Employment Court of New Zealand

Greetham v Lawter (NZ) Limited [2020] NZEmpC 174 (28 October 2020)

Last Updated: 2 November 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2020] NZEmpC 174
EMPC 117/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JOHN GREETHAM Plaintiff
AND	LAWTER (N.Z.) LIMITED Defendant

Hearing:	22-26 June 2020 (Heard at Auckland)
Appearances:	W Reid, advocate for plaintiff E B Burke, counsel for defendant
Judgment:	28 October 2020

JUDGMENT OF JUDGE M E PERKINS

Introduction

These proceedings involve a challenge to a determination of the Employment Relations Authority (the Authority) dated 4 April 2019.1 A subsequent costs determination was issued on 8 July 2019.2 This has not been challenged. The plaintiff, John Greetham, was unsuccessful in his claim before the Authority and was ordered to pay costs to the defendant, Lawter (N.Z.) Ltd (Lawter), of $7,000.

1 *Greetham v Lawter (NZ) Ltd* [2019] NZERA 203 (Member Campbell).

2 *Greetham v Lawter (NZ) Ltd* [2019] NZERA 401 (Member Campbell).

JOHN GREETHAM v LAWTER (N.Z.) LIMITED [2020] NZEmpC 174 [28 October 2020]

Mr Greetham was held to have resigned voluntarily from his position of employment with Lawter and not to have been constructively dismissed. He now seeks to reverse that finding. In his challenge Mr Greetham seeks the following remedies:

(a) Payment of compensation in the sum of $50,000 for hurt, humiliation and injury to feelings, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act);

(b) payment of compensation in a sum equivalent to three months lost wages pursuant to s 128(2) of the Act being $23,013;

(c) payment of compensation in respect of lost earnings and future lost earnings to age 65 pursuant to s 128(4) of the Act; and

(d) costs.

Employment background

Lawter is incorporated in New Zealand and is a wholly owned subsidiary of the Harima Chemical Group (Harima). It operates an industrial plant in Mt Maunganui processing raw materials from pine forestry to make a variety of products such as inks, resins and adhesives. The Mt Maunganui plant had previously been owned by AZKO Nobel Ink and Adhesive Resins (N.Z.) Ltd (AZKO Nobel). The plant was sold in 2006 to Hexion Specialty Chemicals (N.Z.) Ltd (Hexion) before changing its name to Momentive Specialty Chemicals (N.Z.) Ltd. In 2010, the company was sold to Harima and Lawter was officially incorporated in December of that year.

On 1 August 2005, Mr Greetham commenced employment at the Mt Maunganui plant as a production co-ordinator with AZKO Nobel. He had recently emigrated to New Zealand from the United Kingdom and had obtained the role through a recruiting agency. While the plant was still owned by Hexion, Mr Greetham was moved from his position as a production co-ordinator to a role as an Environmental Health and Safety Co-ordinator. This change in employment designation occurred as a result of dissatisfaction with Mr Greetham's performance in

the former role. The new role was offered to him after unsuccessful attempts at performance management as an alternative to termination. There was no evidence that Mr Greetham disputed what had occurred. These events, while mentioned in evidence, play no part in the current matter.

Mr Greetham signed a new employment agreement on 30 June 2008. The position description set out the following as the key purposes of Mr Greetham's position:

> (a) To monitor continuous improvement related to product quality and production processes.
>
> (b) To implement, promote and monitor environmental health and safety, management systems and quality assurance standards and practices at the site.
>
> (c) To recognise and recommend opportunities in process improvement and support the New Zealand Site Manager in implementing changes.

The new role meant that Mr Greetham took on responsibility for aspects of personnel safety arising from workplace hazards such as from chemicals, working from heights and other such hazards. His tasks included incident management and investigations, personal protective equipment purchasing, the maintenance of site security systems and close working relationships with other business managers. The position description also set out that the role required a tertiary qualification. Mr Greetham did not have such a qualification and this was known when he was appointed. It was apparently decided that this requirement was not critical in Mr Greetham's case.

From June 2008 until April 2010, Mr Greetham reported in his new position to Ronald de Jong, who was the Regional Health and Safety Manager and was responsible for three sites. Ian Yates was appointed Site Manager on 1 February 2010. Mr Greetham was advised on 7 April 2010 the reporting line for his role was to change and he would from then on report to Mr Yates. Mr Yates had previously been the

Production Manager. In his new position he was the most senior person in New Zealand in the day-to-day management of the site.

In February 2011, Mr de Jong was made Global Environment Health and Safety Manager for Lawter. He transferred to Lawter's site in Maastricht in the Netherlands in June 2011. In response to his departure, Lawter appears to have decided not to fill his vacated position with just one new employee. A Task Transfer Plan (TTP) was created. This distributed the responsibilities being vacated by Mr de Jong amongst a number of employees. It seems clear, however, that a large majority of Mr de Jong's responsibilities fell to Mr Greetham. Lawter agreed that the TTP was never formally implemented but stated that this was because it would have added a significant number of responsibilities to Mr Greetham's current role. This does not appear to be what occurred in practice. While Lawter denied that Mr Greetham worked both roles following Mr de Jong's departure and states that the role was distributed across a number of employees, Lawter, nevertheless, admitted that Mr Greetham took on a large number of new responsibilities following Mr de Jong's departure. One particularly important role was ensuring the plant's compliance with "5S" standards by the conducting of audits. The 5S standards were a workplace organisation methodology employed across Lawter sites worldwide. It was apparent that until later, Mr Yates was not entirely wedded to the 5S standards as a workplace organisation methodology.

