

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 11
5467150

BETWEEN TYRONE FOSTER
 Applicant

A N D TWO DEGREES MOBILE
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Georgina Burness, Advocate for the Applicant
 Penny Swarbrick, Counsel for the Respondent

Investigation Meeting: 29 January 2015 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 30 January 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Tyrone Foster, claims he was unjustifiably dismissed (albeit constructively) by the respondent, Two Degrees Mobile Limited (2 Degrees) on 27 January 2014.

[2] Through both the letter by which he raised his grievance (18 March 2014) and his Statement of Problem Mr Foster says he relies on four events which led him to conclude he was being constructively dismissed. It is also claimed each of those gives rise to a disadvantage grievance pursuant to s.103(1)(b) of the Employment Relations Act 2000 (the Act).

[3] 2 Degrees denies Mr Foster was constructively dismissed and says he resigned of his own volition. It also says one of the four grounds giving rise to the purported

constructive dismissal (a warning dated 19 November 2013) cannot be pursued as a disadvantage claim as it was not raised within 90 days as required by s.114 of the Act.

Background

[4] Mr Foster commenced with 2 Degrees as a Customer Care Agent in Christchurch on 15 May 2012. Shortly thereafter he was promoted to Senior Customer Care Agent. He was subsequently appointed acting Team Manager to cover the incumbent's (Melissa Grose) absence on parental leave.

[5] On 10 August 2013, and while still employed as Team Manager, the first relevant event occurred. On that day Mr Foster took a dozen beers from 2 Degrees' premises. They were consumed at his home with some but not all of his staff present.

[6] He justifies this on the grounds he was trained to entertain his staff in this manner by Ms Grose and had also telephoned prior to taking the beer to obtain her approval.

[7] 2 Degrees disagrees. It says Ms Grose was not aware of the issue till after she returned from parental leave on 31 October 2013. Having had this and another matter brought to her attention she consulted with Human Resources (HR) and decided to initiate an investigation. The letter inviting Mr Foster to meet advises 2 Degrees wished to discuss two concerns. The first was the removal of the beer and the second was inappropriate dissemination of confidential information about one of his staff.

[8] The meeting occurred on 14 November 2013 and resulted in a written warning dated 19 November 2013. The warning was for improperly removing the beer. It notes Mr Foster accepted he did so with the good intention of keeping a couple of staff members *engaged*. The letter also notes 2 Degrees accepted Mr Foster's denials in respect to the dissemination of confidential information and no action was taken in respect of that allegation.

[9] On 1 December 2013 Two Degrees received a complaint from one of its staff who had recently tendered her resignation. It aired a variety of issues and included the transcript of a lync (electronic messaging) conversation which appeared to suggest Mr Foster attempted to disseminate confidential information about her to others.

[10] Having discussed that with HR Ms Grose again decided to investigate. She prepared a letter inviting Mr Foster to a meeting but subsequent events overtook its issuance which was put in temporary abeyance while other issues were investigated.

[11] Those investigations emanate from the fact, accepted by both Mr Foster and 2 Degrees, that the Christchurch office was dysfunctional. There was considerable conflict between staff members which, in some instances, resulted in formal complaints. One of those was a complaint Mr Foster made about a colleague on 10 December 2013. It led to an investigation and a conclusion there was insufficient grounds for disciplinary action. It did however lead to letters to both outlining 2 Degrees expectations regarding their future behaviour. These were issued on 19 December which was the same day the colleague levelled various allegation against Mr Foster including a claim he sexually harassed her.

[12] These claims were then investigated with a similar outcome. Notwithstanding Mr Fosters admission he had made at least one comment the recipient could well have construed as sexual harassment, 2 Degrees concluded disciplinary actions was not warranted but once again Mr Foster received a letter outlining its expectations about his future conduct. It was issued on 9 January 2014.

[13] Here it should be noted Mr Foster does not take issue with the way in which 2 Degrees addressed these complaints. He says 2 Degrees did all it could and considered the outcomes fair.

[14] 2 Degrees says that during an interview regarding the first of these complaints Mr Foster advised he was looking for alternate jobs. Mr Foster denies that saying he was only commenting about the fact he was seeking a new position within 2 Degrees.

[15] Upon conclusion of its investigations into the above complaints Ms Grose decided to recommence the process regarding Mr Foster's alleged breach of confidentiality. She also had concerns regarding his performance in respect to various failures to follow instructions and this was added to the concerns raised in a letter inviting Mr Foster to an investigative meeting.

[16] The meeting occurred on 16 January 2014. The letter recording the subsequent warning was issued on 22 January and records Mr Foster conceded he was party to a lync exchange which evidenced an attempt to disseminate confidential information about one of his staff to another. It also notes he accepted another breach

of employee confidentiality and confirmed he had not followed various instructions in the past but was attempting to do better.

[17] Mr Foster's response to the warning was to advise Ms Grose he wanted to be demoted from his then current position of Team Coach and return to the role of Customer Care Agent. Ms Grose followed their discussion with an email which, amidst other things, contains the following:

One of your concerns was the lack of work/life balance and also you are not enjoying the role.

Could you please outline what your concerns are, so that I have a chance to address them?

...

I would prefer the opportunity to help you through this Tyrone, and I would like the chance to work with you to resolve some of the concerns you have.

[18] There was no response and Ms Grose sent a follow-up email the following afternoon (Thursday 23 January).

[19] On 24 January Mr Foster was interviewed for, and given a positive indication about attaining, a new job with another employer. He had confirmation an offer would be made the same day.

[20] On Saturday 25 January Mr Foster responded to Ms Grose's email of 22 January outlining various concerns. Included therein is a claim he had been told he was under performing but not told why and an assertion he was suffering stress as a result of *the unwarranted written warnings*. He goes on to say:

I do enjoy this job, I don't recall ever saying I don't enjoy it but I would enjoy going on the phones more as the stress of this job does not match the level of enjoyment.

[21] The same day he also engaged in a series of email exchanges with Ms Grose which saw a request for leave between 29 January and 21 February 2014 (inclusive) being approved.

[22] On 27 January Mr Foster was working in 2 Degrees Auckland office. That day he sent Ms Grose an email which reads:

To whom it may concern,

I wish to hand in my resignation as of today 27th January 2013 (sic)

Thank you for the opportunity and experience I have gained

Regards,

[23] Earlier that day Mr Foster had met with one of the Auckland managers who later produced a file note recording that Mr Foster was clearly unhappy. He did, however, send a message to various colleagues which was predominantly positive about his time and experiences at 2 Degrees.

Determination

[24] Mr Foster claims he was constructively dismissed.

[25] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*¹ 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.

[26] There must be a causal link between the employers conduct and the tendering of the resignation². Furthermore the possibility a resignation might ensue should be evident to the employer.

[27] While a simplistic summary of significantly more complex law, the underlying assumption is actions or words of the employer amounted to a breach which induced a subsequently proffered resignation.

[28] The onus falls on Mr Foster to establish, prima facie, there was such a breach.

[29] For the following reasons, I conclude he is unable to do so.

¹ (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

² *Z v A* [1993] 2 ERNZ 469

[30] Mr Foster's approach is a combination of the second and third examples referred to in *Woolworths*. As already said, Mr Foster originally cited four events which cumulatively gave rise to a conclusion he could no longer remain with 2 Degrees. They were:

- (a) Issuance of the warning concerning the removal of the beer;
- (b) Issuance of the second warning which, according to the letter raising the grievance, was not justified as:
 - (i) the information discussed was not, to the best of Mr Foster's knowledge, confidential; and
 - (ii) its dissemination could not be shown to have had a direct impact on the subject being unsuccessful in a job application.
- (c) 2 Degrees' decided not to pay a bonus of \$500 Mr Foster had expected to receive in January 2014; and
- (d) 2 Degrees arbitrarily amended the shifts Mr Foster would work on and after 29 January 2014. He says the changes were sudden and precluded him from working out his notice due to family commitments. It is implied this forced him to take annual leave during his notice period.

[31] When asked at the beginning of the investigation meeting why he had resigned, Mr Foster cited the two warnings. After some prompting as to whether there were other reasons he said Ms Grose had bullied him. He did, however, say this was not significant – her actions were ones that could have been handled.

[32] That means there are now five grounds upon which Mr Foster relies for having concluded he had no option but to resign.

[33] They are the two warnings, the failure to pay the bonus, the forcing of leave during his notice period and Ms Grose's bullying. I shall put the warnings aside and address the last three first.

[34] First is the claim Mr Foster was subjected to bullying by Ms Grose. In support of this contention Mr Foster made very brief comments about Ms Grose constantly

putting him down, making embarrassing comments about his appearance, threatening his job security, overloading him with work and requiring long hours and looking for faults in his work.

[35] These claims are, on the evidence before me, untenable. The accusations were aired in a couple of vague one liners. There is no detail or specific examples and Mr Foster did not explain these claims – indeed he conceded these issues were not significant and he could have remained despite them ([31] above). There was no mention of these claims in the correspondence giving rise to the grievance and notwithstanding the dissatisfaction he expressed when talking to the Auckland manager on 27 January ([23] above) Mr Foster accepts that at no time prior to resigning did he raise or discuss these allegations with 2 Degrees. By the time of this meeting Mr Foster had sourced alternate employment and was going. Given the requirement an employer be given notice of issues giving rise to a constructive claim and allowed an opportunity to address them these claims must fail.

[36] Returning to the four issues originally cited. Two have now been conceded as ill founded. After questioning during the investigation meeting Mr Foster accepted the claim he was forced to use annual leave during his notice period was inaccurate. He had already sought, and been granted, the leave in question.

[37] Similarly he acknowledged the claim regarding the bonus lacked merit and accepted 2 Degrees' policy clearly states the receipt of a warning extinguishes entitlement.

[38] The removal of two of the four grounds upon which Mr Foster originally claims to have influenced his decision to resign clearly undermines the resulting decision. That would normally be the end of this claim but the unjustified action claims mean the warnings, or at least the second thereof, needs to be addressed.

[39] The reason the first warning need not be considered is that 2 Degrees is correct when it says this cannot be pursued as a disadvantage grievance. The warning was not challenged until 18 March 2014. More than 90 days had elapsed since it was issued and 2 Degrees refuses to accept the disadvantage claim. As there is no section 114(3) application it cannot now proceed.

[40] However, and for the sake of completeness, I would have concluded it was justified. I accept the content of the contemporaneous documentary evidence which

record acknowledgments by Mr Foster that he had acted inappropriately against his present denials which are now supported by claims which, when challenged by questioning by both myself and Ms Swarbrick, were answered vaguely and inconsistently.

[41] For similar reasons I conclude the second warning was justified and to that add two additional factors. First I note there is no evidence to support Mr Fosters original assertions as why the warning lacked validity ([30](b) above). Second I note his prime contention is now that he did not know the information was confidential. That neither alters nor undermines 2 Degrees conclusion, with which I concur, that it was.

[42] All four grounds which Mr Foster bases his claim he was forced to resign are, in my view and for the above reasons, untenable. To that I add the fact it now transpires Mr Foster was in the throes of a domestic relationship crisis which negatively affected him at the time and he had already attained alternate employment when he tendered his resignation.

[43] I then note Ms Grose's attempts to discuss Mr Fosters' concerns when he tendered his resignation and resolve them. Finally there is the fact he admitted indiscretions regarding his colleagues sexual harassment claim. To use a euphemism, those admissions would have given a reason for 2 Degrees to pursue disciplinary action had it truly sought his removal. It did not. Neither if these reactions is that of an employer seeking an employee's removal.

[44] For the above reasons I conclude Mr Foster has failed, by a very large margin, to establish he was constructively dismissed by reason of either a breach of duty by 2 Degrees or a deliberate course of action by same aimed at attaining said resignation.

Conclusion

[45] For the above reasons Mr Foster's claim he was constructively dismissed fails. His claims he was subject to various unjustified actions also fail.

[46] Costs are reserved.