

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 105  
5370074

BETWEEN                      JARROD HOOK  
   Applicant  
  
A N D                              STREAM GROUP (NZ) PTY  
   LIMITED  
   Respondent

Member of Authority:      Anna Fitzgibbon  
  
Representatives:              David Flaws, Advocate for Applicant  
   Richard Harrison, Counsel for Respondent  
  
Investigation Meeting:      18 March 2013 at Auckland  
  
Date of Determination:      27 March 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Mr Hook’s employment was not affected to his disadvantage by the actions of Stream Group (NZ) Pty Limited.**
- B. Mr Hook was not constructively dismissed.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] Stream Group (NZ) Pty Limited (“Stream Group”) is involved in insurance management processes in New Zealand and Australia. Mr Jarrod Hook was employed by Steam Group (formerly Freemans Group NZ Limited) (“Freemans”) as an IT administrator and during 2010 and 2011 did a great deal of work with Stream Group’s clients in Christchurch following the earthquakes. The environment was a particularly challenging one in which to be dealing with insurance management processes. Mr Hook’s role was very important.

[2] Mr Hook worked hard. However, when he did not receive a salary increase in November 2010 when his performance was reviewed, he became disenchanted. Mr Hook began looking for another job.

[3] In February 2011, Mr Hook received a warning over an incident which had occurred in November 2010. In July 2011 following another incident, Mr Hook was required to participate in a disciplinary process which resulted in a final written warning. After receiving the final written warning Mr Hook resigned on 19 August.

[4] Mr Hook says he was forced by Stream Group to resign his position and that his resignation amounted to a constructive dismissal which was unjustified.

[5] Mr Hook also says the way in which he was treated during the disciplinary process leading up to his resignation and on the last day of his employment amounted to unjustifiable actions by Stream Group to his disadvantage. Mr Hook seeks remedies in respect of his alleged unjustified dismissal and in respect of his claims of unjustified disadvantage.

[6] Stream Group says the disciplinary process was carried out fairly, resulting in a final written warning being issued to Mr Hook. Stream Group says Mr Hook made a choice to resign after receiving the warning, he was not forced to do so by any of its actions and therefore no remedies are payable by it.

## **Issues**

[7] The Authority must determine the following issues:

- a. Was Mr Hook unjustifiably disadvantaged in his employment?
- b. Was Mr Hook constructively dismissed?

### **First issue**

#### ***Was Mr Hook unjustifiably disadvantaged in his employment?***

[8] Mr Hook claims the way in which he was treated at the disciplinary meeting on 3 August by Mr Boehmer amounted to an unjustifiable action to his disadvantage. Mr Hook also claims Stream Group's request that he not work his period of notice out, constituted an unjustifiable action to his disadvantage.

[9] The main facts in this matter are not in dispute. Mr Hook was employed by Stream Group's predecessor, Freemans in March 2010 as an IT Administrator. When Stream Group took over Freemans, Mr Hook was employed pursuant to an Individual Employment Agreement dated 8 November 2010.

[10] In November 2010, Mr Hook began looking for another job following a performance review in which he did not receive a pay increase he felt he deserved. In one email from Mr Hook to a colleague dated 19 November 2010 and obtained by Stream Group following Mr Hook's resignation Mr Hook says:

*... I really hope I get offered a new job!! That would be a nice 'fuck you' to them.*

[11] In another email later that day to the same colleague Mr Hook says "*yep Iz disgruntled*".

[12] Mr Hook had interviews for at least one job in November 2010 but the position did not eventuate and Mr Hook stayed with Stream Group.

[13] Mr Hook received a written warning on 8 February 2011 from the HR Manager for NZ and Australia, Mr Tim Reichel. The warning related to an incident which had occurred in November 2010 and stated:

*Further to our meeting on 20/01/2011, this letter serves to formalise the discussions held and clearly outline the concerns regarding you recording a meeting with Jaci Button and Julie Watts on your mobile phone without notifying or warning the attending parties in advance and seeking their permission, being absent from the office without notifying Julie Watts of your whereabouts, not commencing regularly in the office by 8.30am, inappropriate use of the company email system, and the particular issues brought to your attention and the action needed to rectify these issues...*

*...  
If you are going to be away from the office, you must advise Julie Watts of your whereabouts and expected return time. If you will be late returning, you must advise Julie Watts...Texting or emailing Julie Watts is not appropriate in such circumstances.*

[14] The letter stated the warning was to remain in place for twelve months "*... and will be used as reference if further issues arise with your work, attendance or behaviour*". Mr Hook signed the letter on the same day acknowledging receipt.

[15] On 26 July 2011, Ms Watts to whom Mr Hook reported on a daily basis attempted to contact Mr Hook about an urgent IT matter but was unable to do so. Ms Watts telephoned Mr Hook on his mobile phone but was unable to contact him

and then emailed Mr Hook asking him to make contact urgently. Sometime after receiving Ms Watts' email, Mr Hook telephoned Ms Watts telling her that he had been to the pharmacy getting pain killers for a headache.

[16] Upon Mr Hook's return to the office, Ms Watts asked him to meet with her. Ms Watts wanted to discuss why she had not been able to contact Mr Hook over an urgent IT matter. Ms Watts noticed Mr Hook was wearing a tie which was unusual and asked why he would be wearing a tie to the pharmacy. Mr Hook told Ms Watts that he had been to a job interview and asked Ms Watts not to tell Mr Robert Boehmer, Stream Group's National Operations Manager, based in Australia, and the person to whom Mr Hook reported, about this.

[17] Subsequent to Mr Hook's resignation, Stream Group discovered that Mr Hook had posted a message on his Facebook page on the day of the incident at 3.27pm as follows:

*Welp, work found out I am looking for another job today, and I may get in trouble for it. Thoughts?*

[18] Ms Watts felt obliged to and did inform Mr Boehmer about the events that had occurred on 26 July and that Mr Hook had attended a job interview. On 27 July, Mr Hook and Mr Boehmer discussed the fact Mr Hook had not been contactable when required and that he was looking for another job. Mr Hook says Mr Boehmer gave him the option of giving an extended notice period or just carrying on with the disciplinary process. In an email dated 28 July, Mr Hook told Mr Boehmer that he wanted to keep things as they were but would keep him informed if he "*feels positive*" about a job interview. Mr Boehmer requested any job interviews be in Mr Hook's own time.

[19] On 1 August Mr Boehmer emailed Mr Hook requesting a disciplinary meeting the following day, 2 August 2011 along with Ms Watts and Mr Reichel. The email stated:

*...The meeting is in regards to you not letting Julie or I know your whereabouts prior to your leaving the office premises or letting us know your expected return time. This issue has been previously raised with you in a meeting with Julie and Tim on 20<sup>th</sup> January 2011, where following that meeting an official warning letter was issued to you dated 8<sup>th</sup> February 2011. The warning letter mentioned that further breaches within twelve months may result in further disciplinary*

*action including a further warning, counselling, demotion or dismissal. While no decision has yet been made on any further disciplinary action, we advise you that further action is possible up to and including dismissal...*

[20] Mr Hook says when he received the email from Mr Boehmer he felt Stream Group was “determined to “get rid” of him. Mr Hook may have made that assumption but it was erroneous in my view. Mr Boehmer was aware of the 26 July incident and as Mr Hook’s manager had decided to investigate the matter further. Mr Boehmer was also aware that Mr Hook had been to a job interview so formed the view, reasonably I find, that Mr Hook wanted to leave Stream Group. Mr Boehmer set out the options for Mr Hook. If Mr Hook was wanting to leave, he could give Stream Group an extended period of notice or he could stay but he would be required to participate in an investigation into his performance on 26 July. Mr Hook decided to remain with Stream Group and look for other jobs in his own time. Mr Boehmer continued with the process started by Ms Watts of investigating Mr Hook’s conduct on 26 July.

[21] Upon receipt of Mr Boehmer’s email on 1 August requesting a meeting, Mr Hook contacted the Department of Labour and sent an email on 2 August to Mr Boehmer, copying in Mr Reichel and Ms Watts. The email stated:

*...The period of notice between this email and meeting is not enough for myself to get the resources I need. A less than 24 hour period is unreasonable. As per my contract, under Section 24.1 – Before entering into formal disciplinary process, the employee will be given a reasonable opportunity to improve.*

*I am aware of the warning I received back on 8 February 2011 – however I have been in touch with the Department of Labour as well as Privacy Commissioner and I intend to be reopening and discussing this warning, which I believe was given to myself without proper consultation or abidance[sic] to the law. My personal rights may have been violated but I am not to discuss this any more until I have all my facts. ... Your thoughts welcome, but I will not be attending today’s meeting. Please disregard my email yesterday that was accepting of this meeting.*

*Regards,  
Jarrod Hook*

[22] An email exchange followed between Mr Boehmer and Mr Hook and it was agreed a meeting would take place on 3 August.

[23] Mr Hook attended the meeting on 3 August with his representative, Mr Derek Llewelyn, Mr Hook’s partner’s father. Mr Reichel and Mr Boehmer linked into the

meeting from Australia, by telephone and Ms Watts was present and took notes. The notes of the meeting on 3 August record that Mr Llewelyn stated:

*Jarrod is reasonably satisfied with the summary of events with some minor differences. Regarding the incident on 26 July when Mr Hook had not been contactable and had attended a job interview.*

[24] Mr Hook and Mr Llewelyn largely agree with the facts regarding the incident on 26 July. However, both Mr Hook and Mr Llewelyn were very concerned at Mr Boehmer's behaviour at the meeting on 3 August to discuss the incident. Mr Hook described Mr Boehmer's behaviour as trying to bully and browbeat and constituted an unjustifiable action to his disadvantage. I do not accept this to be the case.

[25] Ms Watts and Mr Reichel were both of the view that while the meeting on 3 August was tense and at times heated, it was nevertheless carried out in a professional manner. I prefer the evidence of Mr Reichel and Ms Watts, both of whom presented as credible witnesses. Mr Hook, on the other hand, was not a credible witness, his evidence was inconsistent and contradictory. It is my finding that the meeting became heated which is not unusual in such circumstances, but Mr Boehmer's conduct did not amount to an unjustifiable action which affected Mr Hook's employment to his disadvantage.

[26] Following the meeting on 3 August, Mr Boehmer sent an email to Mr Hook which stated:

*As outlined at the meeting, we are now going away to consider all of the facts before making any decision. We are scheduling a meeting for 4.30pm NZ time tomorrow 4/8/2011 where we will let you know of a decision we make and any disciplinary action that we decide is appropriate will be outlined to you at that meeting. You are welcome to bring a support person if you wish. ... If you have any questions please do not hesitate to contact me, or alternatively you can also contact our HR manager Tim Reichel.*

[27] Mr Hook then emailed Mr Reichel seeking clarification about Stream Group's internet and email policy and requesting copies of his employment agreement and Stream Group's IT usage policy. Mr Reichel provided the required documentation and information.

[28] Mr Hook was away sick on 4 and 5 August and the meeting proposed for 4 August did not take place. On 9 August 2011, Mr Boehmer emailed Mr Hook

requesting a meeting on Thursday, 11 August. Mr Hook replied by email on 10 August as follows:

*Hi team, sorry about the late update, I've been trying to contact my support person, who is out of Auckland and cannot attend this meeting because of his travel. Are we okay to do this next week when he will be back in Auckland? Sorry again. I only got hold of him now. Thanks!*

[29] Mr Llewelyn says he did not feel comfortable about attending further meetings on behalf of Mr Hook, he felt Mr Hook should obtain professional advice. Neither Mr Hook nor Mr Llewelyn informed Stream Group of this. Further, Mr Llewelyn was very busy with a full time job and was unable to commit to a meeting on 11 August. Mr Boehmer did not wish to reschedule the meeting again and emailed Mr Hook confirming the meeting would take place on 11 August 2011 at 4pm. Mr Hook did not respond and did not attend the meeting. Mr Hook says he did not attend the meeting because he was too afraid to go without Mr Llewelyn and felt unsafe because of Mr Boehmer's behaviour at the meeting on 3 August. At 4.15pm on 11 August, Ms Watts telephoned Mr Hook asking whether he was coming to the meeting. Ms Watts' notes, taken at the time state:

*Jarrod advised that he wasn't coming and he had work to do. Stuart's stuff to do, so if you guys just let me know what is happening.*

[30] This note does not record that Mr Hook felt unsafe going to the meeting. Nor does the note record that Mr Hook's representative, Mr Llewelyn was too busy to commit to the meeting. This is because Mr Hook did not give either of those as reasons to Ms Watts for not coming to the meeting.

[31] Mr Boehmer, Mr Reichel and Ms Watts discussed what may be an appropriate penalty and determined that a final written warning was appropriate. A proposed draft written warning was prepared and sent to Mr Hook by email on 11 August. The covering email from Mr Boehmer to Mr Hook stated:

*... we are proposing a final warning letter which is attached to this email. It is unsigned at this point and is not yet official. We would like to give you time to consider the proposed letter and give you the opportunity to discuss with a support person or representative. Please respond with any feedback in writing by 5.00pm on Monday 15<sup>th</sup> August 2011. If you have any questions, please contact me or alternatively you can contact our HR Manager, Tim Reichel.*

[32] Mr Hook did not provide any feedback as requested. Mr Hook says he did not believe it would do any good to respond given the way in which Mr Boehmer had acted at the meeting on 3 August. For the reasons stated earlier, I do not accept Mr Hook's evidence.

[33] On 16 August a final written warning was issued. The final written warning included the following statement:

*... Such action may include dismissal. This is not the outcome we are looking for and we will continue to do everything we can to assist you in reaching the required levels. ...*

[34] Mr Hook decided to resign. Subsequent to his resignation Stream Group became aware of the following comment posted by Mr Hook on his Facebook page on 18 August:

*Going to quit my job tomorrow, while in annual leave. Probably should have timed that better.*

[35] Mr Hook's comment indicates he had decided on 18 August to resign. Mr Hook did resign the following day.

[36] Under Mr Hook's above comment on Facebook it says "7 people like this". One of Mr Hook's Facebook friends says: "is your boss on Facebook?" to which Mr Hook comments:

*Na. If he was, I'd tell him he is a dickhead.*

[37] Mr Hook's comment in my view demonstrates a contemptuous attitude by Mr Hook towards his employer, Stream Group. In my view, Mr Hook's attitude had been contemptuous of Stream Group for quite a period of time as is evidenced by the emails to his colleague in November 2010 referred to earlier in this determination.

[38] Mr Hook resigned on 19 August stating in his letter of resignation:

*...I intend to work my two weeks' notice out, with my last day being the 2<sup>nd</sup> of September, however, due to the nature of my work, I may extend this period out, at my discretion, to help the transition...*

[39] Mr Hook continued to work until 24 August. However, Ms Watts says he was difficult to manage and his negative attitude was affecting other staff. Mr Reichel says Mr Hook was disruptive and unproductive. Mr Boehmer concluded that it would be

best for Mr Hook to be paid out his notice rather than work it out. A meeting with Mr Hook was arranged. Mr Boehmer and Mr Reichel both linked in to the meeting by telephone from Australia. Ms Watts attended and took notes. Mr Hook was unhappy he was unable to work out his notice and says this constituted an unjustifiable disadvantage. I do not accept this to be the case. Under clause 26.2 of his agreement, Stream Group is entitled to “..pay wages in lieu of the Employee having to work out the notice period.” Stream Group as was its right, elected under this clause of the agreement to pay Mr Hook out his notice rather than have him work and cause disruption.

[40] I find that Mr Hook’s employment was not affected to his disadvantage by any unjustifiable actions by Stream Group.

## **Second issue**

### ***Was Mr Hook constructively dismissed?***

[41] Mr Hook claims he was constructively dismissed and refers to the pressure that he claims was put on him at the meeting on 3 August as the reason for his resignation.

[42] The Court of Appeal considered the correct approach to constructive dismissal cases<sup>1</sup> as follows:

*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 reasonable 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.*

[43] I do not accept that there was such a breach of duty by Stream Group as to make Mr Hook’s resignation reasonably foreseeable. Mr Hook had been unhappy for some time and had been looking for other jobs since November 2010. This was evident from the emails he sent to a colleague at that time.

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<sup>1</sup> *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 at p.172

[44] Mr Hook received a written warning on 8 February and accepts it was a reasonable warning. The warning was clear about what was expected of Mr Hook in the future.

[45] Following the incident on 26 July, Mr Hook was required to participate in a disciplinary process. I do not accept that requiring Mr Hook to participate in a disciplinary process in these circumstances was action by Stream Group which amounted to a breach of its duty to Mr Hook. To the contrary, as a fair and reasonable employer, Stream Group was obliged to notify Mr Hook of its concerns, provide an opportunity for him to respond and inform him that it was considering disciplinary action in the event it was unsatisfied with his response. Similarly, Stream Group's enquiries of Mr Hook upon hearing he was looking elsewhere for employment were not unreasonable and do not constitute a breach of duty by it to Mr Hook.

[46] It is my finding that Mr Hook decided to resign after receiving the final written warning following the incident on 26 July. Before issuing the final warning, Stream Group carried out a fair and proper process which Mr Hook chose not to participate further in.

[47] In his notice of resignation on 19 August, Mr Hook suggested he could work longer than the 2 week notice. This is not the conduct of a person who has been forced to resign because of a serious breach of duty by his employer. For all of the above reasons, I find Mr Hook was not constructively dismissed by Stream Group.

### **Costs**

[48] Costs are reserved. I invite the parties to agree costs between themselves. If they are unable to do so the respondent has 14 days from the date of this determination in which to file and serve a memorandum on the matter. The applicant has a further 14 days in which to file and serve a reply.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**