

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 1  
5604585

BETWEEN	NEIL BOSMAN Applicant
AND	TOTAL ACCESS LIMITED  Respondent

Member of Authority:	Andrew Dallas
Representatives:	Dean Organ, Advocate for the Applicant Anthony Drake and Hannah Cleaver, Counsel for the Respondent
Investigation Meeting:	2 and 3 August 2016 at Auckland
Submissions	7 and 28 September 2016 for the Applicant and 21 September for the Respondent
Determination:	4 January 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. Neil Bosman's resignation from his employment with Total Access Limited (Total Access) was not a constructive dismissal.**
- B. Mr Bosman was not unjustifiably disadvantaged in his employment by Total Access.**
- C. Total Access did not breach its good faith obligations to Mr Bosman.**
- D. Total Access failed to pay Mr Bosman his holiday pay on termination of his employment.**
- E. Total Access must pay Mr Bosman within 28 days of the date of this determination \$3500 as a penalty for breaching the Holidays Act 2003.**

- F. Total Access must pay Mr Bosman \$550 as unpaid wages within 28 days of the date of this determination.**
- G. Total Access must pay Mr Bosman within 28 days of the date of this determination \$500 for breaching the Wages Protection Act 1983.**
- H. Total Access' counterclaims against Mr Bosman are dismissed.**
- I. Costs are reserved.**

### **Employment relationship problem**

[1] Mr Bosman was employed by Total Access as a branch manager and subsequently a business development manager between 20 January 2014 and 19 October 2015. Total Access is a construction hire business.

[2] Mr Bosman says he was unjustifiably constructively dismissed by Total Access on 19 October 2015.

[3] Mr Bosman also raised a number of other causes of action which were inexorably linked and arose substantially out of the events of 19 October 2015. These claims were not pled in the alternative to his primary claim of unjustifiable constructive dismissal. Mr Bosman says he was subject to unjustified actions by Total Access to his disadvantage as a result of: (i) Total Access general manager, Nick Kraan's hostile and aggressive behaviour (including assault), (ii) Mr Kraan's abusive and bullying behaviour, (iii) Total Access' failure to provide a safe workplace, (iv) Total Access' refusal to pay holiday pay; and (v) unlawful wage deduction by Total Access. Mr Bosman sought \$15,000 under s 123(1)(c)(i) of the Act for each proven unjustifiable disadvantage grievance.

[4] Mr Bosman also said Total Access breached the duty of good faith owed to him under s 4(1)(a) and s4(1)(b) of the Act. The facts giving rise to these alleged breaches were also inexorably linked and arose substantially out of the events of 19 October 2015. Mr Bosman sought a penalty of \$10,000 under the Act for each breach.

[5] Mr Bosman's claims about unpaid holiday pay and wages were also pled as breaches of the Holidays Act 2003 and Wages Protection Act 1983, for which recovery of arrears and penalties were sought. It was unnecessary, therefore, to also

pursue these as personal grievances given the availability of these alternative and effective remedies.

[6] Total Access denied all of Mr Bosman's claims but subsequently paid Mr Bosman his holiday pay. This is discussed further below.

[7] Total Access counterclaimed against Mr Bosman and said he took confidential information on the final day of his employment in breach of his employment agreement and refused to return it. Total Access sought damages and costs. Mr Bosman denied this claim.

### **Issues**

[8] The following are the issues for investigation and determination:

- a. Has there been a constructive dismissal of Mr Bosman by Total Access by a breach of duty by Total Access that led Mr Bosman to resign?
- b. If (i) is answered in the affirmative, was the dismissal justifiable in terms of the statutory test of justification under s 103A of the Employment Relations Act (the Act)?
- c. Has Mr Bosman been unjustifiably disadvantaged in his employment by the Respondent?
- d. If Total Access' actions were not justified, what remedies should be awarded, considering:
  - i. Lost wages and other benefits; and
  - ii. Compensation under s 123(c)(i) of the Act.
- e. If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Bosman that contributed to the situation giving rise to his grievance?
- f. Has Total Access breached its duty of good faith owed to Mr Bosman?
- g. If so, should penalties be imposed, in what quantum and should these be made payable to Mr Bosman?
- h. Has Total Access failed to pay Mr Bosman holiday pay?
- i. Has Total Access unlawfully withheld wages from Mr Bosman?
- j. If so, in addition to recovery of these sums, should penalties be imposed, where applicable, in what quantum and should these be made payable to Mr Bosman?

- k. Has Mr Bosman breached his express and implied obligations to Total Access regarding confidential information?
- l. If so, what remedies should be awarded to Total Access considering general damages, special damages and a penalty?
- m. If a penalty is imposed on Mr Bosman, in what quantum and should this be made payable to Total Access?
- n. Should either party contribute to the costs of representation of the other party?

### **Factual background**

[9] Mr Bosman's employment with Total Access was governed by an individual employment agreement dated 21 February 2014. Mr Bosman was initially employed as manager of Total Access' North Shore branch. However, for a variety of reasons, some of which were disputed between the parties, the branch was reduced to a "satellite" branch in September 2015 and Mr Bosman moved to a new role as Business Development Manager based at Total Access' site in Maurice Road, Penrose, Auckland.

[10] Mr Bosman said he agreed to the move to the new role only because otherwise he believed he would not have a job. He also said he felt unwelcome and even "lost" at the Penrose site. Total Access director, Shannon Chambers, in contrast claimed that Mr Bosman expressed "excitement at the prospect".

[11] Total Access directors Shannon Chambers and Vicki Chambers and general manager Nick Kraan all characterised the relationship between Mr Bosman and Mr Kraan up until the incident as positive and supportive. Mr Kraan's evidence was that he and Mr Bosman would often have broad ranging conversations about life beyond Total Access and the most recent of these had occurred over a beer in September 2015. Mr Kraan said he had to have "words" with Mr Bosman on occasion. He provided two instances. The first was when Mr Bosman had diverted his mobile phone to a more senior manager. Mr Kraan said Mr Bosman subsequently acknowledged this was not appropriate. The second was the events leading up to the incident on 19 October 2015.

[12] In contrast, Mr Bosman said Mr Kraan's attitude and behaviour changed towards him in early 2015. He said Mr Kraan had "threatened" him for raising issues

of concern directly with Vicki Chambers without his knowledge. Mr Kraan denied this.

[13] The events giving direct rise to the incident on 19 October 2015, commenced on 18 October 2015 (a Sunday). Mr Bosman said he was working in his backyard with his wife, Jade, when he received a text message on his work phone from Mr Kraan. The message contained just a photo of a worksite with a company name on it. Mr Bosman took this to mean that Mr Kraan wanted him to contact the company for potential work.

[14] Mr Bosman said that as he was already stressed about Mr Kraan's attitude towards him, he found it "rude" that Mr Kraan would send him his text on a Sunday. Mr Bosman said because the text contained only a picture and no message, he believed it needed his attention straightway. Mr Kraan's explanation was that he was walking around the central business district, which was something he did regularly, had seen the worksite, taken the picture and sent it to Mr Bosman as a text. Mr Kraan said he was actually trying to help Mr Bosman achieve further sales with a potential new client. He said it did not require Mr Bosman's immediate attention. Mr Kraan said, at best, he expected Mr Bosman to thank him for the new lead.

[15] Mr Bosman replied to Mr Kraan and stated:

Don't send me that on the weekends please Nick. Monday Mornings are good for this

[16] Mr Kraan said he was quite taken about by Mr Bosman's response and cited examples of other work-related and personal weekend communications between the pair including when Mr Bosman asked Mr Kraan for advice about a house he was thinking of buying. Mr Kraan responded by stating:

I'll send it to Steve instead. Sharing a possible lead.

[17] Mr Kraan then following up this text with another text saying:

Schedule a catchup with me. Monday at 8am.

[18] Mr Bosman responded and said:

Yes but weekend is personal time you could have shared that lead on Monday. Don't be petty, of course I'll follow the lead. I'm going to enjoy my day with my wife and dog and if you want to catch up tomorrow, then I'll make that my concern tomorrow.

[19] Mr Kraan responded by saying:

Monday. There was no need for you to respond today. Txting has a park and save benefit. Think Attitude!!!.

[20] Mr Kraan sent a further text at 6.25am on 19 October 2015 stating:

Come directly to Maurice Road this morning.

[21] Mr Bosman described this text in his evidence as "unnecessary".

[22] Mr Bosman said Mr Kraan came into his office aggressively and told him to come to Mr Kraan's office for the meeting. Mr Kraan denied this. Mr Bosman claimed that as Mr Kraan had, on his evidence, previously threatened him in relation to an incident where it was alleged by Mr Bosman that Mr Kraan said he had gone behind his back and spoken to the directors about an issue and because Vicki and Shannon Chambers were overseas, he was worried Mr Kraan could "do what he wanted". Therefore, Mr Bosman said he decided to secretly record the meeting to "protect" himself from how Mr Kraan would portray it to Shannon and Vicki Chambers.

[23] A highly disputed interaction then took place. Mr Bosman's account was that Mr Kraan told him his attitude "sucked" and that he would be "micro-managed". Mr Bosman said that every time he went to say something, Mr Kraan would cut him off or talk over the top of him. Mr Bosman said that Mr Kraan became more aggressive as the meeting went on including telling him to "fuck off", calling him an "arsehole" and stating "you're finished". Mr Bosman said that as the meeting was becoming too heated, he decided to remove himself from it. He went to leave Mr Kraan's office and at that point or a point soon after, Mr Kraan "shoved" him in the back.

[24] Mr Kraan agreed with Mr Bosman that he told him his attitude "sucked". He also agreed he said to Mr Bosman, "you're finished". However, he said he did so not in the context submitted on behalf of Mr Bosman that Mr Bosman was being *sent away* from Total Access, but within the context that he believed Mr Bosman had finished expressing his views. He also agreed he asked Mr Bosman for the keys to his

company vehicle but said he did this because he believed Mr Bosman was too angry and upset to drive at the time.

[25] Mr Kraan said he attempted to talk to Mr Bosman about his employment obligations. He said that Mr Bosman did not allow him to make any of his points and kept interrupting him. Mr Kraan suggested that Mr Bosman told him to “get fucked” at some point during the meeting. Mr Kraan said they had made very little progress before Mr Bosman got up, left Mr Kraan’s office and slammed the door. While Mr Kraan denied assaulting Mr Bosman, he conceded in his evidence that he place a hand on Mr Bosman’s shoulder “to get his attention to come back into [his] office”. Mr Kraan said it was at this point that Mr Bosman started shouting and accusing him of assault.

[26] Another Total Access manager, Mike Kirrane, said that he heard raised voices coming from Mr Kraan’s office about 8am on 19 October 2015. He said he was in the dispatch office which was across a hallway from Mr Kraan’s office. He also said he heard a door slam. He said he observed Mr Bosman leave Mr Kraan’s office and enter the sales office next door. He said Mr Kraan followed Mr Bosman into the room. Mr Kirrane said he moved to stand in the doorway of the sales office. Mr Bosman claimed that Mr Kirrane saw Mr Kraan assault Mr Bosman. Mr Kirrane said he did not see an assault although he did see Mr Kraan “tap” Mr Bosman on the shoulder. He also said Mr Bosman was “goading” Mr Kraan and he repeatedly heard Mr Bosman say words to the effect of “are you touching me, Nick?”. Mr Kirrane also said he heard Mr Kraan tell Mr Bosman that he would report to Mr Kirrane rather than himself from then on. Mr Kirrane said Mr Kraan confirmed the change in reporting lines for Mr Bosman with him later that morning.

[27] Mr Kirrane said Mr Bosman and Mr Kraan “gave as good as they got” during the part of the interaction between the pair he witnessed.

[28] Mr Bosman recorded the incident with Mr Kraan on his work phone. Neither Mr Kraan nor Mr Kirrane was aware of this at the time. Mr Kraan said the meeting was neither formal nor disciplinary and if he knew that Mr Bosman was recording it he may have approached the meeting differently but would likely have rescheduled it and sought advice.

[29] After the incident, Mr Kraan emailed Shannon and Vicki Chambers to advise them about it. He indicated to them it was largely “settled” for the time being.

[30] Mr Bosman said went back to his office, rang his wife and then emailed her the recording from his phone. Mr Bosman said he asked his wife to ring their bank manager and ask what their options were if Mr Bosman left his job with immediate effect.

[31] Mr Bosman then left Total Access’ premises in his work ute. He said he was intending to drop off his hockey gear to his wife’s work. While there Mr Bosman evidently created a folder on his work laptop computer and populated it with emails demonstrating where he believed he had been treated unfairly. Ms Bosman said he attempted to transfer the file onto a USB drive he had been given by his wife but as he “gave up midway through” he believed, at the time, this was unsuccessful.

[32] He then bought a new mobile phone. Mr Bosman said he wrote his resignation letter at a local McDonalds at or about this time, he contacted his wife from it and asked her to collect him from Total Access. He then returned to Total Access.

[33] Mr Bosman said he then printed his resignation letter and “reset” his work phone to remove personal data. However, the effect of this reset process was that everything was deleted from the phone.

[34] At or about 3.00pm, Mr Bosman had a brief interaction Mr Kraan where he surrendered his laptop computer, phone, car keys and provided his letter of resignation. Mr Kraan asked Mr Bosman for his computer password, which he was duly given. Mr Bosman said he then left Total Access’ premises. Mr Kraan said Mr Bosman appeared to be “very calm and assured” throughout the interaction and that his resignation letter “appeared very carefully thought out”.

[35] Mr Kraan then advised Shannon and Vicki Chambers that Mr Bosman had resigned. In the letter, which was addressed to Mr Kraan, Mr Bosman stated:

I would like to inform you that I am resigning from my position as Business Development Manager for Total Access Ltd. My last day of employment will be today the 19<sup>th</sup> of October.

I understand that this means I forfeit being paid out any annual leave owing and may have other repercussions. I am however happy to accept

this as I cannot continue working in my current work environment due to the stress and unhappiness it is creating in my life.

I would like to thank Shannon, Vicki and the wider Total Access Ltd team for the many opportunities I have had with this organisation. I believe I have grown and learnt many new skills and obtained invaluable life experience.

I have not taken up employment anywhere else at this time, but will instead be taking the time to reflect and look for further opportunities to grow. I may even consider studying towards a degree.

I wish Shannon, Vicki and the company all the best for the future.

Thanks again for everything.

...

[36] Vicki Chambers would take Mr Bosman's statement "I understand that this means I forfeit being paid out any annual leave owing and may have other repercussions" to mean the Mr Bosman was authorising Total Access to make deductions for the unworked period of notice and reimbursement of the cost of a leadership course Mr Bosman had recently attended. Mr Bosman disputed this and said he was wrong in his view that he would forfeit his holiday pay. This is discussed further below.

[37] Also on 19 October 2015, Mr Bosman emailed Shannon and Vicki Chambers. He advised them he had resigned and then went on to say:

This has been the hardest decision of my life as I well and truly used to love working for you. *You are the most honest, giving and caring employers I have ever had.* It's therefore such a shame that because of one person's rudeness, arrogance and inability to grow trust and loyalty with the staff that I have decided to leave. (emphasis added)

I want to sincerely thank you both for all that you have done for me while I was part of Total. Shannon, I thank you for all your positive encouragement and I am truly gutted that I won't get to reach those massive plans you had in mind for me you always mentioned. I know I will be successful and reach great heights in my career, and a lot of that will be because of what I learnt while I worked for you.

I wish you and the Total team all the best for the future.

...

[38] On 21 October 2015, after returning from overseas, Ms Chambers wrote to Mr Bosman. His letter stated:

...

Your resignation has noted personal stress and didn't give any notice, so I am concerned your decision has been in the heat of the moment. We suggest you have a meeting with myself for a general discussion about the stress and unhappiness you refer to. Or you are welcome to take some time to consider more carefully what you want to do – either by taking sick leave (if you are not well enough to work) or using your annual leave.

...

I was disappointed to receive your resignation and we do not want you to resign. We would also like you to reconsider your resignation.

[39] A meeting took place between Mr Bosman, Shannon Chambers and Vicki Chambers on 29 October 2015. Vicki Chambers said the purpose of the meeting was hear Mr Bosman's version of what happened on 19 October 2015. She said Mr Bosman said he was not intending to make any immediate decisions. The evidence of Shannon and Vicki Chambers was that it was discussed if Mr Bosman was going to stay at Total Access, some changes would need to occur such as his reporting line (including on Shannon Chambers' evidence, reporting directly to him), better communication channels and more support. Mr Bosman said a change in reporting line, which had already occurred on 19 October 2015, and his perception of Total Access's reliance on Mr Kraan's financial expertise, meant he had "no confidence things would change".

[40] A further meeting was held between Mr Bosman, Shannon Chambers and Vicki Chambers on 5 November 2016. Vicki Chambers suggested that the time it took for Mr Bosman to confirm the meeting gave rise to a suspicion he was in the process of obtaining alternative employment. This meeting occurred at a café. Mr Bosman told Shannon and Vicki Chambers that he was not coming back to Total Access and needed to "move on". He also said, on their evidence, he may undertake a university degree and then move into event management with his wife. Mr Bosman, Shannon Chambers and Vicki Chambers were all agreed the meeting was cordial and they parted on good terms. Indeed, Mr Bosman gave Shannon Chambers a ride back to Total Access' premises.

[41] Mr Bosman did not mention to Vicki or Shannon Chambers at these meetings or otherwise advise them that he had recorded the incident with Mr Kraan on his work phone. They said the first time they knew about the recording was when their solicitors advised them about its existence.

[42] On 6 November 2016, Mr Bosman subsequently advised Vicki and Shannon Chambers that he had taken up a new position with Hirepool, one of its competitors. In an email with the subject line “Thanks for everything”, Mr Bosman stated:

I just wanted to say thank you so much for your understanding yesterday and throughout this tough time. You guys are truly amazing people and I sincerely hope we will keep in touch.

Now in keeping with my promise of honesty and integrity yesterday, I want to let you know where I am heading next. I tried to find the right moment to tell you yesterday, but before I knew it we ran out of time. I would much rather tell you myself than have you hear it from somewhere else.

I have today accepted a role with Hirepool in their sales team. This role will mainly be focussing on general hire and events, and I want to stress again that you have my complete word that I will keep all Total Access matters and information to myself. With how great you have been to me, the last thing I would ever want to do is betray your trust.

... I really hope this decision doesn't make you feel I've betrayed you. I will forever keep to my promises made to you and Vicki while I continue on my new journey.

Thanks again for everything. I wish you, your family and everybody at Totals all the best.

....

[43] Subsequent to this email, Mr Bosman and Total Access found themselves in dispute about confidential information. The circumstances of this are dealt with in the preliminary determination and also below in respect of Total Access' counterclaim.

[44] A personal grievance was raised for Mr Bosman by his representative with Total Access on 30 November 2015.

[45] Mr Bosman lodged a statement of problem in the Authority on 21 January 2016. Total Access filed a statement in reply on 5 February 2015, which included a counterclaim for alleged breach of an employment agreement and an application for interim directions on the use and return of confidential information.

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

[46] The Authority dealt with a number of interim matters during the investigation of this employment relationship problem. It is not necessary to record all of these except two.

[47] First, in response to Total Access' counterclaim, the Authority issued a preliminary determination.<sup>1</sup> Directions were then issued granting permission to Total Access to lodge and serve an amended statement of reply further particularising its counterclaim against Mr Bosman. Permission was also granted for Mr Bosman to respond to the counterclaim by lodging and serving an amended statement of problem. Total Access provided an amended statement in reply on 18 July 2016. Mr Bosman provided his response on 1 August 2016.

[48] Second, at the commencement of the investigation meeting on 2 August 2016, the Authority resolved a preliminary issue about the admissibility of a secret recording (and resultant transcript) made by Neil Bosman of an interaction he had with Nick Kraan during a meeting on 19 October 2015.

[49] Counsel for Total Access opposed the admissibility of the recording and transcript on various grounds including fairness, good faith and the public interest. Advocate for Mr Bosman said the Authority had broad powers to receive documents and information and the recording and transcript was highly relevant to the issues between the parties.

[50] After considering the respective positions of the parties during a brief adjournment and the relevant case law, I decided to admit both the recording and the transcript Mr Bosman had obtained of the recording. However, I did so on the basis that better evidence of what happened at the meeting would be available to me from witnesses who had provided statements and were available for examination and cross examination.

[51] As part of his recording, Mr Bosman had briefly captured one side of a conversation Mr Kraan was having with a third party. To the extent this was reflected in the recording and the transcript, this was set aside. In addition, for whatever reason, Mr Bosman had annotated part of the transcript and to the extent he had done so, these annotations were also set aside.

[52] During the investigation meeting it became apparent that there were other accuracy issues with the transcript.

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<sup>1</sup> *Bosman v Total Access Limited* [2016] NZERA Auckland 58

[53] After the investigation meeting, Counsel for Total Access advised the Authority that Mike Spence, a forensic computer consultant had undertaken a review of the audio-file of the recording made by Mr Bosman on 19 October 2015.

[54] Mr Spence lodged and served a report on 7 August 2016. Mr Spence was subsequently asked to lodge and serve an affidavit in support of his report. He did so on 11 August 2016.

[55] Mr Spence's conclusions, in summary, were:

- a. Mr Bosman made the recording on a recording device (his work phone);
- b. Mr Bosman then wiped the recording from the recording device;
- c. There was no proper "chain of custody" for the recording;
- (ii) The recording, after examination, was non-contiguous with the last four seconds of the recording, which have significant lower ambient noise, being added at a later time.

[56] The Authority directed Mr Bosman to provide an affidavit in response to Mr Spence's report. Mr Bosman did so on 11 August 2016. Mr Bosman stated in his affidavit:

I have not altered, removed or added anything to either the original recording or any of the copies of the recording submitted to the Employment Relations Authority in relation to this matter.

[57] Mr Bosman also attached a report from James Pennington of Digital Investigators Ltd about the recording.

[58] Mr Pennington was asked to lodge and serve an affidavit in support of his report. He did so on 16 August 2016.

[59] Mr Pennington's conclusions, in summary, were:

- (i) Samsung phones – the make of Mr Bosman's work phone – save recordings with a file extension ".m4a" and this was not, therefore, evidence the recording had been "adulterated";
- (ii) The ambient noise reduction towards the end of the recording can be accounted for by Mr Bosman moving out of Mr Kraan's office; and

(iii) The abrupt ending to the recording can be accounted for by the phone being in an open wallet which required only a single tap to cease the recording.

[60] Mr Spence lodged and served a further affidavit on 19 August 2016 responding to the report and supporting affidavit prepared by Mr Pennington. Mr Spence contended Mr Pennington had not focused on the evidence in his report and appeared to state assumption and conjecture as evidence. Mr Spence stated Mr Pennington's report did not comply with requirements of Schedule 4 of the High Court Rules for expert witnesses.

[61] Mr Pennington lodged and served a subsequent affidavit on 22 August 2016. Mr Pennington identified that he was in the process of obtaining a "private investigators' licence". He also elaborated on his earlier findings. Mr Pennington did not address the concerns raised by Mr Spence about compliance with Schedule 4 of the High Court Rules.

[62] Having considered all the material provided by the parties, I concluded in a Minute issued to the parties on 23 August 2016 that:

- a. Mr Pennington's report did not comply with Schedule 4 of the High Court Rules. To the extent Mr Pennington's report dealt with the same material as that of Mr Spence, Mr Spence's analysis and conclusions were preferred;
- b. Given the uncertainties about the recording identified by Mr Spence and issues about expertise of, and opinion given by, Mr Pennington, the recording made by Mr Bosman of his conversation with Mr Kraan on 19 October 2015 is set aside (including the transcript);
- c. While the Authority previously considered the recording and transcript were "relevant" to its investigation, no weight should be given to either in light of the uncertainties identified by Mr Spence. However, to the extent the reports lodged with the Authority by Mr Spence and Mr Pennington raise witness credibility issues, these may be addressed by the parties' representatives in their submissions; and
- d. There was sufficient direct evidence before the Authority about the exchange between Mr Bosman and Mr Kraan to make reliable findings and draw appropriate conclusions and the Authority intends to take this course.

[63] During the investigation meeting, I heard evidence from Neil Bosman, Jade Bosman, Nick Kraan, Shannon Chambers and Vicki Chambers, Total Access manager, Mike Kirrane and computer forensic expert, Mike Spence.

[64] As permitted by s 174E of the Act this determination has not recorded all the evidence received from Mr Bosman and Total Access but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

[65] This determination, reserved at the conclusion of a two day investigation meeting, has been issued 1 day outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

### **Was Mr Bosman constructively dismissed?**

#### *Legal principles*

[66] The leading cases on constructive dismissal are decisions of the Court of Appeal. In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*<sup>2</sup>, the Court of Appeal found there were effectively three situations in which a constructive dismissal may arise:

Where an employee was given a choice between resigning and being dismissed; and

There has been a course of conduct followed by the employer with the dominant purpose of inducing the employee to resign; and

Where there was a breach of duty by the employer that caused an employee to resign.

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<sup>2</sup>(1985) 2 NZLR 372 (CA)

[67] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers Industrial Union of Workers*, Court of Appeal observed:<sup>3</sup>

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

[68] In *Wellington Clerical Workers IUOW v Greenwich*, the Arbitration Court examined the nature of the inquiry to be conducted:<sup>4</sup>

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

To amount to a constructive dismissal the employee's resignation must be a proportionate and reasonable response to a sufficiently serious breach of duty by the employer, made in circumstances where he or she had no other option.

[69] In summary, the inquiry into an allegation of constructive dismissal comes down to: Has there been a breach of duty on the part of the employer which has caused the resignation, and if so, was the breach sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation - that is, would there be a substantial risk of resignation?

#### *Application of the principles*

[70] Mr Bosman alleged that his allegation of constructive dismissal by Total Access came with the ambit of situations (2) (course of conduct by the employer) and/or (3) (breach of duty by the employer) identified in *Woolworths*.

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<sup>3</sup>[1994] 1 ERNZ 168 (CA)

<sup>4</sup>[1983] ACJ 965

*Course of conduct*

[71] I accept the submission of Counsel for the Respondent that the incident between Mr Bosman and Mr Kraan on 19 October 2015 was a one-off incident. Mr Bosman attempted to suggest Mr Kraan's conduct was a continuation of conduct towards him which had commenced at or about the time he relocated to Penrose. However, there was also evidence before the Authority, including for the period Mr Bosman was located at Penrose, pointing to a positive working relationship, if not friendship, throughout Mr Bosman's employment with Total Access. Also there was no evidence Mr Bosman formally raised a personal grievance, or otherwise commenced a complaints process shy of a personal grievance, during this period about Mr Kraan's alleged behaviour towards him.

[72] The evidence also established that Mr Kraan was not Mr Bosman's "employer" and he did not have authority to dismiss Mr Bosman. Mr Bosman's employer was Total Access and the authority for dismissing him rested with directors, Shannon and Vicki Chambers. It was clear from the evidence that the directors of Total Access were directly and extensively involved and engaged in the day-to-day operations of the company.

[73] While Total Access may be liable for Mr Kraan's actions in certain circumstances, there was no evidence before the Authority that the directors were acting in concert with Mr Kraan in the alleged course of conduct towards Mr Bosman. Indeed, the evidence established that Shannon and Vicki Chambers did not even know of the events of 18 and 19 October 2015 until reported to them by Mr Kraan and Mr Bosman.

[74] Mr Bosman's allegation of a course of conduct being pursued by Mr Kraan and/or Total Access with the dominant purpose of eliciting Mr Bosman's resignation does not survive closer examination. It is, therefore, unsustainable.

*Breach of duty*

[75] The inquiry into Mr Bosman's allegation of constructive dismissal requires an examination of whether there has been a breach of duty by Total Access towards him and if so, was the breach sufficiently serious so as to make it reasonably foreseeable by Total Access that there was a substantial risk of Mr Bosman's resignation.

[76] Mr Bosman alleged the breach of duty was “employer’s conduct” on 19 October 2015.

[77] There was no evidence before the Authority that Shannon and Vicki Chambers had relinquished or delegated control of Total Access to Mr Kraan, as general manager, while travelling in the United States. Indeed, given Mr Kraan and Mr Bosman saw the need to report the incident of 19 October 2015 to them while overseas is supportive of their contention they remained firmly in control of the company during this time. This creates some problems for Mr Bosman because his case assumes, and is therefore advanced on the basis, that Total Access is liable for Mr Kraan’s actions on 19 October 2015. Mr Bosman conceded during the investigation meeting that Shannon Chambers (and, so it follows, Vicki Chambers) was his employer and not Mr Kraan.

[78] In summary, Mr Bosman said this conduct on 19 October 2015 was that Mr Kraan was aggressive, he swore at him, stated “you’re finished” and “shoved” him in the back.

[79] At the outset, I do not accept the submission advanced on behalf of Mr Bosman’s that the use of words “you’re finished” by Mr Kraan amounted to a *sending away*. I accept Mr Kraan’s evidence that the context within which these words were used was a heated exchange where he was trying to get Mr Bosman to stop talking and listen to what he had to say. In any event, as Mr Bosman accepted Mr Kraan was not his employer, the words could not have the authority or effect of sending him away.

[80] The issue of swearing, including who swore at whom and whether Mr Bosman swore at all, was strongly contested between Mr Bosman and Mr Kraan. The only independent witness was Mr Kirrane who said that Mr Bosman gave as well as he got.

[81] There appeared to be a workplace cultural dynamic at play here. All witnesses acknowledged during the investigation meeting that the construction industry was a robust environment and Total Access was no exception to this. Shannon Chambers acknowledged that in the past this robustness had been taken too far, for example, the incident involving a paint-ball gun raised by Mr Bosman (but not involving him) but that he had learnt a great deal and had developed accordingly. He also acknowledged

that some of his communication with staff (including Mr Bosman) was not always appropriate. In my view, these concessions by Shannon Chambers were appropriately and genuinely made.

[82] Ultimately, regardless of this robustness, the most serious allegation made by Mr Bosman was one of assault. Mr Bosman described it as a shove to the back. Mr Krann described it as a placing of his hand on Mr Bosman's shoulder to get his attention. Mr Kirrane described it as a "tap" (or more than one tap) on Mr Bosman's shoulder.

[83] Given the centrality of the assault to Mr Bosman's claims against Total Access it is very surprising it was not mentioned in his resignation letter. There was also no evidence before the Authority of a police complaint.

[84] Counsel for the Respondent submitted that aspects of Mr Bosman's behaviour, including recognition of a change in reporting line to Mr Kirrane, was consistent with an on-going, rather than repudiated, employment relationship. It was only during the investigation meeting that Mr Bosman said the change in report line was "not suitable". He did not appear to raise this as a concern when he met with Vicki and Shannon Chambers on two separate occasions.

[85] Of concern is that Mr Bosman did not mention to Vicki or Shannon Chambers at the two meetings he had with them or otherwise advise them that he had recorded the incident with Mr Kraan on his work phone. He also did not mention his "rainy day" file of emails he said supported his claim for constructive dismissal (some of these contained the inappropriate communications from Shannon Chambers to Total Access employees referred to above).

[86] Mr Bosman's evidence in relation to the recording was that he made it to effectively "protect" himself from how Mr Kraan would portray the meeting to the directors. Shannon and Vicki Chambers said the first time they knew about the recording was when their solicitors advised them about its existence and after Mr Bosman had lodged his statement of problem in the Authority.

[87] Mr Bosman's conduct here was not satisfactorily explained. Nor were his friendly and enthusiastic communications with Vicki and Shannon Chambers in the

period immediately after he resigned properly explained. When I asked Mr Bosman to explain this during the investigation meeting he told me that he no longer regarded them in such a light. This may account for his feelings towards them after his litigation was on foot, but it cannot account for his feelings at the time of the communications were sent.

[88] I do not accept the submission of Counsel for the Respondent that the incident on 19 October 2015 “was not a disciplinary situation”. Had Mr Bosman not resigned when he did, Total Access would have been required to conduct a proper investigation into the incident and particularly the allegation of assault made by Mr Bosman. There is often a fine line between “robust” conduct and misconduct. It is likely in the circumstances of an incident such as this, involving two managers who worked closely with the directors of Total Access, that a fair and reasonable employer would have conducted an independent investigation. However, as Mr Bosman did not accept the overtures of Total Access to retract his resignation and to return to his position, the immediacy of an investigation arguably fell away.

[89] Had he not resigned, any breach of duty by Total Access in relation to Mr Bosman could have occurred had the company not conducted a proper investigation and/or not followed the fair and reasonable recommendations of an investigation. Except in very limited circumstances, an assault, in and of itself, would not constitute a breach of duty by an employer giving rise to a constructive dismissal claim.

[90] For completeness, I find the attempts by Shannon and Vicki Chambers to engage with Mr Bosman after he resigned and after they returned from overseas were not contrived to limit the exposure of Total Access to any possible constructive dismissal (or other) claim by Mr Bosman. I believe their intentions towards Mr Bosman were genuinely positive at that point and the evidence of Shannon Chambers, in particular, was convincing in this regard.

[91] Ultimately, Mr Bosman resigned from Total Access of his own free will. He may have done so in difficult or heightened circumstances – and prematurely, that is, in the absence of an investigation into the events of 19 October 2015 – but the consequences of that decision are for him to bear.

### **Other causes of action – disadvantage grievances**

[92] For the reasons outlined above, I do not believe Mr Bosman's unjustifiable disadvantage grievances, which arise out of the same essential facts, are made out.

### **Other causes of action – breach of good faith.**

[93] Also for the reasons outlined above, I do not accept that Total Access has breached its duty of good faith to Mr Bosman.

### **Is Mr Bosman owed holiday pay by Total Access?**

[94] After the investigation meeting on 26 August 2016, Total Access instructed its solicitors to pay Mr Bosman's outstanding holiday pay. It is not entirely clear what prompted this payment. Total Access until that point had maintained that Mr Bosman had agreed in writing to the deduction when he wrote in his resignation letter

*I understand that this means I forfeit being paid out any annual leave owing and may have other repercussions. (emphasis added)*

[95] Mr Bosman's evidence was that he subsequently came to understand his position about the payment of holiday pay on termination was incorrect in law.

[96] During the investigation meeting the Authority made it clear to Total Access' directors that withholding holiday pay was not seen as an acceptable practice. Vicki Chambers' explanation for the non-payment of the holiday pay was Mr Bosman had consented to its deduction and Total Access had not otherwise refused to pay it to Mr Bosman, it had put the matter on "hold".

[97] Total Access paid Mr Bosman \$4600.00 gross (\$3039.25 net) as unpaid holiday plus interest of \$121.57. Total Access used the official cash rate (OCR) plus 2% to determine the applicable interest rate.

[98] Ordinarily the Authority would likely approach its power to awarding interest pursuant to cl 11 of the second sch of the Act by applying the rate prescribed under s 87(3) of the Judicature Act 1908, which is currently 5% per annum. However, as Mr Bosman did not take issue with either the calculation of the unpaid holiday pay or the applicable interest rate, it is not necessary for the Authority to intervene here.

[99] Solicitors for Total Access in communicating the payment of the unpaid holiday pay to Mr Bosman's advocate stated that payment "deposes of Mr Bosman's claim for unpaid holiday". However, this is not correct because in addition to seeking arrears of holiday pay, Mr Bosman also sought a penalty for breaches of s 16 and s 27(1)(b) and 27(2) of the Holidays Act 2003. Mr Bosman, in turn, sought to have these penalties paid to himself through exercise of discretion by the Authority under s 136(2) of the Employment Relations Act.

[100] As to the breaches of the Holidays Act 2003, it is unclear how s 16 has been breached by Total Access given Mr Bosman's entitlement to holiday pay has never been in doubt or denied by Total Access. However, breaches, if established, of s 27(1)(b) and 27(2) may give rise to penalties.

[101] In *Borsboom v Preet PVT Limited*<sup>5</sup> a full court of the Employment Court identified the factors for imposing a penalty under the Employment Relations Act and related Acts including the Holidays Act.

[102] The Court then set out "four step" process to be followed when assessing penalties in order to provide a consistent and reasonably predictable result.<sup>6</sup>

[103] At step one, the maximum penalty is identified as \$20,000 for each breach giving a total maximum penalty of \$40,000. However, given the breaches of s 27 arose out of the same factual matrix and relate to the same provision of the Holidays Act, it is appropriate in the circumstances of the case to "globalise" the penalties giving a total maximum penalty of \$20,000.

[104] Holiday pay is an important workplace entitlement and its non-payment is a serious matter. Mr Bosman was deprived of his holiday pay by Total Access for a period of approximately 10 months, a relatively significant period. The payment of the outstanding holiday pay to Mr Bosman by Total Access is an acknowledgment that the holiday pay ought to have been paid. However, it is also a factor in mitigation – that is, it was ultimately paid and the Authority was not required to order it to be paid. Taking into account all the relevant circumstances, the severity of the breach is

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<sup>5</sup> [2016] NZEmpC 143 at [67] and [68].

<sup>6</sup> Ibid at [151]

assessed as moderate. This breach warrants 50 per cent of the maximum penalty of \$20,000, which is \$10,000.

[105] There was no direct evidence of Total Access' ability to pay a penalty. However, during the investigation the size and scope of Total Access' business was touched on in evidence. There was nothing in this evidence that suggested the imposition of a penalty would be onerous for Total Access to pay. In the absence of evidence about Total Access' ability to pay a penalty, there is no adjustment made to the provisional penalties at this stage of the process.

[106] The Court in *Boorsboom* said the penalties imposed should be proportionate to the amount of money unlawfully withheld.<sup>7</sup> The current proposed penalty of \$10,000 is not proportionate to the amount of holiday pay withheld, which was \$4600.

[107] Standing back and assessing the proportionality of the outcome for Total Access, it is apparent the penalty must be reduced further. In all the circumstances of the case, it is appropriate to impose a significant, but proportionate, penalty on Total Access for breaching the Holidays Act. That penalty is \$3500.

[108] Having considered the submission of Mr Bosman that the penalty should be payable to him (rather than the Crown), I have decided to exercise my discretion under s 136(2) of the Employment Relations Act in his favour.

[109] Total Access must pay Mr Bosman a penalty of \$3500 for breaching the Holidays Act within 28 days of the date of this determination.

### **Is Mr Bosman owed wages by Total Access?**

[110] Mr Bosman claimed that Total Access deducted \$550 from his final pay without authorisation. Total Access denied this. It said the amount deducted comprised amounts for insufficient notice, reimbursement for payment for a course Mr Bosman attended and half a day's annual leave. Total Access said Mr Bosman agreed to these deductions in writing. In the end, the amount of \$550 appears to only relate to reimbursement of Total Access by Mr Bosman for a course he undertook.

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<sup>7</sup>Ibid at [190]

[111] It is difficult to accept that the words “and may have other repercussions”, which came after Mr Bosman’s (then) understanding about payment of his holiday pay, could be construed as expressly consenting to the specific deduction identified and made by Total Access.

[112] Total Access also sought to rely on an attachment to Mr Bosman’s individual agreement entitled the “Training Course Etiquette Policy” which, on its face, appeared to allow for deductions from wages of employees for course costs if employment ended within 12 months of the course being undertaken. However, Mr Bosman said this policy did not form part of his agreement when he signed it and he did not subsequently agree to it. Total Access’ evidence was not particularly satisfactory around the timeframe for the development, implementation and alleged agreement by Mr Bosman to the policy. Ultimately, I prefer Mr Bosman’s evidence.

[113] Counsel for Total Access said Mr Bosman did not raise the issue of the wage deduction with Total Access in the email he sent the directors on 10 November 2015 responding to their email of 9 November 2015 which set, among other things, Mr Bosman’s final pay (conversely, he also did not consent to the deductions in that email). In the face of statutory right to claim unpaid wages for six years, this is not a particularly strong or convincing submission.<sup>8</sup>

[114] The deduction of \$550 was not consented to by Mr Bosman. Total Access must pay Mr Bosman \$550 as unpaid wages within 28 days of the date of this determination.

[115] In addition, Mr Bosman sought penalties for breaches of s 4 and 5 of the Wages Protection Act 1983. Mr Bosman, in turn, sought to have these penalties paid to himself through exercise of discretion by the Authority under s 136(2) of the Employment Relations Act.

[116] As with breaches of the Holidays Act, the principles in *Borsboom* apply.

[117] The maximum penalty is \$20,000 for each breach giving a total maximum penalty of \$40,000. However, given the breaches arose out of the same factual matrix,

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<sup>8</sup>Wages Protection Act 1983, s 11(2).

it is appropriate in the circumstances of the case to “globalise” the penalties giving a total maximum penalty of \$20,000.

[118] The non-payment of wages through an unauthorised deduction is a matter of concern. Mr Bosman was deprived of his wages by Total Access for a period exceeding 12 months, a significant period. Total Access relied on an erroneous understanding of Mr Bosman’s position about the deduction from his wages. From, at least, 21 January 2015, being the date Mr Bosman lodged his statement of problem with the Authority, Total Access have been on notice that Mr Bosman did not consent to the deduction from his final wages. Taking into account all the relevant circumstances, the severity of this breach is assessed as moderate. This breach warrants 50 per cent of the maximum penalty of \$20,000, which is \$10,000.

[119] As with the penalty for breach of the Holidays Act, there was no direct evidence of Total Access’ ability to pay a penalty. In the absence of evidence about Total Access’s ability to pay a penalty, there is no adjustment made to the provisional penalties at this stage of the process.

[120] As with the breach of the Holidays Act, the penalty imposed should be proportionate to the amount of wages deducted without authorisation. The current proposed penalty of \$10,000 is not proportionate to the amount of wages deducted, which was \$550.

[121] Standing back and assessing the proportionality of the outcome for Total Access, it is apparent the penalty must be reduced further. In all the circumstances of the case, it is appropriate to impose a proportionate penalty on Total Access for breaching the Wages Protection Act. That penalty is \$500.

[122] Having considered the submission of Mr Bosman that the penalty should be payable to him, I have decided to exercise my discretion under s 136(2) of the Employment Relations Act to do so.

[123] Total Access must pay Mr Bosman a penalty of \$500 for breaching the Wages Protection Act within 28 days of the date of this determination.

**Total Access' counterclaim: has Mr Bosman breached his express and implied obligations to Total Access regarding confidential information?**

[124] Total Access claimed Mr Bosman breached the express and implied terms employment agreement in several ways on or about 19 October 2015.

[125] First, it said Mr Bosman breached the implied duty of fidelity he owed to Total Access by erasing information and/or interfering with the company's laptop and smart phone and copying the company's information and/or data for the purposes of taking it with him when he left his employment.

[126] Second, Mr Bosman breached the implied term of trust and confidence and ostensibly for the same reasons.

[127] Third, in the alternative, Mr Bosman breached the implied term of reasonable skill and care by not devoting the requisite skill and diligence to his duties by deleting company information so it could not be retrieved easily.

[128] Fourth, Mr Bosman breached the duty of confidentiality by taking and/or retaining a customer list and sales plan, which Total Access' forensic computer expert, Mr Spence, has not been able to recover.

[129] For these breaches, Total Access said it was entitled to special and general damages arising out the costs associated with its investigation and interruption and inconvenience to its business caused by Mr Bosman's actions. Total Access said the amount of general damages should be \$5000. The amount of special damages was not quantified.

[130] In addition, Total Access said the Authority should impose a penalty under s 134 of the Act on Mr Bosman for breaching his employment agreement. Total Access said the basis for the imposition of a penalty was the conduct described above and because Mr Bosman "mislead" the company and Total Access in evidence lodged and given about his actions in respect of the smart phone and computer. Total Access said the Authority should order the penalty payable to it.

[131] Mr Bosman said Total Access' counterclaims were "vexatious and frivolous" and of "no substance".

[132] Whilst counterclaims may be meritorious, the Court has urged caution in the assessment of counterclaims.<sup>9</sup>

[133] Having considered the submissions, the evidence and the surrounding circumstances – particularly the fact Mr Bosman believed he was assaulted by Mr Kraan – as unsatisfactory, in the same way as some of Mr Bosman’s conduct was unsatisfactory in deleting the information from his phone and removing, as ultimately established, the file containing his “rainy day” emails; his behaviour is largely explicable, and not outside a range of reasonable responses, when considered within the context of what happened, from his perspective, on 19 October 2015.

[134] An objective assessment of the exhibited rainy day emails is suggestive they are evidence of the “robust” culture existing at specific points in time at Total Access rather than material which was “confidential” and could assist one of Total Access’ competitors, including Mr Bosman’s current employer.

[135] Ultimately, I accept Mr Bosman’s position that he wanted this material to assist him to demonstrate what, in his view, had gone wrong with his employment at Total Access.

[136] For these reasons, I decline to accept any of Total Access’ counterclaims against Mr Bosman. However, if Total Access makes a costs application, consideration may be given to an “uplift” in any costs award made to take account of additional costs incurred in the investigation of Mr Bosman’s conduct in respect of the smart phone and the computer on 19 October 2015.

[137] For completeness, I decline to impose a penalty against Mr Bosman under s 134 of the Act for breaching his employment agreement. The claim for a penalty relies essentially on the same conduct complained of by Total Access giving rise to the other causes of action, but in another form and by an alternative means.

#### *Return of Total Access’ information*

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<sup>9</sup> *George v Auckland Council* [2013] ERNZ 675 at [143]-[144]

[138] Mr Bosman consistently denied having a copy of the sales plan. In addition, during the investigation meeting he said that the sales plan actually pre-dated his employment at Total Access.

[139] During the investigation meeting, I asked Mr Bosman if he had complied fully with the orders contained in my determination dated 29 February 2016.<sup>10</sup> He said yes. I also asked him if he understood the consequences of not complying with a determination of the Authority. He again said yes. Based on these answers, and he gave me no reason to doubt their genuineness, I accept Mr Bosman no longer held in his possession any of Total Access' information (confidential or otherwise) after 2 March 2016.<sup>11</sup>

### **Costs**

[140] Costs are reserved. Each party has had a measure of success. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs.

[141] If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff, \$3500 for a matter such as this commenced before 1 August 2016, and adjusted upwards or downwards for relevant factors.<sup>12</sup>

Andrew Dallas  
Member of the Employment Relations Authority

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<sup>10</sup> *Bosman v Total Access Limited* [2016] NZERA Auckland 58 at [44]

<sup>11</sup> Based on compliance within two working days.

<sup>12</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].