

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 336/08  
5116849**

BETWEEN      BRENDON CLIFFORD  
                         Applicant

AND              COLWALL              PROPERTY  
                         INVESTMENT LIMITED t/a CROWNE  
                         PLAZA AUCKLAND  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:              Howard Thompson, Counsel for Applicant  
   Andrew Shaw, Counsel for Respondent

Investigation Meeting:      13 May 2008  
   14 May 2008

Submissions Received:      22 May 2008  
   27 May 2008

Determination:                25 September 2008

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1] The applicant Mr Brendon Clifford (“Mr Clifford”) says he was unjustifiably constructively dismissed or alternatively, that he has a personal grievance for unjustifiable disadvantage. The respondent Colwall Property Investment Limited t/a Crowne Plaza Auckland (“Colwall”) denies Mr Clifford’s claims. The parties were unable to resolve the differences between them by mediation.

## The facts

[2] Mr Clifford was employed by Colwall as its Chief Engineer pursuant to an Individual Employment Agreement dated 24 May 2005 (“the IEA”) at its Crown Plaza Auckland property. He commenced the position on 25 July 2005.

[3] The IEA provided at clause 2.3:-

*2.3 The Employer will undertake salary reviews based on the following:*

*2.3.1 Performance of the Employee, based upon completion of “Your Career with IHG” training modules and the recommendation of the Employee’s Manager;*

*2.3.2 The trading performance of the hotel; and*

*2.3.3 Promotion.*

*The salary review will be undertaken in January each year and thereafter annually. There is to be no guarantee of a salary increase when each annual review is carried out. Such review will be recorded in writing and maintained on the Employee’s personal file.*

[4] Schedule A to the IEA provided for other benefits and included this provision about superannuation:-

*You will be invited to join the Superannuation Scheme after completion of 12 months continuous service. From this point the company will contribute 5% which we recommend you also contribute to.*

[5] Mr Clifford wrote this letter to Nicky Thompson Colwall’s human resources manager (“Ms Thompson”) dated 30 May 2005:-

*Dear Nicky*

*Please find detailed below some comments and assumptions with regards to the benefits that are included with the Chief Engineers package that I assume are taken as given but would like noted just to avoid any misunderstanding.*

*Can you please confirm the following:*

*1. It is considered acceptable to have the occasional personal call or text message from the business mobile phone.*

*2. That the laundry allowance of dry cleaning once a week includes business shirts daily.*

*3. That page 21 of my Individual Salary Employment Agreement is correct as far as the person I report to (the General Manager, as well as the Director of Technical Services), as page 23 states only the General Manager.*

*Secondly, I have the following requests for you to consider:*

*1. I would like entitlement to use the Hotel gymnasium.*

*2.As it is of benefit to the Hotel for the Chief Engineer to monitor and adjust the BMS Computer and schedule the air conditioning from home and on weekends as required, will the Hotel pay for the monthly internet connection fee?*

*3.That I have a formal performance review on the conclusions(sic) of 3 months  
Finally, please record that the Hotel understands that I already have a trip overseas booked, therefore I will require from 26<sup>th</sup> September to 7<sup>th</sup> October off as special leave without pay.*

[6] The General Manager at the time Mr Michael Borostyan (“Mr Borostyan”) responded by letter dated 31 May 2005:-

*Dear Brendon,*

*I would like to confirm the following point as discussed prior to signing your appointment letter.*

- 1. It is a reasonable expectation that there is the occasional personal call or text made and received whilst working at the hotel.*
- 2. Page 23 of the employment agreement has been amended to reflect the dual reporting lines of this position.*
- 3. As an Executive member of the management team you are entitled to utilize the gymnasium.*
- 4. The Owner’s department have approved the provision of Jetstream to your residence. Utilisation of such must comply with the company’s email policy.*
- 5. You will be given a performance review after your first three months of employment, and annually thereafter.*

*Yours sincerely*

*Michael Borostyan*

*General Manager*

[7] Mr Clifford wrote by email to Mr Borostyan on 8 August 2005:-

*Michael,*

*When you get a minute can you send Audy confirmation regarding having access to the BMS compuor(sic) from home for viewing Aircon & Boilers etc after hours, as well as getting the highspeed (Jetstream) or such like connected.*

*Thanks .....B*

*Brendon Clifford*

*Chief Engineer*

[8] Mr Borostyan responded by email of the same date:-

*Hi Brendon*

*In progress*

*Michael*

*P.s. Don’t forget to utilize spell check.*

[9] Mr Clifford raised the issue of his salary review in an email to the acting Human resources manager Mr Craig Plested (“Mr Plested”) on 7 February 2007. Mr Plested was acting from 22 December 2006 to 14 May 2007 while Ms Thompson was on parental leave. Mr Plested consulted Mr Borostyan who advised that salary reviews took place at the end of the year for all employees. Mr Plested advised Mr Clifford accordingly. In an email to Mr Plested of 9 March 2007, Mr Clifford stated he wanted to “let the matter lie”.

[10] Mr Clifford met with Ms Thompson on 7 June 2007 and communicated to her his various concerns about his employment. Mr Clifford says “he drew a line in the sand” at this meeting with Ms Thompson.

[11] He followed up the meeting with Ms Thompson with an email the following day on 8 June 2007 specifying his individual concerns including:-

*I had no three month review as promised  
 There was no home internet benefit as promised as part of my initial salary package  
 My 12 month performance review was delayed unnecessarily  
 No salary review – constantly avoided  
 No back dated superannuation although promised .... (This is not a big issue for me rather just another example of withdrawn promises*

[12] There were meetings held on 3 July 2007 and 6 July 2007 with Mr Clifford, Ms Thompson, Mr Brendon Meppam the General Manager at the time (“Mr Meppam”), and Mr Alex McKenzie, Colwall’s Chief Engineer (“Mr McKenzie”) where Mr Clifford outlined his concerns in detail. Mr Clifford says he found these meetings intimidating and unsatisfactory because there was no resolution of the issues and his employer’s attitude dismissive.

[13] Two months after his email of 8 June 2007, Mr Clifford emailed Ms Thompson and Mr Meppam on 16 August 2007 as follows:-

*Guys,  
 As it has been 2 months now, can you please advise on progress in this matter.*

[14] Mr Clifford met again with Mr Meppam, Ms Thompson and Mr McKenzie, on 22 August 2007. He says that this meeting was also unsatisfactory in the same way the previous two had been.

[15] Mr Meppam wrote to Mr Clifford by letter dated 11 September 2007 addressing Mr Clifford's various concerns as outlined in Mr Clifford's email of 16 August 2007.

[16] Mr Clifford wrote to Mr Meppam by letter dated 19 October 2007 as follows:-

*Dear Brendon*

*I wish to reluctantly tender my resignation. This letter will serve as my four weeks notice.*

*In dealing with my employment concerns and contract dispute, the Hotel has behaved so unreasonably and calculated that the trust and mutual confidence has been finally destroyed.*

*Despite my frequent requests to resolve this matter quickly, the Hotel management and owners department have not attempted to resolve my breach(sic) of contract with any level of good faith, which has now ultimately undermined our relationship.*

*In spite of my conscious effort and loyalty to uphold my performance and fulfil my duties, the unnecessary drawn out process and offer from the Hotel on the 11<sup>th</sup> and 13<sup>th</sup> September and recent petty actions, are such that this may be no longer possible.*

*These actions were not only disrespectful and inconsiderate, but they unfortunately did not even meet the absolute minimum statutory requirement. Moreover, the procedure in which the Hotel has handled this entire dispute did not follow the correct due process in several areas. This is not what a fair and reasonable employer would have done and has been very disappointing from a company the size of Colwall Property Investments and Intercontinental Hotels Group.*

[17] Mr Meppam wrote by letter dated 24 October 2007 to Mr Clifford as follows:-

*Dear Brendon*

*We were surprised to receive your resignation on Tuesday, 23<sup>rd</sup> October 2007. It was not anticipated that you would choose to resign due to the issues discussed. As such we would like to offer some time should you wish to reconsider your decision. Should you choose to withdraw your resignation, your position will remain yours without prejudice. If however you still choose to resign, we will obviously have no option but to accept this. Please confirm by close of business on Monday 29<sup>th</sup> October 2007, if you wish to withdraw your resignation.*

[18] Mr Clifford wrote two letters dated 26 October 2007. The first was to the Area Director of Human Resources Ms Nina Weir (“Ms Weir”) asking her to step in and review his situation. The second, was this letter to Mr Meppam:-

*In response to your letter I received on 25<sup>th</sup> October.*

*In regards to your offer that I reconsider my resignation on Tuesday 23<sup>rd</sup> October, my resignation was due to the working environment created by the contractual shortfall, actions, lack of good faith and incorrect due process by the Hotel. This has not changed nor yet been rectified, therefore my resignation has to stand.*

*Further more, despite giving repeated warnings and efforts to resolve the issue amicably by myself over the last 4 months, these breeches(sic) in statutory requirement do have eventual repercussions. Personally the loss of my job and income, the humiliation amongst my peers and loss of career opportunities ultimately now needs to be compensated.*

*As offered to Nicky Thompson on the 23<sup>rd</sup> October, I invite invite(sic) the Hotel to apologise and formulate an acceptable exit package as reparation for these mistakes. If you would like to explore this avenue of settlement, please advise me by the 2<sup>nd</sup> November.*

*Obviously as per my previous correspondence, my position is very clear and my intentions to see this to an acceptable end should also be without misunderstanding.*

[19] Ms Weir responded by letter dated 5 November 2007 referring Mr Clifford back to Ms Thompson.

## The merits

[20] The Authority now assesses the merits of the parties’ respective cases and first evaluates the question of whether Mr Clifford was unjustifiably constructively dismissed. The established test asks these questions:-

- (i) Did Mr Clifford resign?
- (ii) Was Mr Clifford’s resignation caused by a breach of duty on the part of Colwall?
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach

### *Did Mr Clifford resign?*

[21] It is not disputed that Mr Clifford did in fact resign.

*Was Mr Clifford's resignation caused by a breach of duty on the part of Colwall?*

[22] It is submitted for Mr Clifford that the cumulative effect of a number of breaches was sufficient to amount to repudiatory conduct on Colwall's part and that the question is whether the employer's conduct was causative of the employee's resignation. Although he refers to a number of instances in which he alleges Colwall's conduct fell short of his expectations, Mr Clifford places greatest emphasis on three issues, as I will too:-

- (i) Colwall's repeated failure to provide him with (or reimburse him for the cost of) a broadband internet connection at his home;
- (ii) Colwall's repeated failure to back-pay his superannuation entitlement to the date of the first anniversary of the commencement of his employment;
- (iii) Colwall's failures, despite repeated requests, to provide him with salary reviews.

[23] I consider the other matters raised by Mr Clifford are peripheral only.

*The monthly internet connection fee*

[24] I deal first with the broadband issue. I find this was a term of Mr Clifford's employment agreement. That is confirmed by Mr Borostyan's letter of 31 May 2005 when he confirmed *"The Owner's department have approved the provision of Jetstream to your residence. Utilisation of such must comply with the company's email policy"*. I also accept Mr Borostyan's oral evidence that the matter was discussed and agreed at interview. The question Mr Clifford asked was "will the Hotel pay for the monthly internet connection fee?"

[25] The discussion in the letters of 30 and 31 May 2005 was in the context of Mr Clifford's remuneration. But I consider it pertinent to ascertain the true nature of the monthly internet connection fee. Was it essentially an element of Mr Clifford's remuneration? I have concluded it was not. Mr Clifford's request for payment was premised upon a benefit to Colwall of remote access by him. In the event that he

incurred the expense of remote access he sought reimbursement. The request for reimbursement was granted to him. But I do not see the agreement to reimburse him as an element of remuneration. Reimbursement is not remuneration. Accordingly, I distinguish the monthly internet fee from the other elements which were remuneration. I conclude therefore that Mr Clifford was not entitled to insist on monthly payments for internet access. He was entitled only to reimbursement where he had actually incurred the expense.

[26] As matters transpired however, Mr Clifford did not require remote access. He did not then incur any expense which entitled him to reimbursement. So when he arranged the installation of telecom broadband jetstream to his home at a cost of \$39.95 per month which over the 27 months of his employment totalled \$1,078.00, that was not an expense he was asked to incur by his employer as part of his duties.

[27] I find that Mr Clifford raised the matter of reimbursement and remote access with Colwall's management as a matter of significance to him. But he was not entitled to reimbursement because had not been required to incur any expense. Although he continue to claim payment, he was not entitled to it. Accordingly, I find that Colwall did not breach any duty to Mr Clifford.

[28] Colwall did not address the matter until Mr Meppam's advice of 11 September 2007 many months later. This was Colwall's ultimate substantive response:-

*Internet*

*Your initial request for internet was for the purpose of adjusting the BMS computer. This is not considered a requirement or frequent occurrence for the Chief Engineer, so access to the hotel system is not agreed to. However, an internet package (yet to be determined) from your home will be paid for by the Hotel effective from 25th July 2005. Any excess usage over the monthly data allowance of the package will be at your own cost. The period of 25th July 2005 to 25th September 2007 will be backdated with the value of up to Telecom "Basic" (direct dialling with Telecom) per month. As this duplicates the internet access on the Blackberry your phone will revert to a standard mobile phone.*

*Regarding the ongoing payment of internet access, you will be required to submit an expense claim with copies of your phone bill each month, to be received no*

*later than the following month by the Finance Department. Likewise, for the back payment, please provide copies of your phone/internet bills for the period 25th July 2005 to 25th September 2007 to be attached to an expense claim form.*

[29] I agree that Colwall took too long to reach a definitive resolution of the matter. Its long delayed conclusion I agree with however. I consider it reached a pragmatic compromise solution in permitting Mr Clifford to claim reimbursement even though he had not incurred any expense.

[30] I prefer Mr Clifford's evidence and find that there was no agreement that he accepted a blackberry phone in exchange for home broadband and remote access.

[31] Colwall's ultimate offer to pay Mr Clifford was only partial and it required Mr Clifford to submit his previous home phone accounts to be submitted for reimbursement by way of an expense claim. The cost of historical invoices was \$5.00 each. Colwall also required Mr Clifford to return the blackberry phone he had. The replacement mobile phone he was given was very basic. Mr Clifford says it was not a manager's phone and had text messages on it indicating it was previously used by a young girl. He says he was insulted when given the phone and was expected to use it. He is aggrieved that while Colwall finally agreed to reimburse him for internet access, it then took his blackberry phone from him and gave him a poor quality replacement. He says this was retaliatory. I tend to agree it was.

[32] As well, when Mr Clifford submitted his expense claim it was approved by Mr Meppam and he did not require Mr Clifford provide historical invoices. However, Mr David Lithgow, Director of Finance and Business Support ("Mr Lithgow") would not accept the expense claim without the historical invoices even though Mr Meppam had approved the claim. Ms Thompson also confirmed that Colwall would not pay \$39.95 per months but instead would pay only basic dial up at \$29.95. Mr Clifford cites these matters as typifying his employer's unreasonable conduct and manner of interaction with him. He describes this conduct as demeaning and undermining of

him. Colwall subsequently after the employment ended sent Mr Clifford payment of \$838.60 for the internet.

[33] I agree the replacement phone Mr Clifford was given is very basic. It is most unattractive and not one which befits a senior management executive. I also agree that the events which accompanied Colwall's compromise to pay, were unfortunate and added to Mr Clifford's frustration.

[34] It is most regrettable that such a relatively minor issue could proceed to have such a significant impact on the relationship between these parties. It does seem rather petty to be trifling over internet access but sadly I am persuaded the matter was actually material in the demise of the employment relationship.

[35] The Crowne Plaza Auckland Employee Handbook invites employees to raise problems with its management. The Grievance Procedure therein states that "The problem should be discussed or addressed with you within 48 hours." I consider Colwall did not comply with its own procedure as concerns Mr Clifford's problem.

[36] Colwall's management of the matter was not ideal and I have no doubt its lack of decisive action only complicated matters and led to the matter assuming a much greater significance than it was worthy of. But despite the delayed resolution, the unfortunate processing of the expense claim, the partial reimbursement and the confiscation of the blackberry phone, I find there was no breach of duty by Colwall.

### ***The superannuation***

[37] Mr Borostyan wrote to Mr Clifford by email of 20 September 2006 as follows:-

*Dear Brendon*

*I am pleased to advise that your participation in the Hotel super plan is confirmed. The hotel will be contributing 5% of your salary, backdated to your anniversary year.*

*I would encourage you to contribute as well, suggesting somewhere between 2 to 5% as it will be a fantastic windfall at the end of your tenure with this hotel – whenever that may be. I also recommend selecting the high growth sector as it(sic) there is minimal risk being AMP.*

*The starter pack is on your desk. Please complete and return to David Lithgow this week.*

[38] Mr Clifford did not action the matter immediately because he was desirous of and had initiated discussions about opting out of the scheme and receiving the cash equivalent instead, and about the implications of the Government Kiwi Saver scheme.

[39] Mr Lithgow says that Mr Clifford's delay in completing the superannuation application of six months "was unacceptable". Mr Lithgow confirms to the Authority he made a decision not to backdate Mr Clifford's superannuation entitlements to 25 March 2006, but instead only 12 days to 1 March 2007.

[40] Whatever the delay by Mr Clifford in submitting his application or his reasons for it, he was contractually entitled to have his participation in the superannuation scheme backdated to 25 March 2006 (his first anniversary of service).

[41] Mr Meppam's letter of 11 September 2007 in relation to superannuation continued to maintain a position in breach of contract. However administratively inconvenient Mr Clifford's delayed application was for Mr Lithgow, Colwall's decision through Mr Lithgow not to backdate Mr Clifford's date of participation to 25 March 2006 was unjustifiable, being contrary to its duty of good faith and also in breach of an express term of contract.

### ***The salary reviews***

[42] The IEA provided as follows:-

*2.3 The Employer will undertake salary reviews based on the following:*

*2.3.1 Performance of the Employee, based upon completion of "Your Career with IHG" training modules and the recommendation of the Employee's Manager;*

*2.3.2 The trading performance of the hotel; and*

*2.3.3 Promotion.*

*The salary review will be undertaken in January each year and thereafter annually. There is to be no guarantee of a salary increase when each annual review is carried out. Such review will be recorded in writing and maintained on the Employee's personal file.*

[43] A salary review provision entitles the employee to have their salary reviewed. It is not an entitlement to have the salary increased. It is also within the scope of the provision for salaries to be decreased.

[44] It is accepted that Mr Clifford received salary increases in both January 2006 and January 2007. The reviews were conducted by Colwall unilaterally and all employees received the same cost of living annual increase as a result of the reviews.

[45] But what Mr Clifford desired was consultation with him from an individual perspective, as a review. He says he considered he was entitled to a review on an individual basis because he had received a favourable mid year performance review, the scope of his work had increased as a result of a refurbishment programme and because he was working very long hours. Mr Clifford wrote emails of 14 September 2006 and 7 February 2007 to Mr Borostyan in those terms. He says he was not given an opportunity to discuss whether his personal circumstances and his own efforts justified an increase in his salary over and above the cost of living increases given to all staff. Mr Clifford says his employer's failure to provide him with proper salary reviews in this way indicated it was unappreciative of his efforts.

[46] Ms Thompson tells the Authority that salary reviews include market research, individual performance and Hotel performance. She says too that any salary pay increases above the Group recommendation must be submitted with a business case to support it and approved by the Group and the owners.

[47] As I emphasised to the parties, the issue is one of contract. These parties have turned their minds to salary reviews and they have negotiated and agreed a provision dealing with it in the IEA.

[48] It is clear that salary reviews for Mr Clifford are undertaken each in January each year. Not December, not February, not June but January and no other month.

The matters contractually relevant are these. Firstly, the trading performance of the hotel which I suspect means whether the hotel can afford it. Secondly, the employee's performance based upon completion of "Your Career with IHG" training modules. Ms Thompson conceded there was no reference or application of those modules in relation to Mr Clifford. Next, there is the recommendation of the employee's manager. Finally, there is promotion.

[49] I regard it most likely that "the review will be recorded in writing" means the outcome of the review rather than the mechanics of the review. It may be a matter Colwall should consider clarifying in the event expectations are different.

[50] Nor do I read the contractual provision as obliging Colwall to seek Mr Clifford's input. The express wording of the provision permits Colwall to review without any reference to the employee. Mr Clifford accepted the provision in that form. But what of the statutory provisions on good faith? The parties are obliged to be active and constructive, responsive and communicative. But I understand that it is only where a proposed decision is likely to have an adverse effect on an employee where the legislature expects that an employer will provide the affected employee an opportunity to comment. That is the express situation the legislature has provided for at section 4(1A)(c) of the *Employment Relations Act 2000*. I do not consider a salary review contemplating an increase can be said to be of adverse effect to an employee. So I conclude it was not a breach of duty for Colwall to conduct its salary reviews without reference to Mr Colwall and as contractually prescribed. Having said that, I expect that a contemplated salary decrease is quite the reverse. Such a proposal will require consultation.

[51] Mr Clifford was entitled to no more than the contract he agreed to. That is, his salary would be reviewed each January. When he asked for reviews outside of that contractual provision, Mr Clifford was seeking an indulgence. Colwall was not obliged to extend to him anything other than the contractual entitlement.

[52] I understand Mr Clifford to say that he did approach Mr Borostyan in that way. He admits that Mr Borostyan informed him that reviews would take place at year end, although he should have referred to January. That was purportedly in accordance with the IEA.

[53] When Mr Clifford asked for his salary reviews other than those actually carried out, he was prevailing upon his employer seeking an indulgence, i.e. he was asking for something outside of the IEA. Colwall was not obliged to accede to his request and grant him that indulgence. There was therefore, no breach of duty. I am satisfied Mr Clifford's performance was reviewed according to the terms of the IEA.

[54] Ultimately I conclude that Colwall did breach its contractual duty to Mr Clifford in relation to his superannuation.

*A reasonably foreseeable substantial risk of resignation?*

[55] How serious was the breach of duty I have found? Colwall refused to backdate its contributions to his superannuation which was in breach of contract.

[56] I view this situation objectively and I conclude that Colwall's breach of duty was not so serious that it was reasonably foreseeable that Mr Clifford would resign. The correct response was for Mr Clifford to raise an employment relationship problem with his employer in relation to the superannuation issue. But his resignation partially because of it was not the answer.

**The determination**

[57] I find that Mr Clifford was not constructively dismissed. The question of justification does not arise. **I find that Mr Clifford does not have a personal grievance for unjustifiable constructive dismissal. I find that the contended personal grievances for disadvantage are raised out of time. There will be no formal orders.**

**Costs**

[58] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Shaw is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Thompson is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson

**Member of Employment Relations Authority**