IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 197
5432636

	BETWEEN	FRITZ FROST Applicant
	AND	MR CHIPS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Greg Bennett, Advocate for the Applicant David Munro, Advocate for the Respondent
Investigation Meeting:	21 February 2014
Determination:	19 May 2014

DETERMINATION OF THE AUTHORITY

A. Fritz Frost's employment by Mr Chips Limited (MCL) ended in circumstances that amounted to a constructive dismissal and was unjustified.

B. Within 28 days of the date of this determination MCL must settle Mr Frost's personal grievance by paying him:

(i) A sum equal to seven weeks' wages; and

(ii) $4000 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000.

C. Costs are reserved.

Employment relationship problem

[1] On 11 September 2013 Fritz Frost, then employed as the logistics manager of Mr Chips Limited (MCL), attended a performance review meeting with the

company's general manager Alastair McCredden and its Auckland plant manager Paul Horton. Shortly after the meeting began Mr McCredden told Mr Frost that he should get a written warning because how he dealt with various work issues was "*not good enough*". During a ten-minute break in the meeting Mr McCredden and Mr Horton prepared a written warning. When Mr Frost was called back to the meeting he protested about being given a warning and said he should have been given a day's notice if the meeting was to be disciplinary rather than solely a performance review. Mr McCredden then set a time to meet on the next day (a Thursday) and, according to his own notes, said "*but our decision would not change*".

[2] Mr Frost left the premises and did not come to work the next day. Instead his advocate notified Mr Horton that day of a personal grievance and, by email sent at 5.31pm, that he would provide a medical certificate the next day. He was then asked through MCL's advocate to attend a meeting on Monday, 16 September. He did not do so. Instead he lodged a statement of problem in the Employment Relations Authority. Meanwhile Mr Frost had also provided a medical certificate stating he was unfit for work for 14 days. The certificate included the doctor's comment that he understood the reason Mr Frost was unfit for work was "*stress at work over recent events*".

[3] Mr Frost's statement of problem, dated 16 September, said that if the parties could not resolve the matter in mediation he would "*resign and cite constructive dismissal*".

[4] MCL's statement in reply, lodged on 3 October 2013, denied Mr Frost was disadvantaged by its actions or that he could justify resigning on that basis.

[5] The matter was not resolved through mediation, held on 20 September and 14 November 2013 and 17 February 2014.

[6] Mr Frost had resigned from his position with MCL on 19 November 2013. He did so through a letter from his advocate to Mr Horton. The letter said the resignation was due to the actions of Mr Horton and Mr McCredden, referring to the events of the performance review meeting, and MCL not paying Mr Frost sick leave although he provided medical certificates.

The Authority's investigation

[7] Mr Frost, Mr McCredden and Mr Horton provided written witness statements for the purposes of the Authority's investigation. At the investigation meeting the three men answered questions from the Authority member and the parties' representatives and the representatives provided submissions on the issues for determination.

[8] During the investigation meeting it became clear that Mr Frost had incorrectly alleged he was not paid for two weeks sick leave covered by the first medical certificate and it was irrelevant to debate whether what his second medical certificate said was sufficient to warrant paid sick leave because, by then, Mr Frost had already used up his sick leave entitlement (that is by late September 2013).

[9] The issues that remained for determination by the Authority were:

(i) Whether MCL unjustifiably disadvantaged Mr Frost by how Mr McCredden and Mr Horton conducted a performance review on 11 September 2013, including advising him that he would get a written warning?

(ii) Whether Mr Frost's employment with MCL ended by genuine resignation or was a constructive dismissal (that is that it arose from MCL breaching his terms of employment, with it being reasonably foreseeable that he would resign as a result)?

(iii) If MCL did unfairly disadvantage and/or constructively dismiss Mr Frost, what remedies he should receive, considering:

(a) Lost wages (subject to evidence of reasonable endeavours to mitigate his loss); and

(b) Compensation for hurt and humiliation (subject to evidence)?

(iv) Whether any remedies awarded to Mr Frost should be reduced due to conduct by him contributing to the situation giving rise to his grievance?

(v) Whether either party should contribute to the costs of representation of the other party?

[10] As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination has not set out all evidence and submissions received but has made findings of fact and law and expressed conclusions on the matters for determination.

Was Mr Frost unjustifiably disadvantaged?

[11] In closing arguments MCL submitted there was no disadvantage to Mr Frost because no written warning was issued to him in the performance review meeting. Instead it submitted Mr McCredden's arrangement for the meeting to continue on the next day showed that he was open minded and respected Mr Frost's right to prepare for a disciplinary meeting and seek representation in it. It also said Mr McCredden's decision to change the nature of the meeting on 11 September from a performance review to a disciplinary process – marked by the break in which a written warning was prepared – was a minor breach of the company's own disciplinary procedures and that once it was clear that was not acceptable to Mr Frost, the company was prepared to slow its pace.

[12] There were a number of concerns about the operation of MCL's logistics department that Mr Horton and Mr McCredden could legitimately raise in a performance review with Mr Frost as that department's leader. Some such concerns resulted from changes of personnel and reassignment of duties among remaining members of the logistics team. In the previous month Mr Horton had talked to Mr Frost about the need to issue warnings to team members who did not follow stock control processes. Another concern related to feedback from a staff member in February and a supplier in July that Mr Frost could be too brusque or blunt in how he spoke with people.

[13] Mr Frost's performance review on 11 September was one of six Mr Horton and Mr McCredden conducted with MCL employees that day. He was given nothing in advance to indicate the review meeting was or could become disciplinary in nature. An email sent to him the day before simply said the review would consider a list of criteria (which included approachability, customer focus, decision quality, peer relationships and planning).

[14] Mr McCredden's own notes of the meeting said Mr Horton went through comments about Mr Frost's competencies, including how he appeared to other people, and that Mr McCredden then raised a number of issues about Mr Frost's accuracy and job performance, which included problems with delivery and communication by logistics. He then said the "*list of performance issues was not good enough and that he thought it warranted a written warning*" and that while he and Mr Horton would

help develop a plan to improve issues in the logistics department, this "*had to be a 'line in the sand' moment and that [Mr Frost's] performance must improve*". His notes then record a ten-minute break in which he and Mr Horton agreed to give Mr Frost a written warning and typed it up (so they could give it to him that day).

[15] The oral evidence of Mr Frost, Mr Horton and Mr McCredden that the message confirmed about the written warning was delivered more bluntly than described in Mr McCredden's notes. About ten minutes into the meeting Mr McCredden said words to the effect of "*we're all grown men here, let's cut to the chase*" before telling Mr Frost that he was to get a written warning. Mr Frost's evidence that Mr McCredden also said he would "*ride*" Mr Frost while Mr Horton was away on an upcoming period of leave was also probably correct as it was consistent with other evidence about Mr McCredden's style of speaking. When Mr Frost then said he did not agree with being given a warning in that way, Mr McCredden – according to his notes - responded "*that was fine*" and did not give him the written warning he had prepared. Instead he set a meeting with Mr Frost for 3pm the next day. Mr Frost's evidence was that Mr McCredden said: "*You can play it that way if you want Fritz, but you will be at the meeting tomorrow*". Importantly, all three witnesses agreed that Mr McCredden also said, as he recorded in his own notes, "*our decision would not change*".

[16] Contrary to the company's submission, that comment cannot be objectively understood as showing Mr McCredden was open-minded and respectful of Mr Frost's rights in a disciplinary context. Mr McCredden had already made and declared a disciplinary decision. The manner in which he did so was inconsistent with MCL's disciplinary procedure. The procedure set out a number of steps that a manager "*will*" do in investigating and deciding on disciplinary matters. These started with a preliminary investigation by the manager and advice to the employee about the nature of the allegation and its potential impact on their employment. Other steps included a formal investigation, a disciplinary interview, the employee's explanation, and due consideration (along with any required further investigation).

[17] Mr McCredden's premature decision was a breach of company policy that understandably left Mr Frost with considerable doubt Mr McCredden would subsequently follow a fair procedure in dealing with his concerns about Mr Frost's

performance. As such it was also less than what a fair and reasonable employer could have done in all the circumstances at the time, because such an employer follows its own procedures.[1] The breach of procedure was not minor as Mr Frost was advised of a decision without notice of the allegations or the opportunity to gain representation or being given a reasonable opportunity to then provide an explanation about Mr McCredden's concern before a decision was made – a decision that, in his own words, would not change even if the proper procedure were followed. As a result Mr Frost was unjustifiably disadvantaged and had a personal grievance due to his employer's action to that time.

Did the employment end by genuine resignation or constructive dismissal?

[18] MCL's failure to follow its own rules and treat Mr Frost fairly was a breach of the terms of its employment relationship with Mr Frost. It established the first element necessary for Mr Frost's argument that his subsequent resignation was really forced rather than freely given.[2]

[19] The second element, and issue for resolution, was whether that breach was sufficiently serious to make it reasonably foreseeable to MCL that Mr Frost would not be prepared to continue to work for it under those circumstances (making his resignation, in law, a constructive dismissal).[3]

[20] The Court has described the analysis required in this way:[4]

> *It is essential to examine the actual facts of each case to see whether the conduct can be fairly and clearly said to have crossed the border line which separates inconsiderate conduct causing some unhappiness and resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship. … In identifying cases of constructive dismissal, and in separating them from cases of employee resignation, we suggest there is useful insight to be gained from a consideration of the real or true source of the initiative for the termination. If the real source of the initiative for the termination is the employer, or the basic causation comes from the employer, then the case is one of constructive dismissal.*

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[1] Section 103A of the Employment Relations Act and *Personal Grievances* (online loose-leaf edition, Brookers) at 14.4.01.
[2] *Auckland Shop Employees IUOW v Woolworths (NZ) Limited* (1985) ERNZ Sel Cas 136, 139.
[3] *Auckland Electric Power Board v Auckland Local Bodies Officers IUOW* [1994] 1 ERNZ 168, 172.
[4] *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cas 95, 104.

[21] The assessment of the seriousness of an employer's breach of its duties, while objective, is a matter of impression and of degree. The evidence may be assessed on the basis of whether the situation was *"not so serious as to be irremediable by discussion or as authorising or entitling [the employee] to resign and call [his] resignation a dismissal*".[5]

[22] MCL submitted that the issues discussed with Mr Frost on 11 September were no surprise and Mr McCredden was, in good faith, attempting to manage him in order to improve his performance. It submitted Mr Frost had not accepted responsibility for his role in problems in the operation of his department and resigned after about two months off work because he wanted his holiday pay rather than because of any breach of duty by MCL.

[23] The comment in the statement of problem that Mr Frost would "*resign citing constructive dismissal*" – made so soon after the issue was raised with the employer – has a manipulative or cynical look to it but in any event was not what established reasonable foreseeability. Rather foreseeability was to be determined on the basis of the question identified in the extract from the *Greenwich* case noted above – this is whether the 'basis causation' for Mr Frost's eventual resignation came from the employer.

[24] Standing back and considering the written and oral evidence as a whole, I concluded Mr McCredden's actions rather than an oversensitive response by Mr Frost created the situation in which his employment ended. Mr Frost's resignation – formally tendered on 19 November 2013 but really already in effect because of his long absence from work by that time – was, at law, a constructive dismissal.

[25] What Mr McCredden said and did in the 11 September review meeting established that he did not consider himself bound by the company's disciplinary policy and its obligations. It was more than what MCL submitted was a mere matter of pace and attempted "*truncation*". I have accepted Mr Frost could have reasonably believed, in those circumstances, that he would not be treated fairly in Mr McCredden's future deliberations about his performance and such a conclusion, in turn, would have been reasonably foreseeable to MCL's representatives at the time.

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[5] *Harrod v DMG World Media (NZ) Limited* [2002] 2 ERNZ 410, 424.

[26] Mr McCredden's views on Mr Frost's performance, and level of responsibility for problems in the logistics department were so firmly and clearly formed – both at the time of the review meeting and as expressed in his evidence to the Authority investigation – that the situation would not (in the phrase used in the *Harrods* case noted above) have been remediable by discussion. Neither, in the circumstances at the time, could Mr Frost have been confident that he would have received the well-established requirements of guidance and time to improve his performance before MCL took further, and possibly final, disciplinary action against him.[6]

[27] I have not accepted MCL's submission that Mr Frost's resignation was ultimately because he wanted his final pay. He did refer in his oral evidence, in response to a question from me, to needing the money at the time he resigned. However that answer had to be considered in the context of the fact that by 19 November he had received no pay for more than six weeks (his sick leave entitlement having been exhausted) and his assessment of his position after having attended mediation with MCL on 14 November. Although his answer to me did not disclose what was said in mediation that day, his resignation soon after clearly showed he understood his employment with MCL could not continue. That state of affairs was 'basically caused' by Mr Mc Credden's actions on 11 September rather than Mr Frost's decision expressed in his 19 November resignation.

What remedies were due to Mr Frost?

Lost wages

[28] Mr Frost's evidence in support of his application for lost wages was inadequate. He said he registered with two employment agencies sometime after 19 November and had applied for three logistics roles since then. However he provided no documentary evidence of his job search and I was not satisfied this met the requirement to prove he had made reasonable endeavours to mitigate his loss from 19 November onwards.[7] Accordingly I considered his claim of lost wages was confined to the period from the date of his last pay from MCL at the end of September to his date of resignation – that is the seven weeks' awarded.

[6] *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659 at 679.
[7] *Allen v Transpacific Industries Group Ltd* (2009) 6 NZELR 530 at [78].

[29] Mr Frost admitted he had not sought alternative income during that seven week period.

[30] He had medical certificates for some of that time – issued by his doctor after seeing him on 25 September and 11 October. Both certificates referred to "*a mediation process*" being "*in place*" and Mr Frost asking for two weeks leave as part of the process. Neither certificate declared him unfit to work, indicated any diagnosis that was work related, or expressed the doctor's opinion on whether the leave requested was necessary or appropriate in light of any medical assessment made. Both were different in that respect from the certificate that same doctor had issued on 12 September declaring Mr Frost to be unfit to resume work for 14 days.

[31] If Mr Frost's claim for lost wages in the October-November period relied solely on those medical certificates, I would have declined it. However I have accepted that it was not clear in those seven weeks whether he needed to seek alternative work to mitigate his losses as he was still employed by MCL; it was uncertain if or when he would be able to return to work at MCL; and, in any event, his ability to get out and find other income in that time was impaired due to the effect of his employer's actions on his confidence.

Compensation for hurt and humiliation

[32] Mr Frost said he felt devastated by his treatment by Mr McCredden and Mr Horton, had been through depression, and had now slowly started to feel better about himself. He said he was looking for new work but felt humiliated about having to tell prospective employers about how his job at MCL came to an end. He said he had been to two counselling sessions to get his frustration and anger out and get his head clear but could not afford to continue going.

[33] There was no independent or medical evidence in relation to his reference to depression resulting from the circumstances of the end of his employment with MCL. The statement from his doctor in his 12 September medical certificate that the reason for Mr Frost being unfit for work was "*stress at work over recent events*" refers, at best, to what Mr Frost has said had happened rather than reporting a diagnosis of any health condition resulting from work-related stress.

[34] Mr Frost sought an award of $15,000 under s123(1)(c)(i) of the Act to compensate him for the effects of the constructive dismissal on him. Due to the limited evidence advanced in support of that claim, I considered the appropriate award was $4000.

No reduction for contribution under s124 of the Act

[35] I considered no reduction of remedies awarded to Mr Frost was required under s124 of the Act.

[36] The issues of how his department was working, and his performance in managing it, were proper matters for discussion in a review meeting and may even have warranted disciplinary sanction at some level, if properly notified, explored and decided. However "*the situation that gave rise to [his] personal grievance*", as referred to in s124, was Mr McCredden's action of truncating the performance review and announcing a premature disciplinary decision rather than Mr Frost's conduct prior to or during the review meeting.

Costs

[37] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination of costs is required, Mr Frost may lodge and serve a memorandum on costs no later than 28 days after the date of this determination. In that case MCL would then have 14 days to lodge a memorandum in reply. The representatives know costs are usually set on a daily tariff of $3500 (which would apply to the one-day investigation meeting here) and, subject to what might be disclosed by the parties' memoranda, the tariff would only be adjusted up or down if required by various factors in the particular case, (under the principles set out in *PBO v Da Cruz*).[8]

Robin Arthur
Member of the Employment Relations Authority

[8] [2005] 1 ERNZ 808.