

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 203
3040791

BETWEEN JOHN GREETHAM
 Applicant

AND LAWTER (NZ) LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Warwick Reid for Applicant
 Erin Burke for Respondent

Investigation Meeting: 4 February 2019

Submissions Received: 4 and 13 February 2019 from Applicant
 4 February 2019 from Respondent

Further Information
Received: 12 February 2019

Determination: 4 April 2019

DETERMINATION OF THE AUTHORITY

A. Mr Greetham was not constructively dismissed.

B. Costs are reserved.

Employment relationship problem

[1] Mr Greetham was employed by Lawter (NZ) Ltd from August 2005. He was initially employed as a Production Coordinator. At the time the employment relationship ended he was employed as the Environmental Health and Safety Manager.

[2] Lawter operates an industrial plant manufacturing products processed from material extracted from pine trees. The manufacturing process involves the use of hazardous substances.

[3] Mr Greetham resigned from his employment in April 2018 after performance concerns were raised with him in January 2018 and after a proposal was made to implement a performance management plan.

[4] Mr Greetham challenges the ending of the employment relationship. He says he was constructively dismissed. Lawter objects to the Authority investigating and determining Mr Greetham's personal grievance. It says Mr Greetham failed to raise a personal grievance within the statutory timeframe of 90 days as required under s 114 of the Employment Relations Act 2000 (the Act).

Issues

[5] To resolve Mr Greetham's employment relationship problem I must determine the following issues:

- a) Did Mr Greetham raise his personal grievance within 90 days?
- b) Was the resignation actually a dismissal?
- c) If Mr Greetham was unjustifiably dismissed what if any remedies should follow?

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

Did Mr Greetham raise his grievance within 90 days

[7] Mr Greetham's claim relates to the ending of the employment relationship which he describes as a constructive dismissal.

[8] Section 114 subsections (1) and (2) of the Act deal with the timeframe for the raising of personal grievances in the following terms:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[9] Section 114(2) makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[10] After resigning from his employment on 18 April 2018 Mr Greetham raised a personal grievance in writing on 25 May.

[11] Lawter's appears to be saying that the date from which the 90 days runs is the date of the 12 January letter. This would clearly make his 25 May letter out of time. However, Mr Greetham does not claim an unjustified disadvantage on the basis of the 12 January letter. References to the 12 January letter form part of the continuing course of conduct leading to and linked to the reasons why Mr Greetham ended the employment relationship. The action alleged to amount to a personal grievance is his resignation. That did not occur until April 2018.

[12] Mr Greetham raised his personal grievance by way of letter dated 25 May following his 18 April resignation. The letter was received by Lawter's on 30 May. This is well within the statutory 90 day period.

[13] Mr Greetham has raised his personal grievance within 90 days and is entitled to have his personal grievance investigated and determined by the Authority.

Was the resignation actually a dismissal?

[14] Mr Greetham claims his 18 April resignation was in law a constructive dismissal.

[15] A constructive dismissal is an apparent resignation which is, in reality, an employee's response to an act or omission of the employer of such significance that it amounts to a repudiation of the contract of the employment and entitles an employee to accept that repudiation by resigning the employment.

[16] In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*¹ the Court of Appeal listed three situations in which a constructive dismissal might occur, although the Court noted that these were not exhaustive. The three situations are:

- a) Where the employee is given a choice of resignation or dismissal;
- b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- c) Where a breach of duty leads a worker to resign.

[17] The Court of Appeal elaborated on the third category of constructive dismissal in the case of *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* and stated:²

In such a case as this 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 the 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.

[18] The nature of a claim for constructive dismissal is dependent on the events that preceded the employee leaving their employment; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.³

¹ [1985] 2 NZLR 372.

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA) p172; p 419.

³ *Commissioner of Police v Hawkins* [2009] NZCA 209.

[19] In deciding whether an employer's conduct amounted to a constructive dismissal it is essential to examine the facts of the case to see whether the conduct of the employer can fairly and clearly be said to have crossed the line between inconsiderate conduct causing some unhappiness from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.⁴

[20] Mr Greetham bears the onus of establishing on the balance of probabilities that he did not freely or voluntarily resign. Based on what I have seen and heard, I have concluded Mr Greetham does not rely on the first of the three situations set out in the *Woolworths* case to support his claim that his resignation was not voluntary. I have therefore considered whether either of the remaining two situations might apply. If they do then I must be satisfied Lawter's actions and how it acted were sufficiently serious to make it reasonably foreseeable by Lawter's that Mr Greetham would be unable to continue working in the situation. That is, that there would be a substantial risk of resignation.

Appointment as Environmental Health and Safety Manager

[21] Mr Greetham had been the Environmental Health and Safety and Quality Assurance coordinator for Lawter since June 2008. The employment agreement signed by Mr Greetham on 30 June 2008 set out in schedule D the job description for that role.

[22] Under the heading of Environmental Health and Safety Mr Greetham was required, among other things, to maintain a high level of knowledge and awareness of health and safety and environmental standards and regulations including the management of HSNO legislative requirements. Under the results section of the job description Mr Greetham was required to ensure compliance with company and statutory quality, health and safety and environmental requirements.

[23] At the time of his appointment Mr Greetham reported to the manufacturing function. This was changed in 2010 to recognise the need for his role to independently support the site operations. From 7 April 2010 Mr Greetham reported directly to Mr Yates, the Site Manager.

⁴ *Wellington etc Clerical Workers Union IUOW v Greenwich*

[24] By way of a letter dated 28 March 2014 Mr Greetham accepted a salary increase and a change to his job title to Environmental Health and Safety Manager. In his letter Mr Yates advises Mr Greetham that the change was reflective of the skills and experience Mr Greetham brought to the role and was befitting of the position Mr Greetham took as the leader of environmental health and safety on the site and as a member of the management team. In recognition of the change Mr Greetham's health care plan was upgraded and he qualified for Lawter's Incentive Compensation Plan.

[25] Mr Greetham says Lawter's did not take into consideration whether he had the educational background or knowledge of the New Zealand Health and Safety law or the aptitude to cope with the demands of the job.

[26] Mr Greetham did not raise any concerns about his ability to perform his role at any time during his employment. Mr Yates told me that up until 2016 his performance was satisfactory. It was only in 2016 and 2017 that concerns began to be raised about Mr Greetham's performance.

[27] Mr Greetham also says he was not provided with adequate training to ensure he could undertake his role. I have not accepted his evidence on this point. Lawter's has provided documentary evidence which shows Mr Greetham was provided with a number of opportunities to undertake training, especially in relation to the changes to health and safety legal requirements. Mr Greetham did not take up the opportunities provided to him for this training.

Performance issues

[28] During his employment with Lawter a number of performance concerns were addressed with Mr Greetham. In addition to one on one discussions about his performance, Lawter's carries out annual performance reviews of all of its employees. The review is completed within the first four months of a year covering the previous year. So in early 2017 the period reviewed was the 2016 year.

[29] Mr Greetham's performance for 2016 was rated as "partially achieved". This means Mr Greetham achieved behaviours in some competencies and met some expectations but improvement was required before performance could be considered to have achieved expectations. Mr Greetham was disappointed in this assessment. He considered the assessment to be negative and not representative of his actual performance.

[30] His performance for 2017 was rated as “unsatisfactory”. Mr Greetham’s response to the concerns raised about his performance was that he did not have time to complete all of his tasks and had too much work. In order to better ascertain where the problems were, Lawter’s undertook a number of time-in-motion studies against Mr Greetham’s role. Lawter concluded the time-in-motion study did not support Mr Greetham’s explanation that he did not have time to complete all of his tasks.

[31] Throughout 2017 Mr Yates met regularly with Mr Greetham where they discussed specific actions required by Mr Greetham to meet performance expectations. These meetings were not formal performance improvement meetings however, notes taken during these meetings show that critical action points for tasks were discussed and actions agreed.

12 January 2018 letter

[32] On 12 January 2018 Mr Yates and Ms Riches met with Mr Greetham where he was given a letter outlining a number of concerns about his performance. After going through the letter Mr Yates advised Mr Greetham that at a meeting to be held the following week they would agree on a performance improvement plan which would be based on the main areas of his performance and would be reviewed weekly.

[33] In the meantime Mr Yates confirmed a discussion he had held with Mr Greetham in December 2017 that he was engaging two professional environmental health and safety contractors to guide Lawter’s through a statutorily required registration process as a major hazard facility (MHF).

[34] The letter referenced matters that had arisen during 2017 but were ongoing concerns for Lawter’s and were expressed under five main headings:

- a) Lack of professional understanding, job knowledge and awareness of the role;
- b) Attention to detail;
- c) Communication and contribution;

- d) Leadership of site environmental Health and Safety;
- e) Lack of engagement in responsibilities
- f) Position expectations

[35] Under each heading Mr Yates set out specific examples of his concerns. The majority of the concerns raised in the letter were points discussed between Mr Yates and Mr Greetham during their one on one meetings throughout 2017.

Lack of understanding and job knowledge

[36] There were two key concerns about Mr Greetham's understanding and knowledge of Lawter's statutory and regulatory duties relating to the MHF registration process and the new Hazardous Substances Regulations.

Major Hazard Facility

[37] In 2016 the Health and Safety in Employment Act 1992 was replaced by the Health and Safety at Work Act 2015 (HSWA). In preparation for meeting its commitments under the HSWA Lawter's was required to be registered with Worksafe as a major hazard facility.

[38] Mr Greetham completed an online questionnaire in 2013. He took no further action to ensure Lawter's workplace was registered with Worksafe as a MHF. Registration was to have been completed in 2016. Mr Yates made enquiries with Mr Greetham in July 2017 but received no response.

[39] On 17 July 2017 Mr Greetham completed the required MHF paperwork. He concluded Lawter's was a high-tier MHF. Mr Yates was not convinced Mr Greetham had calculated this correctly and made enquiries from the engineering and production teams to ensure everything that needed to be taken into account in the calculation had been taken into account.

[40] Mr Yates calculated Lawter as being a low-tier MHF and this rating was later confirmed by Worksafe. The MHF notification was finally submitted to Worksafe on 13 September 2017. On 12 October Worksafe notified Lawter's that it was in breach of the HSWA by registering an MHF one year later than required by law.

[41] As required by Worksafe, Mr Yates drafted a letter explaining why the breach had occurred and passed the letter to Mr Greetham for his input. Lawter's was not prosecuted but the failure of Mr Greetham to meet the legal requirements of the HSWA put Lawter's at risk of significant fines.

[42] In his 12 January letter Mr Yates raised with Mr Greetham a concern that he had not communicated with him about whether any systems had been implemented to manage the failure, strengthen his understanding or ensure his knowledge was kept up to date.

Hazardous Substances Regulations

[43] Mr Yates was concerned to learn that new regulations had been implemented on 1 December 2017 with no advice from Mr Greetham about whether Lawter's was compliant with the new regulations.

[44] In his 12 January letter Mr Yates raised concerns that Mr Greetham was demonstrating a lack of regulatory support and provided two examples. Firstly, that he was unhelpful and slow to respond with MSDS issues when raised through the Supply Chain. Secondly, when questions arose about posting dangerous goods samples he had failed to provide any guidance and at least one employee was still awaiting a response to a query some months later.

Attention to detail

[45] Mr Yates was concerned about the accuracy of Mr Greetham's work. He provided Mr Greetham with the following three examples:

- a) Evacuations;
- b) Systems Maintenance;
- c) Environmental health and safety training.

Evacuations

[46] Mr Yates believed the evacuations had been poorly managed throughout 2017. Given the environment in which Lawter's operated Mr Yates was of the view that the evacuation processes needed to be strictly controlled.

[47] A report compiled by Mr Greetham in relation to November and December 2017 evacuation drills contained errors in the documented times and some of the corrective actions identified by Mr Greetham.

[48] During a one on one meeting with Mr Greetham in November, Mr Yates requested that an alternative car park be used for the assembly point. He had asked Mr Greetham in an email to provide him with information about what needed to be done to make this happen. By 12 January Mr Greetham had not provided any information.

[49] Mr Yates was critical of Mr Greetham for the way he had organised a spill response in December. He had not planned the drill with other key members of the management team and as a result employees did not respond to the drill. In his letter Mr Yates states he had addressed several items for follow up but had not heard back from Mr Greetham.

[50] Mr Yates was also critical of Mr Greetham in respect of the time taken to implement a tablet for printing the evacuation muster report to allow the person responsible for the report to evacuate early instead of being the last person to leave the area. After two years the tablet was trialled once but despite having two further evacuation drills after the first trial, it was not used again.

Systems Maintenance

Every Lawter site is required to comply with a 5S compliance regime. The 5S's stand for Sort, Simplify, Shine, Standardise and Sustain. Each area of the site is subject to an audit against each of the 5S's. Scores of between 0 and 5 are recorded against each of the 5S's. In 2018 the goal was to achieve an average score on the site of 3.10.

[51] Mr Yates was critical of Mr Greetham with respect to:

- a) Not updating the 5S information boards and providing inaccurate 5S audit reports;

- b) Sharing incorrect and outdated information during an ISO audit;
- c) Contacting the wrong insurance company during recent maintenance on the fire protection system when he had previously contacted the correct insurance company.

Environmental health and safety training

[52] Mr Yates was critical of Mr Greetham with respect to:

- a) The Permit to Work (PTW) training, the lack of records and Mr Greetham's competency to assess and observe trainees in order to finalise their training of PTW;⁵
- b) Failure to provide confined space guidance generated by a 5S audit and the signing off of permits for confined space work when no rescue plans had been tested prior to work commencing;
- c) Lack of documented training plans for confined space, hot work, excavation or general health and safety practices.

Communication and contribution

[53] Mr Yates was critical of Mr Greetham regarding:

- a) A failure by Mr Greetham to lead the provision of health and safety information. Managers were distributing notifications and updates with no input from Mr Greetham;
- b) Failure to respond to emails and other communications especially at critical times;
- c) Lack of contribution in particular in environmental health and safety, MHF and 5S meetings. Mr Yates also raised concerns that had been raised with him about the accuracy of some information provided by Mr Greetham;

⁵ A permit to work system is a formal system used to control certain types of work that are potentially hazardous and forms part of a safe system of work.

- d) Slowness in completing tasks and a vagueness by Mr Greetham about his current tasks at weekly senior leadership team meetings;
- e) Lawter's provided an incorrect Hazardous Substance Location Test Certificate to Worksafe. Mr Greetham had received the new certificate but had failed to remove the old Certificate or advise anyone of the receipt of the corrected certificate;

[54] Mr Yates also referred to historical issues regarding monthly SO2 reporting to the Bay of Plenty Regional Council.

Leadership of site environmental health and safety

[55] Mr Yates was critical of Mr Greetham's lack of contribution to 5S meetings. He was concerned that others were taking responsibility for committee meetings and driving improvements when this was part of Mr Greetham's role.

[56] Mr Yates was of the view that Mr Greetham was underprepared for environmental health and safety meetings. Mr Greetham had taken to reading out information other participants could have read in advance of the meetings. He was concerned about the number of aged actions on the action log that had no apparent follow up from Mr Greetham to close out the actions. He was also concerned about the lack of detailed minutes from the meetings which had resulted in discussions not being recorded due to them not requiring an action for follow up and some actions that were discussed were not recorded and did not get resolved.

Lack of motivation to engage in the responsibilities of the role

[57] Mr Yates raised concerns about others having to take on roles in relation to managing contracts relating to Fire Safety Management and PPE. Mr Yates also raised concerns that he himself had had to take over the air consent application process as he did not have confidence in Mr Greetham's ability to coordinate or manage the process.

[58] Mr Yates was concerned that many audits that needed to be undertaken by Mr Greetham were completed only after he followed up or prompted Mr Greetham into action. In particular he was concerned that 5S audits, PTW and forklift assessments were not being completed on a regular basis.

[59] He raised concerns about a lack of a robust system for job risk assessments which required a thorough analysis of hazards for each task and actions to prevent injury. He was also concerned that work station assessments took too much time to resolve.

[60] Mr Yates advised Mr Greetham of his view that emergency response planning was the weakest area in the management systems. He advised Mr Greetham that the site as a whole should be aware of the emergency response planning procedures for all reasonably foreseeable emergencies and there should be regular education about emergency response planning on site.

[61] Finally, he was concerned that the costs associated with the Protégé system (a security management system) were unknown and unmanaged.

19 January and 12 February meetings

[62] On 18 January Mr Yates suggested to Mr Greetham that they meet the following day to discuss the contents of the letter. Mr Greetham agreed to meet and at that meeting on 19 January the contents of the letter were discussed. Mr Greetham explained that he needed more time to do things, and that he had a number of ideas for the role which he was unable to articulate at that time.

[63] A further meeting was scheduled to allow time for Mr Greetham to set out his ideas for discussion. Mr Greetham was encouraged to include any additional resources he thought would be necessary to achieve the implementation of his ideas.

[64] The next meeting took place on 12 February. At that meeting Mr Greetham, rather than focussing on putting forward his ideas, asserted that there was too much work for him to complete. When asked to identify what was causing the lack of time Mr Greetham was unable to identify the areas causing problems.

[65] Mr Yates asked Mr Greetham to source solutions and define the issues. He asked him not to get bogged down in the small stuff but talk to him and be more vocal with the management team. Mr Yates proposed they proceed with the performance improvement plan and asked Mr Greetham if he agreed that it be drafted and reviewed together. Mr Greetham agreed with this proposal.

Performance Management Plan

[66] In line with his suggestion on 12 February, in a letter dated 28 March Mr Yates proposed placing Mr Greetham on a performance management plan for a period of eight weeks. It was proposed that a meeting be held to discuss expectations regarding Mr Greetham's performance and the issues. Mr Yates would be responsible for monitoring Mr Greetham's actions and performance and this would be done through weekly meetings to discuss and assess progress.

[67] A draft performance management plan was attached as part of the written proposal. It outlined Lawter's expectations in relation to Mr Greetham's performance and proposed measures in terms of expected results against Mr Greetham's areas of responsibility.

[68] The proposal set out possible consequences if insufficient improvement was achieved during the eight week period. The consequences included decisions about:

- a) whether to review the period and requirements of the performance management plan;
- b) any other suitable/appropriate action including escalation of the performance management plan requirements;
- c) issue a recommendation or a written warning including a final warning; or
- d) propose termination of Mr Greetham's employment.

April 2018

[69] Mr Greetham commenced a period of sick leave on 3 April. He returned to work on 5 April for a short time but appeared to suffer from an anxiety attack and was taken home after being at work for about 90 minutes.

[70] Mr Greetham did not return to work but did attend a meeting on 9 April at the work site. Mr Greetham was represented at this meeting. The Authority has been provided with a recording and transcript of the 9 April meeting. At times during the meeting it seems Mr Greetham was willing to enter into discussions about how to progress matters.

[71] The meeting ended after it was agreed that Mr Greetham would undertake some counselling through Lawter's EAP scheme and that Ms Kate Riches, HR Manager, would make a company referral and the Counsellor would contact Mr Greetham directly.

[72] Nothing further was heard from Mr Greetham until he resigned from his employment on 19 April.

Resignation

[73] In his resignation letter Mr Greetham sets out the reasons for his resignation including that the 12 January letter came as a shock to him because it detailed a considerable number of performance concerns that had never been addressed previously. He states he was overwhelmed with the array of performance concerns delivered at once.

[74] Mr Greetham describes suffering from workplace stress as a result of the 12 January letter and that this was exacerbated when he received the 28 March letter. Mr Greetham advised Lawter he had concerns about the performance management plan and its proximity to the annual shut-down. He told Lawter's he felt unable to cope with the demands required of him during the shut-down and the performance management plan.

[75] Mr Greetham explains that he has reached the stage where he can no longer cope with his job. He advised Lawter's that he was currently on medication which was causing drowsiness and concentration issues. Due to his medical condition Mr Greetham asked that the requirement for him to work his notice period be waived.

[76] On 20 April Mr Yates acknowledged Mr Greetham's resignation and asked him to reconsider his decision. Mr Yates expressed his concern that Mr Greetham had reached his decision with only minimal discussion about the proposed performance management plan.

[77] Because Mr Greetham did not respond to Mr Yate's email, Ms Riches emailed Mr Greetham on 23 April and asked if he had had the opportunity to reconsider his resignation. Ms Riches expressed a desire to resolve the performance issues if possible.

[78] In response Mr Greetham reiterated his previous advice that he was struggling to come to terms with the volume of criticism's contained in the 12 January and 28 March letters. He advised Ms Riches he felt he had no choice but to resign and confirmed his resignation. He gave Lawter's permission to communicate his resignation to the site and resident contractors.

Was there a course of conduct designed to coerce resignation?

[79] In *Wellington Clerical Workers IUOW v Greenwich* the Court observed in describing this type of constructive dismissal:⁶

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 border line 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.

[80] Mr Greetham says Lawter's embarked on a course of conduct starting with the 12 January letter including:

- a) Failure to undertake a fair inquiry into the allegation that he had been under-performing;
- b) Failure to raise issues relating to his performance in a timely manner;
- c) Storing up of a significant array of alleged performance issues and presenting them in one single blow in a letter dated 12 January;
- d) Failure to address in a meaningful way perceived shortcomings in his performance;
- e) Imposing a performance management regime which resulted in workplace stress.

Failure to undertake a fair inquiry into the allegation that he had been under-performing

[81] Lawter was not instigating disciplinary procedures with respect to Mr Greetham's performance. It was instead embarking on a process to rectify identified

⁶ (1983) ERNZ Sel Casual 95 at 104.

gaps in Mr Greetham's performance. There were no "allegations" rather examples of concerns in specific areas that in Mr Yates' view, required attention and improvement.

[82] The 12 January letter was the culmination of the failure of one to one meetings held during 2017 to rectify performance concerns raised by Mr Yates with Mr Greetham. During the one on one discussions ongoing actions were identified and agreed with Mr Greetham but the results sought by Lawter were not being achieved.

[83] It is well established that an employer is required to identify performance issues with an employee, advise that employee of the need for improvement, and then provide a sufficient period of time to address the issues that have been brought to his or her attention.⁷ This is the process Lawter's intended to embark upon when it wrote its letter to Mr Greetham on 12 January.

Failure to raise issues relating to his performance in a timely manner and storing up of a significant array of alleged performance issues and presenting them in one single blow in a letter dated 12 January

[84] Mr Greetham says Lawter's had an obligation to raise any performance issues in a timely manner. He claims that until he received the 12 January letter he had no idea Lawter's had any concerns about his performance.

[85] Lawter's had identified a decline in Mr Greetham's performance since 2016. His performance reviews for both 2016 and 2017 resulted in a rating that put Mr Greetham on notice that Lawter's was concerned about his performance.

[86] The 12 January letter sets out examples of the areas of Mr Greetham's performance in which Lawter's wished to see improvement. I am satisfied the issues were ones that had been discussed in the one on one meetings throughout 2017 and were intended as examples only.

[87] Lawter did raise its issues in a timely manner and attempted to deal with them in an informal way. The 12 January letter resulted from the failure of the informal

⁷ *Candyland Ltd v Jervois* [2013] NZEmpC 206 at [38]; endorsing *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659 at 681.

processes during 2017 to achieve the expected improvements in Mr Greetham's performance.

Failure to address in a meaningful way perceived shortcomings in his performance

[88] Lawter's had attempted to address Mr Greetham's shortcomings in his performance during 2017 in informal one on one meetings between Mr Greetham and Mr Yates. When that process did not result in expected improvements Lawter's indicated its intention to embark on a formal process of performance management.

[89] On 19 January and 12 February Lawter's met with Mr Greetham in an attempt to come up with a plan to address the shortcomings that may circumvent the need for a more formal plan. Mr Greetham had told Mr Yates he had a number of ideas and would like the opportunity to discuss them. That opportunity was provided to him on 12 February. That meeting did not result in a defined plan being discussed or agreed. It was during this meeting that Mr Yates proposed returning to the performance management plan. Mr Greetham appeared to accept this as the way forward.

[90] The 28 March letter and draft performance improvement plan arose from the understanding that on 12 February Mr Greetham had agreed to participate in a performance management plan. Before that draft plan could be discussed Mr Greetham resigned from his employment.

Imposing a performance management regime which resulted in workplace stress

[91] Being subject to a formal performance management regime is inherently stressful. At the meeting on 9 April Mr Greetham advised Lawter's he was not well enough to provide feedback on the proposed performance improvement plan which was in draft form at that time. Lawter's accepted this advice and Mr Greetham agreed to provide feedback in written form and to attend a further meeting to discuss his feedback.

[92] Despite his agreement no written feedback was provided and on 18 April Mr Greetham resigned.

Conclusion

[93] After receiving his resignation Mr Greetham was invited twice to reconsider his decision to resign and work with Lawter's in an attempt to improve his

performance. After the second invitation on 23 April, Mr Greetham emailed Lawter's confirming his resignation.

[94] An examination of the facts which I have established through my investigation does not support a conclusion that the conduct of Lawter's crossed the line between inconsiderate conduct causing some unhappiness and resentment to dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship. Neither has Mr Greetham's resignation been linked to any fundamental breach of duty that made Mr Greetham's resignation reasonably foreseeable.

[95] Accordingly, Mr Greetham's application for a determination that he was unjustifiably dismissed is declined.

Costs

[96] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Lawter's shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Greetham shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[97] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority