

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 24  
5627030

BETWEEN

IVAN VOO  
Applicant

AND

ACG YOOBEE SCHOOL OF  
DESIGN LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Eska Hartdegen for Applicant  
Ray Parmenter for Respondent

Investigation Meeting: 7 December 2016

Submissions Received: 15 December 2016 from Applicant  
20 December 2016 from Respondent

Determination: 27 January 2017

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. One or more conditions of Mr Voo's employment were not affected to his disadvantage by unjustifiable actions of ACG Yoobee School of Design Limited.**
- B. ACG Yoobee School of Design Limited has not breached its obligations of good faith.**
- C. Mr Voo was not unjustifiably constructively dismissed.**
- D. Costs are reserved.**

**Employment relationship problem**

[1] Mr Ivan Voo claims one or more conditions of his employment were affected to his disadvantage by the unjustifiable actions of ACG Yoobee School of Design Limited (Yoobee School of Design) and that Yoobee School of Design has breached its statutory obligations of good faith. Mr Voo also claims he has been unjustifiably constructively dismissed. Yoobee School of Design denies the claims.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Voo and Yoobee School of Design but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

**Background**

[3] Yoobee School of Design is a specialist tertiary provider of creative digital technology courses. Mr Voo started working for Yoobee School of Design on 1 July 2007 in the position of Graphic Design Tutor. The terms and conditions of Mr Voo's employment are set out in an individual employment agreement dated 22 June 2007.

[4] Mr Voo says he has experienced ongoing bullying, victimisation and disparity of treatment from Mr Jason Hyland, Head of Faculty Graphic Design and Web, since 2007. By way of example Mr Voo says Mr Hyland complained about his work to the then Head of Faculty which resulted in an external assessment being undertaken of his work. The result of the assessment was favourable to Mr Voo. As a further example Mr Voo told me Mr Hyland instructed him to take down his students work from display without any explanations.

[5] Mr Voo says that when he attempted to discuss the situation Mr Hyland became aggressive and told Mr Voo he could not discuss the situation as he was too angry. Mr Voo says he filed a formal complaint with the Campus Manager about Mr Hyland on 19 August 2008.

[6] Mr Voo says Mr Hyland has required Mr Voo to teach additional classes which has resulted in a workload of 31 teaching hours each week where other tutors have a much lesser workload. In addition to the extra classes Mr Voo says Mr Hyland required him to undertake his [Mr Hyland's] marking in February and March 2016.

[7] Before the summer holiday break in 2015 the Divisional General Manager announced a 3% increase in pay for all staff. Mr Voo says he did not receive any increase but is aware of others in his department who did receive an increase although this was in February 2016.

[8] On 29 February 2016 a newsletter was emailed to all staff from the Campus Manager, Ms Tracey Lee. A comment was made in the newsletter advising Mr Voo that he was the next person to provide a short biography. This was followed by the words “*this will be an interesting test to see if he reads the newsletter! :)*”.

[9] On 29 March 2016 Ms Lee wrote to Mr Voo raising concerns about his hours of work and instructed him to work the hours set out in his employment agreement. Ms Lee also raised a number of allegations which included time theft, failure to consult with Head of Faculty over changes he made to his schedule, lack of regular professional development, not following protocols when calling in sick and not following lesson plan structures. Mr Voo was instructed to adhere to his hours of work and to show improvement in the areas set out in the letter.

[10] Mr Voo responded to Ms Lee’s letter on 7 April 2016 confirming that he would adhere to his contracted hours of work. He also requested further information regarding the allegations set out in her letter.

[11] Mr Voo was invited to attend a meeting with Ms Lee and Mr Hyland on 26 April 2016. He was advised the meeting was not disciplinary but that Ms Lee and Mr Hyland would be accompanied by Ms Ashley Rennie, Human Resources Advisor, who would take notes of the meeting.

[12] The meeting proceeded on 26 April 2016. Mr Voo was provided with a copy of the notes of the meeting. On 27 April 2016 Mr Voo commented on the accuracy of the notes and set out omissions he believed had been made and which had not been recorded.

[13] On 2 May 2016 Mr Voo emailed Ms Rennie confirming that he would adhere to the hours of work and reiterated his request from 7 April 2016 for further details about the allegations. Ms Rennie emailed Mr Voo on 3 May 2016 setting out specific examples of the concerns raised in the letter dated 29 March 2016. Ms Rennie

reiterated that they were not working through a performance management process nor were the concerns being treated in a disciplinary setting.

[14] On 4 May 2016 Mr Voo attended work following a day's annual leave. In an email sent to him from Mr Hyland on 2 May 2016 Mr Voo was asked to teach a Friday afternoon class. He was upset at the short amount of notice and despite not wanting to meet with Mr Hyland was forced to meet with him. Mr Voo walked out of the meeting and left the workplace.

[15] Mr Voo commenced a period of sick leave on 5 May 2016. By 27 June 2016 Mr Voo had not returned from sick leave and Yoobee School of Design confirmed that on his return from sick leave Mr Voo would be teaching courses for the September 2016 intake of students. Yoobee School of Design requested a diagnosis and prognosis from Mr Voo's doctor to enable consideration of Mr Voo's return to work.

[16] Mr Voo's doctor provided documentation on 15 July 2016. After reviewing the documents Yoobee School of Design sought clarification from Mr Voo that it understood correctly that the doctor was reporting that Mr Voo would not be able to resume full time employment. Mr Voo did not respond to this request.

[17] On 19 July 2016 Yoobee School of Design emailed Mr Voo seeking a response to its 15 July 2016 email and asked Mr Voo whether he was able to return full time or whether Yoobee School of Design and Mr Voo should be discussing the possibility of part time work. Yoobee School of Design recognised that with Mr Voo's classes starting in September 2016 he would need to upskill during August 2016.

[18] On 5 August 2016 Mr Voo presented a further medical certificate which specified that he would be unfit for work for a further 30 days. On 25 August 2016 Yoobee School of Design advised Mr Voo that it needed his office space temporarily and it wanted to be clear that it was not promoting the impression that Mr Voo had been dismissed.

[19] Mr Voo did not return to work and after presenting a further medical certificate for 30 days from 5 September 2016 Mr Voo resigned on 29 September 2016. He raised a personal grievance for constructive dismissal that same day.

**Issues**

[20] The issues for determination are whether:

- a) One or more conditions of Mr Voo's employment were affected to his disadvantage by unjustifiable actions of Yoobee School of Design and if so what, if any, remedies should be awarded;
- b) Yoobee School of Design has breached its obligations of good faith and if so what, if any, penalty should be imposed; and
- c) Mr Voo was unjustifiably constructively dismissed and if so what, if any, remedies should be awarded.

**Disadvantage**

[21] Mr Voo claims one or more conditions of his employment were affected to his disadvantage by the unjustifiable actions of Yoobee School of Design when it subjected him to bullying, victimisation and disparate treatment.

[22] Mr Voo bears the onus of establishing on the balance of probabilities that he was disadvantaged in his employment. If Mr Voo discharges that onus then the burden of proof moves to Yoobee School of Design to establish on the balance of probabilities that any disadvantage Mr Voo may have suffered was justified.

[23] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Yoobee School of Design's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

***Bullying and victimisation***

[24] Mr Voo says the following actions by Yoobee School of Design constituted bullying and victimisation:

- a) complaint to the previous Head of Faculty, Mr Angelo De Marchi about Mr Voo's work;
- b) Mr Hyland instructed Mr Voo to take down his students' work from display;
- c) Mr Hyland treated Mr Voo as his "*dogs body*" requiring him to teach additional classes;
- d) Mr Hyland never provided course materials on time which led to stress as Mr Voo did not know what he was supposed to be teaching;
- e) Mr Hyland gave Mr Voo his marking to do;
- f) Ms Lee suspected Mr Voo was not teaching the correct curriculum to the students, not working his full complement of hours and/or that he was cutting corners;
- g) Ms Lee's distribution of a newsletter where she added a comment which caused Mr Voo to become the laughing stock of all the staff;
- h) Ms Lee changed Mr Voo's hours of work and suggested he work part-time;
- i) short notice of a requirement that Mr Voo teach the AfterEffects course;  
and
- j) Ms Lee using "*name and shame*" tactics.

[25] Yoobee School of Design objects to the Authority investigating what it says are historical claims that were not raised within the statutory 90-day period.<sup>1</sup> I can consider earlier events if the earlier events led to a course of conduct leading to and linked to the events within the 90-day period. I am also able to consider evidence that provides background and context to the alleged personal grievances.<sup>2</sup>

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<sup>1</sup> Employment Relations Act 2000, section 114.

<sup>2</sup> *Premier Events Group v Beattie (No 3)* [2012] NZEmpC 79 at [14]; (2012) 10 NZELC 79-011; [2012] ERNZ 257; (2012) 10 NZELR 127.

[26] Mr Voo raised a personal grievance for unjustified disadvantage on 18 May 2016. The 90-day period encompasses the period 19 February to 18 May 2016. I will take into account the earlier events only to the extent that they lead to or are linked to the events within the 90-day period.

Prior complaint to the previous Head of Faculty

[27] This claim relates to an issue that arose in 2007 and is therefore outside the 90-day period. I have however considered the issue as contextual background because Mr Voo says that this was the beginning of the bullying by Mr Hyland.

[28] Mr Voo claims that Mr Hyland made a complaint about his work and performance to Mr De Marchi who was, in 2007, the Head of Faculty and Mr Voo's manager.

[29] Mr De Marchi attended the investigation meeting and gave evidence. Mr De Marchi told me Mr Hyland did not make a complaint about Mr Voo. He told me there was a complaint but it was made by either the Principal or Vice-Principal of the School, he could not be sure which of the two it was but he was certain that the complaint did not come from Mr Hyland.

[30] Mr De Marchi told me that the concerns related to how Mr Voo was doing his work. Mr De Marchi explained that the tutors had to follow the curriculum and there was a concern that Mr Voo was doing things a little differently.

[31] Mr De Marchi requested that Mr Voo's work be assessed by the industry advisory group. While the advisory group identified one or two things that weren't being done well, overall Mr De Marchi received positive feedback.

[32] I am satisfied Mr Hyland was not involved in any way in the making of any complaint about Mr Voo's work that led to the industry advisory group's assessment and therefore this incident is not related to or linked in any way to any other actions complained of by Mr Voo which he attributes to Mr Hyland and Ms Lee.

Instruction to take down students work from display

[33] This is another action which is outside the 90-day period. Mr Voo says, following the response from the industry advisory group, Mr Hyland instructed him to

take down his students' work. Mr Voo says Mr Hyland was motivated to do this because it highlighted for other students that they were not getting equally good tuition and resulted in other staff being jealous of his success with his class.

[34] I find it is more likely than not that Mr Voo was asked to take the work down but not because of any jealousy or other hidden motive. The work completed by the students did not meet the curriculum criteria and it was for that reason only that the work was taken down.

[35] I am satisfied this was a one-off incident which occurred at least seven years before any other events occurred which have led to Mr Voo's claims. I find this incident is not related to or linked in any way to any other actions complained of by Mr Voo.

Treated as Mr Hyland's "dogs body" requiring him to teach additional classes

[36] Mr Voo says he was regularly instructed to take Mr Hyland's classes. Mr Voo says he had been teaching Mr Hyland's 4-hour Friday afternoon class each week and in December 2015, when a staff member left, Mr Hyland required Mr Voo to teach that tutor's component also. Mr Voo says this led to him teaching an additional 15 hours per week in the afternoons on top of his usual teaching hours.

[37] The allocation of contact teaching hours for 2015 was completed by the Operations Manager, Shuling Jin in consultation with the various Heads of Faculty. At the time the timetabling was completed for 2015 Mr Hyland was not the Head of Faculty but was a tutor working in the department with Mr Voo.

[38] In December 2015 Mr Voo was asked by Mr Hyland and Ms Lee whether he would agree to two classes, each with small numbers of students, being combined due to the departure of another staff member. Mr Voo was already teaching one of the two classes and both classes were taught at the same time. A merger of the two classes would still leave the class size under subscribed. Mr Voo agreed to the two classes being merged and Mr Hyland extended an invitation to Mr Voo to attend the second class with him when the students were informed of the merger.

[39] Mr Voo taught the merged class from January to March 2016. There was no increase in Mr Voo's contact teaching hours as a result of the merged class as the

classes were both taught as one class which required only one tutor and Mr Voo was already teaching one of the classes. Mr Voo's evidence that his teaching hours increased by 15 hours is simply not credible.

#### Provision of course materials

[40] Mr Voo claims Mr Hyland never gave him the course materials for his classes in time and he only ever received them at the last moment. Mr Hyland gave uncontested evidence that the campus utilises a course WIKI (Yoobee School of Design's intranet) which all tutors have access to. WIKI holds all course materials which are available at all times.

[41] I am satisfied all tutors have full access to course materials at all times through Yoobee School of Design's intranet and that Mr Voo was not reliant on Mr Hyland to provide him with course materials.

#### Marking of student work

[42] Mr Voo claims that Mr Hyland added to the pressures of his workload when, in February or March 2016 he instructed Mr Voo to undertake marking for him.

[43] I have accepted Mr Hyland's evidence that Mr Voo was one of five tutors who team teach (share a lab) and they share in the marking of the work. Mr Voo was given approximately 20% of the marking which was his share. As sometimes occurred, another tutor offered to and did complete Mr Voo's 20% of the marking. However, it was not unreasonable for Mr Hyland to request Mr Voo to undertake his share of the marking for the class.

#### Distribution of an email causing Mr Voo to become the laughing stock of all the staff

[44] On 29 February 2016 Ms Lee sent out a weekly update email to all staff advising them of the happenings for the coming week. This email included a short paragraph by an employee who had previously been invited to share information about herself so that the other members of staff could get to know a bit more about her.

[45] At the end of the paragraph which had been written by the staff member concerned, Ms Lee added the words (verbatim):

*(Ivan – you are next – this will be an interesting test to see if he reads the newsletter!:)*

[46] During the course of the day other members of the staff who had read the weekly update asked Mr Voo if he had read the update. Mr Voo had not read it and acknowledged that. There was some fun made of the fact that Mr Voo had, as predicted by Ms Lee, not read the email so was not aware that he had been invited to share information about himself.

[47] Mr Voo says this action by Ms Lee was humiliating and caused him great embarrassment. Ms Lee says she did not intend to offend Mr Voo and intended the comment to be light-hearted in nature.

[48] I have concluded that Mr Voo has overreacted to a light hearted comment which I am satisfied was not intended to be offensive or to disparage Mr Voo in any way. The comment was in keeping with the general culture of the workplace which, while taking seriously the commitment Yoobee School of Design makes to its students, also tries to create a work environment that encourages some light heartedness.

Ms Lee changed Mr Voo's hours of work and suggested he work part-time

[49] Mr Voo says that when he commenced employment in 2007 it was agreed that he would work flexible hours as long as he worked 7.5 hours each day. Mr Voo says he worked from 7.00am to 2.30pm each day Monday to Thursday and would teach a class from 3.15pm to 4.15pm on a Friday.

[50] Mr Voo raised his concerns about his hours of work with Ms Lee during a conversation on 3 March 2016. Ms Lee wrote to Mr Voo on 29 March 2016 advising Mr Voo that if he was working the hours he reported to her then he was not working 7.5 hours each day, given that staff were expected to take at least a 30 minute break for lunch. Ms Lee also noted that the majority of Yoobee School of Design's courses were offered in the afternoon and so working from 7.00am to 2.30pm would not meet Yoobee School of Design's requirements.

[51] Ms Lee instructed Mr Voo to attend the workplace in accordance with his contractual obligations and if he was timetabled to teach a 3.15pm class then he was required to do so.

[52] Ms Lee instructed Mr Voo that his attendance at Yoobee School of Design had to be more regular and provided him with a window of four weeks from 29 March 2016 to sort out his personal or business affairs so that he could work from 8.00am to 4.00pm.

[53] Ms Lee also suggested that if Mr Voo was not able to accommodate his full time hours she recommended he consider going part time. Ms Lee invited Mr Voo to discuss options with her if he wished to follow this up.

[54] On 7 April 2016 Mr Voo confirmed to Ms Lee in writing that from 26 April 2016 he will have resolved all his personal issues and will work between the hours of 8.00am and 4.00pm. Mr Voo advised Ms Lee that he was happy to work as directed when required between the agreed hours of work but that it was not his intention to work part time.

