

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 384
3032037

BETWEEN PRESTON JOHN HOPE
 Applicant

A N D HOSE AND ENGINEERING
 SUPPLIES (TAURANGA)
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: W Reid, Advocate for Applicant
 W McKenzie, Director of Respondent

Investigation Meeting: 28 November 2018 at Tauranga

Submissions Received: 28 November 2018 from both parties

Record of Oral
Determination: 3 December 2018

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Preston Hope was unjustifiably disadvantaged by two warnings issued by Hose and Engineering Supplies (Tauranga) Ltd.**
- B. Hose and Engineering Supplies (Tauranga) Ltd is ordered to pay \$3,500 to Preston Hope within 28 days of the date of this written determination.**
- C. Hose and Engineering Supplies (Tauranga) Ltd is also ordered to pay Preston Hope \$2,250 as a contribution towards his representative's costs within 28 days of the date of this written determination.**

Employment Relationship Problem

[1] Preston John Hope resigned on 16 June 2018 alleging that he had been unfairly dismissed from his employment by the treatment he had received from his superiors.

[2] Hose and Engineering Supplies (Tauranga) Limited (HES) denies that it acted inappropriately. It alleges that he resigned because he could not perform in his job.

Relevant Facts

[3] HES manufactures hoses, pipes and engineering supplies for sale. It trades as Pipeline Hose and Engineering Supplies from Tauranga. Preston Hope was employed as the Customer Service Engineer on or about 11 April 2017. His job was primarily to undertake sales in accordance with the job description he had been provided.

Conflict within the workplace

[4] On or about 6 September 2017, Warwick McKenzie, the Director and owner of the respondent, wrote to Mr Hope regarding a “trial period” as a Branch Manager. This was in view of the intended departure of the current manager. However, by October 2017, Mr McKenzie became aware of conflict between Mr Hope and a co-worker who I shall call “M”.

[5] Complaints were made by M to Mr McKenzie about Mr Hope’s behaviour. Mr McKenzie sought some response from Mr Hope and also met with both men. Mr McKenzie also asked another employee, whom I shall call “B”, for his opinion about these two men’s conduct.

[6] Mr McKenzie determined that they were both at fault. It was, as he told me today, a “he said, she said” situation.

[7] He issued a disciplinary warning on 20 October 2017 by emailing a letter to Mr Hope and to M. The letter warned them both that if the conflict continued it could lead to their employment being terminated. This was a first warning.

[8] Mr McKenzie accepts he did not advise Mr Hope that he was considering issuing a warning for this conduct prior to it being given.

[9] Mr Hope replied on 26 October 2017. He accepted some of Mr McKenzie's comments but not all. He set out his explanation for the conflict and sought the rescinding of the warning and alleged it was an unjustified action.

[10] Mr McKenzie did not send any formal reply. However, he told me at hearing that he would not have considered rescinding the warning because the conflict between M and Mr Hope continued. He would have rescinded the warning if that conflict had ceased. No further action was taken by either party regarding this warning.

Performance issues

[11] By November 2017, there were concerns about Mr Hope's sales performance. Another shareholder and owner of HES, Dennis May, had asked Mr Hope to complete call sheets setting out his sales activity such as telephone calls and cold calling on businesses. In his correspondence Mr May noted concerns about Mr Hope's sales performance and advised Mr Hope to seek assistance from himself or another worker with sales. During this period of time Mr May was a regular attendee at the HES Tauranga 1-2 times per month. He stayed there during the Christmas period until mid-January 2018. He was at the time Mr Hope's manager albeit based in Auckland.

[12] At some stage in early 2018 Mr May decided to provide hands-on training for Mr Hope. He took Mr Hope to an industrial area in Tauranga where it appeared to Mr May that Mr Hope was unfamiliar with the clientele that the respondent serviced. He attempted at that stage to encourage him to visit various companies that they saw in the industrial area at that time.

Events leading to termination

[13] However, it became clear from the evidence that by June 2018 Mr Hope's sales performance had not improved. HES believed no sales were generated by the call sheets Mr Hope had completed. I do accept he may have undertaken some counter sales from work with clientele at the branch, however, both Mr McKenzie and Mr May were clear that there was no evidence of any other sales.

[14] There is also evidence of ongoing conflict between Mr Hope and M.

[15] By 9 June 2018 Mr McKenzie had determined to give Mr Hope a final warning related to the conflict with M, customer complaints about his attitude and declining sales. Again, Mr Hope was warned that if business did not improve, his employment would be terminated. This warning was phrased as a final warning.

[16] Mr Hope emailed Mr McKenzie on 16 June 2018 setting out his views regarding the conflict, customer complaints and sales performance. He believed his position was untenable and wished to resign as a result. That same day Mr McKenzie replied that he was saddened by Mr Hope's resignation, didn't accept his comments, but did accept his resignation.

[17] On 25 June 2018 Mr Hope raised a personal grievance of unjustified and constructive dismissal. The parties have been unable to resolve the matter and it is now before me for determination.

Issue

[18] There was a single issue for determination namely whether the applicant was constructively and unjustifiably dismissed.

Constructive dismissal?

[19] Mr Hope relies upon a Court of Appeal decision known as *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 as the basis for a constructive dismissal. That case set out three situations in which a constructive dismissal may occur:

- (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 by the employer leads a worker to resign.

[20] It is the last category that Mr Hope relies upon to show constructive dismissal.

[21] The Court has also noted in respect of that last category that a breach of contract relied upon by the employee must show that the employer had breached the implied duty not to act in a manner calculated to destroy or seriously damage the

employment relationship, that is acting in a manner that destroys the necessary trust and confidence between an employer and employee.

[22] The Authority must examine all the circumstances of the resignation. Even if there was a breach, the next question is “whether a substantial risk of resignation is reasonably foreseeable, having regard to the seriousness of the breach.”¹

[23] I was referred to the case of *Williams v Kimberly Fashions Limited*.² This case can be distinguished from the circumstances here because there was a serious breach of duty that occurred by the employer towards that applicant employee. There was an inference in that case that the applicant was unclean. That was the basis for the Court finding there was a destruction of trust and confidence. There is no similar evidence here.

[24] Here is a situation where the parties’ employment contract provides for a warning procedure in clause 13.2. The warning procedure states:

13.2 Warning procedures

In the event of less serious misconduct, you shall be entitled to one preliminary warning and one final warning in writing, prior to dismissal. If the matters or conduct complained of in the final warning are not improved or corrected you may be dismissed and you will receive one week’s notice of that dismissal or pay in lieu.

[25] Mr Hope was aware of this clause in his employment agreement. However, he did not accept that they followed any proper process prior to imposing any warnings. He also took issue with whether there was substantive justification.

[26] From the evidence I have heard, I am not persuaded that HES was acting with any ulterior motive in issuing the warnings. There was evidence that there was substantive justification for the concerns that are set out in the warnings.

[27] Mr Hope’s job description required he undertake sales and also do quotations in respect of sales. There was evidence from Mr May that he had made no sales, other than counter sales from walk-ins prior to dismissal; Mr Hope was not responding to his training and was overly aggressive and combative in taking direction from

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA).

² (2006) AC 72/06.

Mr May about his sales. I accept Mr May's evidence about the poor sales performance drawn from Mr Hope's sales call sheets. There was certainly sufficient evidence in front of this employer to be concerned about Mr Hope's job performance at that time.

[28] There was also sufficient evidence in my view for an employer to be concerned about Mr Hope's conflict within the workplace. Mr Hope accepted he had conflict with M. The first warning and Mr Hope's reply email dated 26 October 2017 explicitly refers to there being conflict with M.

[29] However the resignation letter refers to conflict with M in far greater detail than he accepts he had previously made his employer aware of, and also to conflict with both Mr McKenzie and Mr May who are the owners of HES. Mr May referred to Mr Hope's overly aggressive stance towards him in respect of sales training. There was sufficient evidence that a reasonable employer could have instituted a disciplinary process.

[30] There was little on the facts that indicated how his resignation was foreseeable. He was aware he could have been warned for his behaviour. He did protest the first warning but otherwise took no further steps about it until a second warning was issued 8 months later.

[31] The breaches relate to the failure to follow proper process. This would not usually give rise to any foreseeable resignation. As Mr McKenzie stated in evidence he "hoped it would give Preston a jolt" and get him back on track, not result in his resignation. In my view this was not a constructive dismissal.

Unjustified Disadvantage?

[32] However, as indicated to the parties, I am not bound to treat this matter as described by the parties. I may, in investigating this matter, concentrate on resolving the employment relationship however described.³ What that means for the parties is that if I believe or I find that this matter is, in fact, not a constructive dismissal but an unjustified disadvantage matter, I may treat it as such and make a determination to that effect.

³ Section 160(3) of the Employment Relations Act 2000.

[33] From the evidence I have heard the real nature of this dispute is an unjustified disadvantage related to the two warnings issued without any prior statutory process required by s 103A of the Employment Relations Act 2000 (the Act).

[34] Section 103A of the Act requires an employer to investigate and raise their concerns with the employee, provide the employee with an opportunity to be heard and genuinely consider their responses prior to any disadvantaging action occurring. This includes before issuing warnings. They must advise an employee in advance that they are considering taking action such as warnings, and give the employee an opportunity to be heard about it.

[35] I must objectively determine whether this test has been met by this employer in these circumstances. I must determine how this employer acted and measure this against what a fair and reasonable employer could have done in all the circumstances at the time the warnings were issued.

[36] There is no doubt Mr Hope was not given any opportunity to be heard about the imposition of either the first or final warning before they occurred. From the evidence Mr McKenzie was uncertain as to who was telling the truth about the cause of the conflict.

[37] There was also little investigation preceding either warning other than seeking the views of employee, B. They ought to have provided those views to Mr Hope for comment prior to issuing any warning. Similarly, they should have also provided him with evidence about his sales performance before issuing any warning.

[38] It appeared HES was trying an informal performance review through Mr May. This is insufficient to meet the obligations under s 103A of the Act and also the duty of good faith. The duty of good faith under s 4 requires parties to be responsive and communicative. Given warnings can lead to dismissal, employers are also required to provide all relevant information to the affected employee, and an opportunity to comment upon the same prior to imposing warnings because they may have an adverse effect upon the continuation of employment.

[39] In HES's circumstances that would have only cost them time. They should have sought input from Mr Hope about possible disciplinary action before it was

taken. He was not given an opportunity to explain his side of the story. As a result there has been no opportunity to consider his responses.

[40] These defects were not minor. The failures in adhering to the process set out in s103A of the Act were also unfair to Mr Hope.

[41] Preston Hope was unjustifiably disadvantaged by two warnings issued by Hose and Engineering Supplies (Tauranga) Ltd.

Remedies

[42] As Mr Hope has a proven personal grievance he is entitled to lost remuneration and compensation.

[43] Because this was a disadvantage grievance his losses must be restricted to losses during the employment relationship. He was paid throughout his employment until termination. Therefore no further lost remuneration is to be paid.

[44] There was evidence of emotional harm. This was not long-lasting. No medical assistance was required. He had to rely on his family, including his church, to support him throughout this matter. He did find alternative employment quickly. This shows that these disadvantages had no effect upon his ability to find work.

[45] Similar recent cases in the Authority have awarded between \$6,200 and \$12,000 for disadvantages. This case sits at the lower end of the spectrum. An award of \$7,000 subject to any reduction for contributory conduct is made.

[46] I have found there was some contributory conduct leading to the warnings around the conflict and poor sales performance. I have determined a 50% reduction is appropriate.

[47] Accordingly Hose and Engineering Supplies (Tauranga) Ltd is ordered to pay \$3,500 to Preston Hope within 28 days of the date of this written determination.

Costs

[48] After hearing from the parties, Hose and Engineering Supplies (Tauranga) Ltd is also ordered to pay Preston Hope \$2,250 as a contribution towards his representative's costs within 28 days of the date of this written determination.

T G Tetitaha
Member of the Employment Relations Authority