IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 161
ARC 1/11

IN THE MATTER OF	a challenge to the determination of the Employment Relations Authority
BETWEEN	BRENT O'HAGAN Plaintiff
AND	WAITOMO ADVENTURES LTD Defendant

Hearing: 13-16 August 2012
(Heard at Hamilton)

Counsel: David Hayes, counsel for plaintiff
Roger Clark, counsel for defendant

Judgment: 21 September 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr O'Hagan was employed by the defendant company, Waitomo Adventures Limited, from 4 April 2004. The relationship did not end happily. Mr O'Hagan developed concerns about perceived irregularities in the company's financial records, which he raised with Mr Andreef (director of the defendant company). He did not consider that Mr Andreef adequately addressed the concerns he had raised, and subsequently advised through his lawyer that he felt he had no option but to tender his resignation.

[2] A personal grievance was pursued claiming constructive dismissal. The Employment Relations Authority dismissed that claim.[1] However, the Authority found that the defendant ought not to have deducted from Mr O'Hagan's final pay money it thought was owing to it (in light of the fact that Mr O'Hagan disputed that this was so), and ordered the defendant to pay him two weeks' pay, and holiday pay (totalling $9,585.60). The Authority also ordered Mr O'Hagan to reimburse the defendant the sum of $17,995.00, comprising a claimed vehicle allowance, bonus payment, holiday pay on a claimed salary increase, and a "salary increase" paid in 2008.[2]

[3] Mr O'Hagan has filed a challenge to the Authority's determination. In essence he contends that, as a chartered accountant, he could not continue working with the defendant company, in light of the concerns he had raised and Mr Andreef's claimed refusal to rectify them. He also says that Mr Andreef had verbally agreed to the payment of a vehicle allowance, bonus payment, and salary increase, and that he was accordingly entitled to such payments. The defendant denies the plaintiff's allegations and counterclaims against him, claiming the sum of $17,995.00 (as previously ordered by the Authority).

[4] The hearing proceeded on a de novo basis.

The facts

[5] Mr O'Hagan is a member of the New Zealand Institute of Chartered Accountants and as such is bound by the Institute's Code of Ethics. He was employed as company accountant at the defendant company from 4 April 2004 and maintained his membership of the Institute during the course of the employment. Mr O'Hagan was initially employed on a salary of $55,000. This was to be reviewed annually, having regard to (amongst other things) performance.

[6] Waitomo Adventures Limited (WAL) primarily operates adventure caving trips through various caves in the Waitomo district. The company pays royalties to

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[1] AA 512/10, 15 December 2010.
[2] At [136]-[137].

land owners for the use of their land. These are based on turnover. Mr O'Hagan's role involved keeping the company's financial records in order, paying salaries to staff and calculating the royalties payable to land owners. Mr O'Hagan was also responsible for preparing and filing GST returns on behalf of the company.

[7] WAL had been owned by two family trusts. There was also a common shareholding in two other companies, Skyjump Limited (Skyjump) and Jump Technics Limited. Mr Weidmann, Managing Director of Skyjump, was involved with these companies as a managing director, together with Mr Andreef. Relationship issues developed between the two men. In the event, Mr Andreef took over WAL and Mr Weidmann took over Skyjump.

[8] The source data for royalty payments was a report prepared by the Reservations Manager (Mrs Hunt).[3] This report was referred to as the "end of month report".

[9] Mr O'Hagan says that he developed concerns in early 2009 about the company's cashflow reporting and that this prompted him to monitor cash takings in the booking system. He says that he expected that this would give him a better feel for expected cash takings. He began noting the daily combined cash and eftpos figures in the eight day summaries on pieces of paper before they were deleted from the system, totalled them, and deducted the known eftpos figure to give him the "cash" total. His evidence was that this revealed a total for the month of January of around $60,000, but that the cash banking figure when banked was around $32,000 – reflecting a $28,000 shortfall. Mr O'Hagan says that he was "staggered" by the difference. Despite detecting such an apparent shortfall in the company's banking records Mr O'Hagan took no steps to raise his concerns with anyone in the company. Nor did he seek further information that might otherwise explain the perceived discrepancy. Rather, he decided to undertake further monitoring and investigation of the company's takings, which he accepted he did in a covert and secretive manner.

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[3] Also interchangeably referred to in evidence as the Office Manager.

[10] Mr O'Hagan was away from the office for much of February, and was not in a position to carry out any further investigative work during this period. In April 2009 he copied the daily cash and eftpos takings totals from the bookings computer and then carried out a comparison with the end of month report. This, he says, reflected that the cash received (as reflected in the bookings recorded on the bookings sheets) was significantly higher than the cash amounts later banked. Mr O'Hagan was concerned that the figures copied from the bookings computer differed significantly from those in the end of month report for April, provided by the Reservations Manager in May 2009.

12 May meeting

[11] On 11 May 2009 Mr O'Hagan wrote to Mr Andreef. The following day he requested an urgent meeting, at which he presented the letter. Mr Andreef was at home, preparing a speech that he was giving that evening at an awards ceremony. He was also attending to some work that needed to be completed as a matter of priority. Mr O'Hagan did not give Mr Andreef advance warning of what he wanted to discuss. Up until this point, Mr Andreef believed that he enjoyed a relaxed and collegial working relationship with Mr O'Hagan. I have no difficulty accepting Mr Andreef's evidence that the contents of Mr O'Hagan's letter and the way in which Mr O'Hagan approached the issue came as a surprise to him and caught him off guard (as Mr O'Hagan could reasonably have assumed that it would).

[12] The letter stated:

> For some time I have been concerned that cash takings may have been short banked, thereby making the GST returns, royalty calculations and other accounting reports prepared under my name incorrect.
>
> Figures I've seen for April seem to confirm these concerns, therefore I deem it appropriate I draw your attention to the Code of Ethics of the Institute of Chartered Accountants that I am bound by, and I attach extracts of appropriate clauses.
>
> From my reading of these requirements, if these concerns cannot be resolved satisfactorily, then I have no option but to seriously consider my continued employment with Waitomo Adventures Ltd.
>
> I request you consider the matters raised and arrange a time to discuss further.

> Given the seriousness of the situation, it would be appropriate for me to have a support person attend any employment related discussions, as is my right, however, I acknowledge that sensitive and confidential information is involved, so in the first instance, I am prepared to discuss the matter on a "without prejudice" basis, without a third party in attendance.

[13] Mr O'Hagan says that he had attempted to be subtle in the letter, by not accusing Mr Andreef directly of acting illegally, but that he felt in his own mind that it was unlikely that anyone else could be responsible. Mr O'Hagan says that Mr Andreef's immediate response when he finished reading the letter was to state that the matter "was historical, and perhaps it's time to stop." According to Mr O'Hagan, Mr Andreef asked him how he had come to his conclusions that the cash was being short banked, and that Mr O'Hagan had explained that it was from reconciling the daily figures from the bookings system to the accounts. Mr O'Hagan says that he asked Mr Andreef if the royalty payment calculations for April should be amended before being paid to the landowners on 14 May 2009, and that Mr Andreef instructed him to pay them as calculated. Mr O'Hagan says that the meeting was reasonably lengthy. Mr Andreef's evidence was that it was relatively brief, and had to be because he had other pressing engagements.

[14] Mr Andreef says that he was caught by surprise by Mr O'Hagan's approach, both in terms of its formality (given their previous relaxed relationship) and the reference to the possibility of short banking. He says that he initially assumed that Mr O'Hagan was getting worked up about some minor variance that would likely be able to be explained, but began to realise that the issues were serious as the meeting progressed, and as he started to absorb what was in the letter.

[15] Mr O'Hagan says he formed the view that Mr Andreef had accepted that there had in fact been short banking. It appeared that this view was based on two things – firstly, that Mr Andreef did not immediately refute the concerns highlighted in the letter (that cash takings may have been short banked) and secondly, in reliance on the comment that he says Mr Andreef made ("it's a historical thing, maybe it's time to stop").

[16] Mr O'Hagan accepted in cross examination that Mr Andreef did not expressly admit short banking and that, at best, it was a perception that he had formed. Mr

Andreef was adamant that he did not accept that short banking had occurred either at the meeting or subsequently. He could not recall precisely what he said at the meeting in relation to the issue. His evidence, which I accept, was that any reference to things being historic was to the fact that the office systems had been in place for some time and that, with the company's growth, it may be timely to revisit them and consider whether they needed to be updated. I do not consider that Mr O'Hagan could reasonably have assumed, given the surrounding circumstances and what Mr Andreef said, that he had admitted to any sort of illegal activity or that he was already aware that short banking was taking place.

[17] As it transpired, Mr O'Hagan had more than just the letter with him when he visited Mr Andreef's home. He also had two other documents, which he said demonstrated the shortfall. This documentation was to become a bone of contention. Despite raising serious concerns about the integrity of the company's finances, Mr O'Hagan did not volunteer this documentation to Mr Andreef at the meeting, or otherwise indicate to Mr Andreef that he had it. When Mr Andreef subsequently requested information relating to the short falls that Mr O'Hagan said he had identified, Mr O'Hagan steadfastly refused to provide it. It was some months later, and after numerous requests, that Mr O'Hagan finally allowed Mr Andreef to see his workings. By that stage information that may have assisted in analysing the data that Mr O'Hagan had collated, and explaining any variances, was no longer in existence.

[18] Mr O'Hagan sought to make something of the fact that Mr Andreef did not immediately request documentation relating to the concerns he had raised at the meeting. He suggested that this reinforced his view that Mr Andreef was aware of what was going on, and admitted it. However, Mr Andreef was unaware that Mr O'Hagan had any documentation with him on 12 May. That is because Mr O'Hagan did not refer to it or offer it to him. Mr O'Hagan says that he did not provide the information to Mr Andreef as he (Mr Andreef) had appeared to admit responsibility and did not ask for any further information. I was not drawn to Mr O'Hagan's evidence on this point. If he had genuinely been interested in identifying his concerns, to enable Mr Andreef to address them, it is more likely that he would have provided Mr Andreef with the material he had and (if necessary) left it for him to digest and respond to.

[19] Rather, Mr O'Hagan suggested a "without prejudice" meeting without a third party present. Mr Andreef said that he took this as a veiled threat. Mr Andreef's impression tends to be supported by subsequent events, including Mr O'Hagan's attempt to extract a hefty settlement package (which occurred at a meeting on 27 May) and documentation (dated 31 May 2009) which suggests that Mr O'Hagan had received legal advice to provide the documentation sought to Mr Andreef, but that he had doubts about doing so as:

> I believe the constructive dismissal case is established and why pass over the evidence for him to find ways to refute – I realise he will get it in time, but now is too soon.

Period between 12 May and 27 May

[20] Mr O'Hagan's evidence was that his impression that Mr Andreef was responsible for the short banking was reinforced by the fact that he did not request further details of his concerns in the period following the 12 May meeting. However, that must be viewed in light of the fact that the parties agreed on 12 May to come together the following week to discuss matters further, and as requested in Mr O'Hagan's letter.

[21] In the event, Mr O'Hagan and Mr Andreef met on 27 May. It is apparent that other events had occurred in the intervening period which would have had a distracting effect.

[22] On 13 May Mr O'Hagan emailed Mr Andreef referring to a discussion that had taken place some months earlier (in February) about the possibility of Mr O'Hagan doing the Skyjump accounting directly for Mr Weidmann on a contract basis. He said that Mr Weidmann had raised a concern about Skyjump's data being kept on the WAL computer given the deterioration in the relationship between Mr Weidmann and Mr Andreef, and that he had given Mr Weidmann an assurance that he would take responsibility for it and that he would remove it at any time if he considered it appropriate. Mr O'Hagan advised that he considered that it was best, in the circumstances, to transfer the data to his home computer (which he did). He indicated that the direct contracting option could be revisited "when we discuss the way forward." The Skyjump records were not Mr O'Hagan's to remove, and he

ought not to have done so without first securing Mr Andreef's agreement. That is because Skyjump's contract for book keeping services was with WAL, not with Mr O'Hagan himself (as Mr O'Hagan knew).

[23] Mr Andreef communicated with Mr O'Hagan about the Skyjump accounts, and then wrote to Mr Weidman on 15 May seeking confirmation as to Mr Weidmann's agreement to the steps Mr O'Hagan had taken and advising that he would do his best to work through employment or contractual arrangements with Mr O'Hagan "that allow him to provide this accounting service directly to [Skyjump] – since that appears to be what you both want." Mr Weidman communicated his consent to the proposal.

[24] Further exchanges then took place. On 21 May Mr Andreef wrote to Mr O'Hagan confirming that he was not comfortable with the Skyjump accounts being kept at Mr O'Hagan's home if, as appeared to be the case, the contractual relationship between Skyjump and WAL was to continue. He confirmed that any changes to Mr O'Hagan's contract would only be necessary if he was going to take over the Skyjump accounts directly. He went on to say that:

> Re the other matter, I'm prepared to put in place whatever reasonable changes you'd care to recommend to alleviate your concerns with the current system – does that solve the problem?

[25] It is apparent that Mr Andreef's invitation fell on stony ground, and did not solve the problem from Mr O'Hagan's perspective.

27 May meeting

[26] Mr Andreef met with Mr O'Hagan on 27 May. Mr O'Hagan commenced the meeting by asking if Mr Andreef had considered "the issue" and what his thoughts were. Mr Andreef responded by asking Mr O'Hagan to explain precisely what the issue was, saying that he was at a loss to understand what the problem was. Mr O'Hagan's response was that it was "fraud", and referred to short banking and alleged underpayment of royalties. Mr O'Hagan says that immediately after the meeting he went home and typed up notes of the meeting. The notes refer to Mr Andreef seeking to justify his actions. Mr Andreef did not accept that the notes

reflected an accurate account of the conversation. He maintained that he had, at no time, accepted that short banking had occurred.

[27] Mr Andreef's evidence was that the meeting was difficult, and that Mr O'Hagan repeatedly accused him of fraud. When he asked Mr O'Hagan for documentation to support his accusations, Mr O'Hagan refused to provide it. He did not volunteer the documentation he had collated to explain the concerns he had.

[28] At the meeting, Mr Andreef made it clear, on a number of occasions, that he did not want Mr O'Hagan to leave the company. He asked whether Mr O'Hagan was experiencing any personal issues, and offered to help. He also acknowledged that there may be problems with the system, and asked Mr O'Hagan to assist with identifying what they might be and how they might be remedied. They agreed that some improvements would be made, and that Mr O'Hagan would be emailed a record of the cash takings each day.

[29] In evidence Mr O'Hagan said that he decided to resign at this meeting, after Mr Andreef refused to rectify the situation. Mr O'Hagan held the view that the royalty payments that had previously been made needed to be revisited and that Mr Andreef refused to do so. However, as Mr Andreef made clear, he did not understand the basis of Mr O'Hagan's concerns because Mr O'Hagan had refused to disclose them. Accordingly, while he could accept that there might be some deficiencies in the accounting system which might have given rise to some issues and which he was willing to address, he was not in a position at the time to accept that there was an issue (in terms of royalty payments) that needed to be rectified.

[30] Mr O'Hagan told Mr Andreef that it was a matter of either negotiating an exit package or resigning and pursuing a personal grievance. He cited a figure between $400,000 and $600,000, and then referred to the sum of $250,000. Mr Andreef responded by telling Mr O'Hagan that it was blackmail, and that Mr O'Hagan should take the personal grievance option. Mr O'Hagan's reply was that this option had "fish hooks" in it for Mr Andreef, in the context of the public nature of Authority proceedings. That comment was taken by Mr Andreef as a threat. The meeting was left on the basis that the ball was in Mr Andreef's court.

[31] Mr O'Hagan's position was that he felt forced to resign at the meeting of 27 May because Mr Andreef refused to rectify the situation. He referred to the Code of Ethics in support of this position, which sets out that this may be the only alternative open to a chartered accountant where an employer refuses to rectify. Mr O'Hagan trenchantly stuck to this untenable position. Mr Andreef had made it clear that he did not understand what Mr O'Hagan's concerns were based on. He could not, in those circumstances, be expected to rectify the situation. Mr Andreef's evidence was that at the 27 May meeting he questioned Mr O'Hagan as to how it was possible to rectify if there was no information, or if the information was unavailable. He said that Mr O'Hagan refused to respond to this. Mr Andreef encapsulated the position as follows:

> I believed I was caught in a situation where I was being asked to rectify something that was undefined with Mr O'Hagan acting as the keeper of the information while he was accusing me of fraud. He made it very clear to me that he believed he had me over a barrel and had already raised the fact that I should be making a significant payment of money to him.

[32] I accept Mr Andreef's evidence in this regard. It is evident that Mr O'Hagan was, by this stage, considering a departure from the company on the basis of an agreed exit package on substantial terms. Mr O'Hagan considered that he had Mr Andreef "over a barrel", and this is reflected in Mr O'Hagan's thinly veiled warning that there would be "fish hooks" if settlement was not achieved. I do not accept Mr O'Hagan's evidence that he was merely referring to the disclosure of commercially sensitive information if litigation ensued. Mr O'Hagan's approach was inappropriate, unconstructive, and undermining of the employment relationship.

[33] Even if Mr O'Hagan had genuinely held a belief or suspicion that Mr Andreef was being disingenuous, that did not absolve him of his responsibilities to be communicative and responsive. His conduct also appears to have fallen short of the standards expected of a chartered accountant. The 27 May meeting concluded with Mr Andreef saying that he would respond to Mr O'Hagan's exit proposals.

Following events

[34] Mr Andreef says that, as a result of Mr O'Hagan's claim, he checked the company's financial arrangements and he was surprised to find that Mr O'Hagan had made a number of payments to himself which Mr Andreef considered to be inappropriate. Included in these payments were payments to Coral Agencies Ltd (a company in which both Mr O'Hagan and his wife had an interest) totalling $27,439.91, based on six invoices (only one of which had been signed off by Mr Andreef).

[35] Mr Andreef's investigations also revealed that Mr O'Hagan had made extensive deletions from his computer and had taken company accounts off-site without his approval. Mr Andreef was also concerned that there appeared to be work days with unexplained absences.

[36] Mr Andreef raised these concerns with Mr O'Hagan on 28 May, and requested a meeting. Mr O'Hagan replied, requesting any information that Mr Andreef wanted him to consider in advance of the meeting. He referred again to the Code of Ethics, and advice he had received in relation to it, to previous heart problems, the stress being caused to him by the current situation, and concluded the email by stating that:

> I believe, after 5 years of loyal service, you at least allow me to leave with dignity, the issue bringing about my resignation was not of my making.

[37] Mr Andreef said that he would come back to Mr O'Hagan as soon as possible. He also assured Mr O'Hagan that he would do his best to keep the process as calm as possible, given the health concerns that had been raised, and that while he had suggested a meeting, he was not pressing for one.

[38] As I have said, the 27 May meeting concluded on the basis that Mr Andreef would respond to the proposals that Mr O'Hagan had put forward. He did this by way of email dated 29 May. The email stated that:

> Firstly, I reiterate that I do not wish you to leave the company and urge you one more time to reconsider your position on this matter.
>
> You have alleged that you feel there are problems with the company's accounting procedures which mean you can't continue with your position. If this is truly the root of the problem, then I am willing to make whatever reasonable improvements to transparency of banking and reporting that you wish to recommend.
>
> As far as historical matters are concerned, so far you have merely raised a general query alleging short banking of sales. I apologise if I have appeared a bit unsure in trying to address these concerns, but it would of course be an enormous help if you were able to share with me the information that has caused you to raise these queries. Once I have seen that, we may be able to find a way that we can address specific issues.
>
> ...
>
> You have asked for compensation on the basis that you have been constructively dismissed. ... The company does not have any liability to make any form of payment. We have never had a problem with our accounting systems as far as I am aware. Our IRD audits have not disclosed any issues. I have had no idea of your concerns until you have raised them now. The company cannot be deemed to have required you to do something you are uncomfortable with, and therefore be deemed to have constructively dismissed you, when the company was not aware you had concerns. As stated above, I am more than happy to look into these matters and would like you to stay on with the company.
>
> Finally, (and I know you have already denied this), but if there is some other problem in your personal life that is influencing your thinking in this conflict, then even at this late stage I am still willing to discuss and assist in any way I can.

[39] Mr O'Hagan responded by raising a personal grievance, through his lawyer, by way of letter dated 3 June 2009. The letter referred to the concerns that Mr O'Hagan had raised in relation to WAL's financial and accounting systems, and stated that Mr O'Hagan had been unable to reconcile the sales and accounting data as he had been denied access to the sales data. Evidence was given at hearing that in fact Mr O'Hagan did have access to this data, and had obtained it from time to time.

[40] The letter also referred to evidence that Mr O'Hagan had recently found, confirming earlier suspicions about discrepancies between the banking and daily sales figures, and that (despite numerous attempts to address these issues) Mr O'Hagan remained unconvinced that WAL would take active steps to rectify his concerns. It was said that as a chartered accountant he was under an ethical obligation to report such concerns to his employer and try to persuade his employer

to fulfil its legal obligations and, if he could not, he must consider resignation. Mr Andreef's alleged failure to "properly address" Mr O'Hagan's concerns was said to provide grounds for a claim against WAL for unjustified disadvantage and, if he were to resign, for constructive dismissal.

[41] The obvious difficulty with the position adopted was that Mr O'Hagan had steadfastly refused to provide Mr Andreef with the information he had which he contended supported his concerns, and which was said to reflect the issues which needed to be addressed. That placed Mr Andreef in an invidious position. Mr O'Hagan would reasonably have known that this was so.

[42] The letter of 3 June 2009 concluded with confirmation that Mr O'Hagan was not tendering his resignation at this stage and that the preference was to resolve the matter in a constructive and pragmatic manner, so as to avoid litigation.

[43] Mr Andreef's lawyer responded noting Mr O'Hagan's lack of co-operation and the difficulties that this had presented to his client, and went on to identify several concerns that Mr Andreef had in relation to the removal of the Skyjump accounts to Mr O'Hagan's home, allegedly unauthorised and irregular payments by Mr O'Hagan to Coral Agencies, and in relation to salary and other payments that it appeared Mr O'Hagan had made to himself. Mr O'Hagan was put on notice that, if substantiated, such actions would amount to serious misconduct and that it could result in termination. He was invited to a disciplinary meeting.

[44] Mr O'Hagan took sick leave from 15 June 2009. On 17 June a request was advanced on his behalf to attend mediation. An interim response was provided on 19 June by Mr Andreef's lawyer, advising that a disciplinary meeting was still required, and reiterating the request for provision of the information that Mr O'Hagan held.

[45] Mr O'Hagan's lawyer replied, advising that Mr O'Hagan was unwell and not fit to attend a disciplinary meeting at that stage (although a mediation meeting was again requested on Mr O'Hagan's behalf). The invitation to mediation was not responded to, and a further request for the material that Mr O'Hagan relied on was made. It was said that:

> It is difficult to understand why your client continues to state that my client will not rectify matters when my client has, from the outset and repeatedly afterwards, asked for evidence of the issues. My client has repeatedly advised the issues will be investigated and rectified if need be. As outlined above, my client is more than happy to investigate these issues/errors. Your client does not appear genuine in his attempts to want to resolve any issues.
>
> If your client has information that is inconsistent with the accounts then the only way to address this is with your client's honest co-operation, which quite clearly is not forthcoming.

[46] The need for a disciplinary meeting was again emphasised.

[47] Mr O'Hagan gave his resignation on 26 June 2009. His lawyer stated, by way of email:

> In response to your letter of 24 June, our client is outraged by the allegations made against him and vehemently disagrees that there is any basis for such claims. Further, he believes that he has made his concerns regarding the Company's accounting/financial systems patently clear ... We find the Company's inflexible stance on this matter and its insistence on initiating disciplinary proceedings against our client is a "tit for tat" and unreasonable approach to the matter. Our client is suffering from severe stress as a result of the Company's actions and its refusal to enter into any meaningful discussion with our client with a view to resolving the matter fairly and reasonably. Because of this, our client feels he has no option but to tender his resignation.

[48] The resignation was accepted on 29 June 2009.

[49] Issues relating to the final calculation of Mr O'Hagan's pay, and outstanding sums said to be owed by him to the defendant, followed. These issues remained unresolved, a number of which form part of the current claim.

[50] Mr O'Hagan subsequently laid a complaint with the Police, the Inland Revenue Department and the Privacy Commissioner. It appears that both Inland Revenue and Police closed their files without taking formal action.

Constructive dismissal?

[51] It is well established that a constructive dismissal may occur where a breach of duty by the employer leads an employee to resign.[4]

[52] Mr Hayes, counsel for Mr O'Hagan, submitted that Mr Andreef's refusal to rectify the situation that Mr O'Hagan had identified amounted to a breach of duty which was compounded by a failure to respond positively to two requests to attend mediation, and which gave rise to Mr O'Hagan's resignation. In essence, the submission was that Mr O'Hagan was bound by professional and ethical obligations as a chartered accountant and that he was unable to continue working in the role in light of the response he received to the concerns he had raised.

[53] The position adopted by the plaintiff is inherently flawed. Mr Andreef could only be expected to rectify something he was reasonably satisfied required rectification. There is considerable evidence that he repeatedly asked Mr O'Hagan to provide the information that he had relied on in reaching the conclusion that there were serious concerns relating to the company's accounts, and that Mr O'Hagan repeatedly refused to provide it. Mr Andreef had made it clear that he was willing to investigate and consider Mr O'Hagan's concerns and make changes to the system, some of which had been agreed and implemented by the time Mr O'Hagan resigned. These steps are not consistent with an employer refusing to accept that there were issues to address.

[54] While Mr O'Hagan's perception may have been that Mr Andreef had admitted short banking at the 12 May meeting, I have already found that that was not reasonable in the circumstances. At the very least he should have sought clarification, given the seriousness of the accusations and the inherent unlikelihood of Mr Andreef immediately falling on his sword if he had been engaged in unlawful activity. And the later correspondence and discussions ought to have corrected any

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[4] *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 375.

misapprehension, when Mr Andreef made it plain that Mr O'Hagan had caught him off guard, that he did not have an understanding of the concerns Mr O'Hagan had, and that he wanted further clarification.

[55] Mr O'Hagan had formed a view as to Mr Andreef's implication in what he regarded as short banking and he held to that view, despite the steps that Mr Andreef took and his evident willingness to discuss and explore any issues. Mr O'Hagan may have formed the view that he had no option but to resign, but that was not a decision that was forced on him by a breach of duty by his employer. Nor did Mr Andreef otherwise deliberately compel Mr O'Hagan to leave his employment. Mr O'Hagan resigned once it was clear to him that a disciplinary process relating to alleged irregularities in his own financial record keeping was to proceed. That process was never concluded. I do not accept that the instigation of a disciplinary process was simply a "tit for tat". Mr Andreef had valid concerns about seemingly irregular payments, and other issues, which he was entitled to explore. Nor do I accept that a failure to respond to requests to attend mediation, at the early stages of the disciplinary process, amounted to a breach of duty.

[56] The claim of constructive dismissal fails.

Breach of good faith?

[57] There were significant difficulties with the way in which Mr O'Hagan chose to raise the concerns he says he had, and his handling of subsequent events.

[58] Mr O'Hagan gave evidence that the working relationship with Mr Andreef was good until things began to deteriorate at the beginning of 2009. Mr Andreef's evidence was that they shared a relaxed and effective relationship, and that he encouraged Mr O'Hagan to participate in social events. It is also clear that Mr O'Hagan shared a positive relationship with the Reservations Manager, who he would go to from time to time to ask for advice on a range of work related issues. He accepted in cross examination that Mrs Hunt may have been able to assist in reconciling the figures he had collated and explain any variances he had identified.

Mr O'Hagan also accepted that he could, and did, approach office staff to extract information from the computer system.

[59] Despite the nature of these relationships, and the access to information that he had, Mr O'Hagan did not choose to approach either Mr Andreef or Mrs Hunt at an early stage about the concerns he had. The defendant made the point that such an approach could well have resolved the issues that Mr O'Hagan had, as (for example) Mrs Hunt or others may have been in a position to provide further information as to the variances between the base data that Mr O'Hagan was relying on and the figures in the end of month report. Because the office operated on a system of deleting bookings data on a regular basis[5] (a system which Mr O'Hagan was aware of) this meant that, with the effluxion of time, it became progressively more difficult to scrutinise the basis for Mr O'Hagan's concerns. I pause to note that both experts agreed that the spreadsheet records of financial performance distributed by the Reservations Manager to Mr O'Hagan and Mr Andreef for February and April 2009 indicated that there were no major differences between the cash received and cash subsequently banked. The point was made that any discrepancies that may have existed could not now be investigated.

[60] Since Mr O'Hagan's departure, adjustments have been made to the company's systems, including the introduction of a daily audit process in conjunction with the landlords. As Mr Andreef pointed out, despite his concerns and position within the company, Mr O'Hagan never suggested a similar system during his employment with WAL.

[61] Mr O'Hagan chose to instigate a covert operation, to secretly collate data to verify suspicions about Mr Andreef. He said in evidence that he had harboured suspicions about Mr Andreef since as early as 2004/2005. He was unclear, when asked, why the focus of his suspicions was on Mr Andreef rather than anyone else. He was asked why, if he thought there might be discrepancies in the cash-figures, he

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[5] Mr Andreef's evidence was that this was because of concerns about retaining sensitive customer information, including credit card details and medical information.

had not asked Mrs Hunt in February whether she might be able to cast any light on matters. He said that he did not want to alert Mr Andreef to any concerns.

[62] Mr O'Hagan made much of his professional obligations as a chartered accountant and of the need to comply, in raising concerns about possible financial mismanagement, with the Code of Ethics. He had attached an extract of the Code to his letter of 11 May, which he handed to Mr Andreef. He referred to them in the letter itself – making specific reference to the fact that if his concerns could not be satisfactorily resolved he would have no option but to seriously consider his continued employment with the company.

[63] Clause 5 of the Code provides that:

> When members become aware that their employers have committed an unlawful act that could compromise them, every effort should be made to persuade the employer not to perpetuate the unlawful activity and to rectify the matter.
>
> When faced with a significant ethical conflict between the instructions or interests of their employer and their professional and ethical obligations, members should take all reasonable steps to resolve the conflict.

[64] It is clear that Mr O'Hagan had, at least as early as February, developed suspicions about Mr Andreef's financial management practices and that he set out to obtain proof to confirm his suspicions by covert means. Mr O'Hagan ought not to have undertaken covert investigations. The expert witnesses agreed that the appropriate approach would have been to prepare a report, setting out the concerns in detail together with the material on which they were based, and that the report ought to have been provided. Mr O'Hagan did not do so.

[65] The basis on which Mr O'Hagan refused to provide the information he was relying on to assert that his employer was requiring him to breach his professional obligations reduced to three grounds, each of which lacked substance:

- That Mr Andreef had not asked for the information at the meeting on 12 May, despite the fact that Mr O'Hagan did not tell him that he had it with him;

- That he had made a complaint to the Police and that it would be inappropriate in these circumstances to provide the material to Mr Andreef;

- That he did not want to provide Mr Andreef with the opportunity to undermine his claim for constructive dismissal which, as at 31 May 2009, he considered was established.[6]

[66] The fact that Mr Andreef did not expressly ask for any documentation at the meeting on 12 May is no answer. Mr O'Hagan should have volunteered it. And there was no defensible basis for declining the express requests from his employer for the material thereafter.

[67] Mr O'Hagan's obstructive approach effectively denied his employer the opportunity to seek to resolve the issues that Mr O'Hagan had raised, particularly as Mr Andreef made it abundantly clear at the 27 May meeting, and thereafter, that he was uncertain as to the basis for Mr O'Hagan's concerns and was seeking information so that he could try to understand them, and address them.

[68] Section 4 of the Employment Relations Act 2000 (the Act) imposes mutual obligations of good faith on employers and employees. Mr O'Hagan fell short of his obligations. He breached his duty to be active and constructive in maintaining a productive employment relationship, including by undertaking (on his own initiative) a covert investigation, which involved personally entering the reservations computer. He was neither responsive nor communicative in relation to the reasonable requests for information that Mr Andreef made. The information that Mr O'Hagan had compiled by stealthy means was not his to retain.

[69] A party to an employment relationship who fails to comply with the duty of good faith in s 4(1) is liable to a penalty under s 4A(a) if the failure was deliberate, serious, and sustained. Although counsel for the defendant submitted at hearing that the plaintiff's breaches of good faith made him liable for a penalty, that claim was not pleaded in the defendant's counterclaim, and nor did counsel actively pursue any penalty in relation to the alleged breach.

[70] In any event, s 135 provides that an action for recovery of a penalty for breach of the Act may be brought at the suit of the person in relation to whom the

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[6] Reflected in Mr O'Hagan's documentation dated 31 May 2009, referred to at [19] above.

breach is committed but must be commenced within 12 months of that person knowing of the breach. The breaches complained of in this case all occurred before July 2009. I am not satisfied that the defendant complied with the 12 month statutory limitation or that the plaintiff was properly on notice of the penalty claim. I decline to impose a penalty on the plaintiff.

Counterclaim

[71] The defendant advanced a number of counterclaims against the plaintiff, relating to a claimed salary increase, holiday pay, vehicle allowance, and a bonus. I deal with each in turn.

Salary increase

[72] Mr O'Hagan's evidence was that Mr Andreef agreed to a salary increase of $3,000 in 2007, and that this was to be by way of "salary sacrifice", with payment being made to Mr O'Hagan through Coral Agencies Ltd, with him travelling to Australia and doing marketing work there. There is no documentation to support that claim. Mr Andreef denies that any such agreement was made and made the point that he, rather than Mr O'Hagan, had experience in – and responsibility for - marketing. In 2008 Mr O'Hagan made a payment, through Coral Agencies Ltd, of $3,250.00. The payment was not signed off by Mr Andreef.

[73] The expert witnesses agreed that it was not in accordance with standard practice for a chartered accountant to process payments to themselves, without supporting sign-off and appropriate documentation. Mr O'Hagan was a chartered accountant with many years' experience. He was in charge of the pay records, and was the only person to have access to them. One of the key performance outcomes for his role was to ensure that all records were accurately maintained.

[74] I am not satisfied on the evidence that there was an agreement to increase Mr O'Hagan's salary, as Mr O'Hagan asserted. Nor am I satisfied that there was any approval, specific or general, for the payment that was made. I preferred Mr Andreef's evidence on this issue.

[75] Mr O'Hagan must reimburse the defendant the sum of $3,250.00.

Holiday pay

[76] I am satisfied that Mr O'Hagan made an unauthorised payment to himself of $270 by way of holiday pay on the basis of the claimed increased salary payment. That amount must be reimbursed to the defendant.

Vehicle allowance

[77] Similar issues arose in relation to the vehicle allowance. The contract specifically refers to an allowance, as follows:

> Clause 12.4:
>
> The Employer will reimburse any agreed costs including travelling costs from Waitomo to Auckland at the same time as payment of wages once these costs have been claimed by the Employee and provided acceptable evidence of expenditure is provided to the Employer by the Employee.

[78] The amount of $40.00 for each return trip between Auckland and Waitomo was agreed.

[79] Mr O'Hagan asserted that there was a verbal agreement in relation to travel, that Mr Andreef agreed to an annual allowance of $2,600.00, and that he had paid himself $8,400.00 in accordance with that agreement. Mr Andreef firmly denied that any such agreement had been entered into. There was no documentary evidence of an agreement of the sort contended for by Mr O'Hagan. I am not satisfied that one existed. I preferred Mr Andreef's evidence on this point. Mr O'Hagan must reimburse the defendant the sum of $8,400.00.

Skyjump bonus

[80] Mr O'Hagan made a payment to himself of what he claimed to be an allowance agreed by Mr Andreef in relation to the Skyjump work. The payment (amounting to $6,075.00) was put through in February 2009, and was said to relate to work on the Skyjump accounts for the 2008/9 year. Mr Andreef denied that an

allowance had been agreed, but accepted that Mr O'Hagan was eligible for consideration for a bonus. He made the point that a bonus was not automatic and was dependant on performance. He said that as serious concerns had been raised in relation to the plaintiff's performance, and in light of the fact that he had taken the Skyjump accounts home without the defendant's authorisation, it was most unlikely that a bonus would have been given. I accept that this is so. It is also notable that Mr O'Hagan made the payment to himself before the end of the financial year, and before the Skyjump accounts were completed. Again, there is no documentation to support the position Mr O'Hagan is advancing. I prefer Mr Andreef's evidence on this point.

[81] The sum of $6,075.00 must be reimbursed to the defendant.

Other relief sought

[82] The Authority found that there was no basis for the defendant to withhold unpaid salary and holiday pay at the conclusion of the plaintiff's employment. The plaintiff's salary was $62,400.00 at this time. The Authority ordered the defendant to pay Mr O'Hagan $9,585.60, based on calculations set out in its determination. Mr Clark did not take issue with this aspect of the Authority's determination. The defendant must pay the plaintiff the sum of $9,585.60 for unpaid salary and holiday pay.

[83] At hearing the defendant sought orders requiring Mr O'Hagan to return any company records that he held, together with related orders. Mr O'Hagan refuted any suggestion that he was in possession of any such material, and there was insufficient evidence to persuade me that orders were necessary or appropriate. In the event, counsel for Mr O'Hagan took instructions from his client and confirmed that Mr O'Hagan was prepared to give undertakings in relation to these matters. He should proceed to do so, without delay.

[84] The defendant sought orders requiring the plaintiff to pay the costs award in the Authority, which remains outstanding. The plaintiff remains liable to meet his

costs obligations, as no stay was ordered. Recovery of the amounts owing can be pursued in the usual way. No additional order is warranted.

Conclusion

[85] The plaintiff's claim of constructive dismissal is dismissed.

[86] The defendant must pay the plaintiff $9,585.60 by way of unpaid salary and holiday pay.

[87] The defendant's counterclaim is allowed. The plaintiff must reimburse to the defendant the following sums:

$3,250.00 – salary increase

$270.00 – holiday pay on salary increase

$8,400.00 – vehicle allowance

$6,075.00 – bonus

[88] The parties are encouraged to agree costs. If that does not prove possible, the defendant is to file any submissions and supporting material within 60 days of the date of this judgment, with the plaintiff to file and serve any submissions and supporting material in response within a further 30 days.

Christina Inglis
Judge

Judgment signed at 12 noon on 21 September 2012