IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 188
ARC 23/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JARROD HOOK Plaintiff
AND	STREAM GROUP (NZ) PTY LIMITED Defendant

Hearing:	18 September 2013; and by written submissions by the plaintiff dated 25 September 2013
Appearances:	Gregory Bennett and Sian Snell, advocates for plaintiff Richard Harrison and Emily McWatt, counsel for defendant
Judgment:	9 October 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Hook was employed as an information technology administrator with the defendant company. Disciplinary issues arose within the first year of his employment, which ultimately resulted in a written warning. He was later issued with a final written warning in relation to similar issues. Shortly after receiving the final written warning, Mr Hook advised that he was resigning with two weeks' notice. His resignation was accepted. The company says it then became concerned about the disruptive impact Mr Hook was having in the workplace and for this reason told him that he would not be required to work out the period of notice.

[2] Mr Hook contends that he was constructively dismissed. Mr Hook filed a personal grievance with the Employment Relations Authority (the Authority)

claiming unjustified constructive dismissal, together with a claim for unjustified disadvantage. His grievance was dismissed.[1]

The claim

[3] Mr Hook has challenged the Authority's determination on a de novo basis. The sole relief he seeks is a compensatory payment under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for unjustified constructive dismissal. In his statement of claim he sought compensation of $8,000. In the course of closing submissions, Mr Bennett, advocate for the plaintiff, submitted that any award ought to be reduced by 50 percent to reflect Mr Hook's contribution to the situation that he found himself in.

[4] While issues were raised in the course of the hearing about the way in which the notice period was dealt with, no claim for unjustified disadvantage was advanced and it was apparent that the focus of the plaintiff's challenge was squarely on whether or not Mr Hook had been constructively dismissed.

Parties' submissions

[5] A constructive dismissal arises where an employee has no choice but to resign, including in circumstances in which they are presented with the option of resigning or being dismissed, or where a breach of duty by the employer has caused the employee to resign.[2]

[6] Mr Bennett submitted that the plaintiff's claim falls within the latter category. In particular, it was submitted that the company breached an implied term not, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. In this regard the plaintiff says that his resignation arose out of the actions of the company, namely the way in which the first disciplinary process was conducted (giving rise to a written warning) and the events which followed. It was submitted that the main

[1] [2013] NZERA Auckland 105.
[2] *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

reason the plaintiff resigned was because of comments made to him by his manager (Mr Boehmer) during a telephone conversation on 27 July 2011. It is alleged that during this conversation, Mr Boehmer gave Mr Hook the option of resigning or staying with the company, and that this option was presented against the backdrop of a disciplinary process. Mr Bennett submitted that this was "the catalyst" which resulted in the plaintiff resigning, seen in the context of the earlier issues between the parties.

[7] In essence, the defendant submits that Mr Hook resigned of his own free will and not as a result of any breach of duty by it.

The facts

[8] It is necessary to understand what occurred during the two disciplinary processes in order to put Mr Hook's departure from the company into context.

[9] Mr Hook was initially employed by Freemans Group NZ Limited. That company merged with Stream Group shortly afterwards. It is apparent that Mr Hook became disenchanted with a number of initiatives undertaken following the merger. He sent emails to other staff which were crafted in derogatory terms, including reference to members of the Australian management team (which included Mr Boehmer) as "dumb Aussies." Unsurprisingly, the company took a dim view of this sort of correspondence when it became aware of it.

[10] Towards the end of 2010, issues arose in relation to Mr Hook being absent from the office without notifying his supervisor and tardiness. The company also raised concerns about his use of the email system and the recording of a disciplinary meeting on his mobile phone without notifying or seeking the permission of the attendees in advance. The disciplinary process relating to these matters was delayed, partly because of Mr Hook's personal circumstances at the time.

[11] Mr Hook received a formal written warning on 8 February 2011. He acknowledged receipt of the warning. The warning was expressed to remain current for a period of 12 months. In evidence Mr Hook said that he signed the warning as a

sign of good faith but that in retrospect he believes that he should not have. In cross-examination he accepted that the expectations that were set out in the letter were clear, reasonable and easy to comply with. It would have been difficult for him to have asserted otherwise given the way in which the letter was drafted. Mr Hook was put on notice that a failure to meet the requirements spelt out in the letter could result in further disciplinary action, up to and including dismissal. Mr Hook took no steps to challenge the warning.

[12] Despite the warning and the clear expectations set out in the letter, Mr Hook was absent from the office on 26 July 2011 without prior notice or approval. A member of staff had been looking for IT assistance but was unable to contact Mr Hook. Julie Watts, who had day to day supervisory responsibility for Mr Hook, spoke to him later that day. He told her that he had been at the pharmacy, purchasing pain killers. When she asked why he was wearing a tie to the pharmacy he told her that he had in fact been attending a job interview and asked that she not alert senior management about this. She told him that she would make no such undertaking and subsequently did report the incident. I pause to note that in cross-examination Mr Hook asserted that the "interview" he attended on 26 July was the result of a chance, without notice, encounter with an acquaintance as he left the pharmacy. He described it as "no more of an interview than running into an old friend who has a proposition." He said that he put on a pull-on tie which he keeps in his car to show his friend that he could be professional and then forgot to take it off. I was not drawn to Mr Hook's evidence as to the way in which events unfolded on 26 July.

[13] Mr Boehmer rang Mr Hook on 27 July and had a conversation with him. Mr Hook made it clear to Mr Boehmer that he was looking for alternative employment. Mr Hook said that Mr Boehmer was aggressive and intimidating during the course of the call and gave him an ultimatum of resigning or going through a disciplinary process. I preferred Mr Boehmer's evidence as to what occurred. He said that the conversation was amicable, and this is supported by the tenor of the emails that the pair exchanged around this time. He discussed Mr Hook's desire to look for other work and how this might be accommodated, in terms of time off work to attend interviews. The next day Mr Boehmer emailed Mr Hook asking what decision he

had made, and Mr Hook replied that he wished to stay on with the company but would continue looking for another position.

[14] A meeting was arranged for 2 August 2011 to discuss the concerns that had arisen in relation to Mr Hook's absence from the office on 26 July. Mr Hook initially accepted the invitation to the meeting but then requested further time, after having contacted the Department of Labour. The company agreed to postpone the meeting until 3 August 2011. On 2 August Mr Hook sent an email to Mr Boehmer advising that he intended to 're-open and discuss' the earlier warning. In the event, he took no steps to do so.

[15] Mr Hook attended the 3 August meeting with his support person, Mr Llewellyn. A record of the meeting was made by Mr Reichel, the Human Resources Manager. Ms Watts and Mr Boehmer also attended the meeting. Ms Watts gave evidence that the meeting was conducted in a professional manner although it became tense at times. Mr Hook described the meeting in different terms. He said that Mr Boehmer, who was attending the meeting via telephone conference call from Australia, became very angry and aggressive, was shouting and refused to engage in constructive discussion. I preferred Ms Watts' description of how the meeting unfolded. It was consistent with the evidence of Mr Boehmer and Mr Reichel, and the contemporaneous notes that had been made.

[16] The meeting concluded with Mr Boehmer advising that consideration would be given to what had been raised and that a meeting would be rescheduled for the following day to discuss the outcome. Difficulties arose in relation to scheduling the meeting, due to Mr Hook advising that he was sick and then that his support person was unavailable. The meeting was eventually rescheduled for 11 August 2011. As it transpired, Mr Hook advised on the morning of the meeting that he would not be attending as his support person was not available.

[17] Mr Boehmer took the view that Mr Hook had had ample notice of the meeting, and had the opportunity to arrange an alternative support person. He advised Mr Hook that the meeting would go ahead at 4pm and that he hoped that Mr Hook would attend and take part in the process. Ms Watts spoke to Mr Hook in

person prior to the meeting time and asked him whether he was attending and he confirmed that he was not.

[18] The meeting went ahead as scheduled. As he had foreshadowed, Mr Hook did not attend. Mr Boehmer wrote to him following the meeting advising that after consideration the proposal was to issue him with a final written warning. He advised that:

> 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 August 2011.

[19] Mr Hook did not respond to Mr Boehmer's invitation to comment on the proposal and accordingly Mr Boehmer wrote to him on 16 August 2011 confirming that the written warning had been finalised and would be placed on his staff file.

[20] Three days later, on 19 August 2011, Mr Hook emailed Mr Boehmer advising that he was resigning. In doing so he said that while he appreciated the time he had had with the company "recent events have left me with no other option". He said that he intended to work out his two weeks' notice period, but, due to the nature of his work, he "may extend this period out, at my discretion, to help the transition."

[21] Mr Boehmer responded, accepting Mr Hook's resignation and recording that, while he appreciated Mr Hook's suggestion that he would be available for a transition period after the two week notice period, he expected the company could manage without him, and the proposed extension was accordingly not required.

[22] Mr Hook took some time off work on sick leave. The exact period and days remained unclear. What is clear is that Ms Watts became concerned about the disruptive effect that Mr Hook was having when he did return to work during this time. She raised this issue with Mr Boehmer. A meeting was convened with Mr Hook on 24 August 2011. Mr Boehmer told Mr Hook that he would not be required to work out his notice period and that would make it easier for him to attend interviews. Mr Hook indicated that he appreciated that and raised no other concerns

in respect of what was being proposed. It is apparent that he raised an issue as to whether he would be paid during the notice period and Ms Watts confirmed that he would. Following receipt of that confirmation he indicated that that was "fine." Notes of the meeting record that Mr Hook appeared quite relaxed and "was OK with decision once he understood he would be paid out notice and Annual Leave. No other reservations raised."

[23] Shortly after the meeting (on 24 August 2011), Mr Hook emailed Mr Reichel seeking written confirmation that he would be paid out his two weeks' notice period together with his outstanding annual leave. He also asked for the reason why he had been "walked." Mr Reichel responded advising that Mr Hook had not been dismissed, that the company had elected to pay out his remaining notice period in lieu of service following resignation and that this was permissible under cl 26.2 of Mr Hook's employment agreement. Clause 26.2 provided that:

> Where the Employee terminates this agreement under this clause, the Employer may pay wages/salary in lieu of the Employee having to work out the notice period.

Was Mr Hook issued with an ultimatum?

[24] It is clear from the evidence that Mr Hook was disenchanted with the company. It is also clear that he was actively seeking employment elsewhere. I do not accept that Mr Boehmer presented him with an ultimatum, namely to resign or go through a disciplinary process, during the course of their telephone conversation on 27 July. Rather, Mr Hook had made it plain to Mr Boehmer that he was looking for other work, Mr Boehmer accepted this and said that he was happy to accommodate Mr Hook attending job interviews provided it was during his breaks. I do not accept that Mr Boehmer's follow-up email supports the claim that an ultimatum was issued to Mr Hook.

[25] I accept Mr Boehmer's evidence that he would have preferred Mr Hook to stay as finding a replacement would be inconvenient. Issues had arisen around this time and previously that gave rise to concerns within the company, but I do not accept that Mr Boehmer or anyone else within the company was set on securing Mr Hook's departure. Rather, it is clear from what occurred that this was not so.

[26] Mr Hook ultimately received a warning in relation to events on 26 July. The company did not seek to take any stronger disciplinary action and, as Mr Harrison pointed out, it had been moderate (some might say lenient) in its response to earlier events, including having regard to the tenor of the internal emails Mr Hook had sent.

Use of material from Facebook

[27] Mr Reichel gave evidence by way of unchallenged affidavit that he undertook a search of Facebook following Mr Hook's departure from the company. He says that the page was in the public domain and that he was readily able to access it as it was not protected by a privacy setting. Mr Reichel took some screen shots of the Facebook page, which included a post on 26 July:

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

And, on 18 August, the following exchanges were posted:

> **Mr Hook:** Going to quit my job tomorrow, while in annual leave. Probably should have timed that better.
>
> **Reply:** is your boss on Facebook
>
> **Mr Hook:** Na. If he was, I'd tell him he is a dick head.
>
> **Reply:** That's putting it awfully nicely. I hope he gets mauled by a pack of rabid Dingos.

[28] The use of social networking posts in employment disputes has only arisen sporadically in New Zealand, predominantly at an Authority level. It has received a greater degree of judicial attention elsewhere.

[29] It is apparent that the increased use of social networking sites by individuals to express dissatisfaction with their employers is becoming more prevalent. This carries risk. It is well established that conduct occurring outside the workplace may give rise to disciplinary action, and Facebook posts, even those ostensibly protected by a privacy setting, may not be regarded as protected communications beyond the reach of employment processes. After all, how private is a written conversation initiated over the internet with 200 "friends", who can pass the information on to a limitless audience?

[30] Judicial notice has been taken of the potentially far reach of Facebook posts in *Senior v Police*,[3] albeit in the context of criminal proceedings involving an alleged breach of a protection order. There the High Court observed that:[4]

> The Court takes judicial notice that persons who use Facebook are very aware that the contents of the Facebook are often communicated to persons beyond the "friends" who use Facebook. When information is put on a Facebook page, to which hundreds of people have access, the persons putting the information on the page know that that information will likely extend way beyond the defined class of "friends". Very strong personal abuse directed at a former partner, placed on Facebook, read by a large number of friends, some of whom will inevitably have contact in the natural social network with the person being abused, is at the very least highly reckless. It is somewhat improbable to say, which was not said here, "Oh, I never thought it was possible that the person I was abusing could possibly have known about this."

[31] The reality is that comments made on virtual social networks can readily permeate into real-life networks. Facebook posts have a permanence and potential audience that casual conversations around the water cooler at work or at an after-hours social gathering do not.

[32] As was pointed out by a Commissioner of Fair Work Australia[5] in *Fitzgerald v Smith t/a Escape Hair Design*:[6]

> It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences.

[33] This sentiment was later echoed by a full bench of Fair Work Australia in *Linfox Australia Pty Ltd v Stutsel.*[7] There an employee was dismissed for serious misconduct following the posting of comments about two of his managers on his Facebook profile page, which were alleged to be offensive, derogatory and discriminatory. At first instance, a Commissioner of Fair Work Australia found the employee to be unfairly dismissed and ordered reinstatement. In particular, the Commissioner emphasised that the employee mistakenly believed that his page was private and only viewable by his Facebook "friends", that the comments were not so

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[3] [2013] NZFLR 356 (HC).
[4] At [6].
[5] Now the Fair Work Commission.
[6] [2010] FWA 7358 at [52].
[7] [2012] FWAFB 7097.

offensive so as to validate dismissal and that the employer had no social media policy in place.

[34] In upholding the decision of the Commissioner (on the limited grounds of appeal available under the Fair Work Act), the full bench made the following apposite comments:[8]

> The posting of derogatory, offensive and discriminatory statements or comments about managers or other employees on Facebook might provide a valid reason for termination of employment. In each case, the enquiry will be as to the nature of the comments and statements made and the width of their publication. Comments made directly to managers and other employees and given wide circulation in the workplace will be treated more seriously than if such comments are shared privately by a few workmates in a social setting. In ordinary discourse there is much discussion about what happens in our work lives and the people involved. In this regard we are mindful of the need not to impose unrealistic standards of behaviour and discourse about such matters or to ignore the realities of workplaces.
>
> In the present case, the series of Facebook conversations in which the comments were made were described by the Commissioner as having the flavour of a conversation in a pub or cafe, although conducted in electronic form. We do not agree altogether with this characterisation of the comments. The fact that the conversations were conducted in electronic form and on Facebook gave the comments a different characteristic and a potentially wider circulation than a pub discussion. Even if the comments were only accessible by the 170 Facebook "friends" of the Applicant, this was a wide audience and one which included employees of the Company. Further the nature of Facebook (and other such electronic communication on the internet) means that the comments might easily be forwarded on to others, widening the audience for their publication. Unlike conversations in a pub or cafe, the Facebook conversations leave a permanent written record of statements and comments made by the participants, which can be read at any time into the future until they are taken down by the page owner. Employees should therefore exercise considerable care in using social networking sites in making comments or conducting conversations about their managers and fellow employees.

[35] As regards to the relevance of an employee's knowledge and understanding (or lack thereof) as to the reach of their social media communications, the full bench said:[9]

> It is apparent from the recital of these matters that the findings of the Commissioner as to the Applicant's understanding about the use of Facebook were an important part of the circumstances taken into account in concluding that the dismissal was unfair. It is also apparent that, with increased use and

[8] At [25], [26].
[9] At [34].

> understanding about Facebook in the community and the adoption by more employers of social networking policies, some of these factors may be given less weight in future cases. The claim of ignorance on the part of an older worker, who has enthusiastically embraced the new social networking media but without fully understanding the implications of its use, might be viewed differently in the future. However in the present case the Commissioner accepted the Applicant's evidence as to his limited understanding about Facebook communications. We have not been persuaded, having regard to the evidence and submissions presented, that such a finding was not reasonably open.

[36] The cases generally recognise that Facebook is not a strictly private forum, and that asserted expectations of privacy will likely be tested. Depending on the circumstances, posted comments may substantiate a dismissal/disciplinary action or, by logical extension, vitiate a claim of constructive dismissal.

[37] In *Linfox*, it was suggested that a special dispensation of sorts for older employees might exist to take into account their ignorance of social media norms. However it is unclear why a distinction along the lines of age would apply, as problems with privacy on social media tend to stem from a sort of recklessness (which does not know any age boundaries) rather than lack of technological understanding.

[38] In the present case, the defendant submitted that the Facebook entries went to credibility, undermined the plaintiff's version of events and that they tended to support the contention that Mr Hook resigned of his own free will. I accept that that is so, but even putting this evidence to one side I would not have found in the plaintiff's favour.

Residual issues

[39] Many of the issues that Mr Hook now seeks to raise were not drawn to his employer's attention at the time and I found his evidence less than straight-forward and consistent. It was submitted that the company, knowing that Mr Hook suffered from an anxiety disorder, ought to have taken additional steps to support him at the meeting of 3 August. It is clear that Mr Hook had advised the company, in his pre-employment form, that he suffered from an anxiety disorder but noted that it was well managed by medication. Ms Watts gave evidence that the issue was raised at

the meeting but she was assured that there were no difficulties in this regard. Mr Hook was supported at the meeting by a representative and there is no record of any concerns being raised which might otherwise have alerted the company's representatives as to any issues that might require consideration. While Mr Hook gave evidence that he was extremely stressed and anxious both before and during the meeting, it is clear from the notes of meeting that he was able to engage, pointing out (for example) a misstatement of the facts that had been outlined by Mr Boehmer. Nor were any issues raised after the meeting. Rather, it is apparent that the first time any concern was identified about health issues and the potential impact on Mr Hook's ability to engage with the disciplinary process was during the course of the hearing in this Court.

[40] The plaintiff was critical of the process that had been followed in issuing the final warning. The final warning, like the original warning, was not challenged. Even putting aside this difficulty, it was reasonable. The events underlying the warning were not in dispute. In these circumstances, and contrary to the submission advanced on behalf of the plaintiff, there was no need for further investigation. While Mr Hook declined to attend the meeting on 11 August, he was given a further opportunity to comment on the proposed disciplinary action before it was confirmed. He did not take up that opportunity.

[41] Criticisms were levelled against the company during the course of the hearing for paying Mr Hook out his notice. I do not consider that these criticisms can be sustained in the circumstances. The issue was raised with Mr Hook and he accepted it, expressing a degree of gratitude for the position adopted by the company.

[42] I accept Mr Harrison's submission that there was no cause for Mr Hook to resign on account of the final written warning. Compliance was well within his ability and means, as he accepted in cross-examination. All he was required to do was advise Ms Watts or Mr Boehmer of his whereabouts if he was leaving the office and his expected return time. Nor do I accept that he was otherwise unjustifiably constructively dismissed.

Conclusion

[43] I do not consider that there was a breach of duty by the defendant that caused the plaintiff to resign. He was disenchanted with his employment situation but that does not, of itself, support a claim for constructive dismissal. I have no difficulty concluding that Mr Hook resigned of his own volition.

[44] The plaintiff's claim is dismissed. Costs are reserved at the request of both parties. If costs cannot otherwise be agreed they may be the subject of an exchange of memoranda, with the defendant filing and serving any memorandum and documentation in support of an application within 30 days of the date of this judgment with the plaintiff filing and serving within a further 15 days.

Christina Inglis
Judge

Judgment signed at 10.30am on 9 October 2013