[55] I am satisfied the offer of the part time hours was in the context of allowing Mr Voo the option to have flexibility and to enable him to meet his family responsibilities. I find it is more likely than not that the offer was a genuine attempt by Ms Lee to accommodate Mr Voo's needs.

#### Ms Lee was suspicious of Mr Voo

[56] Prior to Ms Lee's appointment as Campus Manager she was employed as a tutor and worked with Mr Voo. It was common ground that they enjoyed a professional working relationship and shared conversations about their university days.

[57] Mr Voo says Ms Lee changed after she became Campus Manager and the work environment became even more difficult, demoralising and distressing for him. Mr Voo told me that Ms Lee became suspicious that he was not teaching the correct curriculum to students, not working his full complement of hours and/or that he was cutting corners. I have dealt with the issues about Mr Voo's hours of work earlier in this determination.

[58] Mr Voo agreed with Ms Lee's evidence that after Ms Lee became the Campus Manager she would go out of her way to chat with him about his son and daughter and

to accommodate his sick leave and leave requests even though they were often made on short notice.

[59] Mr Voo says the issues raised by Ms Lee in her letter dated 29 March 2016 show that she was suspicious of him. The concerns included:

- Time “theft”: lateness, not fulfilling the required hours of work, arriving late, taking more than Mr Voo’s allocated breaks and going for breakfast during work hours;
- Adjusting his own schedule without always consulting his Head of Faculty or the Campus Manager;
- A lack of regular upskilling or professional development; Mr Voo did not attend guest speakers who were visiting campus during work hours;
- Not following proper protocols when calling in sick;
- Not following the lesson plan structure; missing out on teaching key components of the courses which had a negative impact on student development.

[60] Ms Lee instructed Mr Voo that his behaviour had to change and his performance had to improve if he wished to avoid a disciplinary process to enforce compliance. Ms Lee clarified that what she was seeking was correction of the deficiencies listed in her letter immediately.

[61] Mr Voo requested clarification and more detail on the deficiencies set out in Ms Lee’s letter, including the provision of detailed documented evidence in support of the asserted deficiencies.

[62] Mr Voo met with Ms Lee and Mr Hyland on 26 April 2016. Ms Lee assured Mr Voo that the meeting was not disciplinary in nature however, when Mr Voo arrived at the meeting Ms Lee had arranged for Ms Rennie to attend the meeting to record notes of the meeting. Mr Voo decided he needed to arrange for a support

person and the meeting was adjourned to allow him the opportunity to make arrangements for support.

[63] It was not until 3 May 2016 that Mr Voo was provided with examples of the alleged deficiencies. A number of the examples provided to Mr Voo dated back to August, September and October 2015 and related to not following sick leave protocols. Ms Bridget Ashby, HR Advisor, gave evidence, which I accept, that these matters were raised with Mr Voo at the time and they were only provided to him to give him concrete examples of the concerns held by Yoobee School of Design. Three of the noted deficiencies related to incidents that had occurred during the month of March 2016 including:

- a) Mr Voo leaving early from work without completing his 7.5 hours of work and without consultation with Mr Hyland or Ms Lee;
- b) not participating in the AfterEffects training;
- c) and not following the correct protocols when calling in sick.

[64] Ms Lee never had the opportunity to discuss these concerns with Mr Voo in any detail as he left work on 4 May 2016 and did not return.

Ms Lee using “name and shame” tactics

[65] This claim relates to the email sent by Ms Lee on 29 February 2016 and another incident during a staff meeting where Ms Lee talked about staff having untidy desks. Mr Voo says that Ms Lee walked up to his desk and said “...Ivan...Ivan...” which singled him out as having an untidy desk.

[66] I have dealt with the 29 February 2016 email earlier. Ms Lee told me in relation to the desk incident that during the meeting the group was laughing and joking about how messy people’s desks were and that many individuals were laughing about how messy their own desks were. Ms Lee acknowledges that Mr Voo’s name was mentioned but that his was not the only one. Mr Voo’s name was mentioned as part of the overall banter that was part of the discussion and there was nothing malicious in it.

[67] I find on balance that the incident regarding the untidy desks is a further example of the culture of light heartedness that was part of the working environment at Yoobee School of Design. Ms Lee told me that she and Mr Voo often had a laugh about different things in the workplace, especially when they were working together as tutors. Mr Voo denies this but I am satisfied it is more likely than not that Mr Voo did enjoy the light side of the working environment at Yoobee School of Design.

Requirement to teach AfterEffects course

[68] Mr Voo claims that Mr Hyland required him to teach an AfterEffects course starting on 5 May 2016 and that he only became aware of this requirement on 4 May 2016 when he returned from a day's leave.

[69] The teaching period was from 12.00pm to 4.15pm each Friday. Teaching until 4.15pm on a Friday is difficult for Mr Voo because of his family commitments. Mr Voo says that wanting him to teach this course was intentional victimisation. He told me it was unfair of Mr Hyland to give him two days' notice that he was expected to teach this course.

[70] AfterEffects is a software program which had been updated. The updated programmes were being delivered by Yoobee School of Design in 2016 and 2017. This required tutors to be upskilled. The upskilling sessions were run on the Auckland Yoobee Design School campus. Mr Voo was provided with dates and times for the upskilling sessions in advance.

[71] Mr Hyland attended one of the sessions at which Mr Voo was also present. Mr Hyland had noticed that Mr Voo had not switched on his computer and was not taking notes. When Mr Hyland discussed his observations with Mr Voo he told Mr Hyland that he had done AfterEffects during his studies. Mr Hyland took from his comments that Mr Voo was familiar with the software.

[72] On the basis that Mr Voo knew the software Mr Hyland asked him to deliver basic introductory level demonstrations during a lab session. He was not asked to teach the entire course. The tutor who stood in for Mr Voo on 5 May 2016 spent about 30 minutes doing demonstrations for the class.

***Disparate treatment***

[73] Mr Voo says that he was treated disparately when Yoobee School of Design:

- a) Announced a 3% pay increase for all staff and then did not pay him the increase when others were paid it; and
- b) Mr Hyland required Mr Voo to take his classes or to cover for others when needed instead of requiring others to do these additional classes.

[74] The Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)*<sup>3</sup> adopted a three stage test to be applied to cases where disparity of treatment is claimed. The Authority is required to determine:<sup>4</sup>

- a) Whether there was disparity of treatment;
- b) If so, whether there is an adequate explanation for the disparity;
- c) If not, whether the [disadvantage] was justified, notwithstanding the disparity for which there is no explanation.

#### 3% pay increase

[75] Mr Voo says that in December 2015 the General Manager announced a 3% increase for all staff. Mr Voo became aware that other staff in his department received the increase in February 2016 but that he did not.

[76] Ms Ashby confirmed that the General Manager announced the pay increase. Ms Ashby told me that the announcement was made prematurely as the budgets had not been approved and subsequently, it was decided that only staff who were paid below the industry average would receive a pay increase.

[77] Ms Ashby confirmed to me that no employees were advised of the error of the announcement and there was no discussion with Mr Voo about why he did not receive a pay increase.

[78] By way of explanation as to why Mr Voo did not receive an increase, Ms Ashby stated:

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<sup>3</sup> [2005] ERNZ 767 (CA).

<sup>4</sup> Ibid at [45].

We had extremely experienced and talented tutors being paid around the \$45,000 mark, which was not competitive. The money that was budgeted for increases was distributed to ensure there was pay parity. Some staff at Yoobee School of Design received increases in that round; others did not. [Mr Voo's] salary was significantly above the average, thus was not included in that round of increases. It was absolutely not the intention to single him out; others missed out too. Rather to bring his colleagues salaries up to a respectable level.

[79] In applying the tests as set out above, Mr Voo was subject to disparate treatment in relation to the 3% pay increase because others who worked with him received the increase while he did not. However, I am satisfied that Yoobee School of Design has provided an adequate explanation for the disparity.

#### Additional classes

[80] Mr Voo has not provided the timeframe for this claim so I have been unable to ascertain whether it was raised within the 90-day period. Mr Voo claims that when Mr Hyland was to take a period of annual leave he instructed Mr Voo to take his class. Mr Voo says he was busy at that time and could not manage an additional class.

[81] Ms Lee told me that all tutors cover each other when tutors are absent on leave. Mr Voo spoke to her about the classes Mr Hyland asked him to teach while he [Mr Hyland] was on annual leave and told her that he was feeling overwhelmed with work. After hearing from Mr Voo, Ms Lee arranged for a different tutor to teach the class in Mr Hyland's absence instead of Mr Voo.

[82] Mr Voo has not established to my satisfaction that he was treated disparately when he was asked to teach another tutors class while that tutor was on leave.

#### *Conclusions*

[83] Mr Voo left work after meeting with Mr Hyland on 4 May 2016. The evidence supports his claim that he suffered from an anxiety attack and had to seek medical assistance. Mr Voo's doctor told me that Mr Voo had talked to him about his work situation and feeling quite helpless about his workplace, in particular that the allegations contained in the letter dated 29 March 2016 were false.

[84] Mr Voo told me that the actions by Ms Lee and Mr Hyland distressed him and impacted on him emotionally. Mr Voo described to me how his cultural norms were

different to those of Ms Lee and Mr Hyland. He told me that the differences he experienced and the way he interpreted Ms Lee and Mr Hyland's behaviour affected his dignity and offended his moral compass which caused him humiliation and loss of dignity.

[85] While overall I have some sympathy with Mr Voo's complaints, I must determine on the balance of probabilities and in all of the circumstances whether one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Ms Lee and/or Mr Hyland, and therefore Yoobee School of Design.

[86] I find Mr Voo was unhappy in his work and was unhappy to have issues raised with him but he has not established to my satisfaction that one or more conditions of his employment were affected to his disadvantage by the actions of Yoobee School of Design.

#### **Breach of good faith**

[87] Mr Voo claims Yoobee School of Design failed to take his personal grievance claims seriously and has failed to address them and this conduct by Yoobee School of Design is a breach of good faith.

[88] The evidence shows that Yoobee School of Design did take Mr Voo's claims seriously. It responded to his letter raising a personal grievance by denying it in the first instance. I agree with Mr Voo that the apparent tone of the letter appears to be dismissive, but I am satisfied Yoobee School of Design did treat Mr Voo's concerns seriously enough to attend mediation in July 2016.

[89] The fact that no resolution was reached does not mean Yoobee School of Design did not conduct itself in good faith.

#### **Unjustifiable dismissal**

[90] Mr Voo resigned from his employment on 29 September 2016 while still on sick leave. He says he had no option other than to resign and claims he was constructively dismissed.

[91] 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 or actions of the employer. In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*<sup>5</sup> the Court of Appeal listed three situations in which a constructive dismissal might occur, although the Court noted that these were not exhaustive. The three situations are:

- a) Where the employee is given a choice of resignation or dismissal;
- b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- c) Where a breach of duty leads a worker to resign.

[92] Mr Voo bears the onus of establishing on the balance of probabilities that he did not freely or voluntarily resign. Based on what I have seen and heard, I have concluded Mr Voo does not rely on the first of the three situations set out above to support his claim that his resignation was not voluntary. I have therefore considered whether either of the remaining two situations might apply.

[93] If either of the two situations do apply, I must then be satisfied that Yoobee School of Design's actions and how it acted were sufficiently serious to make it reasonably foreseeable by it that Mr Voo would be unable to continue working in the situation. That is, that there would be a substantial risk of resignation.

***Was there a course of conduct designed to coerce resignation?***

[94] In *Wellington Clerical Workers IUOW v Greenwich* the Court observed in describing this type of constructive dismissal:<sup>6</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 causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[95] I understand the following are the specific areas of conduct on which Mr Voo relies to support his claim for constructive dismissal:

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<sup>5</sup> [1985] 2 NZLR 372.

<sup>6</sup> (1983) ERNZ Sel Casual 95 at 104.

- a) Ms Lee's invitation to him to teach the Digital Media (DM) course;
- b) Ms Lee's direction to Mr Voo on 29 March 2016 that he work 8.00am to 4.00pm; and
- c) The raising of historical allegations.

#### Digital Media Course

[96] Mr Voo claims that when, in late 2015, Ms Lee asked him to move to teaching the Digital Media (DM) course it was designed to get rid of him. Mr Voo's view of this course is that it was insecure work and would ultimately see his employment terminated as the course would not last.

[97] Ms Lee told me that she and Ms Jennifer Rojkoomar, Head of Faculty – DMA & iCreate, had an informal conversation with Mr Voo in late 2015 about whether he was interested in moving to teaching a higher level course. Ms Lee saw this as a compliment to Mr Voo's teaching ability and was seen as a positive career move for him.

[98] Ms Rojkoomar told me that the invitation to Mr Voo to consider moving to the DM course was intended as a compliment and as a recognition that his skills as a tutor were valued. Ms Rojkoomar views the course as an elite option for students after they have completed the Graphic Design course.

[99] The DM course continues to be offered to students and the course has been filled for 2017.

#### Hours of work

[100] Mr Voo told me the reason why Ms Lee raised concerns about his hours of work and other allegations on 29 March 2016 was because Yoobee School of Design wanted him to leave so that he could be replaced by a graduate. This would allow Yoobee School of Design to pay about \$26,000 a year less than Yoobee School of Design was paying Mr Voo. Mr Voo says his belief is supported by the statements and allegations contained in Ms Lee's letter to him dated 29 March 2016.

[101] Yoobee School of Design was entitled to raise its concerns about Mr Voo's working hours and to set its expectations that he would work in accordance with the terms of the employment agreement.

[102] I have accepted the evidence from Yoobee School of Design that it had never considered terminating Mr Voo's employment in order to employ someone on a lesser salary. During the period of Mr Voo's sick leave Yoobee continued to include Mr Voo on the teaching schedule, including the teaching schedule for the remainder of the 2016 academic year and for the 2017 academic year.

#### Historical allegations

[103] Mr Voo says that the allegations set out in the letter dated 29 March 2016 were historical and were more than 8 months old. Mr Voo claims that in raising these historical issues Ms Lee has fabricated an appearance of him being a problematic employee and that this was designed to procure his resignation.

[104] The historical issues raised in the 29 March 2016 letter had been addressed previously with Mr Voo.

#### Conclusion

[105] An examination of the facts which I have established through my investigation does not support a conclusion that the conduct of Yoobee School of Design crossed the border line between inconsiderate conduct causing some unhappiness and resentment to dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

#### ***Was there a breach of duty?***

[106] Mr Voo claims Yoobee School of Design has:

- a) Ridiculed and made light of Mr Voo's complaints and grievances about his employment situation; and
- b) Failed to offer Mr Voo access to Vitae (Yoobee School of Design's employee assistance program).

Ridicule and making light of Mr Voo's complaints and grievances

[107] Mr Voo claims Yoobee School of Design did not take his personal grievances seriously and did not address them. He says instead they ridiculed his complaints.

[108] Mr Voo has not established that Yoobee School of Design ridiculed his concerns. Yoobee School of Design certainly rejected Mr Voo's claims but it did take them seriously enough to attend mediation in an effort to resolve matters.

[109] It is clear that Mr Voo's concerns have not been addressed. Mr Voo's continued absence and then his resignation has been a major contributor to matters not being addressed.

Failed to offer Mr Voo access to Vitae

[110] Vitae is Yoobee School of Design's employee assistance program. There is no dispute that this service was not specifically offered to Mr Voo, however, at the time he may have needed access to this service, Mr Voo was already on sick leave and had access to free counselling services through his general practitioner.

***Conclusion***

[111] I find Mr Voo has failed to discharge the onus of establishing to the required standard that his employment ended because Yoobee School of Design constructively dismissed him. I consider it more likely than not that Mr Voo genuinely resigned.

[112] Mr Voo was unhappy at work and had been thinking of leaving his employment for some time before he commenced sick leave in May 2016. He had told as much to his friend Mr De Marchi as early as January or February 2016.

[113] Mr Voo resigned on 29 September 2016. This was after he had decided to open his own business. Mr Voo told me that he has been doing an internship since August 2016 with a view to opening his own business in 2017.

[114] I am not satisfied Mr Voo's resignation can be linked to any conduct that meets the test of being dismissive or repudiatory or to any fundamental breach of duty that made Mr Voo's resignation reasonably foreseeable. Accordingly, Mr Voo's application for a determination that he was unjustifiably dismissed is declined.

**Costs**

[115] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Yoobee School of Design shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Voo shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[116] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority