

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 107
5545006

BETWEEN THEODORE MARSH
 Applicant

AND SMAIL & COMPANY
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Richard Upton for Respondent

Investigation Meeting: 16 November 2016

Further Information
Received: 24 November 2016

Submissions Received: 24 December 2015 from Applicant
 15 December 2015 and 25 January 2016 from
 Respondent

Determination: 7 April 2016

DETERMINATION OF THE AUTHORITY

- A. Mr Marsh was not unjustifiably disadvantaged in his employment.**

- B. Mr Marsh was not constructively dismissed.**

- C. Costs are reserved.**

Employment relationship problem

[1] Mr Theodore Marsh claims one or more conditions of his employment were affected to his disadvantage by unjustifiable actions of his employer Smail &

Company Limited (“Smail & Co”) and that he was unjustifiably constructively dismissed. Smail and Co denies the claims and says Mr Marsh resigned from his employment during a disciplinary process and was offered the opportunity to reconsider his decision to resign.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Marsh and Smail & Co but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] Mr Marsh commenced employment with Smail & Co on 31 March 2014 in the role of technical support. The position was part time for 16 hours each week to be worked 8.30am to 5.00pm on a Monday and Wednesday.

[4] Mr Iain Harrison, General Manager, commenced in his role in July 2014. On 15 October 2014 Mr Harrison and Mr Rob Pond, Manager of Operations, met with Mr Marsh to better understand Mr Marsh’s role in the company and how his role worked in practice. Mr Harrison determined that the allocation of work to Mr Marsh from week to week was not as well planned or monitored as it could be.

[5] Following the meeting Mr Harrison implemented improvements to work processes. This included an agreement that Mr Marsh would be allocated work from the Service Manager, Mr Mark Grantham and Mr Pond. Mr Marsh was to complete a “tracker sheet” each week which would include the time taken for each job. The weekly tracker sheet would be reviewed by Ms Annabel Smail, Marketing Manager, and Mr Pond. The review was to ensure priorities were allocated correctly.

[6] Ms Smail met with Mr Marsh on 29 October 2014 where they discussed the new tracker sheet, a request that Mr Marsh provide a notification of his whereabouts if he was leaving the building and Mr Marsh’s unhappiness with sales reps requiring everything to be done as soon as possible. At that time Mr Marsh was using his personal cell phone and Ms Smail requested that he use the company cell phone. Ms Smail also requested Mr Marsh to complete the tracker sheet and if he was making any purchases they were to be made through the company providing receipts and information about the job the purchase related to.

[7] That same day and coincidentally, Ms Smail received a complaint from Mr Stephen Engelbrecht, Territory Manager, regarding two jobs he had asked Mr Marsh to complete but more particularly Mr Engelbrecht raised questions about Mr Marsh's hours of work. Mr Engelbrecht advised Ms Smail that there was confusion about whether Mr Marsh was to work from 8.00am to 5.00pm or from 7.30am to 4.00pm.

[8] Mr Harrison and Ms Smail met with Mr Marsh on 5 November 2014. The purpose of the meeting was to review the weekly work in progress process and to discuss further potential improvements. Mr Harrison requested more detail be included in the reports being completed by Mr Marsh including job numbers, type of work carried out, when and where, and clearly stated outcomes and follow up actions. Mr Harrison also raised concerns about Mr Marsh's hours of work which continued to give cause for concern over the following months.

[9] Mr Marsh was absent from work for two weeks in December 2014. Mr Marsh did not complete any company forms relating to his absences and he was requested to remedy this by 22 December 2014. When Mr Marsh failed to comply with this request he was invited to attend a meeting to discuss his absences, the communication process for absences and the levels of professionalism required by the company. This latter point was in relation to an email Mr Marsh sent Ms Smail and Mr Harrison on 19 November 2014.

[10] The meeting took place as scheduled on 12 January 2015. Following the meeting Mr Marsh emailed Mr Harrison his view of the meeting and requested further information and claimed he was being bullied by false allegations being made about him.

[11] On 13 January 2015 Ms Smail emailed Mr Marsh and advised him that the company was seeking legal advice and that Mr Marsh was not required to attend work on Wednesday, 14 January 2015 for reasons which would be explained in a letter.

[12] Ms Smail emailed a letter to Mr Marsh on 16 January 2015 advising Mr Marsh that he is to take time off on paid special leave to consider his future with the company. Ms Smail set out concerns about Mr Marsh's commitment to Smail & Co, concerns about the genuineness of the leave taken by Mr Marsh in December 2014

and pointed out that all of the issues are potentially serious and should be discussed in a disciplinary context.

[13] Ms Smail also set out the expectations discussed on 12 January 2015 and advised Mr Marsh that all future meetings would be recorded to ensure an accurate record of the meeting was kept.

[14] Mr Marsh responded accepting that all was as discussed with the exception to the one thing that was contrary to employment law and advised Ms Smail that he would see her on Monday. Mr Marsh did not specify the “...*one thing that was contrary to employment law*”.

[15] Mr Marsh suffered a foot injury on 27 January 2015. On Wednesday 28 January 2015 Mr Marsh called the office to advise that he was unable to work that day. Mr Marsh was requested to provide further information about his injury as well as a medical certificate.

[16] On 2 February 2015 Mr Marsh was invited to attend a disciplinary meeting to discuss a number of allegations which were set out in the letter. Mr Marsh was advised that termination of employment was a possibility.

[17] The disciplinary meeting took place on 4 February 2015 and focussed on two main issues being Mr Marsh’s absences and that he had told Mr Harrison and Ms Smail that he was looking at an “exit strategy”. During the meeting and before any decisions were made about Mr Marsh’s ongoing employment Mr Marsh resigned verbally. Mr Marsh was offered a cooling off period to reconsider his resignation but Mr Marsh confirmed his resignation on 9 February 2015 and raised a personal grievance for unjustified constructive dismissal.

Issues

[18] The issues for determination are:

- a) whether one or more conditions of Mr Marsh’s employment were affected to his disadvantage;
- b) whether Mr Marsh was unjustifiably constructively dismissed;

- c) if the answer to either or both of the first two questions is yes, what, if any, remedies should be awarded.

Mr Marsh's complaints

[19] Mr Marsh has raised a number of issues with respect to his employment with Smail & Co that he says gives rise to a claim that one or more conditions of his employment were affected to his disadvantage and supports his claim for unjustified constructive dismissal. They are:

- a) sick leave;
- b) hours of work;
- c) fabricated abusive emails;
- d) fabricated stories of unhappy customers and poor performance;
- e) disciplinary meeting based on false statements; and
- f) bullying and intimidation;

[20] I have set out below the facts associated with each of the issues as I have found them to be.

Sick leave

[21] Mr Marsh became entitled to paid sick leave on 30 September 2014. He took his first day of sick leave on 1 October 2014. In November 2014 Mr Marsh took a further two days sick leave both on Mondays being 3 and 10 November 2014.

[22] In December 2014 Mr Marsh took further sick leave being Monday and Wednesday, 1 and 3 December 2015. As this absence was over three consecutive days Mr Harrison requested Mr Marsh to provide evidence of his illness. Mr Marsh told Mr Harrison he would get a medical certificate in two weeks. That medical certificate was never provided.

[23] Mr Marsh was absent on Monday and Wednesday, 15 and 17 December 2014. Mr Marsh had exhausted his paid sick leave by 3 December 2014 and so he was not paid for Monday 15 December 2014. Mr Marsh took a day off on Wednesday 17 December 2014. There was confusion by Smail & Co as to whether this was bereavement leave or not. During the investigation meeting Mr Marsh told me that he had not intended attending a funeral but his mother's sister had died and he needed to

be available to drive her around. His mother was in a distressed state as this was the second death in the family in a short space of time.

[24] By 18 December 2014 Mr Harrison was becoming concerned at Mr Marsh's rate of absenteeism and apparent lack of communication when not attending work. Mr Marsh had worked only two days in December at that point. This prompted Mr Harrison to write to Mr Marsh and raise his concerns with the lack of communication and to seek the reasons for his leave on 3 and 5 November, and 1, 3 and 15 December 2014 and the bereavement on 17 December 2014.

[25] No information was forthcoming and on 22 December 2014 Mr Harrison wrote requesting Mr Marsh to attend a meeting on 12 January 2015 to discuss the concerns raised in his letter.

[26] At the meeting on 12 January 2015 the issue of Mr Marsh's sick leave was discussed. Ms Smail was concerned that Mr Marsh had never made any comments to her or, as far as she was aware, anyone else about why he was absent. Ms Smail says Mr Marsh was unable to offer any explanation about this.

[27] Following the meeting Mr Marsh emailed Ms Smail and Mr Harrison setting out his view of the meeting and providing further information and seeking further clarification on the items discussed. In relation to the sick leave issue Mr Marsh advised Ms Smail and Mr Harrison that if there was a genuine need for him to provide a doctors certificate he was happy to provide it. Mr Marsh raised concerns about being asked six weeks after taking the leave to provide a medical certificate. He requested a timeframe and suggested two weeks.

[28] On 14 January 2015 Ms Smail responded to Mr Marsh's email instructing Mr Marsh that from that day forward he was to provide a medical certificate at his cost for every sick leave absence and was to notify Smail & Co as soon as possible if sick leave was required. Mr Marsh was instructed to provide a written application for all time off required, outlining the reasons for the time off and the type of leave to be taken. Mr Marsh was instructed to submit the application in time for it to be properly considered.

[29] Mr Marsh suffered a foot injury on 27 January 2015 and was unable to work the following day. Despite being requested by both Ms Smail and the company's

lawyer to provide a medical certificate Mr Marsh told the Authority that he chose not to spend the \$65.00 as he could prove he had suffered an injury.

Hours of work

[30] Mr Marsh says he was employed on the basis that his hours would be flexible to allow him to coach his son's soccer team. This is disputed by Smail & Co who says Mr Marsh was employed to work from 8.30am – 5.00pm on two days of the week, being Monday and Wednesday, each week.

[31] Mr Marsh says that when he attended the interview for the role he and Ms Smail agreed that he could be flexible in his hours of work. Ms Smail denies this.

[32] Mr Marsh was made a formal offer of employment on 24 March 2014 which included a written employment agreement. In the covering letter Ms Smail points out that the hours of work for the role on offer were "...8.30am to five." This is also reflected in the employment agreement signed by Mr Marsh.

[33] Mr Marsh received a copy of the proposed employment agreement and had clearly read it before signing it. I have reached that conclusion because after receiving the written offer Mr Marsh contacted Ms Smail and requested a change from being a salaried employee to being paid wages for each hour worked. This change was agreed and the parties signed the employment agreement confirming the terms and conditions of employment. At no stage did Mr Marsh object to the stated hours in the agreement or request any additional wording to reflect his belief that he would be working flexible hours.

[34] On 29 October 2014 Mr Engelbrecht emailed Ms Smail about Mr Marsh's hours of work saying that there was confusion about the hours Mr Marsh was expected to work. Mr Marsh had told Mr Engelbrecht that his hours were from 7.30am – 4.00pm. Ms Smail passed this email onto Mr Harrison to deal with.

[35] Mr Harrison met with Mr Marsh on 5 November 2014 to follow up on a previous meeting. During this meeting Mr Harrison raised questions with Mr Marsh about his hours of work. Mr Harrison had noted that the reports he was receiving from Mr Marsh indicated Mr Marsh was finishing earlier than 5.00pm on most days.

[36] Mr Marsh explained to Mr Harrison that he ran a soccer team and needed to take time off for that. Ms Smail, who was also in attendance at the meeting, indicated that she was unaware of Mr Marsh's soccer commitments. Mr Harrison indicated to Mr Marsh that he was expected to bring his hours in line with all other company employees in the Auckland operation. Mr Marsh was unhappy about that. He was invited to put his concerns in writing so Mr Harrison and Ms Smail could review his request and see what could be accommodated.

[37] On 11 November 2014 Ms Smail emailed Mr Marsh and set out her expectations that Mr Marsh was to work the hours agreed in the employment agreement. Ms Smail pointed out to Mr Marsh that starting and finishing earlier than the stated hours causes issues for customers and tasks were not being completed during the working day. Ms Smail also pointed out that everyone else started at 8.30am and jobs could not be allocated to Mr Marsh until others had started work.

[38] Ms Smail asked Mr Marsh to advise them of the commitments he had made including the time required and the length of the soccer season. Mr Marsh made no response to this request.

[39] Mr Harrison confirmed the discussions he had had with Mr Marsh on 5 November in writing on 19 November 2014. In his email Mr Harrison reiterated the expectation around his hours of work and invited Mr Marsh to confirm his concerns in writing if this was a major issue for him.

[40] In response Mr Marsh blamed Ms Smail for the confusion and told Mr Harrison that his family was his priority and he intended coaching his boys soccer and working at the school two days each week. Mr Marsh confirmed he intended to continue starting early and finishing early but undertook to log his hours and make sure the job got done. Mr Marsh concluded his comments relating to his hours of work stating:

...my working hours ... are cast in stone. If you think I am going to let down my son and 9 other children because you expect me to. YOU ARE WRONG."

[41] Mr Marsh finishing work at 4.00pm instead of the stated 5.00pm had caused problems for customers. For example Mr Engelbrecht had asked Mr Marsh to look at a customer's damaged units and to take them for repair. Mr Marsh did not undertake

the task as it was his view that he finished at 4.00pm and there was no time for him to complete the task in time for him to leave at 4.00pm.

[42] Issues between Smail & Co and Mr Marsh about his failure to adhere to his agreed hours of worked plagued the employment relationship until it ended in February 2015.

Fabricated abusive emails

[43] Mr Marsh claims Smail & Co fabricated emails on which it based assertions that Mr Marsh had communicated in an offensive manner.

[44] During the 12 January 2015 meeting Mr Harrison raised concerns about the email sent by Mr Marsh on 19 February 2015. Of particular concern was Mr Marsh's reference to Ms Smail's failure to remember the agreement regarding the agreement with respect to hours of work which he said was her failure not his and his reference to Ms Smail as being "*..that lady who hired me...*".

[45] During the discussion about the email Mr Marsh said Ms Smail had accused him of calling her a "*two faced f.....g b...h*". Mr Harrison explained to Mr Marsh that Ms Smail had found the words he used to be offensive and inappropriate and perceived his comments in the email as being the same as calling her a "*two faced f.....g b...h*". Ms Smail immediately apologised to Mr Marsh and advised him she was withdrawing those comments.

[46] Mr Marsh himself wrote the email dated 19 November 2015 which had given cause for concern. The email was not fabricated and Smail & Co was entitled to raise its concerns about the tone of the email and to seek Mr Marsh's responses to those concerns.

Fabricated stories of unhappy customers and poor performance

[47] Mr Marsh claims Smail & Co fabricated stories of unhappy customers and poor performance to support its assertions that he was not performing well.

[48] During the 12 January 2015 meeting Ms Smail raised with Mr Marsh that not all customers were happy with the job he was doing and advised him she had received some complaints from the sales team about work not being completed on displays.

[49] Following the meeting Mr Marsh emailed Mr Harrison and Ms Smail seeking documentation supporting Ms Smail's contention that there were unhappy customers and outstanding warranties. No response was made to Mr Marsh's request.

[50] Ms Smail gave evidence that customers had phoned and complained about Mr Marsh and there had also been complaints from some merchants to the sales representatives about Mr Marsh's timeliness in completing work.

[51] Also in evidence was Mr Engelbrecht's email in which he outlines concerns about Mr Marsh's failure and timeliness in undertaking tasks requested of him for two customers.

[52] The performance concerns, while not specific or pursued in any detail were genuine concerns held by Smail & Co and not fabricated. The concerns were raised in the context of Mr Harrison and Ms Smail countering Mr Marsh's stated belief that he was meeting all expectations regarding his work.

Disciplinary meeting based on false statements

[53] Mr Marsh says the disciplinary meeting set up for 4 February 2015 was done using false statements. By letter dated 2 February 2015 Mr Marsh was invited to attend a disciplinary meeting. The allegations of misconduct set out in the letter included Ms Smail's belief that Mr Marsh may have:

- (a) Informed Mr Harrison on at least two occasions that he was implementing an "exit strategy" from the business. Ms Smail was concerned that Mr Marsh may have been working contrary to the company's interests and that this could be a breach of Mr Marsh's duty of fidelity.
- (b) Misused bereavement leave in relation to his Aunt passing away in December. Ms Smail requested evidence of the bereavement and funeral. Ms Smail was concerned that the manner in which the leave was taken was not in accordance with the required processes and/or that Mr Marsh had not been honest.
- (c) Misused sick leave when he failed to provide a medical certificate as evidence that he had injured his foot.

- (d) Failed to follow a reasonable instruction to provide a medical certificate for the leave taken on 28 January 2015 for his injured foot.

[54] Mr Marsh was advised that dismissal was a possible outcome and was strongly encouraged to engage independent legal representation to assist him.

Exit strategy

[55] During the meeting on 12 January 2015 Mr Marsh indicated that he was working on an exit strategy. This prompted Ms Smail to ask Mr Marsh whether he was happy working for Smail & Co. Mr Marsh did not respond directly to that question instead advising Ms Smail that he did not have enough work to do which was disputed by both Ms Smail and Mr Harrison.

[56] The reference to Mr Marsh working on an exit strategy was raised as a result of comments made by Mr Marsh during the meeting on 12 January 2015. Mr Harrison told me this was included in the disciplinary process as both he and Ms Smail wished to understand what it meant.

Bereavement leave

[57] Mr Marsh took a day's bereavement leave in December 2014 after Ms Smail was advised by Mr Pond that Mr Marsh had had to attend a funeral. No formal record had been made of the leave and no evidence of the bereavement had been produced. Ms Smail wished to find out more about this leave.

Sick leave/failure to follow a lawful instruction

[58] Mr Marsh had taken a significant amount of sick leave and his entitlement to paid sick leave had been fully utilised. Despite receiving written and oral instructions that he would be required to produce a medical certificate for all sick leave absences in the future, when Mr Marsh injured his foot and was unable to work on 28 January 2015 he chose not to provide a medical certificate.

[59] The issue of failing to provide a medical certificate was not fabricated. As far as Ms Smail could tell Mr Marsh had failed to adhere to a reasonable instruction to produce a medical certificate and she was entitled to put this to Mr Marsh and to seek his explanation.

Bullying and intimidation

[60] Mr Marsh claims there were three events that were bullying and intimidating in nature. Those events were:

- (a) the conduct of the 12 January 2014 meeting;
- (b) being alone with Ms Smail without witnesses; and
- (c) the conduct of the 4 February 2015 meeting.

Conduct of the 12 January 2014 meeting

[61] Immediately following the 12 January 2014 meeting Mr Marsh emailed Ms Smail and Mr Harrison complaining that he felt the meeting was a bullying tactic. In his written evidence Mr Marsh says that all of the matters discussed at the 12 January 2015 meeting left him stunned, intimidated and bullied and on the back foot.

[62] I have preferred the evidence of Ms Smail and Mr Harrison regarding the conduct of the 12 January meeting. Mr Marsh, in his written statement attributes direct quotes which he says were made during the meeting. These statements are not consistent with the contemporaneous notes taken at the meeting and which have been provided to the Authority.

[63] There was nothing untoward about the conduct of the meeting which was intended to allow Ms Smail and Mr Harrison the opportunity to discuss with Mr Marsh their concerns about his hours of work and his absenteeism.

Being alone with Ms Smail

[64] On Monday 2 February 2015, Mr Marsh says Ms Smail walked down to the back of the repairs bay where Mr Marsh was working alone and asked about his medical certificate for 28 January 2015.

[65] Mr Marsh told me that Ms Smail had never done this before and given all of the lies that had gone on previously he felt she could accuse him of anything from “...sexual harassment to male assaults female.”

[66] I am satisfied Ms Smail had a reasonable explanation for wishing to speak with Mr Marsh in the workplace. He had taken a day off work for an injury and had

been requested several times to provide a medical certificate for such absences. Mr Marsh had failed to provide one to date and Ms Smail was simply following this up with him.

Conduct of the 4 February 2015 meeting

[67] In his written evidence Mr Marsh says he was called into a meeting with a Barrister present for another bullying session. The 4 February 2015 meeting was a disciplinary meeting set up by way of letter dated 2 February 2015.

[68] Prior to attending the meeting Mr Marsh had received full information about what was to be discussed, had been advised of the potential outcome and had been strongly encouraged to engage legal advice and representation as the company were engaging the services of a Barrister. The notes taken at the meeting indicate that at the commencement of the meeting Mr Marsh advised that he did not require a support person.

[69] The 4 February 2015 meeting was a disciplinary meeting. I am satisfied there was nothing either unreasonable or unlawful about the meeting. The notes taken at the meeting indicate that the issues as set out in the letter dated 2 February 2015 were discussed with Mr Marsh being given a full opportunity to respond to each issue.

[70] I find there was nothing untoward about the meeting or the way in which it was conducted.

Unjustified disadvantage

[71] Mr Marsh says his employment was affected to his disadvantage by the unjustifiable actions of Smail & Co. The statutory test of justification is contained in section 103A of the Act. That section provides that the question of whether an action was justifiable must be determined on an objective basis, having regard to whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[72] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[73] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.¹

[74] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[75] As a full Court observed in *Angus v Ports of Auckland Ltd*²

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[76] Mr Marsh did not have the flexibility in his hours of work he claims. The employment agreement was clear about the hours Mr Marsh had agreed to work as was the covering email sent by Ms Smail which stated:

We are flexible on what days to start. Hours are 8.30 to five – but as required some days with clients might be start earlier etc.

[77] Mr Marsh says Smail & Co attempted to unilaterally alter his hours of work to remove the flexibility which had been agreed to prior to him commencing employment. I find it is more likely than not that there was no agreement that Mr

¹ Employment Relations Act 2000, section 103A(5).

² [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

Marsh could choose his own starting and finishing times. The email and employment agreement proffered to Mr Marsh for his acceptance was clear about the hours of work. For the first part of Mr Marsh's employment Ms Smail was not aware of the times Mr Marsh was working. It was only after the implementation of the tracking sheet by Mr Harrison and the email from Mr Engelbrecht that it became apparent that Mr Marsh was not working the hours stated in his employment agreement.

[78] Mr Marsh's claims that Smail & Co had fabricated abusive emails and stories of unhappy customers and poor performance have not been established. As already set out Ms Smail was offended by Mr Marsh's intemperate email of 19 November 2014 and this was raised with him at the 12 January 2015 meeting.

[79] During that meeting Ms Smail also advised Mr Marsh that she had received complaints from sales staff about unfinished work due to Mr Marsh leaving work early and that some customers complained about his performance.

[80] These are matters which an employer is entitled to raise with an employee. The 12 January 2015 meeting was not a disciplinary meeting but was set up to address concerns Smail & Co genuinely held about Mr Marsh's hours of work and absenteeism. As often happens in such meetings other matters were raised which needed to be addressed including, in this case, answering Mr Marsh's assertions about his work by advising of the complaints that had been received.

[81] While not specifically raised as a disadvantage grievance I have considered whether the conduct of the meetings on 12 January and 4 February 2015, and the conduct of Ms Smail on 2 February 2015 when she asked Mr Marsh whether he had the medical certificate, may have caused one or more conditions of Mr Marsh's employment to have been affected to his disadvantage. For the reasons set out under the claim for constructive dismissal I have concluded that Mr Marsh was not bullied in either of the meetings or when Ms Smail approached him in his workplace on 2 February 2015.

[82] I find Smail & Co's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances of this case. One or more

conditions of Mr Marsh's employment were not affected to his disadvantage during his employment.

Constructive dismissal

[83] Mr Marsh resigned from his employment during the disciplinary meeting on 4 February 2015. Mr Marsh claims that the resignation was in fact a constructive dismissal and the dismissal was unjustified.

[84] In *Wellington etc Clerical Workers etc IUOW v Greenwich*³ the Court stated that for a dismissal to be constructive:

It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.

[85] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*⁴ the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed.
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[86] I have concluded that Mr Marsh's claims fall into the second and third categories set out in the *Woolworths (NZ) Ltd* case, in that Mr Marsh alleges Smail & Co has followed a course of conduct with the deliberate and dominant purpose of coercing him to resign and has breached duties owed to him which caused him to resign.

[87] The relevant questions for the Authority are:

- (a) whether the conduct followed by Smail & Co was causative of the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation;

or

³ (1983) ERNZ Sel Cas 95; [1983] ACJ 965.

⁴ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA).

(b) whether there was a breach of duty on the part of Smail & Co causative of the resignation.

[88] If there was such a course of conduct or a breach, I will then need to determine whether the conduct or breach was sufficiently serious so as to make it reasonably foreseeable by Smail & Co that Mr Marsh would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.⁵

[89] Williamson J in *Wellington Clerical Workers IUOW v Greenwich* 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.

Course of conduct

[90] Mr Marsh claims that the meetings on 12 January and 4 February 2015 as well as the changes to his hours of work, the fabricated emails, fabricated stories of unhappy customers, fabricated stories and the environment of bullying and intimidation were all factors contrived by Smail & Co to force him to resign from his employment.

[91] I have found the meetings on 12 January and 4 February 2015 were conducted in a reasonable and lawful manner. Questions were raised by Mr Harrison and Ms Smail about Mr Marsh's comments that he was working on an "exit package" but this was in the context of Mr Marsh raising this matter himself and Smail & Co wishing to gain a better understanding of what this meant for the company.

[92] Mr Marsh's hours of work had been disputed between the parties consistently during the latter part of Mr Marsh's employment. I am satisfied Smail & Co attempted to address its concerns about Mr Marsh's hours of work in a way that was both lawful and reasonable.

⁵ *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

⁶ *Supra* n 2 at [975].

[93] For the reasons set out earlier, Mr Marsh has not established that Smail & Co fabricated emails, customer complaints or performance concerns.

[94] During the course of the 4 February 2015 meeting Mr Marsh advised Ms Smail that he could no longer work with her and that he was resigning. He advised that he had felt intimidated and threatened at the meeting on 12 January and felt cornered when Ms Smail had approached him at work on 2 February 2015. Mr Marsh advised that he had no option but to resign.

[95] I am satisfied that this is not a case where an employee has resigned in the heat of the moment. In his written evidence Mr Marsh told me that after the meeting with Ms Smail in the back of the warehouse on 2 February 2015 he had gone home and spoken to his partner about it. Mr Marsh told me he decided that day that he could no longer work with Ms Smail.

[96] Following his advice at the meeting on 4 February 2015 that he was resigning Mr Marsh was advised not to make any rash decisions and that he should take some time to re-consider and take some professional advice. In response Mr Marsh advised that he had made up his mind to do this the night before when he had discussed it with his partner.

[97] Mr Marsh was asked if there was anything the company could do to change his mind. Mr Marsh said that he wanted his hours to be as flexible as those he had operated in the beginning of his employment. Mr Marsh was advised that the company would not agree with this and enquired if there was anything else it could do. Mr Marsh said no and that he was not going to change his mind. Before the meeting ended Mr Marsh was given a further opportunity to reconsider. Mr Marsh confirmed his resignation in writing on 19 February 2015.

[98] I find Smail and Co did not follow a course of conduct with the deliberate and dominant purpose of coercing Mr Marsh to resign.

Breach of duty

[99] For the reasons set out above, I also find that Smail & Co have not breached any duties owed to Mr Marsh which could cause Mr Marsh to resign from his employment.

Conclusion

[100] Mr Marsh was not constructively dismissed.

Costs

[101] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Smail & Co shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Marsh 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.

[102] 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