson said that one of the recommendations of the NZQA audit in 2007/2008 had been that ATA needed to recruit a full-time Programme Manager to deal directly with the tutors and the courses they were teaching.

[23] Mr Thompson said he had worked in conjunction with an external HR Consultant to prepare a position description and to carry out the interviews for the position. As a result Ms Devika Muttu had been appointed. Mr Thompson said Mr Hedayaty had not been involved in the interviews, nor had he expected him to be.

[24] Mr Hedayaty explained that he had been consulted by Mr Thompson about the proposed position description and the salary level, but although he had wished to participate in the interviewing process, he had been prevented from visiting New Zealand for the interviews due to a close family member's illness and subsequent bereavement at that time.

[25] In late December 2010 or early January 2011 Ms Muttu resigned and Mr Thompson said he had invited Mr Hedayaty, who happened to be in New Zealand at the time, to join the interview panel to recruit her replacement.

[26] Mr Hedayaty explained that during Ms Muttu's employment at ATA there had been audit concerns raised by NZQA, the business had suffered a significant financial decrease and because he felt that Ms Muttu's appointment had not been a success; he had wanted to change the appointment process. Mr Hedayaty stated that as a result, he personally had set up the interview panel which included Mr Thompson and the senior automotive tutor.

[27] Mr Thompson said it had been his decision to appoint Mr Steve Doust as Programme Manager, and that Mr Hedayaty had agreed to this; however Mr Hedayaty disagreed saying that it had been a unanimous decision of the interview panel to appoint Mr Doust.

[28] Mr Hedayaty said he had informed Mr Thompson that he wanted to attend Mr Doust's 3 month performance appraisal, because he had been told by Mr Thompson that he was not happy with Mr Doust's performance, which was contrary to what he had seen and personally heard from other employees.

[29] However Mr Hedayaty said that he agreed not to attend the performance appraisal at the request of Mr Thompson who had been adamant that he did not want him present, and as there was the NZQA audit pending, he had wanted to avoid any animosity at a critical time for ATA.

[30] On 26 May 2011 Mr Doust resigned. Mr Hedayaty said he had been concerned because he knew the Programme Manager role was a key requirement for the NZQA audit, and he telephoned his wife to discuss the vacancy on Friday 27 May 2011. Mr Hedayaty said Mrs Hedayaty had suggested that he should speak to Ms Jazbani with a view to her taking on the role.

[31] Mr Thompson said he had decided to proceed with the recruitment for the position of Programme Manager and had proposed to Mr Hedayaty that he would contact the next person on the shortlist which had been drawn up when Mr Doust was appointed; however Mr Hedayaty had told him not to contact anyone or to advertise as he had someone in mind for the position.

[32] Mr Hedayaty explained that he had been concerned about the impending NZQA audit given the earlier non-compliance issues and annual reviews. Mr Hedayaty said the Programme Manager position was crucial to ATA and because he considered the two previous Programme Manager appointments had not been successful, he had been concerned about filling the position quickly and effectively.

[33] Mr Hedayaty said he had not been in a position to inform Mr Thompson of Ms Jazbani's appointment until such time as she confirmed her acceptance of the position

#### *Appointment of Ms Jazbani*

[34] Ms Jazbani explained that she had been a close personal friend of Mrs Hedayaty since 1976 and that she had worked in the education sector for more than 20 years at a senior level, and knew the business of ATA well having been CEO for four years from 2003 – 2007.

[35] Ms Jazbani said at the time Mr Hedayaty had spoken to Mrs Hedayaty she had just returned to Australia from Bahrain, had been on the point of qualifying for a real estate licence and was intending to enter into a business on a partnership basis. Ms Jazbani said that at the time when the Programme Manager position had been discussed with her, her intention had been to remain in Australia.

[36] Ms Jazbani, who had been staying with Mr and Mrs Hedayaty at this time, explained that she had been looking at premises for her business venture when Mr and Mrs Hedayaty had spoken to her about the Programme Manager position, and it was not until she had returned to their home that Mrs Hedayaty had spoken to her about her undertaking the role.

[37] Ms Jazbani said that on the basis of her friendship with Mr and Mrs Hedayaty, she had agreed to undertake the position on a temporary basis until November 2011 to assist ATA with the NZQA audit.

[38] Ms Jazbani said when Mr Hedayaty had called her to ask if she could help with NZQA compliance, she had been about to commit to a lease for the partnership business, and therefore she had stipulated that while she would take up the position until the NZQA audit in November 2011, she would require a definite offer of employment.

[39] Mr Thompson said on or about the end of May 2011 Mr Hedayaty had arrived at ATA's premises with Ms Jazbani whom he introduced as the new Programme Manager.

[40] Mr Thompson said he had had no advance notification of the appointment of Ms Jazbani and he had felt concerned as he saw the recruitment of employees as his role. Mr Thompson said he was also upset that he had not been given the opportunity to interview Ms Jazbani, who would be reporting to him.

[41] Mr Hedayaty said he had informed Mr Thompson that Ms Jazbani had been appointed the day after he had spoken to her, and prior to her arrival in New Zealand on 31 May 2011. Mr Hedayaty said he had explained that there had been no time for an interview given her personal circumstances. and because ATA needed to make an appointment urgently because of the impending audit.