There was no immediate change to Mr Greetham's employment agreement, remuneration or job title as a result of the change in his duties. The increase in responsibilities was raised by Mr Greetham at a meeting with Mr Yates and Kate Riches, then described as Human Resources Generalist, on 21 October 2011. A time in motion study was thereafter conducted by Ms Riches in response to the discussion. This stated that she found that Mr Greetham's duties were only consuming around 20– 25 hours per week. Mr Greetham disputed this assessment and that dispute on his part continued throughout the entire period of his employment from that time on.

In March 2014, Mr Greetham's job description was changed to Environmental Health and Safety Manager. His salary was adjusted and he remained reporting to Mr Yates. Lawter stated that this change was due to Mr Yates' belief that

environmental health and safety should be represented on the senior leadership team. Mr Greetham agreed to the change and received a number of benefits in terms of salary, health insurance and admission to the company's incentive compensation plan. The letter sent by Lawter on 28 March 2014 to Mr Greetham outlining these changes did not indicate any change to the other terms of his employment agreement.

At the time Mr Greetham was made a member of the senior leadership team, there were clearly no performance related concerns held by the employer. Lawter's willingness to place Mr Greetham in that team reflected the performance appraisals conducted during this time. Some areas of improvement were identified, but the overall assessment given to Mr Greetham showed him performing at an acceptable level.

5S and the global visit

The circumstances surrounding the global visit and its relationship to the 5S system needs some explanation as it was the first of two significant events playing an important part in the lead up to Mr Greetham's resignation. As indicated earlier, Mr Greetham played a major part in the workplace organisation methodology referred to as 5S. He had the responsibility of conducting the audits as to compliance. The methodology is Japanese in origin reflecting the global management of Harima. The 5S refers to five Japanese words: seiri, seiton, seisō, seiketsu and shitsuke. These are translated into English as to: sort, set in order, shine, standardise and sustain. It is directed towards organising the workplace for cleanliness, efficiency and effectiveness by identifying and storing the items used, maintaining the area and items, and sustaining this new order.

As part of the 5S employed by Lawter across all of the international facilities, audits were carried out by a nominated individual on each site who was to score each part of the facility against a set standard and target set by the international managers. Mr de Jong was globally responsible for ensuring that these audits were carried out effectively and he would carry out Global Realignment Audits to ensure the uniformity of scoring standards.

Prior to leaving the Mount Maunganui facility, Mr de Jong had been the person responsible for 5S audits at the site. The role was treated similarly to that of an external auditor in an attempt to maintain objectivity in scoring. During the audit, Mr de Jong would be accompanied by different managers depending on the area of the facility currently being audited. Overall responsibility lay with the site manager for 5S standards, but when an issue was identified by Mr de Jong during the audit, remedial action would become the responsibility of the senior manager of the relevant area of the facility. 5S issues would be recorded and photographed; any remedial action would then be inspected by Mr de Jong and this would then close the issue. This role was inherited by Mr Greetham as at February 2011 when Mr de Jong was appointed to the global position. Mr de Jong departed in June 2011.

Mr Greetham identified Jason Goldsmith, the Production Manager, and Nadhem Hamadi, the Engineering Manager, as key members of the 5S auditing team. This was confirmed by Mr Goldsmith in his evidence. It was denied by Lawter although it was not denied that these men may have been involved from time to time. Mr Greetham stated that these two men were instrumental in ensuring remedial action was taken after the audits and that after they left the employment in 2014, there was no one with the authority to ensure these actions were taken. This was also denied by Lawter which instead blamed Mr Greetham's performance and attitude in relation to 5S for the failures in remedial action. Lawter stated that Mr Greetham was disorganised in organising audits, often sending last minute calendar invites which would mean that those who were required to join the audits would already have had full timetables and be unable to accompany him. This criticism needs to be considered once again in the context of Mr Yates' clear ambivalence towards the 5S at that time. While attempts were made later following significant events at the plant to assist Mr Greetham, it was somewhat understandable that Mr Greetham started to become demoralised.

In November 2016, Mr de Jong visited the facility and conducted a global realignment audit. The site scored poorly both in relation to the set standards and in comparison with the performances of other Lawter sites internationally. The need for 5S audits to be more regular appeared to have been raised with Mr Greetham in the months following this low score. Ashley Hart, the Manufacturing Manager,

established the 5S committee which conducted an anonymous survey in February 2017 to determine what was causing the lax attitude towards 5S compliance at the facility. The results, while they did not explicitly name Mr Greetham, appeared to be very critical of his leadership and implementation of the 5S system. The establishment of the 5S committee was apparently also something that Mr Greetham should have already done, but he had decided that it was unnecessary. Once again, the criticism of Mr Greetham at this point in time also needs to be kept in context with Mr Yates' own ambivalence towards 5S. Mr Yates had after all elected oversight and Mr Greetham reported to him.

In March 2017, a Global Operations Meeting was held at the Mount Maunganui facility. Present at the meeting were members of Lawter's international management team including a contingent of senior members of the Japanese management team as well as Mr de Jong and Peter Biesheuvel, the Vice-President of Operations and Development. Among the Japanese management team, the CEO of Lawter was present. This visit is referred to throughout the evidence as either the "global visit" or the "Japanese visit". The latter arises from the reaction of the Japanese contingent to what was seen at the site.

During the visit, a 5S walkthrough was conducted by members of the international delegation. This walkthrough and the overall visit are described as a "disaster". Mr Greetham stated in his evidence that the reaction from the visitors was one of visible dissatisfaction (even anger) at the state of the site. This evidence was not challenged by Lawter. Photographs were taken by Mr Hart and Mr Greetham throughout the walkthrough.

The findings of the global alignment audit conducted by Mr de Jong and the criticism emanating from the global visit were, it appears, a turning point for Mr Yates in his attitude towards 5S. At the end of the visit, Mr de Jong told Mr Greetham that from that point on Mr Yates and Mr Hart would oversee the housekeeping at the site. Mr Yates and the senior leadership team began to become more involved in the 5S standards to raise the level of compliance at the site. It is worth noting that Mr Yates had, at the 5S committee meeting on 21 February 2017, already stated that as site manager he would be the go-to person on the management team with regards

to 5S.

Mr Yates' own performance appraisal at the time, written by his manager Mr Biesheuvel, contained additional details of the senior international management's views of the visit. The tour was described as "dramatic", with little effort having been made to deal with quite "simple-to-manage waste". The appraisal also discussed the cultural dishonour felt by the Japanese CEO. In Japanese culture the pending visit of a CEO should have seen significant effort put into the appearance, cleanliness and tidiness of the facility.

Additional comments were added by Mr Biesheuvel to Mr Yates' already negative performance and development appraisal following the visit. The feedback provided was overwhelmingly critical of Mr Yates' attitude towards the 5S standards and stated that Mr Yates would need to win back Mr Biesheuvel's confidence. Mr Yates accepted that the 5S uptake at the facility had been slow and embarrassing, but stated that he found the feedback against him harsh. The fact that Mr Greetham had not been invited to a meeting and presentation during the global visit was also criticised. Mr Yates stated in response to this that he had issues with Mr Greetham's performance, that Mr Greetham had some responsibility for the poor 5S standards. He felt that Mr Greetham's presence at the meetings would have been negative and embarrassing, and noted that while the delegation was touring the facility, Mr Greetham had apparently led the party he was guiding into a dangerous area. Mr Yates said that he would discuss with Mr Biesheuvel, Mr Greetham's perceived "apathy and lack of awareness" on their next call.

In view of Mr Yates' overall responsibility for what had occurred and probably stemming from his own ambivalence to that point, the criticisms of Mr Greetham appeared to be somewhat unfair.

The Major Hazard Facility Regulations

Following Mr Greetham's 2016 performance appraisal, events occurred which gave rise to considerable criticism of Mr Greetham's performance. Mr Greetham's job description required him to stay abreast of regulatory changes affecting environmental health and safety at the site. His position description contained a term

requiring him to "maintain [a] high level of knowledge and awareness of the SH&E standards and regulations".

In 2016, the Health and Safety in Employment Act 1992 was replaced with the Health and Safety at Work Act 2015. Under that Act, the Health and Safety at Work (Major Hazard Facilities) Regulations 2016 required Lawter's plant to be designated as a major hazard facility by WorkSafe. A notification to WorkSafe was required of Lawter in accordance with reg 14. The Regulations set out a duty to notify WorkSafe if a facility that existed on 4 April 2016 had, or was likely to have, hazardous substances that equalled or exceeded the set lower threshold quantity.3 The following information had to be included in the notification:4

(a) a brief description of the primary business activity or activities at the facility; and
(b) information about the operator; and
(c) sufficient information to identify the specified hazardous substances present or likely to be present at the facility; and
(d) the quantity and physical form (for example, solid, liquid, or gas) of the specified hazardous substances referred to in paragraph (c); and
(e) the contact details of a person with whom WorkSafe may communicate in relation to the information that is, or must be, contained in the notification; and
(f) the details of any enforcement action against the operator or an officer of the operator, under any legislation related to the management of health and safety or hazardous substances, taken either in New Zealand or in an overseas jurisdiction; and
(g) information about the land use and other activities in the area surrounding the facility or proposed facility; and
(h) any other additional information that WorkSafe requires for the purpose of determining —
(i) whether the facility or proposed facility is a major hazard facility; and

(ii) the physical location of the facility or proposed facility.

Mr Greetham did not carry out his responsibilities to advise Lawter of its obligations under the new Act and Regulations so that Lawter, as a result of failing to carry out its notification requirements, found itself facing prosecution.

3 Health and Safety at Work (Major Hazard Facilities) Regulations 2016, reg 12(1).

4 Reg 14(2).

Earlier in December 2013, Mr Greetham had completed and submitted an online survey document referred to as the Major Hazard Facilities Risk Landscape Questionnaire. This questionnaire had been sent by the Ministry of Business, Innovation and Employment (MBIE) to facilities which were deemed likely to be classified as a Major Hazard Facility (MHF). Mr Greetham completed the questionnaire on behalf of Lawter and claims that Mr Yates was copied into an email containing the completed form. There does not seem to be any evidence of this amongst the documents and Mr Yates denies having received it. It appears Mr Yates was forwarded a PDF document containing a blank version of the questionnaire. Given this was an online survey it seems unlikely that Mr Yates could have been copied in.

Neither Mr Yates nor Mr Greetham followed up the survey. Mr Greetham was under the misapprehension that the survey had put MBIE on notice as to Lawter's likely MHF status and that communication would be forthcoming from MBIE if any further steps needed

to be taken. In July 2017, Lawter became aware of the requirement to notify WorkSafe and that it had been in breach of this requirement for over a year. The company was forced to take urgent action in order to comply with the new regulations.

Mr Yates contacted WorkSafe by email on 4 September 2017 once the issue had been identified. He explained the error. While Mr Greetham's role in the misunderstanding is mentioned, the email letter does not appear to attempt to make Mr Greetham solely responsible. However, it seems that privately Mr Yates believed responsibility lay with Mr Greetham. He believed that if Mr Greetham had continued attending environmental health and safety seminars and networking events he would have been aware of the MHF Regulations. In his evidence, he described the consequences flowing from the error as being the result of Mr Greetham's "negligence".

During this urgent response, Mr Greetham was asked to calculate the maximum levels of flammable liquid on the Mount Maunganui site. This was in order to ascertain if the site was a MHF and, if so, whether it was an upper tier or lower tier facility under the regulations. While performing the task, Mr Greetham mistakenly

recorded that the site held 1,000 tonnes of solvent paint; this should have been recorded as 1,000 litres. Therefore, his calculations at the time erroneously established that the facility would have been an upper tier MHF. It later became clear this was not the case and the site was registered as a lower tier MHF.

There appears to have been some dissatisfaction with the contribution of Mr Greetham during this stressful time for the business. On 9 October 2017, in response to a query about Mr Greetham's contribution to the MHF registration from Mr de Jong, Mr Yates wrote that he:

... is not interested and has completely backed away from this issue. He barely contributes to discussions on site. I am currently discussing how we can [formally] address John's performance as it is becoming steadily [worse].

He then went on to state:

What I will say is that the game has radically changed in [New Zealand] and there is no way this site can function, in a compliant way, with John as our EHS expert.

Mr Yates stated that the senior leadership team worked 70-hour weeks during this period in a desperate effort to make the company compliant. During this period, Mr Greetham continued to leave work at exactly 3.30 pm and took a two-week vacation. Because of Mr Greetham's perceived lack of concern, Mr Yates mentioned his concerns in an email to Mr Biesheuvel and Mr de Jong. On 10 October 2017 he stated:

[John's] performance has been declining for a while now but this seems to have tipped him over the edge. He is a very nice person but he is out of his depth as an EHS person and a [manager]. He seems unwilling or incapable of engaging in this process.

He stated that he and Ms Riches were looking to address these concerns formally.

Lawter had engaged Aurecon New Zealand Ltd (Aurecon) to provide consultancy services to enable the company to meet MHF requirements. The consultancy team was led by Catherine Morar who, on 1 November 2017, wrote to Mr Yates, somewhat perceptively, expressing the need for delineated Environmental

Health and Safety Co-ordinator and Manager roles in order to meet the MHF and regulatory requirements as well as the day-to-day requirements of the business.

Performance concerns

In April 2016, Mr Greetham's performance appraisal for the preceding 2015 year was made. Mr Greetham received an "achieved" grade and the tone of the appraisal was generally complementary. There was a comment made that his performance in terms of 5S had significantly slipped and there was a large amount of negative feedback about his approach to the system. It was observed that Mr Greetham appeared "powerless" and to have "lost hope". The comments end by stating that Mr Greetham needed to show once again he was part of the solution and not the problem. This is somewhat ironic comment from the person to whom Mr Greetham was responsible as Mr Yates had himself shown ambivalence towards 5S and was later reprimanded for an incident showing that ambivalence.

Mr Greetham took exception to the appraisal and contacted Mr de Jong who had previously been his mentor. Mr Greetham indicated that he was considering leaving the company and during the exchange commented that he felt the Mt Maunganui site was being run more for "personal interest". Mr de Jong counselled Mr Greetham through this. He commented that the appraisal was a standard mix of encouragement and constructive criticism. He suggested that Mr Greetham speak to the Human Resources Department in New Zealand and that he was reluctant to see Mr Greetham leave. While the comments from Mr Yates seemed unfair, the appraisal itself and the reaction to it was significant as showing that, at that stage, there was the beginning of dissatisfaction with Mr Greetham's performance and that Mr Greetham was aware of it. It also indicates relational difficulties between him and Mr Yates and that these were occurring and being presented well before the stressors which occurred later and nearer to the time when Mr Greetham resigned his employment.

In evidence, Lawter (and more particularly Mr Yates) characterised Mr Greetham as uncommitted and not a team player. Comment was made that when offered the opportunity to participate in training and upskilling he declined to attend these opportunities as they involved working past the end of his working day at

3.30 pm or having to leave Tauranga to attend. Mr Hart stated in his evidence that Mr Greetham would invariably leave work at 3.30 pm no matter the level of stress the facility was operating under at the time. This became significant in relation to the period of great stress on the site arising from the MHF assessment already discussed in this judgment.

A short time after the international visit, in April 2017, Mr Greetham received the results of his 2016 appraisal which included statements alleging he was 'coasting' and had no drive in his work. Mr Yates wrote that he hoped Mr Greetham "can bring more enthusiasm and conviction to his duties in 2017." Lawter emphasised throughout its evidence that this appraisal related to the previous year and was not a reaction to the embarrassment caused by the global visit. The appraisal, and the reaction to it, were significant in confirming the earlier signs of dissatisfaction with Mr Greetham's performance, and continuation of the relational difficulties between him and Mr Yates, well before the stresses arising from the global visit and MHF crisis.

In his response to the appraisal which he called "negative and not representative of actual performance", Mr Greetham stated that 5S compliance was low due to the responsible managers not following through on the required actions he identified during his audit.

Mr Greetham stated that the conflict over the performance appraisal was never resolved but that Mr Yates never gave any further indication he was unhappy with the plaintiff's performance. He had regular 'catch-ups' with Mr Yates between January 2017 and October 2017 and again in March 2018 where only operational concerns were discussed. This perception of Mr Greetham is denied by Mr Yates, who stated that throughout 2017 he regularly raised concerns and sent emails expressing his dissatisfaction. The notes taken by Mr Yates during these catch ups and the emails do indicate him raising concerns on several occasions about the frequency of 5S audits, other routine drills and checks, and the need for Mr Greetham's attitude to change.

Lawter began to place a stronger focus on the 5S program during 2017 with Mr Yates and senior management taking a more direct involvement. The purpose was to raise the 5S scores. Mr Greetham claimed that all of the remedial work, including

photographing, documenting and recording tasks, was assigned to him. Lawter stated that this was not the case and any remedial work was carried out by maintenance workers. Lawter admits that Mr Greetham's role involved a weekly audit of one area of the site, but that this had always been a part of his duties and could not have taken any more than three hours.

The events leading to resignation

In December 2017, an informal meeting took place between Mr Yates and Mr Greetham where performance concerns were raised again. Mr Greetham claimed they were historic while Mr Yates maintained they were ongoing issues. Mr Greetham's recollection of the concerns raised were that they covered the following issues:

(a) air consent;

(b) Permit to Work training;

(c) systems maintenance;

(d) an insurance error; and

(e) the Hazardous Substance Location Compliance Test certificate.

Mr Greetham believes he responded satisfactorily to each of these concerns. Mr Yates perceived Mr Greetham presenting as impassive and unresponsive.

On 12 January 2018, Mr Greetham received a six-page letter from Mr Yates detailing many ongoing performance concerns. Mr Yates said the letter was the result of a lack of response to the informal meeting approach. Mr Yates wrote in the letter that he was going to establish a performance management plan with Ms Riches, who was by this time the HR Manager. Mr Greetham claimed to have been surprised by the concerns and that he thought he had remedied those concerns raised at the earlier December meeting.

The letter stated its intention was to summarise conversations they had already had. It set out five broad headings under which a significant number of performance related concerns were listed. Those headings were:

(a) Lack of professional understanding, job knowledge & awareness in the role;

(b) Attention to detail;

(c) Communication and contribution;

(d) Leadership of site environmental health and safety; and

(e) Lack of motivation to engage in the responsibilities of the role.

There were a significant number of subheadings which raised performance issues in relation to aspects of what Lawter viewed as Mr Greetham's responsibilities. It is worth noting that a number of these subheadings, for example "Systems Management" correspond to the five concerns Mr Greetham believed were raised in December 2017. Both Mr Greetham and Mr Yates seemed to agree there were five clear areas of concern. There may have been an issue arising from the informal nature of how these concerns were raised at the first meeting. All the five concerns Mr Greetham thought had been raised earlier can be found in some form in the letter.

Mr Greetham claimed to have fallen into depression because of these issues. He sought medical assistance and was prescribed medication. Lawter said it had not known of this and that Mr Greetham had not presented as depressed at work. He took no sick leave until 3 April 2018 and the medical notes show he did not seek medical advice until 4 April 2018. Lawter inferred that this was conveniently proximate to the time Mr Greetham engaged an employment advocate. It points out the medical notes stated he was not fit to work for the period of 4 to 6 April and then for two weeks from 9 April. Lawter confirmed that these two weeks resulted from his employment advocate suggesting, following a meeting on 9 April 2018, that he took time to consider his options. It also says that Mr Greetham was offered and had available to him EAP counselling.

Prior to the meeting on 9 April 2018 when Mr Greetham's advocate, Warwick Reid, was present, meetings had been held with Mr Greetham. A meeting was held with Mr Greetham, Mr Yates and Ms Riches present on 19 January 2018. Mr Greetham claimed that he raised concerns about the tone of the letter of 12 January 2018 and that the current workload in the environmental health and safety role was too high. His perception was that the letter was a "full-frontal" attack designed to scapegoat him for Mr Yates' failings. Ms Riches and Mr Yates' stated, however, that during this meeting, Mr Greetham claimed to have ideas around how the role could be adapted. He did not seem to be able to articulate them, so Ms Riches suggested the meeting be adjourned to give Mr Greetham the chance to formulate these ideas. Mr Greetham in his evidence denied he had these ideas but appears to have agreed he said this at a later meeting.

At the next meeting on 12 February 2018, Mr Greetham again raised concerns around the number of tasks associated with his role and the effect this had on the ability to perform them. Ms Riches and Mr Yates did not regard this as contributing ideas but as restating his view of the problem. The meeting ended with Mr Yates suggesting that the Performance Improvement Plan (PIP) be drafted.

In March 2018, while this process was ongoing, Mr Greetham applied for leave to go overseas. Mr Yates was unimpressed that Mr Greetham booked flights before seeking the leave as he felt it left him no choice but to approve. He received no reply to a query as to how his role would be covered during that time.

A proposed PIP was presented to Mr Greetham on 28 March 2018. Mr Greetham claimed it set out a number of significant tasks to be undertaken by him within the timeframe set out. His impression was that he was being set up to fail due to the nature and extent of these tasks. Lawter believed that the PIP simply set out key aspects of his role and that the tasks set out were the key tasks that made up his role. Lawter still hoped Mr Greetham would engage and provide input of ideas.

A meeting was held to discuss the PIP on 9 April 2018 attended by Mr Greetham, Mr Yates, Ms Riches, Mr Reid, and Lawter's lawyer Erin Burke. During this meeting Mr Greetham broke down and had to leave the meeting. Lawter stated

that, while Mr Greetham was upset, and an adjournment was taken, Mr Reid refused to allow him to comment on the plan despite their perception that Mr Greetham had indicated an apparent willingness to do so. Mr Reid's combative approach to the meeting appears to have caught Lawter's representatives by surprise when he made statements such as:

... I can tell you I will be looking very carefully about what legal remedies he might have against the employer for the way he has been treated since that letter in January ... you can take it that I will be looking very closely at any remedies that might arise out of what you've done to him ...

The meeting concluded with Mr Reid indicating Mr Greetham would provide written feedback.

Ms Riches stated in evidence that she felt hurt by these statements of Mr Reid. She considered that Lawter had made every effort to make the process fair and reasonable. The purpose was to get Mr Greetham involved in improving his performance and attitude and maintain his employment.

The written feedback referred to by Mr Reid was never provided, and Mr Greetham never returned to work. He resigned on 19 April 2018. His letter of resignation traversed the matters raised in the previous meetings. Both Mr Yates and Ms Riches wrote to Mr Greetham and urged him to reconsider his resignation, but this was refused. A personal grievance was raised on 25 May 2018. The letter raising the grievance specified the one ground of constructive dismissal.

Lawter subsequently hired a new Quality, Health and Safety Manager on a higher salary than Mr Greetham had been receiving. This is attributed to the candidate's higher experience levels and qualifications.

Constructive dismissal – principles applying

The principles relating to constructive dismissal were considered at length in *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)*. In the decision Williamson J, and the members of the Court sitting with him at that time, considered

the cause at length. The ratio of the decision is summarised from the following brief statements:5

A constructive dismissal is one in which the employer's actions are equivalent to a dismissal, or the employer's conduct tantamount to a dismissal.

...

There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. This is the doctrine of constructive dismissal.

Issues of causation and foreseeability are part of the consideration as to whether the employee can rely upon a constructive dismissal.

In *Greenwich* the Court stated:6

In identifying cases of constructive dismissal, and in separating them from cases of employee resignation, we suggest there is a useful insight to be gained from a consideration of the real or true source of the initiative for termination. If the real source of the initiative for termination is the employer, or the basic causation comes from the employer, then the case is one of constructive dismissal. We appreciate that the concept of causation has caused difficulties in some branches of the law. However, we think it has some utility here, ...

In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc*, the Court of Appeal outlined the correct approach to constructive dismissals as follows:7

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

5. *Wellington, Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 at 104.

6 At 104.

7. *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union Of Workers (Inc)* [1994] NZCA 250; [1994] 1 ERNZ 168 (CA) at 172.

In the first Court of Appeal decision considering constructive dismissal, *Auckland Shop Employees Union v Woolworths (NZ) Ltd* the Court had earlier enunciated three situations where a constructive dismissal may occur:8

(a) Where the employee is given a choice of resignation or dismissal;

(b) where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

(c) where a breach of duty by the employer leads a worker to resign.

In the present case the first of these categories does not apply. It is not entirely clear if Mr Greetham claims to fall under the second or third categories, given some of the claims made about Mr Yates' behaviour or antagonistic intentions. However, it seems more likely that a breach of duty is the relevant category here. This gives rise to the claim that in response to repudiatory conduct on the part of Lawter, Mr Greetham was entitled to, and did cancel the employment agreement.

As discussed in *Fredericks v VIP Frames and Trusses Ltd*, the employee must make the election in response to the repudiatory conduct, unless there are extenuating circumstances, within a short timeframe.9 This has considerable relevance in the present case, as indicated later in this judgment, in view of the timeframe within which the sequence of events took place.

Mr Reid's closing submissions lean heavily upon the similarities between the facts in this case and those in *Donaldson & Youngman t/a Law Courts Hotel v Dickson*.10 The facts of that case can be distinguished from the present.

In that case, Ms Dickson was hired as the head chef of a Cobb & Co restaurant franchise located within a hotel. There were no performance-based incidents of any real note in her first six months apart from minor difficulty in achieving the guidelines for optimum food and labour costs. After just over six months of employment she was

8. *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374 and 375.

9 *Fredericks v VIP Frames and Trusses Ltd* [2015] NZEmpC 203.

10 *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920 (EmpC).

approached by Mr Donaldson, the owner of the business, who asked to meet her after she finished work for the night. The meeting took place at 9 pm.

Mr Donaldson had prepared a two-page handwritten list of concerns that set the agenda for the meeting. It was headed up “not pulling your weight - shirking!" The list was described as a catalogue of perceived errors with no opportunity for discussion or suggestions for improvement. The meeting ended with Ms Dickson’s resignation although there was a dispute as to whether she offered it or was asked to give it.

For obvious reasons this was found to be a constructive dismissal taking the form of a breach of duty by the employer. The Court found that Mr Donaldson had the opportunity to raise the concerns contained in his list with Ms Dickson individually as they happened. The Court then eloquently stated:

To store them up and then to smite the employee with them, hip and thigh, in one giant instalment, is about as great a breach of the duty of trust and confidence inherent in every employment contract as can be imagined.

The *Donaldson* case is distinguishable for the following reasons:

Lawter, over a lengthy period, raised the performance issues individually as they happened. This is confirmed by contemporary documents. There had also been performance appraisals that indicated Mr Yates had performance concerns.

Mr Yates had raised these concerns collectively at a meeting in December 2017. They did not come out of the blue. The letter of 12 January 2018 claimed to set out what had already been discussed at that meeting.

The letter set out that Lawter wished to undergo a performance management process and was willing to listen to any feedback Mr Greetham may have and provide support to enable him to become competent in his role. There was a clear intention to follow a proper process and maintain Mr Greetham’s employment.

There was no immediate resignation or dismissal. Mr Yates does not suggest at any point that he would like Mr Greetham to resign, quite the contrary is the case.

Mr Greetham went on to attend several further meetings and resigned around three months later.

The letter is written in a professional and moderate tone.

An employer is entitled to carry out a genuine, frank and robust performance appraisal of its employee without fear of it giving rise to allegations of constructive dismissal. The facts will determine whether the appraisal is a genuine attempt to improve performance given in a moderate way or is an unwarranted attempt to manufacture disharmony or manipulate a resignation.

In this context both parties referred to *Trotter v Telecom Corporation of New Zealand Ltd.*11 In *Yan v Commissioner of Inland Revenue,* Judge Inglis (as she then was) upheld the usefulness of *Trotter* under the Act as a framework for assessing dismissals arising out of performance management.12 In that context she wrote:

> [3] It is well accepted that an employer may dismiss an employee for poor performance. Section 103A of the Employment Relations Act 2000 (the Act) provides the yardstick for assessing the justification or otherwise for the Department’s actions. While Mr Scott, advocate for the plaintiff, cautioned against a formulaic tick-box approach, the factors identified in *Trotter v Telecom* (which largely mirror or are subsumed within the statutory considerations set out in s 103A(3)) provide a useful framework for analysis and it is convenient to summarise them at the outset:
>
> a. Did the employer in fact become dissatisfied with the employee’s performance?
> b. Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher standard of performance?
> c. Was information given to the employee readily comprehensible, an objective critique of the employee’s work and an objective statement of the standards to reach?
> d. Was the employee given a reasonable time to attain the required standards?
> e. Following the expiry of a reasonable time:

11 *Trotter v Telecom Corporation of New Zealand Ltd* [1993] NZEmpC 152; [1993] 2 ERNZ 659 (EmpC).

12 *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36 (footnotes omitted).

i. Use of an objective assessment of measurable targets?
ii. Fairly putting tentative conclusions before the employee?
iii. Listening to the employee’s explanation with an open mind?
iv. Considering the employee’s explanation and favourable aspects of the employee’s service and the employer’s responsibility for the situation (for example, not detecting weaknesses sooner or promoting beyond level of competence).

v. Exhausting all remedial steps including training, counselling and exploring redeployment.

Ms Burke in her submissions also referred to *New Zealand Institute of Fashion Technology v Aitken.* In that decision it was stated:13

It must be possible for employers, in the context of a formal performance appraisal, to hold a frank discussion with employees, including the voicing of dissatisfaction or less than entire satisfaction with the employee's performance. The employee is entitled, in the context of the subsequent discussion, to advance facts and considerations that might alter or moderate the employer's adverse views ... But the fact remains that this is the appropriate forum for both parties to express concerns on subjects that fall short of warranting a resignation by the employee or disciplinary action or some performance monitoring exercise by the employer.

Findings

Applying these principles, the circumstances surrounding Mr Greetham's resignation do not constitute a constructive dismissal. Lawter followed a process designed to improve perceived inadequacies in Mr Greetham's performance but for the purposes of maintaining his employment. Its concerns related to his overall competence and commitment. The letter of 12 January 2018 covered a substantial period of employment and was very detailed as a result. It could have been criticised if it was not so detailed. Mr Yates, supported by contemporary documents, claimed to have made the substantial number of concerns known to Mr Greetham at the December meeting and the letter which then followed was a follow-up detailing in writing the issues discussed. There is some conflict of evidence as to the extent of the issues discussed at the previous meeting. However, in view of the incidents, meetings and appraisals which preceded the letter, it cannot be said that the issues were saved up in

13 *New Zealand Institute of Fashion Technology v Aitken* [2004] NZEmpC 128; [2004] 2 ERNZ 340 (EmpC) at [57].

order to "smite" Mr Greetham as the Court had indicated occurred in *Donaldson*. The letter set out a significant number of concerns across a broad range of responsibilities and competencies. Nevertheless, Mr Greetham from the earlier matters which occurred and his clear awareness of the issues raised in the letter, would have known that he needed to engage in the performance management meetings and present constructive feedback and options. He failed to do so.

Lawter's concerns about Mr Greetham's performance touched on a large number of aspects. However, applying the principles contained in *Trotter*, *Yan* and *Aitken* a comprehensive statement of issues and concerns in a situation, where an employee's overall performance is considered to be below standard, does not give rise to a grievance. This is particularly so in a situation such as the present where the concerns had been frequently raised in the past. As indicated, Lawter displayed a clear willingness to help Mr Greetham improve his performance and was diligent in ensuring that he had the opportunity to come back with proposals and had available to him EAP services throughout the process.

Mr Greetham has made a causal link between the letter of 12 January 2018, the performance management process and his eventual resignation. However, the evidence of Mr Yates and Ms Riches, corroborated by contemporary documents, discloses that they were intent on maintaining Mr Greetham in employment. There are aspects of earlier difficulties faced by Mr Greetham, but the process adopted by Lawter was to endeavour to review Mr Greetham's position and certainly there was no intention to terminate his employment. In view of the process undertaken it cannot be said that, with the discussions held and attempts to have Mr Greetham properly engage with Lawter, the situation had reached the stage that resignation was foreseeable.

The attempts to informally discuss matters with Mr Greetham, the letter in January 2018, the attempt to establish a performance improvement plan and obtain engagement and feedback from Mr Greetham took place over several months. By this stage there were serious performance issues which had arisen which provided background to the endeavours made by Mr Yates and Ms Riches to achieve continuation of Mr Greetham's employment. Mr Greetham simply did not engage

appropriately. By the time Mr Reid became involved, and he took his premature actions at the meeting at 9 April 2018, the prospect of resolution was slipping away. Even so, after Mr Greetham's resignation, attempts were made by Mr Yates and Ms Riches to have Mr Greetham reconsider. The attempt to causatively link a basis for resignation with the letter on 12 January 2018 and therefore a constructive dismissal, which Mr Reid has appeared to do on Mr Greetham's behalf, cannot be sustained.

Mr Greetham had agreed to meet Mr Yates and Ms Riches on more than one occasion following the letter of 12 January 2018 being given to him and discussed. He agreed to put forward proposals of his own. Even at the final meeting there was no suggestion that Mr Greetham was taking the step of resignation and Mr Reid, despite his apparent antagonism, indicated on behalf of Mr Greetham that proposals would be forthcoming. Applying the principles from the authorities discussed in this judgment, causation between the letter of 12 January 2018 and resignation could no longer be made as a basis for constituting constructive dismissal. Lawter had set out performance issues of concern to it, but on the basis that a resolution could be reached, not resignation. The recommendations of Ms Morar offered an alternative and Mr Yates was clearly prepared to restructure the environmental health and safety roles as had been recommended. If Mr Greetham had engaged with Mr Yates and Ms Riches, a resolution could have been possible enabling him to continue in employment. He chose not to do so.

While rejecting the claims based on a constructive dismissal, I have considered whether, pursuant to s 122 of the Employment Relations Act 2000, Mr Greetham has a personal grievance of a type other than that alleged.14 The only possibility under a consideration such as this would be whether some unjustifiable action by Lawter has affected Mr Greetham's employment to his disadvantage. Looking back over the history of this matter, Lawter may not have acted as a fair and reasonable employer towards Mr Greetham at the time of dividing Mr de Jong's duties following his transfer to the Netherlands. It might be possible to argue some link between those events and the circumstances surrounding termination of employment. However, the history of Mr Greetham's

employment from that time has somewhat overtaken events and any

14 See *Nathan v C3 Ltd* [2016] NZEmpC 55.

prospect of now alleging a grievance on this basis. Mr Greetham later agreed to undertake the management role and received financial benefits from doing so. Substantial efforts were taken by Lawter to get to the bottom of difficulties which Mr Greetham appeared to be facing in his employment. Any disadvantage grievance which may have emanated from the original decision when Mr de Jong was transferred would also now be well out of time.

[ ] I have some sympathy towards Mr Greetham in the distress which he has clearly faced. However, the performance issues were serious. Mr Greetham appeared to have become seriously out of his depth. Certainly the mistakes giving rise to the MHF crisis indicated a serious lack of insight into the range of responsibilities attaching to his position. Nevertheless, if the negotiations had continued in the way that Mr Yates and Ms Riches had wanted, it is possible that proper accommodation could have been reached with Mr Greetham along the lines that had been sensibly suggested by Ms Morar.

[ ] For the reasons expressed in this judgment the challenge is dismissed.

Costs

[ ] Costs should follow the event. There has already been a determination of the Authority in respect of costs for the investigation there. That costs determination is not challenged and should stand. Hopefully the parties can reach some agreement as to costs in respect of the challenge. If no such accommodation can be reached then submissions on costs will be needed. In that event a memorandum as to costs claimed by Lawter is to be filed and served on or before 4 pm on 11 November 2020. Mr Greetham will have the opportunity to file a memorandum on costs in reply 14 days following service of the Lawter submissions upon him. The Court will then resolve the issue of costs on the papers.

M E Perkins Judge

Judgment signed at 3.30 pm on 28 October 2020
