

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 113/07
5054741

BETWEEN MATTHEW BURNS
 Applicant

AND HIREQUIP LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Jarrod Lovely, Counsel for Applicant
 Ralph Webster, Advocate for Respondent

Investigation Meeting: 24 July 2007 at Dunedin

Submissions received: 24 July 2007 from Applicant
 26 July 2007 from Respondent
 7 August 2007 from Applicant

Determination: 13 September 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Matthew Burns worked for Hirequip Limited from March 2002 as Credit Controller and then Credit Manager and from February 2005 as Property Manager. In August and September 2006, Hirequip met with Mr Burns to discuss concerns about his work performance. At the meeting on 4 September 2006 Mr Burns resigned. He says that Hirequip breached its obligations to him leaving him with no other choice. Mr Burns is claiming remedies for an unjustified dismissal.

[2] The obligations said to have been breached are identified in the statement of problem. Mr Burns refers to an express term of his employment agreement requiring Hirequip to take all practicable steps to ensure a safe and healthy work environment and to promptly take all reasonable and practicable steps to eliminate, isolate or

minimise any significant hazards observed in the course of the employment. Mr Burns also relies on implied obligations on Hirequip to take reasonable care not to cause him physical or psychological injury by reason of the nature or volume of work required; not to conduct itself in a manner calculated or likely to seriously damage the relationship of trust and confidence; and not to break the statutory duties regarding significant hazards established by the Health and Safety and Employment Act 1992.

[3] Mr Burns says he was exposed to a workplace hazard that was an actual or a potential cause of serious harm to him. That hazard was overwork and stress and the serious harm suffered was attacks of supraventricular tachycardia. That is a benign arrhythmia usually very well tolerated and with a low risk of any significant adverse effects by people such as Mr Burns. Mr Burns says that Hirequip could not eliminate the hazard but that it should have taken all practicable steps to minimise it and to monitor his health in relation to that hazard.

[4] To resolve this matter, I need to set out specifically what are the relevant express and implied duties before turning to an account of various matters relating to Mr Burns' work as Property Manager. There are some evidential disputes about some of these matters which may need to be resolved before turning to the steps taken by Hirequip concerning the work performance issues. Finally I will need to assess whether there has been any breach of duty by Hirequip Limited in its dealings with Mr Burns that caused his resignation.

The relevant terms

[5] Clause 18 of the Employment Agreement is headed *Health and Safety*. Part of clause 18.1 states: *the employer will take all practical steps to ensure a safe and healthy work environment for you*. Part of clause 18.2 states: *both the employer and you have a duty to promptly take all reasonable and practicable steps to eliminate, isolate or minimise any significant hazards observed in the course of employment*.

[6] As to the relevant implied duties, I find they are best expressed as approved by the Court of Appeal in the judgment of *Gilbert v. Attorney General* [2002] 1 ERNZ 31. There, the implied term was identified as *an obligation to provide a working environment and management processes so that undue stress would not be caused to the employee. That was said to be the operation and practice of the duty to maintain a relationship of trust and confidence and to take all reasonable care to avoid*

exposing the employee to unnecessary risk of injury or further injury to their physical or psychological health. The Court noted that this did not make the employer the guarantor of a safe workplace.

The Property Manager position

[7] Mr Burns performed his work as Credit Manager to a high standard. He reported to John Ware, Hirequip's Chief Financial Officer. Both men were based in Hirequip's Dunedin office. Mr Burns was well regarded by Hirequip for this work. That is shown by Hirequip offering to match the salary offered to Mr Burns by an unrelated employer in 2003 in order to secure his continued employment as Credit Manager.

[8] Stuart McKinlay was Hirequip's Managing Director. In January 2005 he and Mr Burns had a discussion about Mr Burns' assuming a property manager role. There had been some earlier talk about this as well. It was agreed that Mr Burns be appointed as Property Manager effective February 2005. It is common ground that Mr Burns had no experience in that work and he was told that training and support would be provided. It was also arranged that there would be a gradual transfer of functions from the various managers previously with property development responsibilities to Mr Burns.

[9] Brian Stephen was Hirequip's Chief Operating Officer. On 5 July 2005 Mr Burns sent a memo to Mr Stephen and Mr Ware asking for greater responsibility. I take from that fact that, at the time, Mr Burns saw no breach of the express and implied obligations owed to him by Hirequip arising from his work as a Property Manager.

[10] In September 2005 there was a reorganisation of Hirequip's senior management. Mr Stephen was appointed joint Chief Executive Officer and Mr McKinlay assumed an Executive Director's role.

The health problems

[11] In 2002, Mr Burns was on a ski field when he felt pain in his chest and collapsed. By co-incidence, Mr Ware was also at the ski field. The condition that caused Mr Burns' attack was eventually diagnosed as supraventricular tachycardia

(SVT) but it is not suggested that the diagnosis was conveyed to Hirequip at the time. No further health problems occurred until April 2006.

[12] Mr Burns says that he was taken from home in an ambulance to Dunedin Hospital in April 2006. The hospital records indicate that Mr Burns was admitted on 26 April 2006. Mr Burns' father rang Hirequip that day to alert them to this development. Mr Burns had several days off work before returning. His evidence is that Mr Ware (who worked alongside him in the Dunedin office) expressed concern but he told Mr Ware that there was no indication that the problem would recur. However, Mr Burns returned to hospital late on 2 May 2006 and again on 22 May 2006.

[13] On another occasion Mr Burns was taken to hospital from work by Mr Ware. This may have been in July 2006. In evidence, Mr Burns said that he sometimes had to resolve these attacks when at work by control and relaxation techniques such as lying on the floor in the toilets. However, it is common ground that Hirequip was not aware during the employment of Mr Burns' use of these measures.

[14] Mr Burns attended Dunedin Hospital as an outpatient on 28 August 2006 as the result of an earlier referral from the emergency department. He was seen by Dr Walker, a cardiology registrar. He was later seen on 11 December 2006 by a cardiologist, Dr Williams. There is a letter dated 22 June 2007 from Dr Williams to Mr Burns' solicitor that has been proffered in evidence. Included with Mr Burns' hospital records is a letter dated 8 September 2006 from Dr Walker to Mr Burns' GP that also records some information about Mr Burns' state as at 28 August 2006. From what was said by Mr Burns, Dr Williams got the understanding that *he may have recently lost his job or at least has a pending Employment Tribunal hearing*. As will be seen, that impression was wrong as at that time. However, that and Mr Burns' marriage separation 18 months earlier are the two factors referred to as explaining Mr Burns' view that he was significantly stressed and thought that his stressful circumstances were exacerbating his health symptoms.

[15] The final point to note is that the medical records indicate that Dr Walker discussed with Mr Burns on 28 August 2006 a course of medication to trial for the control of his symptoms. That medication had potentially unhelpful side effects but another option was recommended by Dr Williams and the script for that medication was sent to Mr Burns on 8 September 2006. Mr Burns commenced the latter course

of medication which has kept his symptoms under control. Currently Mr Burns is awaiting surgical treatment that is likely to be a complete remedy for the problem.

Work performance issues

[16] From about March 2006, it became important to Mr Ware as Chief Financial Officer to have a more direct interest in developments in the property portfolio. Hirequip had embarked on a programme of selling and leasing back various properties. Mr Burns went on holiday for part of March 2006. His evidence is that, on his return, he felt that Mr Ware and Mr Stephen were upset with him for taking a holiday while certain deals were ongoing. Mr Ware's evidence, which I prefer, is that he approved the holiday request and had no issue with its timing. However, in Mr Burns' absence, Mr Ware became aware of a number of matters causing him to think that Mr Burns did not have the job properly under control. There was a discussion between the two men about that upon Mr Burns' return from leave. I prefer Mr Ware's evidence about the discussion to the extent there is any difference in recollection. At the end of the discussion Mr Burns' expressed confidence that he was feeling refreshed after the holiday and would be able to get on top of his work.

[17] In June 2006 there was a discussion between Mr Ware and Mr Burns about the performance of Mr Burns' work aimed at improving his performance. Mr Burns was also asked to complete a self assessment but this was never done.

[18] In mid July 2006, Hirequip engaged an experienced property consultant (Rachel Winder) to help sort out problems with an issue in Whangarei. It is common ground that Mr Burns was not responsible for these problems. Ms Winder was also asked to provide some mentoring support for Mr Burns following on from Mr Ware's recognition that Mr Burns was having problems with some of his work. Her interaction with Mr Burns and review of files caused Ms Winder to think that Mr Burns was not sufficiently experienced to handle the level of work required. Ms Winder reported this view to Mr Stephen who in turn told this to Mr Ware. Mr Ware's evidence, which I accept, is that he none the less remained confident that Mr Burns would come up to speed with continued support, which Mr Ware offered on a day by day basis to Mr Burns.

[19] At some point in July, there was developed a spreadsheet titled *Property Action Plan* that listed issues within the property portfolio that required attention,

Mr Burns' comments on the action required, who this was assigned to and the date for completion. The document demonstrates senior management's support for Mr Burns in his work. The document resulted from a further discussion between Mr Ware and Mr Burns over unsatisfactory work performance.

[20] Despite Mr Ware's continued optimism, by 23 August 2006 Hirequip had become sufficiently concerned about continued inadequate performance by Mr Burns that Mr Ware and Mr Stephen wrote a letter to him of that date requiring him to attend a disciplinary meeting on Friday 25 August 2006. The letter refers to some earlier discussions and some more recent events giving rise to the concerns. It includes a caution that it was a serious issue which might affect continuing employment and Mr Burns was encouraged to seek advice and to bring a support person.

[21] Mr Burns obtained advice and was legally represented at the meeting on 25 August. Mr Ware and Mr Stephen were both present. One significant point of difference in the evidence about this meeting concerns the existence of a report from Ms Winder. Mr Ware's and Ms Winder's evidence is that there was never a written report. During the meeting Mr Burns and his solicitor got the impression that there was a written report from Ms Winder and asked for a copy to be provided. Mr Ware and Mr Stephen did not tell them that it did not exist because they intended to ask Ms Winder to provide a written report. However that was never taken any further by Hirequip.

[22] Details of the performance concerns were canvassed during the meeting. Mr Burns' position then (as now) is that he acknowledged that there were some legitimate concerns about his work performance. However, Mr Burns (and his solicitor) advocated the view that the job was too much for one person. They also referred to stress being suffered by Mr Burns and his view that it was aggravating his heart condition. It is common ground that this was the first reference by Mr Burns to stress causing his poor work performance or his heart condition. The meeting finished with Mr Ware and Mr Stephens to consider what action to take regarding the work performance concerns and Mr Burns' responses. A further meeting was scheduled for 4 September 2006.

[23] As mentioned above, Mr Burns was seen by Dr Walker as a cardiac outpatient on Monday 28 August 2006. Mr Burns had pre-arranged leave for this purpose.

[24] The meeting on Monday 4 September was attended by Mr Burns, his solicitor, Mr Ware and Mr Stephen (by telephone). However, Mr Burns and his solicitor met beforehand. The material lodged on behalf of Mr Burns included the solicitor's notes relating to this client meeting and the following Hirequip meeting. The note of the client meeting reads:

- *Termination*
- *Notice Period*
- *Reasonable 3 months*
- *Holidays*
- *Bonuses*
- *Compensation for breach*

[25] The solicitor's notes of the meeting with Hirequip indicate that Mr Burns accepted that his performance as outlined in Hirequip's letter had been inadequate. However, Mr Burns' explanation for that was that there had been a lack of support for his position from Hirequip and that he was subject to competing demands from the senior managers. Hirequip countered by saying that the senior managers were all available to support Mr Burns and his role was to co-ordinate the activities of others within Hirequip, a role in which he had failed. Mr Burns was told that he would receive a final written warning and that Hirequip would expect compliance with performance standards in the future. Mr Burns did not accept that Mr Stephen was a resource he could use and he said that the regional managers expected him to do the day to day tasks. Mr Burns also said that the expected timeframes and work levels were not achievable. These points were not accepted by Hirequip. After some discussion on these issues, Mr Burns and his solicitor took an adjournment.

[26] When the meeting resumed Mr Burns' solicitor told Mr Ware (Mr Stephen having ended his phone connection) that his client felt he had no choice but to resign because he believed Hirequip had breached its obligation not to overwork him or cause him harm as a result of workplace practices. Mr Ware's evidence, which I accept, is that he was completely surprised by this. However, arrangements were made to finalise Mr Burns' departure and he agreed to put his resignation in writing. Later that day, the solicitor sent an email to Mr Ware saying that Mr Burns would not be signing a resignation letter because the circumstances constituted a constructive dismissal.

[27] By letter dated 14 September 2006, Mr Burns raised a personal grievance of constructive dismissal. The letter says that Mr Burns had an excessive workload that was causing him stress which manifested itself in a serious heart condition; that Hirequip had not taken appropriate steps to manage the workplace or prevent the harm being suffered by Mr Burns; and that Hirequip showed no willingness to make any changes to reduce or better manage the workload that was causing the stress. All of this was said to be the cause of Mr Burns' resignation.

[28] Despite mediation the parties have been unable to resolve the problem.

Personal Grievance

[29] I should first be clear on what this problem is not about. It is accepted by Mr Burns that Hirequip's complaints about inadequate work performance were substantially accurate. There is no challenge by Mr Burns to the reasons for Hirequip's decision to issue him with a final written warning, nor is there any complaint that he did not have a proper opportunity to give his explanation before Hirequip decided to warn him. In his statement of evidence, referring to the 25 August meeting Mr Burns says that he *assumed this was another meeting to discuss how the position of Property Manager could be made better*. However he did not say, nor could it be sustained, that he was not adequately forewarned about the employer's concerns and the purpose of the meeting. Hirequip's decision to issue a final written warning seems to be at odds with Clause 21 of the employment agreement dealing with disciplinary procedures. However, Mr Burns has never complained about this and has never suggested that his resignation was in any way connected with the warning. Nothing more needs to be said on the point.

[30] In *Auckland Shop Employees Union v. Woolworths NZ Limited* [1985] ACJ 963 the Court of Appeal held that constructive dismissal included situations where *a breach of duty by an employer leads a worker to resign*. The breach of duty must be sufficiently serious to make it reasonably foreseeable that the employee would not be prepared to work under the conditions prevailing: see *Auckland Electric Power Board v. Auckland Provincial District Local Authorities IUOW Inc* [1994] 1 ERNZ 168.

[31] The duties said to have been breached are the express and implied terms set out earlier. It is necessary to determine first whether Mr Burns' resignation was

caused by anything done or omitted by Hirequip, then whether that (in)action was a breach of any duty owed to Mr Burns.

[32] It is clear from Mr Burns' description of his circumstances on 28 August 2006 as reported by Dr Walker and the notes of the discussion between Mr Burns and his solicitor on 4 September 2006 that Mr Burns had decided to resign from his position before the meeting with Hirequip on 4 September. It follows from that and for the reason explained above that the announcement about a warning did not cause the resignation. I find further that Hirequip's omission on 4 September to do anything to address Mr Burns' recent assertion of overwork and stress could not have caused the resignation. What caused the resignation was Mr Burns' and his solicitor's belief that the heart problem had already been caused by workplace stress.

[33] The medical evidence of causation comes from Dr Williams. He says that the condition is not caused by stress but by an underlying anatomical abnormality. There is no evidence to link the first episode in 2002 to workplace stress or indeed any other stressful events in Mr Burns' life. Dr Williams says that it is *highly likely that there will be an underlying electro-physiological reason determined for these episodes rather than the diagnosis being attributable to any external factors*. He also says *It is my opinion that Mr Burns has had the potential to experience supraventricular tachycardia all his life and that there are no particular deductible reasons why he started to experience symptoms in 2002*. Accordingly there can be no finding that the onset of symptoms had anything to do with stress from any source.

[34] It is a fact that the onset of more frequent attacks coincided with Mr Burns' finding his work more stressful. Dr Williams says that *a stressful job will not be directly responsible for causing attacks with the caveat that ongoing stress may increase the frequency of episodes* (emphasis added). Elsewhere in his statement, Dr Williams states that it is possible that increased levels of stress may increase the frequency of symptoms. Dr Williams does discount the 2005 marriage break-up as a cause of the recurrent episodes from April 2006. I am then left to infer that because Mr Burns found his job more stressful from sometime after July 2005, that stress caused the attacks to become more frequent. However, the evidence does not establish the link to the necessary standard of probability. I cannot therefore say that Mr Burns was right to attribute the onset of more frequent symptoms to stress at work.

[35] If the evidence does not establish that workplace stress caused Mr Burns' health problems that led to his resignation, it is difficult to see how there could have been any breach of a related duty by Hirequip. I should nonetheless specifically address the points raised by Mr Burns. He says that Hirequip provided insufficient resources for his position which had the additional problem of involving too many people with too many different views. In a sense there is something to the latter aspect of this criticism. Mr McKinlay had founded the business, then was a substantial shareholder and managing director before relinquishing more control to Mr Stephen. Despite that Mr McKinlay no doubt continued to advocate strong views about important aspects of the business within Mr Burns' area of responsibility which did not always accord with other senior management. Managing and resolving such competing views can cause stress. However, I do not accept that there was any breach of obligations arising from this. Mr Burns' reporting line was always clear. He had a strong relationship particularly with Mr McKinlay and Mr Ware. The extent to which there were differences between Mr McKinlay and others was no more than might exist in any healthy management environment. There was certainly nothing dysfunctional about the relationship at senior management level that could reasonably have caused any abnormal level of stress for someone reporting to those managers.

[36] I do not accept there is any validity to Mr Burns' points about a lack of resources or overwork. Mr Ware's evidence is that he personally worked quite long hours at the Dunedin office and that he was unaware of Mr Burns having to work excessively long hours. Mr Burns did work away from the office but that was a result of his desire to do his job and perhaps him not coping. The best evidence available about the level of work required of the position is that of the property consultant, Ms Winder. Her view is that one full time employee could professionally and effectively manage Hirequip's portfolio with assistance from time to time on special projects. Her evidence also is that Mr Burns was able to cope with day to day property management tasks but was out of his depth with more complex situations where he possibly tended to *put his head in the sand* making them worse. I accept these views are accurate. It follows that no breach of obligation is established.

[37] When it became apparent that Mr Burns was not managing his responsibilities, Hirequip at first took reasonable steps to support and mentor him, particularly through the closer attention being paid by Mr Ware in the property area. For the reason

explained above it is not necessary to make findings about its decision to issue a final warning.

Conclusion

[38] It follows from the above findings that there was no breach of obligation by Hirequip that caused stress for Mr Burns. There being no breach, Mr Burns' resignation cannot amount to a constructive dismissal. There is no personal grievance and his claims are dismissed.

[39] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority