

his position as a permanent employee, or Mr Wilkie's employment would be terminated.

- [3] Mr Kenyon Clarke, Managing Director for Sarvee Group, received a complaint from Ms Mossman about Mr Wilkie's conduct. Mr Clarke says he issued Mr Wilkie with a verbal warning as a result of that complaint. Mr Wilkie disputes he was issued with a verbal warning and says that if he was, then he was disadvantaged in his employment as a result of an unjustified action by Mr Clarke.
- [4] The 2007 staff christmas function was held at Mr Clarke's house on 20 December. After the guests had left the party Ms Mossman complained that Mr Wilkie had put his arm about her waist and made inappropriate comments to her during and after the Christmas function. Mr Wilkie says that on the evening of 21 December Mr Clarke rang him at his home and threatened him with physical violence as a result of that complaint.
- [5] On 23 December and 25 December Mr Clarke advised Mr Wilkie that a meeting to discuss the incident would take place on 11 January 2008. Before that meeting could occur Mr Wilkie resigned from his employment. Mr Wilkie claims his resignation was in fact a constructive dismissal and claims that dismissal was unjustified. Sarvee Group denies the claims.
- [6] The issues for this determination:
- Did Mr Wilkie suffer a disadvantage in his employment?
 - Was Mr Wilkie dismissed or did he resign of his own volition?
 - If Mr Wilkie was dismissed what, if any, remedies should be awarded?

Probationary period

- [7] Mr Wilkie met with Mr Clarke and Mr Patrick McDald on 7 November where the probationary period was discussed. During the meeting an extension to the probationary period was discussed. It was agreed that Mr Wilkie's probationary period would be extended for a further six months to 8 May 2008 with a review date of 8 February 2008. The extension was set out in a letter to Mr Wilkie dated 12 November 2007.

[8] At the investigation meeting Mr Wilkie denied agreeing to the extension, however, I am satisfied on the balance of probabilities it is more likely than not that the extension was discussed and agreed to. After being advised in writing of the agreement to the extension Mr Wilkie did not challenge it. Having met and interviewed Mr Wilkie, I have no doubt that if Mr Wilkie had objected or disagreed with anything in the letter, he would have challenged it.

Was Mr Wilkie subject to a disadvantage in his employment?

[9] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Sarvee Group's actions disadvantaged Mr Wilkie in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act (see *Mason v Health Waikato* [1998] 1 ERNZ 84).

[10] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Sarvee Group establishes justification for its disadvantageous actions, there is no grievance (see *McCosh v National Bank*, unreported, AC49/04, 13 September 2004).

[11] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances. (see *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000)

[12] While disputing he was issued with a warning on 7 September 2007, Mr Wilkie says that if the Authority finds he was issued with a warning, then the warning is unjustified and has led to one or more conditions of his employment being affected to his disadvantage.

[13] On 5 September 2007 Mr Wilkie was working in Palmerston North. He made telephone contact with Ms Mossman during which he asked Ms Mossman what

she was wearing. Ms Mossman took offence at Mr Wilkie's question and raised it with Mrs Clarke. Mrs Clarke raised it with Mr Clarke, who then approached Mr Wilkie about it on 7 September 2007.

[14] During his discussion with Mr Wilkie, Mr Clarke told Mr Wilkie that Ms Mossman had taken offence at his questions. Mr Wilkie explained he had not intended to offend Ms Mossman, and apologised for any misunderstandings. Mr Wilkie also undertook to make no further personal comments to Ms Mossman. Following the meeting, Mr Wilkie approached Ms Mossman and apologised to her in person.

[15] Mr Clarke apparently wrote to Mrs Clarke and advised her that Mr Wilkie had been issued with a verbal warning. This letter was never provided to Mr Wilkie and its existence was not known to Mr Wilkie until these proceedings had been commenced. However I find that while Mr Clarke made it clear to Mr Wilkie that his conduct was unacceptable, he did not go so far as to issue a warning on Mr Wilkie's position. There was no evidence from Mr Clarke, nor is it set out in the letter to Mrs Clarke, that Mr Wilkie's job was in jeopardy if he used inappropriate behaviour in the future.

[16] I find Mr Wilkie was not disadvantaged in his employment. I find Mr Wilkie was never issued with a warning, however, he was told, and he understood, that his behaviour toward Ms Mossman was inappropriate.

Was Mr Wilkie dismissed or did he resign of his own volition?

[17] In coming to my conclusions under this heading I must determine the following issues:

- Was the resignation caused by a breach of duty on the part of the Sarvee Group? and
- If there was a breach, was it sufficiently serious to make it reasonably foreseeable that there was a substantial risk that Mr Wilkie would resign?

(Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc [1994] 1 ERNZ 168)

Was the resignation caused by a breach of duty on the part of the respondent?

[18] The basis for Mr Wilkie's claim for constructive dismissal is that he left as a result of a breach of duty on the part of the employer, which is the third of the three non-exhaustive categories of constructive dismissal referred to by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 1 NZLR 372.

[19] The conduct amounting to a breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. (*Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; [1997] 2 All ER 1 (CA)).

[20] At the staff Christmas function on 20 December 2007 Mr Wilkie was given a tour around Mr Clarke and Ms Mossman's new home by Ms Mossman. Ms Mossman says that during this tour, Mr Wilkie put his arm around her and then when he was leaving the party he held her hand and kissed it. Ms Mossman says the following day when she was in the office with Mr Wilkie he made inappropriate comments to her about how she looked and she took offence at these comments.

[21] Mr Wilkie denies he put his arm around Ms Mossman and in his written evidence and all other correspondence leading up to the termination of his employment the only acknowledgement that Mr Wilkie made that he had touched Ms Mossman at all during the party was when he says he helped her down from showing him the issues they were having with the taps over their new bath. Mr Wilkie also denies making any comments of a sexual nature to Ms Mossman the following day at work.

[22] However, at the investigation meeting, and after quite a lot of questioning Mr Wilkie admitted that he had kissed Ms Mossman's hand when it came time for him to leave the party.

[23] Ms Mossman raised the concerns she had about Mr Wilkie's conduct toward her at the party and the comments he had made the following day, with Mrs Clarke. Ms Clarke discussed Ms Mossman's concerns with Mr Clarke who then

discussed the situation with Ms Mossman. Mr Clarke then rang Mr Wilkie at his home on the night of 21 December.

[24] Mr Wilkie says Mr Clarke was aggressive and angry and told him he would knock him down flat. Mr Clarke denies threatening Mr Wilkie with physical violence. Mr Clarke says he told Mr Wilkie he was disgusted and disappointed in his behaviour toward Ms Mossman. He also told Mr Wilkie if he had found him with his arm around Ms Mossman he would have issued him with a written warning.

[25] Unfortunately the truth of what was actually said during that telephone conversation, is not possible to determine with any accuracy. I am therefore left to make my conclusions on the balance of probabilities. To assist me with this I have reviewed the correspondence between Mr Wilkie and Mr Clarke in December and January.

[26] Mr Wilkie advised Mr Clarke on Sunday, 23 December his view of the telephone conversation including his understanding that Mr Clarke had threatened him with physical violence. Mr Wilkie advised Mr Clarke that he considered Mr Clarke's actions in threatening him as sufficient to destroy the employment relationship and had forced him to resign. He sought to urgently settle an exit package and an apology.

[27] Mr Clarke responded by advising Mr Wilkie that he disputed the facts set out in his communication and invited him to attend a meeting to discuss the allegations. Mr Wilkie was invited to have a support person with him at the meeting. In his email Mr Clarke made mention that Mr Wilkie had been verbally warned about making sexual references to Ms Mossman previously.

[28] In his response to this invitation Mr Wilkie sought further details of the allegations and denied he had been warned about making "sexual" references to Ms Mossman. Mr Wilkie took the allegations made about his conduct as an attempt by Mr Clarke to besmirch his character and accused Mr Clarke to trying to get rid of him.

- [29] Late on 25 December Mr Clarke responded to Mr Wilkie's email pointing out once again, that the facts as portrayed by Mr Wilkie were in dispute. He advised Mr Wilkie that a meeting would be held in the Sarvee offices or at another venue of Mr Wilkie's choice on 11 January 2008. Mr Clarke reiterated his previous advice, that Mr Wilkie was entitled to bring a support person with him to the meeting.
- [30] On 10 January 2008 Mr Wilkie resigned from his employment. Mr Wilkie cited the reasons for his resignation as being the failure by Mr Clarke to withdraw the allegations made about his conduct or the threat of violence, or provide an apology or reach agreement on an exit package.
- [31] Later that same day, Ms Gower, acting on instructions from Mr Clarke, emailed Mr Wilkie and advised him that the issues he raised in his email of that day would be discussed at the meeting the following day. Unfortunately that meeting never took place. Mr Wilkie told me at the investigation meeting that he did not attend the meeting on 11 January because he believed the meeting would be akin to a "kangaroo court" and he would not be listened to.
- [32] At the investigation meeting and in answer to questions from the Authority Mr Wilkie told me he resigned because he didn't know what else to do. However, I am not entirely convinced that this was the motivating factor for Mr Wilkie's resignation.
- [33] It transpired during the investigation meeting that Mr Wilkie had been in discussions with another employer about a position in Auckland (which is where Mr Wilkie resides). These discussions had occurred prior to the staff Christmas function. After considerable questioning at the investigation meeting it also became apparent that Mr Wilkie had signed an employment agreement with his new employer at or about the time Mr Wilkie resigned from his position at Sarvee. Taking into account that the talks with his new employer were well on track at the time Mr Wilkie first wrote to Mr Clarke seeking an exit package, together with the fact that Mr Wilkie knew he was not performing, which is why the probationary period was extended. I am sceptical at the best, as to the real motivation behind Mr Wilkie's resignation.

[34] At the investigation meeting Mr Wilkie was under the misapprehension that the probationary period had been extended for three months which he considered to be insufficient. In fact, as set out earlier in this determination, the probationary period was extended for six months. It also became clear during the investigation meeting that Mr Wilkie was convinced that he would not meet the required target by the review date in February.

[35] I find there has been no breach of duty by Sarvee Group Limited. In coming to my conclusions I have preferred the evidence of Mr Clarke with respect to the telephone conversation on 21 December 2007. Even if a breach of the employment agreement by Sarvee had occurred before Mr Wilkie resigned, I find in the circumstances that it would not have been a breach of sufficient seriousness to have made resignation a foreseeable consequence.

[36] Mr Wilkie's claim for unjustified dismissal fails and I am unable to be of any further assistance to him.

Costs

[37] Costs are reserved. 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, Sarvee Group Management Limited may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority