

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 404  
3196399

BETWEEN            LEON VAN DER PLAS  
                                 Applicant

AND                    KIWIRAIL LIMITED  
                                 Respondent

Member of Authority:     David G Beck

Representatives:         Ashleigh Fechny, advocate for the Applicant  
                                 Matthew McGoldrick, counsel for the Respondent

Investigation Meeting:    20 and 21 June 2023 at Christchurch

Submissions Received:    21 June 2023 from the applicant  
                                 21 June 2023 from the respondent

Date of Determination:    28 July 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]            Leon van der Plas worked for KiwiRail Ltd (KiwiRail) as a customer logistics specialist from 27 August 2018 until 6 June 2022. The position occupied was the subject of a collective employment agreement as Mr van der Plas was a union member and latterly a workplace delegate, of the Rail and Maritime Transport Union (RMTU).

[2]            Mr van der Plas claims he was the subject of ongoing, unreasonable treatment by co-workers not adequately resolved by KiwiRail in a supportive good faith manner and this led to his resignation, in circumstances that he claims amount to a constructive dismissal and/or a

situation where he was disadvantaged in his employment. Mr van Der Plas seeks a finding of unjustified dismissal and /or unjustified disadvantage, compensation for distress and humiliation, lost wages and costs.

[3] In contrast, KiwiRail contests the degree of unreasonable treatment claimed and say they took adequate steps to ensure a safe working environment for Mr van der Plas. KiwiRail assert Mr van der Plas voluntarily resigned having arranged ongoing employment with another organisation and that elements of his claimed disadvantage are being raised outside of 90 days.

[4] The parties attended mediation but the matter remained unresolved.

### **The Authority's investigation**

[5] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I, however, have carefully considered the helpful evidence and submissions received from both parties and refer to them where appropriate and relevant.

[6] Mr van der Plas and his supporting witnesses' Enzo Velasquez and Fiona Ross provided written briefs and gave supportive evidence at the investigation meeting. Likewise, for KiwiRail, I heard from: Sean Love, Customer Logistics Supervisor, Sharon McCarthy, National Customer Manager, Timothy Dunlop and Cohen Cameron, Co-Terminal Operations Managers, Hilary Sinclair-Hyde, Senior Human Resources Business Partner and Nicole Woodgate, General Manager Customer Delivery.

### **Issues**

[7] The issues to be determined are:

- (i) Did KiwiRail breach terms of employment or duties owed to Mr van der Plas and if so, was it reasonably foreseeable that he would resign and the ending of his employment be categorised as a constructive dismissal rather than a resignation?

- (ii) Has Mr van der Plas as an alternative established that actions or omissions of KiwiRail caused him to suffer disadvantage whilst employed?
- (iii) If it is found that Mr van der Plas has a personal grievance that he was disadvantaged – did he raise his grievance in a sufficiently timely manner?
- (iv) If any of Mr van der Plas’ claims are established what remedies should follow?
- (v) If Mr van der Plas is successful in all or any element of his personal grievance claims should the Authority reduce any remedies granted because of any contributory conduct?
- (vi) How costs are to be dealt with.

**What caused the employment relationship problem?**

[8] Mr van der Plas’ role involved ensuring freight customers had cargo booked and delivered - a logistics task that involved liaison internally with the wider logistics team and external customers. Mr van der Plas’ role was part of the South Island Customer Service Team based in Christchurch, managing import and export freight and ensuring, once booked, freight met rail and shipping deadlines. Mr van der Plas came to the role with significant customer service experience in the airline, telecommunications, and banking sectors.

[9] KiwiRail witnesses generally regarded Mr van der Plas as a very competent logistics operator who was prepared to be innovative and willing to take on additional responsibilities. However, they also indicated that Mr van der Plas at times, struggled in his discourse with others and had to be counselled on occasion for bluntness in written and oral communication but he was otherwise a well-regarded worker and the evidence I heard established this premise.

[10] Mr van der Plas says within 3-4 months after he was employed he experienced interpersonal conflict with his initial temporary supervisor, that made him feel uncomfortable and wary of the working environment. Mr van der Plas recounted making a formal complaint

to Ms McCarthy about a temporary supervisor in mid-January 2019 and he says difficulties were ongoing until 2021.

[11] Mr Love was appointed supervisor in February 2019 and he was deputed to informally manage the interpersonal conflict between Mr van der Plas and the former temporary supervisor who became his co-worker. In addition, during July 2019, Mr van der Plas was the subject of a complaint by another female co-worker that occasioned him apologising for a verbal altercation. KiwiRail concluded no disciplinary sanction was necessary but a letter was issued by Mr Love to Mr van der Plas and to others, highlighting a need for “respectful” team communication.

[12] From mid-2019 onwards, Mr van der Plas says he had an uneasy relationship with KiwiRail’s Christchurch operations’ team leaders who he was required to liaise with to facilitate customer freight movements. Mr van der Plas described being sworn at in telephone exchanges and resistance to his requests for specific actions.

[13] Mr van der Plas says on 22 April 2021, he made a formal complaint about a container supply manager’s verbal abuse directed to him during a telephone conversation that followed on from an email exchange between the parties. The complaint was sent to Ms McCarthy who was based in Auckland. Unfortunately, Ms McCarthy did not respond. Ms McCarthy accepted receiving the emailed complaint but could not recall reading it and admitted she must have overlooked it. However, Mr van der Plas did not follow up on this issue.

[14] The next significant issue Mr van der Plas raised was by email of 10 September 2021, to Mr Dunlop, Mr Cameron and Mr Love, regarding an operations team leader who he said had used profane and abusive language towards him and because he utilised a speaker phone option the conversation was overheard by other Team Leaders. Mr van der Plas also highlighted a general issue of negative “constant unprofessional behaviour” from operations’ team leaders. Mr Dunlop and Mr Cameron gave evidence that they took the allegation seriously; stood down the person complained of and issued a letter of expectation to him about his communication style. Mr Dunlop indicated during his investigation, the person Mr van der Plas complained of mentioned that Mr van der Plas’ approach was not ideal or

respectful of their (the Team Leaders) experience but he acknowledged he had reacted unacceptably.

[15] Emails disclose Mr Love promptly approached Mr Dunlop and Mr Cameron and then fed back to Mr van der Plas, the team leaders' perception that he was not necessarily being collaborative. It was put that team leaders felt Mr van der Plas was 'giving orders' instead of including them in decision-making. Mr Love also noted that the concerns raised by Mr van der Plas were being investigated. Mr van der Plas responded: 'duly noted'. I observe that this matter was dealt with expeditiously and objectively, fairly.

[16] Other issues arose in mid-October 2021, with Mr van der Plas on two occasions making emailed: "Complaints" to Mr Dunlop and Mr Cameron about another team leader's use of sarcastic email communication, including an email being copied to several recipients (including KiwiRail customers) indicating: "Leon has just about done his job properly well done". On the latter, Mr van der Plas indicated:

If this behaviour continues I will be forced to approach HR myself to obtain disciplinary action against (other Team Leader). This is the final straw and will no longer be tolerated.

[17] Again, Mr Dunlop dealt with the issue promptly by approaching the team leader involved and counselled him to be careful about his email language and who he copied them to. Mr Dunlop says he considered that it was just a general 'rant' by the team leader and not personal abuse directed at Mr van der Plas. Mr van der Plas did not pursue the matter further but was made aware that the co-worker had been spoken to about his conduct.

#### *Customer incident*

[18] On 22 October 2021, Mr van der Plas was the subject of angry and aggressive behaviour by a KiwiRail customer's employee who had inappropriately entered the office and remonstrated with Mr van der Plas. Whilst initially saying he handled the incident well (and texted Mr Love to confirm this) and was able to calm the antagonist, Mr van der Plas emailed Mr Love and Ms Woodgate on 21 December 2021, indicating he had been more shaken than anticipated by the customer incident and he also complained about a co-worker yelling at him on the same day. Mr van der Plas sought a formal response on how the incident with the

customer would be resolved. In the email Mr van der Plas explained he had “ ... taken my own steps to a healthier mental state and sought my own resources to combat that however I would like to know what has been done about these situations”.

[19] Ms Woodgate says she was aware of ongoing tension between Mr van der Plas and the co-worker he cited as yelling at him and she later deputed Mr Love to deal with this (the co-worker left KiwiRail on 11 March 2022).

#### *Allegations of a toxic work environment*

[20] On 22 December 2021, Ms Woodgate met with Mr van der Plas and Mr Love. During this meeting they resolved to meet again early in the New Year to discuss the customer incident in more detail. Mr van der Plas also described his general work environment as “toxic” and cited some examples of negative interaction with co-workers. In a follow up email of the same day, Ms Woodgate said she was concerned about the description of a “toxic environment”. Ms Woodgate invited Mr van der Plas to “take the time to document why you feel it is a toxic environment” and to provide examples “of the things you think contribute to this” for discussion in the New Year. Employee Assistance counselling support was offered and Ms Woodgate stressed she and Mr Love could be contacted at any time. Mr van der Plas, despite indicating he was experiencing anxiety, did not take up the counselling support or seek other medical help.

[21] On 11 January 2022, Ms Woodgate and Mr Love met with Mr van der Plas. The customer incident was dealt with by Ms Woodgate committing to formally raise the issue with the customer’s management (this was subsequently done in writing and Mr van der Plas was shown the letter prior to it being sent). I find that Ms Woodgate dealt with the latter issue in a comprehensive and exemplary manner.

[22] In a 12 January email, Mr van der Plas had cause to complain to Mr Dunlop about the same Team Leader who had earlier circulated what he considered to be sarcastic emails. The nature of the further issue was an alleged dismissive attitude displayed by the team leader and that he hung the phone up on Mr van der Plas. The behaviour was described by Mr van der Plas as unprofessional, ongoing and intolerable. Mr Dunlop promptly responded and whilst he cited significant work pressures on behalf of the team leader, he undertook to

address the issue with the worker concerned (Mr van der Plas thanked Mr Dunlop for his response). A disclosed email exchange of 18 January, between Mr Dunlop and the worker complained of, demonstrated that Mr Dunlop took decisive action. Mr Dunlop says he could not recall Mr van der Plas complaining further about this issue and assumed it had been resolved.

[23] On 21 January, Ms Woodgate emailed Mr van der Plas, summarising their 11 January meeting. It detailed how the customer complaint was being resolved and confirmed that Mr van der Plas had decided not to take any further the matter of the co-worker who had yelled at him. On the claim Mr van der Plas made of a toxic work environment, Ms Woodgate again invited him to document and provide examples – Ms Woodgate noted “as a manager I have a duty of care to investigate this further”. I observe the email was objectively constructive and a commitment was made to look at some team bonding activities.

[24] In an email of 25 January to Ms Woodgate and Mr Love, Mr van der Plas outlined in bullet points, the reasons the work environment felt toxic to him or “not conducive to a positive office atmosphere”. In summary, the overall concern Mr van der Plas identified was his belief that management had not effectively addressed unwarranted attitudinal issues he had been the subject of from co-workers. Historical issues were highlighted and the concern was generally expressed about what he saw as “consistently demeaning treatment” of him and the team from other departments (citing primarily the operations’ team leaders). He acknowledged that some “incidents have been addressed” but he noted he was not enjoying the working environment.

[25] The email noted that the co-worker he had chosen not to proceed with a complaint about, continued to be defensive and that his own team had some negative environmental problems. Mr van der Plas openly acknowledged he may at times have contributed to the negativity he says prevailed. I observe the email lacked sufficient detail. One suggestion Mr van der Plas made to resolve matters, was to acknowledge he willingly took on extra responsibilities in support of Mr Love and he implied a formal ‘2IC’ role for him should be considered.

*KiwiRail's response to toxic work environment issue*

[26] An exchange of emails disclosed between Ms Woodgate and Mr Love of 1 February 2022, show objectively that Mr van der Plas' concerns were taken seriously. Ms Woodgate in her email to Mr Love (and Ms McCarthy), noted she would continue to resolve the aggressive customer issue but on the 'toxic' work environment, she said that would be left to Mr Love and Ms McCarthy to address. Ms Woodgate suggested that Mr Love take the lead on meeting with Mr van der Plas and to assure him that he had been heard and in future, he (Mr Love) would pro-actively address specific issues as they arose.

[27] Regarding the operations' team leaders' behaviour, Ms Woodgate noted that action was required by Mr Dunlop and Mr Cameron to address this unacceptable behaviour and that Mr van der Plas be apprised what measures were taken and encouraged to be specific in raising any further incidents. I observe these responses were constructive and objectively supportive of Mr van der Plas.

[28] Mr Love in response to Ms Woodgate, agreed to monitor the interactions more closely between Mr van der Plas and the co-worker who had yelled at him. On a wider front, Mr Love indicated frustration that Ms van der Plas may not realise how much he was at times contributing to the situation with other team members and that Mr Love had had cause to discuss this with him. However, in a telling observation, Mr Love noted that in criticising him on some communication aspects:

... Leon is a great worker and always thinks outside the box which not a lot of people do in the team. He is also the only one to put his hand up to cover me when I am on leave. I know he talks about a 2IC role of some sort, but perhaps with this restructure there may be a more suitable role for him?

[29] Objectively, the above comment and wider evidence I heard, showed KiwiRail had a high regard for Mr van der Plas and there was mutual respect between him and Mr Love. KiwiRail displayed a willingness to monitor the situation, that given an established and long-standing workplace culture and difficult and pressured contextual working environment, was an ongoing and challenging task with no 'quick fix'.

[30] Ms Woodgate says a further meeting with Mr van der Plas and Mr Love was held on 4 February 2022, to follow up on the issue of the alleged toxic working environment and

other points raised in Mr van der Plas' 25 January email. Unfortunately, this meeting was not minuted. Ms Woodgate and Mr Love recalled the discussion centred on the matters Mr van der Plas had raised about his perception of co-workers' behaviours. The approach Ms Woodgate took was to categorise the issues as being work performance matters.

[31] As a solution, Ms Woodgate reiterated to Mr van der Plas that he should deal directly with Mr Love about any ongoing concerns and provide specifics. Mr van der Plas did not refer to the 4 February meeting in his initial written brief and when questioned did not recall the meeting. However, in his written brief in response to Mr Love's evidence, Mr van der Plas did recall detail of the meeting around his co-workers' performance issues being raised. I prefer the evidence of Ms Woodgate and Mr Love that the meeting did take place on 4 February and Mr van der Plas genuinely did not recall it or mixed it up with an earlier meeting. Mr van der Plas does recall the outcome was that Mr Love would continue to monitor his concerns.

[32] Mr van der Plas suggested from this point in time he became disillusioned about his concerns being resolved by Mr Love, who he had personal trust in and regard for but felt was not resolving underlying culture issues firmly enough. Nevertheless, Mr van der Plas affirmed he knew he could have escalated matters or raised a personal grievance and was also aware of KiwiRail's bullying and harassment policy. Mr van der Plas says he chose not to take a formal pathway as he felt it may jeopardise his ongoing career. It was apparent that Mr van der Plas decided to 'stick it out' and look for alternative work as he had a mortgage to pay but was experiencing stress and lack of job satisfaction. His supporting witnesses confirmed this to be so.

#### *Concerns expressed about Mr van der Plas*

[33] On 8 February 2022, a female co-worker, who Mr van der Plas had an uneasy working relationship with and had been involved in a minor complaint some two years earlier, complained to Mr Love about communication issues with Mr van der Plas. The co-worker who was at the time working from home, expressed concerns about Mr van der Plas' style of communication in terms akin to what team leaders had raised. The matter was resolved by Mr Love speaking to Mr van der Plas and following it up with an email of 10 February, with

some hints on how Mr van der Plas could improve his communication with the co-worker. Mr Love indicated he would meet with the co-worker weekly to monitor progress and Mr Love invited ongoing feedback from Mr van der Plas. I observe again, this matter was objectively dealt with in fair and balanced manner.

[34] Ms Sinclair-Hyde, the senior HR business partner, explained that KiwiRail was generally aware of some negative work culture issues and in response they had placed an emphasis on developing a documented collaborative policy (Just and Fair Culture Policy) with the RMTU that essentially did not take a tough disciplinary response but rather empowered middle managers to adopt a coaching approach to conflict. This involved more use of the issuing of letters setting out expectations of ongoing conduct. In addition, Ms Sinclair-Hyde conceded that there had been a huge culture change recently, in focusing upon worker's physical safety culture. I record Ms Sinclair-Hyde's evidence was measured, realistic and considered.

[35] Mr van der Plas did not raise any other significant issues of concern (except he says, informally with Mr Love) until he decided to resign in mid-May 2022.

#### *The resignation communication*

[36] Mr van de Plas obtained an alternative offer of employment on 17 May 2022 with an airline that he accepted on 20 May. He consequently resigned by emails of 23 May to Mr Love and "KiwiRail HR" and widely to all co-workers, indicating:

As of today, Monday 23<sup>rd</sup> May 2022, please accept this letter of Resignation, with my two weeks' notice effective from today.

Please note my intended last day of duty is to be Friday the 4<sup>th</sup> June 2022 with Saturday the 5<sup>th</sup> June 2022 being the final day of my 2 weeks' notice period.

Thank you for your time.

Regards

Leon van der Plas

Hi Team

First of all I would like to say a big thank you to everyone who has crossed my path in KR.

As of today I have handed in my resignation to Sean and I will be finishing up my notice period on June 4<sup>th</sup>.

For any of you that might be interested I will be returning back to my field of passion the aviation industry and will return to flying, working for Jetstar.

Some of you may know I worked previously for Emirates for 9 years and to return to the skies will be exciting and an opportunity for me to get back to this is now.

If you see me on board please feel free to say hi.

Thanks again it has been a pleasure.

Thanks.

[37] Mr Love recalled on 23 May, having a discussion with Mr van der Plas about his resignation and him discussing his passion for returning to the aviation industry. Mr Love could recall nothing untoward or bitter being raised, so he wished him well and told him he was sorry to lose him as he was a valued team member. Mr van der Plas confirmed he resolved to communicate that he was leaving on good terms despite him being disillusioned and harbouring a strong perception that KiwiRail had not dealt decisively enough about his concerns.

*Further incident during notice period*

[38] On 27 May while he was working out his notice, Mr van der Plas was the subject of what he considered an abusive and threatening phone call from a team leader (the same individual involved in the September 2021 abusive phone exchange). The complaint as relayed, involved an initial profane and aggressive response to a work scheduling issue that when Mr van der Plas responded by suggesting he “not get his knickers in a twist”, the team leader reacted by suggesting - if he persisted in talking to him like that he would come and visit him “and you don’t want me to do that”. Mr van der Plas reasonably perceived the latter comment to be threatening and on 30 May he emailed a complaint to Ms Sinclair-Hyde. The email generally alluded to past “unprofessional behaviour” from the team leaders involved and he indicated:

I resigned from KR and its this behaviour that I have had to continuously deal with every day that has contribute (sic) to the reason for me leaving. I have raised these

concerns on many occasions with Tim Dunlop, Cohen Cameron and Sean Love yet nothing seems to change and these behaviours continue.

[39] Mr van der Plas' email then observed that new team leaders had worked well with him but three named individuals adopted an embattled approach. In concluding what he wanted done, Mr van der Plas noted he was leaving and Ms Sinclair-Hyde could "do what you wish" with his concerns but in his view a change in culture needed to occur.

[40] Ms Sinclair-Hyde promptly responded assuring Mr van der Plas that what he had raised was "unacceptable behaviour" and she committed to addressing it with the identified team leader's managers. I was provided with evidence that Mr van der Plas' concern was dealt with immediately and the worker concerned was the subject of appropriate disciplinary action (given he conceded Mr van der Plas' version of the exchange and accepted his conduct was inappropriate).

[41] Ms Sinclair-Hyde emailed Mr van der Plas on 1 June, saying the issue had been dealt with formally with RMTU's involvement "and we now view this as end to the issues raised". Mr van der Plas emailed back "Thanks Hilary".

[42] I observe there was no further conversation engaged in around the inconsistency of Mr van der Plas' resignation messages and none was sought by Mr van der Plas until he raised an unjustified dismissal personal grievance on 5 August 2022. The personal grievance letter suggested Mr van der Plas had resigned due to a failure of KiwiRail to "provide a safe working environment" (essentially contending he had been constructively dismissed). In submissions counsel drew attention to Mr van der Plas' assertion that:

My final decision to resign came from the affect that all these poor treatment (sic) was having on my home life. I was often stressed and started to find myself coming to work with a negative mindset in preparation for the treatment I was going to receive on a daily basis.

[43] Upon not being able to resolve matters an application was filed in the Authority on 25 October 2022.

[44] Mr van der Plas commenced his new employment on 13 June 2022 and at the time of the investigation meeting is still employed in this role.

## **Was Mr van der Plas constructively dismissed?**

[45] A ‘constructive dismissal’ can be found if an employer’s conduct compels a worker to resign in circumstances where although on the surface the worker appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this premise (as alleged here) is where the resignation is caused by a breach of a duty owed to the worker and the employer could reasonably foresee that rather than put up with the breach, the worker resigns - effectively signalling a belief that their employment agreement has been repudiated by the employer. The Court of Appeal has stated the broad legal approach as:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. <sup>1</sup>

[46] The overarching and well recognised duty that is now statutorily recognised as a component of ‘good faith’ <sup>2</sup> is that an employer should not without proper cause, act in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship. <sup>3</sup>

### **Summary of submissions**

[47] Mr van der Plas’ advocate suggested he had resigned in response to being unable to cope with KiwiRail’s inability to take meaningful action to address and resolve issues of concern he raised. While acknowledging that KiwiRail did promptly address formal complaints it was suggested that they ultimately failed to address an underlying culture of negative and abusive discourse directed at Mr van der Plas. Mr van der Plas’ advocate suggested KiwiRail were aware of the use of profane language being used but they tolerated it and appear to have assessed the situation as being partly due to Mr van der Plas’ “blunt and

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<sup>1</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

<sup>2</sup> Section 4 (1A)(a) and s 4(1A)(b).

<sup>3</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

abrupt” communication approach. It was suggested that no formal complaints had been made to support this negative premise or efforts made to make Mr van der Plas aware of his communication shortcomings.

[48] Mr van der Plas’ advocate asserted that KiwiRail had failed to investigate and resolve Mr van der Plas’ concerns in a fair and impartial manner which allowed “toxicity within the workplace to persist”, the latter being evidenced on an ongoing basis, by the incident during Mr van der Plas’ notice period.

[49] In contrast, KiwiRail’s counsel suggested except for an objectively minor matter that Ms McCarthy failed to address (and was not followed up by Mr van der Plas), KiwiRail took appropriate and proportionally reasonable action on all concerns identified. In relation to the claim of a toxic work environment, KiwiRail’s counsel noted that the evidence demonstrated that at the 4 February 2022 meeting, each of the points raised were addressed by Ms Woodgate. Thereafter counsel asserted Mr van der Plas advised he was not wishing to proceed any further but wanted some specific matters monitored on an ongoing basis and up until his resignation he did not raise any further formal concerns (a period of three and a half months). Counsel noted that the last complaint raised during Mr van der Plas’ notice period was not causative of his resignation. KiwiRail suggest that Mr van der Plas resigned “of his own volition”.

### **Assessment**

[50] In reviewing all the contextual circumstances leading up to the resignation, I do not conclude Mr van der Plas was the subject of ongoing breaches of a serious nature objectively causative of his resignation.

[51] It was evident that Mr van der Plas in or around March 2022, resolved to leave KiwiRail due to his dissatisfaction with the working environment and a wish to return to an industry he felt more comfortable working in and prior to that, by his communication and actions, he had affirmed his employment as ongoing. The timing of the resignation and a failure to identify at that point in time any compelling factors that needed KiwiRail’s intervention leads to a finding that Mr van der Plas was not constructively dismissed.

[52] I do acknowledge that the issues Mr van der Plas raised during his employment were significant but I am satisfied that they were adequately resolved. Mr van der Plas affirmed by his conduct in not availing himself of known escalation options, that he grudgingly accepted that KiwiRail had addressed his specific complaints. I also consider it was inappropriate to suggest that he had not been counselled about his contribution to the situation as evidence from Mr Love showed this to be so and that he fairly balanced any perceived communication deficiencies up against the many other positive attributes Mr van der Plas displayed.

[53] In addition, a formal complaint was made about Mr van der Plas' communication "style" in February 2022 and to his credit, he acknowledged his communication shortcomings (that he also had previously acknowledged when informally raised with him). I accept, in context, the concerns raised were not significant and I do not generally view his accepted at times blunt communication as being exculpatory for the occasional verbal abuse Mr van der Plas was the subject of from others.

[54] However, in all the circumstances of this employment relationship problem, I have not found that Mr van der Plas has made out the initial threshold of establishing any breach of duty occurred.

[55] In the alternative, Mr van der Plas has suggested the same events that gave rise to his need to resign, amount to an unjustified disadvantage. KiwiRail addressed this claim by suggesting no disadvantage claim was raised within 90 days of a specific event occurring. In response Mr van der Plas advocate asserted the disadvantage was KiwiRail's ongoing failure to investigate his concerns as evidenced by the final incident occurring during the notice period.

[56] As I have found that KiwiRail did deal with all Mr van der Plas' significant concerns as they arose and did so in a timely and objectively appropriate fashion, including the issue that occurred during the notice period, there is no basis for the disadvantage claim regardless of its timeliness.

[57] For completeness, I have not found that Mr van der Plas conclusively identified or established, that a "toxic" work environment existed but I do understand he was

uncomfortable at times with the way his co-workers reacted to the stress of their working environment.

### **Finding**

[58] Having not obtained a finding of an unjustified dismissal and/or unjustified disadvantage Leonard van der Plas is unsuccessful in his personal grievances and is not entitled to consideration of any specific remedies.

### **Costs**

[59] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so, the party that considers they are entitled to a consideration of a cost contribution has 14 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and serve a memorandum in reply. Costs will not be determined outside this timeframe unless prior leave is sought and granted to make submissions out of time. The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>4</sup>

David G Beck

Member of the Employment Relations Authority

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<sup>4</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)