[42] Mr Hedayaty said that at the time he had believed Mr Thompson had understood and accepted this. Mr Hedayaty said Mr Thompson had not informed him either at that time or at any time later of his concerns at the appointment of Ms Jazbani, nor had Mr Thompson complained that he had not been involved in the recruitment process.

[43] Ms Jazbani said shortly after she arrived in New Zealand, she had become aware that Mr Thompson had discussed her and her appointment with some of the ATA employees prior to her arriving at the ATA premises. Mr Thompson agreed at the second Investigation Meeting that he had spoken to some of the employees prior to Ms Jazbani's arrival.

[44] Mr Thompson explained it was inexplicable to him that Ms Jazbani would accept a subordinate position in ATA after previously having been the CEO and that he would not have appointed Ms Jazbani to the role. Mr Thompson commented that he did not know of any senior manager who would want a predecessor re-employed.

*Employment Agreement and Position Description*

[45] Ms Jazbani said she had arrived in New Zealand on Friday 31 May 2011 and had immediately gone to the ATA Manukau campus to assume the Programme Manager role. At this point Ms Jazbani said she did not have a written employment agreement or a position description, but she was aware of the expectations of the Programme Manager role as her understanding was that it was similar to a previous ATA position, Director of Studies.

[46] Mr Hedayaty said he had asked Mr Thompson to provide Ms Jazbani with an employment agreement and position description. Ms Jazbani said there had been a delay before she had received these as Mr Thompson was on annual leave on Friday 3 June 2011, and Monday 6 June 2011 was a statutory holiday.

[47] The employment agreement which was provided to Ms Jazbani by Mr Thompson specified in the First Schedule that her job title was Programme Manager, and her reporting line was to the CEO/Operations Manager. The position description of Programme Manager was attached as the Second Schedule.

[48] Ms Jazbani said that she had been concerned when she read through the employment agreement and the position description. Ms Jazbani said there had been operational matters included in the position description which she regarded as falling under Mr Thompson's role as CEO/Operations Manager, rather than under the Programme Manager role, which was educational rather than operational in nature.

[49] Ms Jazbani also said that she was concerned that the amount of work and responsibilities highlighted in the Programme Manager job description were not achievable by one person. Ms Jazbani said she had made her concerns known to Mr Thompson.

[50] Mr Thompson said Ms Jazbani had made it clear to him that her role was to focus solely on academic delivery, and that this had concerned him as he did not know who was to perform the other elements that the position demanded.

[51] Ms Jazbani said that when they had discussed her concerns Mr Thompson's response had been that the previous Programme Managers had had the same job description, and his manner towards her had been very cold and hostile. Ms Jazbani said when she had asked Mr Thompson for assistance and information, he had been dismissive of her requests.

[52] Mr Thompson when questioned at the Investigation Meeting agreed that his manner may have been unwelcoming and agreed he had informed Ms Jazbani he had not wanted her at ATA when she had put this observation to him.

[53] Mr Thompson said he had not asked Ms Jazbani why she had accepted the role of Programme Manager, a lesser senior role than that of CEO.

[54] Mr Thompson said he had considered that Ms Jazbani would not require his assistance as she should have been aware of how ATA operated and the requirements of the Programme Manager role.

[55] Mr Thompson said he did not recall Ms Jazbani telling him that she would only be in the position until the NZQA audit was completed in November 2011, however he did recall her telling him she would not be at ATA for long.

[56] Ms Jazbani said that it had been agreed with Mr Hedayaty that she could have an additional 9 days of annual leave in respect of Baha'i holy days as had been the case during her period of previous employment with ATA, however when she had told Mr Thompson this had been agreed, he had been opposed to it.

[57] Mr Thompson said that he had felt very strongly about this additional 9 days of annual leave and considered that it was unfair to the other employees.

[58] Mr Hedayaty said that he had always allowed the ATA employees leave of absence for religious or cultural purposes, citing one Moslem employee who had 2 hours off every Friday to attend the mosque.

[59] Mr Hedayaty said Mr Thompson had not informed him that he felt concerned about Ms Jazbani's entitlement to the 9 Baha'i Days additional annual leave.

[60] As she was having difficulty addressing her concerns with Mr Thompson Ms Jazbani said she had discussed the matter with Mr Hedayaty. Ms Jazbani said she had told Mr Hedayaty that she would not agree to the employment contract and position description as presented because she had no interest in taking on any of the operational matters. Ms Jazbani said she had told Mr Hedayaty that she had understood that the focus of her role was on the education focused responsibilities to ensure that ATA met the NZQA requirements.

[61] Mr Hedayaty said the matter had been discussed when he, Ms Jazbani and Mr Thompson had been together on a car journey to Hamilton. Mr Hedayaty said he had asked Mr Thompson and Ms Jazbani to try to resolve the issues between them and had advised that they should together examine both of their position descriptions.

[62] Ms Jazbani said she had considered this to be a reasonable suggestion.

[63] Mr Hedayaty said at the time the matter had been discussed Mr Thompson had agreed to resolve the issue in discussions with Ms Jazbani; however he understood that subsequently from Ms Jazbani that in fact Mr Thompson had not shown her his own position description or consulted with her.

[64] Mr Thompson said he had found it humiliating to be asked to provide a copy of his position description to Ms Jazbani.

[65] Mr Hedayaty said he had believed that Mr Thompson had agreed with the suggestion at the time it was made, and that Mr Thompson had not complained to him about having to provide his position description to Ms Jazbani, or mentioned that he had found it humiliating.

#### *Skype calls*

[66] Mr Thompson said shortly after Ms Jazbani arrived, Mr Hedayaty, who had returned to Australia, had sent an email requesting that he and Ms Jazbani attend a Skype meeting with him. At the meeting there was a discussion of on-going role responsibilities.

[67] In addition Mr Thompson said that there was discussion regarding operational matters which were not part of the Programme Manager's role. Mr Thompson said he had considered the involvement of Ms Jazbani in these discussions to be indicative of Mr Hedayaty and Ms Jazbani's intention to undermine his role.

[68] Ms Jazbani explained that the reason she had been present during the operational part of the discussion was because the Skype programme was in her office, and further that as Mr Thompson did not know how to operate Skype, she had needed to facilitate the call.

#### *Emails*

[69] Mr Thompson said he had considered some emails sent between Mr Hedayaty and Ms Jazbani during June 2011 showed that Ms Jazbani was 'side-lining' him.

[70] On 14 June 2011 Ms Jazbani had sent an email to Mr Hedayaty in which she had made the following comments about Mr Thompson: *'he is pretty passive about things and have very little idea!'; 'I really don't know what he does all day'; 'He again has no idea?'*. In the same email Ms Jazbani had also pointed out that the employees had had no salary increase for 3 years and they were unhappy, and suggested that they were given a salary increase of 5%.

[71] Ms Jazbani explained that she had been feeling miserable and alone in New Zealand and had been communicating with Mr Hedayaty as a friend.

[72] Mr Thompson said that Ms Jazbani had not mentioned the proposal that employee salaries were increased to him although this fell within his area of responsibility. However Ms Jazbani disagreed, saying that she had discussed the employee salary increase with Mr Thompson, and it had been his suggestion that she raise the matter with Mr Hedayaty

[73] Mr Hedayaty had replied by email that same day stating:

*Thank you Roya, I will let you know about the staff pay, some has been increased, we also need to have an operational budget prepared by him!*

...

*We need to see how he will respond to the changes you are making. Restructuring is an option we have.*

[74] Mr Thompson said he saw the restructuring comment as Ms Jazbani being given authority by Mr Hedayaty to introduce changes, and thought the restructuring comment referred to his position.

[75] Mr Hedayaty explained that the reference to restructuring had been made in response to Ms Jazbani's comment about the programmes ATA was offering and her concern that ATA might lose a programme. Mr Hedayaty said the restructuring referred to the restructuring of classrooms and instructing employees in connection with the finalisation of academic programmes, and not to a restructuring of the business.

[76] In an email dated 16 June 2011 which Ms Jazbani had sent to Mr Hedayaty, she states that she was concerned at a recruitment advertisement for a tutor being placed without her knowledge when this came within her area of responsibility as Programme Manager.

### *Office Move*

[77] Mr Thompson said that a week or two after Ms Jazbani had arrived at ATA she had moved from her office on the ground floor to an office upstairs which Mr Hedayaty occupied when he was working at ATA and which was adjoining Mr Thompson's office. Mr Thompson said that this office was larger and more opulent than the one he occupied, and he felt that this signalled to the other employees that he was being relegated to a secondary role. Mr Thompson said that he was: *"even more gutted that Behruz had not even discussed this with me."*

[78] Ms Jazbani said the office she had been allocated when she arrived at ATA was on the ground floor in a cramped space shared with two tutors and senior administrative employees; however there were several unused areas on the upper floor and Mr Thompson had required an office for another tutor.

[79] Mr Hedayaty said that he and Mr Thompson had discussed the office situation and that Mr Thompson suggested that one of the rooms upstairs be converted into an office.

[80] Mr Hedayaty said he had suggested to Mr Thompson that the tutor use his office which was largely unoccupied, but Mr Thompson had said it would be logistically impossible for a tutor to be upstairs, and he had suggested that the Programme Officer's office downstairs be used by the tutor. As a result Mr Hedayaty said Ms Jazbani had moved upstairs to share the office he used when he was in New Zealand.

[81] Ms Jazbani disputed that Mr Hedayaty's office was larger and more opulent than that occupied by Mr Thompson, but observed that she had not moved into the office until after Mr Thompson had announced his resignation, and further that Mr Thompson had assisted her by moving her computer up into Mr Hedayaty's office.

### *Ms Jazbani's telephone conversations*

[82] Mr Thompson said that as Ms Jazbani's office adjoined his following the office move, he overheard her speaking in Iranian on the telephone or on Skype, and he had assumed that she was speaking to Mr Hedayaty about ATA. Mr Thompson said that Ms Jazbani's reporting line was through him, and he felt that she was: *"going over my head"*.

[83] Ms Jazbani said that the office move did not take place until after Mr Thompson had resigned.

[84] Moreover Ms Jazbani explained that she conversed in Farsi with her children and Persian friends, but that she spoke in English when dealing with business matters. Ms Jazbani said that she did not have regular Skype conversations with Mr Hedayaty before Mr Thompson's resignation, and that when she did do so, they spoke in English.

*Cheque Signing Authority/Expenditure*

[85] Mr Thompson said that prior to Ms Jazbani's appointment he had exclusive cheque signing authority in conjunction with Ms Laing; however following Ms Jazbani's appointment, Mr Hedayaty said she also was to have cheque signing authority.

[86] Mr Hedayaty said that it was on his instructions that Ms Laing would email him for his authorisation prior to her signing any cheques. Accordingly he controlled the financial commitments of ATA.

[87] Mr Hedayaty said the ATA owned company car Mr Thompson was provided with had needed replacing as it was incurring high maintenance costs, and he had advised Mr Thompson to purchase a smaller Japanese vehicle under \$8,000.00. Mr Thompson explained that he had replaced his existing company vehicle together with another ATA owned vehicle with a larger and more efficient 3 litre Honda. The cost of the Honda was \$18,000.00.

[88] Mr Thompson said Mr Hedayaty had been aware of the vehicle purchase as he had been a passenger in the vehicle and that as Ms Jazbani had commented on the inappropriateness of his driving such a large vehicle, Mr Thompson said he had assumed that Ms Jazbani had been in communication with Mr Hedayaty over the issue because shortly after this his purchasing authority had been altered.

[89] Mr Hedayaty said he had only become aware of the Honda purchase when Mr Thompson had collected him from the airport. Mr Hedayaty said he had subsequently asked Ms Laing why she had not informed him of the vehicle purchase transaction, and she had become upset and explained that Mr Thompson had asked her not to inform him about the purchase.

[90] Mr Hedayaty said after he had returned to Australia, Ms Laing had contacted him and informed him that Mr Thompson was planning to sign a long term contract for an iPhone for his own use which was to be paid for by ATA.

[91] As a result Mr Hedayaty sent an email to Mr Thompson on 16 June 2011 advising Mr Thompson that no order of any value or any contract in the name of ATA should be signed before he had been informed and given his approval.

[92] The email also advised Mr Thompson that in addition to Ms Laing, Ms Jazbani was also to be consulted and have cheque-signing authority in the future.

### *Resignation*

[93] Mr Thompson said he considered the issues regarding having to discuss and resolve the issues of role responsibilities with Ms Jazbani, her office move, her telephone conversations in Farsi, and the issue of his authority levels had eroded his position and role at ATA. Mr Thompson said he considered the relationship of trust and confidence between himself, ATA and Mr Hedayaty had been irrevocably eroded.

[94] As a result Mr Thompson said he had decided he could no longer remain in employment at ATA, and had sent his resignation to Mr Hedayaty on 20 June 2011. The resignation letter read:

*Dear Behruz,*

*I have read your email of Thursday June 16, "Subject: 'Any new orders for ATA'" with concern.*

*I have decided to resign from Advanced Training Academy (ATA), giving three (3) weeks notice as noted in my contract, effective from Monday 20 June 2011. my last day being 11 July 2011.*

*...I leave the company in good heart, with dedicated staff members at both branches and wish ATA all success.*

[95] During the discussion following Mr Thompson's resignation email, Mr Hedayaty said Mr Thompson had told him that he had a better job arranged at Fleet Care and that ATA could no longer afford his services. Mr Hedayaty said he had the impression that Mr Thompson was happy to move on to this new position.

[96] Ms Jazbani said Mr Thompson had also informed her that he was joining Fleet Care, that he would be the Fleet Care contact for ATA, and he had provided her with his contact number.

[97] Mr Thompson agreed that after he had resigned he had mentioned to the other employees that he had a number of options, but explained this comment at the Investigation Meeting as being intended to maintain his self-esteem.

[98] When questioned at the Investigation Meeting on 24 April 2012, Mr Thompson agreed that he could have mentioned the Fleet Care appointment to Ms Jazbani.

[99] Mr Thompson explained that he had meetings with Fleet Care who had been interested in making an employment offer and they had entered into a Memorandum of Understanding with him. However the employment prospect had not subsequently transpired.

#### *Commission Payments*

[100] Mr Thompson said that under the terms of his employment agreement he was entitled to receive commission in addition to a base salary; the commission being payable at the rate of 5% on profit (net profit) above \$105,000 per annum.

[101] Mr Thompson said the financial statements for the financial year ending March 2008 disclosed a net profit of \$182,984.00 which entitled him to a commission entitlement of \$3,899.20 in accordance with his employment agreement.

[102] Mr Thompson stated that this sum had not been paid to him and he had never agreed that the sum was not due and payable to him.

[103] Mr Hedayaty said he did not believe Mr Thompson was entitled to a commission payment for the financial year ended March 2008 on the basis that Mr Thompson had joined ATA in October 2007 which was after all funding contracts had been finalised. Mr Hedayaty said he had discussed this at the time with Mr Thompson, who had agreed that no commission was payable for the financial year ended March 2008.

[104] Mr Hedayaty further stated that Mr Thompson had not requested any payment of this alleged outstanding commission payment at any time in his four years of employment.

## Determination

### Was Mr Thompson constructively dismissed by ADA?

#### The Law

[105] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[106] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*<sup>1</sup> the Court of Appeal said regarding the correct approach to constructive dismissal:<sup>2</sup>

*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 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.*

[107] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation,
- ii. Secondly if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[108] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*<sup>3</sup> observed in describing this type of constructive dismissal:<sup>4</sup>

*It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct*

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<sup>1</sup> [1994] 1 ERNZ 168

<sup>2</sup> Ibid At p 172

<sup>3</sup> [1983] ACJ 965

<sup>4</sup> at [975]

*causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.*

*Breach of duty on part of the employer which has caused the resignation*

[109] Mr Thompson believed that Mr Hedayaty's action in appointing Ms Jazbani without any reference or consultation with him undermined his role and constituted a breach of duty owed to him by ATA.

[110] The appointment of Ms Jazbani by Mr Hedayaty had taken place without Mr Thompson having been consulted or having taken any part in the recruitment process. Mr Thompson undoubtedly had responsibility for staff management and recruitment as detailed in his position description which stated:

*KEY DUTIES*

*1 Manage staffs (sic)*

*...*

*Responsible for staff selection and recruitment*

[111] Until it had been decided to create the position of and subsequently appoint a Programme Manager, I accept that Mr Hedayaty's involvement in the staff selection process and management had been limited to setting the salary levels for the employees.

[112] Following the NZQA audit in 2007/2008 which identified the Programme Manager position as critical to ATA's business, Mr Hedayaty's evidence was that he had wanted to be involved in the recruitment process for that position, and a proposed job description and salary proposal had been sent to him by Mr Thompson. However a family illness had prevented him from participating in the recruitment of Ms Muttu.

[113] I accept that following Ms Muttu's resignation, Mr Hedayaty decided that the recruitment process should be changed and an interview panel was constituted consisting of Mr Hedayaty, Mr Thompson and a senior tutor. This interview panel had appointed Mr Doust.

[114] As Managing Director of ATA, the ostensible authority of Mr Hedayaty would be very wide, I consider it to have been within the area of his managerial prerogative to decide to become involved in the recruitment process. Mr Thompson's evidence confirmed that Mr Hedayaty had participated in the recruitment of Mr Doust.

[115] However some time later, although Mr Hedayaty had wanted to be involved in Mr Doust's performance appraisal, he had respected Mr Thompson's wishes in the matter and agreed not to attend the performance appraisal at Mr Thompson's request.

[116] I find that prior to the appointment of Ms Jazbani, although Mr Hedayaty had as Managing Director the requisite authority to participate in the recruitment and performance appraisal of the critical and senior position of Programme Manager, he had been willing to consider the request of Mr Thompson and to accede to his request that he did not attend Mr Doust's performance appraisal.

[117] I find that this evidence, together with the statement in the letter to Mr Hedayaty from Mr Thompson's lawyers dated 22 July 2011 which stated: "*Mr Thompson's concern regarding his opposition with ATA first started in May 2011*" denotes a positive business relationship between Mr Hedayaty and Mr Thompson to this point.

[118] Mr Doust resigned on 26 May 2011 and left ATA's employment without working the requisite notice period. I accept from the evidence of both Mr Hedayaty and Mr Thompson that because the NZQA audit was due in November 2011 with preliminary stage work requiring to be completed prior to that date, losing the Programme Manager placed ATA in jeopardy and an immediate solution was required.

#### *Appointment of Ms Jazbani*

[119] Mr Thompson said that despite staff recruitment being his area of responsibility, he had not been involved in the recruitment of Ms Jazbani, nor had he been informed about her appointment prior to her arriving at the offices of ATA, and in his opinion this had been a breach of duty on the part of ATA.

[120] Mr Hedayaty said that in a telephone conversation with his wife on Friday 27 May 2011 she had suggested that he should consider speaking to Ms Jazbani; a personal friend who had previously carried out programme manager duties for ATA, with a view to her taking on the role.

[121] Mr Hedayaty said he had not involved Mr Thompson in the recruitment of Ms Jazbani due to the time constraints placed upon the process by Ms Jazbani's personal circumstances and the pressing NZQA audit schedule requirements. Both Mr Hedayaty and Mr Thompson agreed that Mr Hedayaty had instructed Mr Thompson not to advertise the vacant position of Programme Manager because he had someone in mind.

[122] I find Mr Hedayaty's explanation as to the reason why Mr Thompson had not been involved in the recruitment process to be attributable to the facts surrounding the brevity of time to make and implement the decision rather than to any intention to purposely exclude Mr Thompson from the process. These factors included:

- the short space of time between the conversation with Ms Jazbani on Friday 27 May and her arrival in New Zealand on Tuesday 31 May 2011;
- her need for an immediate definite offer of employment, which was a requirement to allow her to deal with her commitment to her alternative personal plans;
- the small window for a decision given her pressing personal circumstances; and
- the urgent nature of the appointment in light of the NZQA schedule.

[123] I further find Mr Hedayaty's evidence that he had informed Mr Thompson that Ms Jazbani had been appointed prior to her arrival in New Zealand to be supported by Mr Thompson's admission at the Investigation Meeting that he had discussed Ms Jazbani with employees of ATA prior to her arrival at the ATA premises.

[124] Whilst I find that Mr Hedayaty acted speedily in the appointment of Ms Jazbani, as Managing Director of ATA he had the requisite authority to do so. I consider it was inconsiderate of him not to keep Mr Thompson informed, even a brief telephone call would have sufficed. However I do not find that this constituted dismissive or repudiatory behaviour on the part of ATA.

#### *Employment Terms of Ms Jazbani*

[125] Mr Thompson said he had been suspicious over the motivation behind Ms Jazbani's appointment and felt that she had been recruited to resume the role she had previously held at ATA. The basis of his suspicion was that she having previously been the CEO of ATA, he could not comprehend why she would want to be re-employed in a less senior position.

[126] I have already observed that, prior to the appointment of Ms Jazbani, previous evidence denoted a positive and considerate business relationship between Mr Hedayaty and Mr Thompson; and I find no evidence that Mr Hedayaty had intended Ms Jazbani's

appointment to displace Mr Thompson's responsibilities as Operations Manager/CEO, or that Ms Jazbani understood that to be the case. Mr Hedayaty stated in his evidence that: *:Deryk was not being sidelined by me ... I fully intended him to remain as operations manager"*.

[127] To substantiate the basis for his suspicions, Mr Thompson pointed to the fact that Ms Jazbani had not been appointed on a fixed term basis. Mr Hedayaty confirmed that he had agreed the substantive terms relating to Ms Jazbani's employment, and had instructed responsibility to Mr Thompson to draft and present a written employment agreement to Ms Jazbani.

[128] In evidence Mr Hedayaty stated that: *"We (Mr Hedayaty and Ms Jazbani) discussed her remaining at ATA until November's audit and then we would review the situation at that point"*. Ms Jazbani said she had informed Mr Thompson that she had accepted the role until the November NZQA audit was complete.

[129] Mr Thompson said he had not been advised that Ms Jazbani's employment agreement was to be fixed term. However on the basis that Mr Thompson agreed in evidence at the Investigation Meeting that Ms Jazbani had informed him that she would not be at ATA for a long period of time, I find it was open to Mr Thompson to clarify the precise terms of Ms Jazbani's employment agreement with Mr Hedayaty; and if appropriate to have reflected the fixed term nature of the appointment in the employment agreement fixed term. However Mr Thompson did not do so and there is no evidence that the matter of a fixed term employment agreement was ever raised or discussed by Mr Thompson with either Mr Hedayaty or Ms Jazbani.

#### *Ms Jazbani's responsibilities*

[130] It is not disputed that although Mr Hedayaty had agreed the salient points of Ms Jazbani's employment arrangements, he had not provided her with a written employment agreement or job description; instead he had instructed Mr Thompson to complete this task. Mr Thompson confirmed in his evidence that: *"It was clear from this that Behruz had not agreed what Ms Jazbani's duties were to be ..."* and he provided her with a copy of the job description given to the previous incumbent of the position.

[131] In response Ms Jazbani had explained to Mr Thompson that her understanding was that she was to focus on the academic delivery parts of the job description and not on operational matters.

[132] The evidence of Mr Hedayaty and Ms Jazbani was that when Ms Jazbani had raised her concern at the inclusion of operational matters in the job description for the Programme Manager, Mr Hedayaty had asked Mr Thompson, in consultation with Ms Jazbani, to clarify their separate areas of responsibility.

[133] I find there was no evidence that Ms Jazbani had tried to usurp Mr Thompson's position during the short time they worked together, on the contrary there is evidence that Ms Jazbani had not wanted any involvement in the operational matters which fell within the responsibilities of Mr Thompson, the Operations Manager.

[134] Further the evidence is that Ms Jazbani had been treated with coldness and hostility by Mr Thompson. I consider that this attitude arose from Mr Thompson's suspicions about the nature of Ms Jazbani's appointment. I observe that Mr Thompson appeared to be status conscious as demonstrated by the fact that he had, within a short time of joining ATA and without the authority of Mr Hedayaty, changed his title from Operations Manager to Operations Manager/CEO after he had been appointed to the role of Operations Manager, and become aware of Ms Jazbani's previous position as CEO.

[135] Whilst Mr Thompson's perception was that Mr Hedayaty and Ms Jazbani had sought to undermine his position and to 'sideline' him; I have seen no evidence to support this. Ms Jazbani had made it clear from the outset that she did not want to assume any of the operational responsibilities she considered to be appertaining to the role of Operations Manager. Ms Jazbani had also told Mr Thompson that she would not be remaining long in the employment of ATA.

[136] I consider that Mr Thompson's suspicions about the ulterior motivation behind Ms Jazbani's appointment coloured his perception of certain events which followed:

- Mr Thompson objected to Ms Jazbani being party to a 3 way Skype discussion with Mr Hedayaty about operational matters, despite the fact that this had taken place in her office utilising her personal Skype account, and she had facilitated the call because Mr Thompson himself was unable to do so.
- Mr Thompson, who resigned on 20 June 2011, pointed to the emails which had been sent between Mr Hedayaty and Ms Jazbani in June 2011 as confirming the intention of Mr Hedayaty and Ms Jazbani to 'sideline' him. The tone of Ms Jazbani's email of 14 June 2011 was scathing of Mr

Thompson's performance, however this email was not copied to Mr Thompson and it is therefore unclear when he became aware of it, or that it influenced his decision to resign.

I note as significant in this respect Mr Thompson's evidence that he had reached the decision to resign on 13 June 2011, although it was not implemented until 20 June 2011. This was prior to the date of the email of 14 June 2011.

- Mr Thompson cited Ms Jazbani's conversations in Farsi as evidence that she and Mr Hedayaty were conversing about him and seeking to undermine his position. As Mr Thompson does not understand Farsi, this was merely an assumption on his part. Moreover Mr Thompson stated that he heard the conversations as his office "*...adjourned Ms Jazbani's new space*" As the move did not take place until after Mr Thompson had resigned, I do not see how the conversations could have influenced Mr Thompson's decision to resign.
- Mr Thompson assumed that the change in the cheque-signing authority to include Ms Jazbani as a co-signatory had arisen as a direct result of Ms Jazbani communicating with Mr Hedayaty on the subject of the expensive vehicle he had authorised ATA to purchase, however there is no evidence that she had done so.
- Mr Thompson further believed that the cheque signing authority had been amended in order to promote Ms Jazbani's management authority. Mr Hedayaty's evidence was that his decision to amend the signing authority to include Ms Jazbani had been largely based on what Ms Laing had told him about Mr Thompson's own behaviour in regard to the vehicle purchase and the proposed iPhone contract.
- Mr Thompson believed that Ms Jazbani's office move was further evidence of the attempt to 'side-line' him, and such a move would be perceived by the other employees as him being relegated to a subsidiary role to Ms Jazbani. From the evidence presented it would appear to have been Mr Thompson's suggestion that the office Ms Jazbani had used as Programme Manager on the ground floor be used by a tutor, prompting the necessity for Ms Jazbani to move office. Mr Thompson did not produce any evidence to substantiate his

views of the perceptions of the other employees, and I find the office relocation to have been a practical operational consideration rather than an attempt to 'side line' Mr Thompson.

#### *Alternative Employment*

[137] I turn now to consideration of the matter of Mr Thompson's application for other employment whilst he was employed at ATA, and his comments alleging that in fact he had secured another position as being indicative of the motivation for Mr Thompson's resignation and pertinent to consideration of whether Mr Thompson was unjustifiably dismissed by ATA.

[138] At the Investigation Meeting Mr Thompson agreed that prior to his resignation he had been in dialogue with another company, Fleet Care, and in fact had secured "*a memorandum of understanding*" relating to an offer of employment with that company. Mr Thompson also confirmed that the proposed employment offer did not eventuate. This evidence substantiates the evidence given by Mr Hedayaty and Ms Jazbani that Mr Thompson had told them and other employees that he had another job.

[139] It is also apparent from the copy email dated 19 October 2010 which referred to Mr Thompson's application for the position of "*Institute Director, Le Cordon Blue, NZ*" that Mr Thompson had been actively seeking other employment some 8 months prior to his resignation. At the Investigation Meeting Mr Thompson said that after 3.5 years with ATA he had regularly searched for employment opportunities to advance his career in larger organisations.

[140] I consider that these events indicate that Mr Thompson could have been set on a course of leaving the employment of ATA for career advancement, notwithstanding the appointment of Ms Jazbani or subsequent matters.

[141] In summary, Mr Thompson claims that the events leading to his resignation took place between 31 May 2011 and 13 June 2011, a period of 14 days in total. That period included two weekends, and a statutory holiday, and Mr Thompson also had one day's annual leave. Mr Thompson's evidence was to the effect that: "*.. he considered his position for a further week ... and resigned on June 20*" thereby confirming that events which occurred after 13 June could not have influenced his initial decision to resign from the employment of ATA on 13 June 2011.

[142] The email evidence dated 14 June 2011 is inconclusive since it is not clear that Mr Thompson knew of its existence until after he had resigned and left ATA.

[143] Having fully considered all the circumstances at the relevant time, I do not find evidence of a breach of duty on the part of the employer which would give rise to Mr Thompson being unjustifiably constructively dismissed.

*If there was a breach of duty was it reasonably foreseeable that the employee would resign*

[144] Mr Hedayaty's evidence was that Mr Thompson had raised none of his concerns over the appointment of Ms Jazbani with him. Specifically Mr Thompson had not:

- informed him that he had been concerned at the appointment of Ms Jazbani;
- informed him that he was upset at not being included in the recruitment process or given the opportunity to interview Ms Jazbani;
- informed him he was concerned at Ms Jazbani being allowed to take 9 days additional leave in respect of the 9 Baha'I Holy days;
- objected to having to provide his position description to Ms Jazbani or said that he considered the request to be humiliating.

[145] Mr Thompson said that he was "*gutted*" that Mr Hedayaty had not discussed Ms Jazbani's office move with him, however Mr Hedayaty's evidence had been that he and Mr Thompson had discussed the office move. Ms Jazbani stating that Mr Thompson had assisted her by moving her computer up to Mr Hedayaty's office. There is no evidence, nor in my view was it likely that ATA foresaw the office move, which was a practical business consideration, as an action which would cause Mr Thompson to resign.

[146] Mr Thompson had referred to having concern at the changes made by Mr Hedayaty to the purchasing authorisation system which required Ms Jazbani to be consulted. The email from Mr Hedayaty dated 16 June 2011 sets out clearly the reasons for the changes and I find that in the circumstances of Mr Thompson having exceeded his authority level in the matter of the car purchase, Mr Hedayaty had responded reasonably. The changes did not remove Mr Thompson from the purchasing authorisation process, they merely added Ms Jazbani, nor did the changes make Ms Jazbani the final authority to place a purchase order, which remained with Mr Hedayaty. This was a system change for commercial purposes and it is unlikely that ATA foresaw this as an action which would cause Mr Thompson to resign.

[147] In his email of resignation Mr Thompson does not explain what his concern may have been with the changes to the purchasing authorisation system, nor did he subsequently raise the issue with Mr Hedayaty, who it is reasonable to assume based on the evidence regarding his previous good relationship with Mr Thompson, would have been willing to address the matter.

[148] I find that there was no notification from Mr Thompson to ATA prior to his resignation that he regarded Mr Hedayaty to have acted in such a way as to amount to a serious breach of duty towards him, or indeed that there was an employment relationship problem which should have been addressed by Mr Thompson in accordance with clause 13 of his employment agreement entitled '**Resolving Employment Relationship Issues**'.

[149] I accept that in the case of a serious breach of the employer's duty within the employment relationship there may be no obligation that the employee notifies the employer of their concern; however I have not found that there was a serious breach of duty on the part of ATA

[150] I find that considering the circumstances which Mr Thompson alleged were the reason for his resignation, and given the lack of any identification of his concerns to ATA, it would not have been reasonably foreseeable to ATA that there was a substantial risk of resignation or that Mr Thompson would not be able to continue to work under the prevailing conditions.

[151] I determine that Mr Thompson was not constructively dismissed by ATA but that he voluntarily resigned from his employment.

### **Was Mr Thompson unjustifiably disadvantaged in his employment?**

[152] Mr Thompson is claiming unjustifiable disadvantage. I find that there has been no unjustifiable action and determine that Mr Thompson has suffered no unjustifiable disadvantage.

### **Is Mr Thompson owed outstanding commission payments by ADA?**

[153] Mr Thompson's employment agreement stated at clause 6.2

*The Employee shall be entitled to receive Commission in addition to their base salary or hourly rate of 5% on the following basis **above Profit of \$105,000.** ..*

[154] Clause 14.1 of the employment agreement '**Variation of the Agreement**' stated:

*The parties may vary this agreement, provided that no variation shall be effective or binding on either party unless it is in writing and signed by both parties.*

[155] Mr Hedayaty stated that Mr Thompson had verbally agreed that he would not be entitled to a commission payment in respect of the financial year ended 31 March 2008. The agreement had been reached on the basis that Mr Thompson had not commenced employment with ATA until October 2007, by which time the work to secure funding for the financial year ended March 2008 had been completed.

[156] Mr Thompson denies that there was any verbal agreement that he would forego the contractual entitlement, and he had not done so.

[157] Mr Hedayaty points to the fact that Mr Thompson had not raised any claim for this commission payment during the four year period since it became due as supporting evidence of the verbal agreement.

[158] The employment agreement is quite clear pursuant to clause 14.1 that any variation to the contractual terms contained therein must be in writing and signed by both parties. There is no evidence of a signed written agreement to vary the contractual terms relating to a commission payment for the financial year ended 31 March 2008.

[159] The terms of clause 6.2 are not clearly defined. Profit can have a number of interpretations but in the absence of any discussion I shall use the figure disclosed by the financial statements and agreed by both parties as being \$182,984.00. This being above the cited threshold of \$105,000.00 entitles a commission payment to be made pursuant to clause 6.2.

[160] Mr Thompson is entitled to receive a commission payment based on the rate of 5% of \$77,984.00 being the net profit above \$105,000.00, which would equate to a commission entitlement of \$3,899.00.

[161] During the ATA financial year 2007/8 Mr Thompson was employed from 8 October 2007 to 31 March 2008, a period of 6 months. In line with the normal pro-rata arrangements which cover part working arrangements and Mr Thompson's Statement of Problem which claimed: " ... including a pro-rata claim of his entitlement for the portion of the year in which he commenced employment in 2007.", Mr Thompson is entitled to a commission payment of \$1,949.60.

[162] ATA is ordered to pay Mr Thompson \$1,949.60 in respect of commission entitlement for the financial year ended 31 March 2008.

### **Costs**

[163] Costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions by the Applicant to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**