

NOTE: An order prohibiting the publication
of certain evidence appears at p 9

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Robert Hill (Applicant)
AND Pyrotek Products Ltd (Respondent)
REPRESENTATIVES M Lewis, Counsel for the Applicant
S Langton, Counsel for the Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 23 and 24 August, 15 December 2004
DATE OF DETERMINATION 21 March 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robert Hill says he was unjustifiably and constructively dismissed by his former employer, Pyrotek Products Limited (“Pyrotek”). He says Pyrotek:

- . followed a course of conduct with a deliberate or dominant purpose of coercing him to resign; and, or alternatively
- . breached its duty to provide a safe place of work by overloading him, leading to his stress-related illness and causing him to resign.

[2] Shortly before Mr Hill resigned Pyrotek issued him with a warning about aspects of his management of its inventory. Mr Hill has raised a separate personal grievance in respect of the warning, and says further that the warning was issued as part of the conduct aimed at coercing his resignation.

[3] Pyrotek denies Mr Hill was dismissed or that it breached its duty to him, and says he resigned of his own accord. It says the performance-related warning was justified.

The nature of Mr Hill’s employment

[4] Mr Hill began his employment at Pyrotek in April 1991 as production manager. There were two other employees in Auckland at the time, a technical manager and a sales and general manager. Pyrotek is a US-based organisation, although the New Zealand company reports directly to Australia, and is in the business of manufacturing and selling tempered metal and other high-temperature products. In the early years of Mr Hill’s employment it was establishing the manufacturing part of its operation in New Zealand.

[5] In 1998 Craig Schweighoffer was appointed as Pyrotek's New Zealand general manager. By about that time the staff had grown to some twelve employees. In 1999 Mr Hill transferred to the position of customer services manager, which he held until his resignation, and was not replaced as production manager. Two team leaders shared that role.

[6] In November 2001 Mr Schweighoffer returned to Australia and Robin Stanley was appointed as New Zealand general manager. It is likely that Mr Stanley's management style was significantly different from Mr Schweighoffer's, and in particular that it was more firmly focussed on defining and observing lines of accountability and responsibility. Mr Stanley's personal style was probably different too. Existing staff members, particularly long-serving ones like Mr Hill, found the change a culture shock. Indeed one person sought to resign, but Mr Stanley persuaded her to stay.

Existence of constructive dismissal

1. Conduct aimed at coercing Mr Hill's resignation

[7] Thus allegations were made during the investigation meeting to the effect that Mr Stanley expressed an intention to end the employment of longer-serving employees, including Mr Hill, for no real reason other than that they were either older or long-serving employees.

[8] Having considered the evidence about the relevant conversations I am not persuaded Mr Stanley did so. It is likely there were misunderstandings arising out of and fanned by: the reaction to a different management style; taking information out of context; gossip; and some aspects of Mr Stanley's personal manner. Regarding one of the alleged conversations I consider it likely Mr Stanley used the term 'dead wood' - and I note he did not give an unequivocal denial except to say he did not use it to Mr Hill - but the quality of the evidence on this and similar issues means I also consider it likely the reference was taken out of context. Overall I consider it likely Mr Stanley referred in a general way to concerns about staff performance in the context of Pyrotek's overall performance - which he considered poor - rather than to any concern based merely on employees' age or length of employment.

[9] There were further allegations about aspects of Mr Stanley's treatment of Mr Hill, for example an allegation that Mr Stanley prevented Mr Hill from pursuing his previously-accepted practice of visiting a gym during the working morning. However a more detailed discussion of the evidence on the point revealed Mr Hill's view was formed to a significant degree by advice from colleagues to the effect that Mr Stanley had been looking for Mr Hill during Mr Hill's absence and made adverse comment about the absence, rather than any direct evidence. There was no direct allegation that Mr Stanley instructed Mr Hill to cease the practice or even that there was a disagreement between the two about it. Mr Hill eventually said he stopped attending the gym because he felt uncomfortable about Mr Stanley's reaction, but that is not the same as saying Mr Stanley prevented his attendance.

[10] Mr Stanley may have looked for Mr Hill on occasion while Mr Hill was at the gym, and even expressed general irritation when he could not find him, but I do not accept that Mr Stanley prevented Mr Hill from going to the gym or that his attitude to Mr Hill's gym attendance indicated a wish that Mr Hill's employment end. I am afraid I found most of the allegations about Mr Stanley's expressions of intention, as well as about his treatment of Mr Hill, to be based on misinterpretations.

2. Breach of duty - work overload

[11] According to a written job description dated September or October 2000, Mr Hill's duties as customer services manager included: the preparation of internal customers' RFQs (requests for

quotes) and RFQ's for external customers when necessary; administration of all internal and external customers' quotes; estimation and 'alternate' for preparing BOMs (bills of materials, ie the list of raw materials required to manufacture a product); entering sales orders; preparing works orders; monitoring and reporting on works order status; packing and shipping finished goods and invoicing. Mr Hill said a reason for the appointment was his product expertise and associated ability to answer customer queries – an area that was considered lacking.

[12] Despite the contents of Mr Hill's job description, according to Mr Schweighoffer Mr Hill was:

“... also in effect assisting production and was handling the production control duties. I assisted Bob with the PC/data entry/Visual software side of his role. There was no production manager, and the two production team leaders reported to me. However Bob had day to day involvement with the team leaders and had a role in co-ordinating/scheduling production in line with the customer demands. The lack of a production manager meant that Bob's role was more involved in this area than would otherwise have been the case.”

[13] The evidence suggested this state of affairs got out of hand, and Mr Schweighoffer has some responsibility for that. I have no difficulty in accepting Mr Hill's evidence that staff members continued to come to him with production-related queries and this took up a great deal of time. Clearly he was relied on, and indeed valued, as a source of knowledge on a number of matters including many that were outside the scope of his job description.

[14] For his part Mr Hill relied on Mr Schweighoffer if he felt he had too much to do. His evidence was that when he became too busy Mr Schweighoffer would take up some of his work. Apparently that arrangement worked satisfactorily for both of them. The problem was that Mr Stanley's approach to his role as general manager, and to Mr Hill's role as customer services manager, was quite different. He assumed Mr Hill would have a grasp of his own duties and be able to carry them out without the kind of hands-on backup Mr Schweighoffer had provided.

[15] Thus while Mr Hill asserted his workload increased after Mr Stanley arrived, he also acknowledged the effect of no longer being able to rely on Mr Schweighoffer to help him when he became busy. Indeed there was no evidence that Mr Hill's actual hours of work increased after Mr Stanley's arrival.

[16] As for what Mr Hill did during those hours, when detailing the areas in which his workload increased he referred to the company's acquisition in December 2001 of a company called Cowan Refractory. I accept the acquisition involved some increase in customer service work, but was given no information about exactly what the work was or a reliable indication of the extent of the increase. Moreover from later in 2002 a newly-appointed customer services employee carried out the associated administrative duties, and two other existing Pyrotek employees also carried out administrative duties arising out of the Cowan work.

[17] Otherwise Mr Hill said his work involved doing all customer queries, local sales, purchasing and export. He would raise works order numbers, packing slips and invoices, as well as letters of instruction to freight companies. That description accorded with the written job description, as well as a handwritten list of his duties which Mr Hill prepared for Mr Stanley's information. The list included: the processing and entry into the company's computer system of various work orders, purchase orders and quote forms; processing certain invoices; maintaining hard copy files; and addressing correspondence and queries including internal queries from Pyrotek staff. The list also records “Check stock in computer and stores, raise purchase order for more stock as required on a regular basis.”

[18] In conclusion I understood the effect of the Cowan acquisition to be the only matter relied on in support of the allegation of an increase in these kinds of duties. While the acquisition may have created some extra work for Mr Hill during 2002, I am not persuaded this was so to a level that

would support a breach of duty on Pyrotek's part. In any event, by later in 2002 additional staff were available to assist with the work.

[19] Mr Hill said his workload also increased as a result of staffing matters. He said the appointment of additional staff members to report to him, together with associated training requirements, contributed to the increase as did the impact of the alleged poor performance of two other staff members Essam and Adam. The problems were exacerbated by the subsequent resignations of Essam and Adam, and the sharing of their duties between Mr Hill and two more new employees.

[20] Of the additional staff members reporting to Mr Hill, Lisa Blakelock had been appointed as a part time clerical assistant in October 2002 and her appointment became full time in December 2002. Ms Blakelock struck me as a competent and reliable employee, loyal to Mr Hill, but inevitably at the commencement of her employment Mr Hill did have to spend time training her. I also consider it telling that she said in her evidence:

"Bob had responsibility for many areas beyond that of immediate customer services. This included answering queries from the factory staff on production issues as there was no production manager until about May 2003, just before Bob left Pyrotek. We worked as a team and Bob took responsibility for any tasks not covered for the time being, in the customer service area, including the phones."

[21] This evidence supported the way of working Mr Hill and Mr Schweighoffer described. I return to its significance later.

[22] A second clerical assistant was appointed in or about January 2003. Her duties included answering the telephones and working on local sales. The appointment was intended to allow Ms Blakelock to concentrate on export sales. I was told the second clerical assistant did not pick her work up as quickly as Ms Blakelock had, and Mr Hill found this a problem. Even if that were so, there was no evidence the assistant's performance was outside the ordinary range or that there were any difficulties outside the ordinary.

[23] I do not accept that anything in the appointments of these two people, on its own or cumulatively with other staffing matters, was even arguably indicative of a breach of duty on Pyrotek's part. There had been recognition during 2002 that Mr Hill needed assistance. Assistance was provided in circumstances where it was reasonable to expect Mr Hill to carry out the necessary training. There was no evidence that anything about the training requirement was unduly arduous or that anything about the appointments was outside the range of matters a manager can be reasonably expected to cope with. On the contrary, with Ms Blakelock in particular it seems Mr Hill was fortunate.

[24] As for the further concerns about staffing, Essam was an existing employee and a process engineer. He had been employed to implement a quality assurance standard, and on completion of that project he returned to process engineering and other duties. The duties included managing bills of materials, preparing quotes, and managing Adam. Adam was also an existing employee, whom Mr Hill had employed to work on the factory floor. Later Adam was moved into the office and given the title of process engineer, doing engineering work and drawings. Some of his work dovetailed with Mr Hill's, in that he processed works order numbers, and received job sheets for completed stock prior to Mr Hill raising packing slips and invoices. Mr Hill said he had to spend a great deal of time running up and down stairs chasing Adam and Essam for work not completed.

[25] Mr Hill referred in evidence to having raised concerns about Adam with Mr Schweighoffer, and later with Mr Stanley. He made no comment about Mr Schweighoffer's response, but accused Mr Stanley of doing nothing about his concerns. However that is not the case as Mr Stanley

discussed the concerns with Essam, who said he would manage Adam. Since that was part of Essam's job, Mr Stanley was entitled to expect Essam to address the matter. When Mr Stanley found Essam had not done so, he addressed the matter himself and issued Adam with a disciplinary warning. Adam resigned not long afterwards, in March 2003. Essam resigned a month later to start his own business.

[26] Meanwhile a new process engineer named Chris had been appointed. He took over the quality standard and some export sales work. I was told he did not know how to do purchase orders and receivers – which was work Adam had done. The new production manager, who started work in or about May 2003, picked up that work initially as well as some of Essam's work.

[27] I accept that Mr Hill took on the task of showing Chris how to do purchase orders and receivers. Again, however, there was nothing to suggest that required any effort out of the ordinary from Mr Hill. If, as I am prepared to accept he did, he experienced stress and pressure in carrying out such tasks, I do not believe the cause was any breach of duty on Pyrotek's part.

[28] In what seemed to have been a related argument, the availability to Mr Hill of suitable training was also put in issue. One of the essential skills listed in Mr Hill's job description as it was in 2000 was 'computing knowledge'. During Mr Schweighoffer's tenure in New Zealand the US parent company introduced a new software system called 'Visual' which was intended to encompass all facets of the Pyrotek operation globally. According to Mr Hill, he sought full training in Visual from Mr Schweighoffer but that was deferred because 'we were too busy'. Mr Hill also said:

"Craig continued to take responsibility for those tasks [unspecified computer tasks]. He provided on-the-spot administration and took up tasks which needed more training/skills than I had. He worked in a co-operative, consultative manner and helped wherever he could. If I did not have the knowledge of the system for a particular task, he came into the office and demonstrated, giving me sufficient time to write down the instructions/steps so I could then acquire the skill myself."

[29] It therefore appears that, while Mr Hill did not receive formal training in the Visual system, Mr Schweighoffer showed him enough for him to do his job. In particular since it was common ground that Mr Hill had no difficulties with Visual in these respects, I infer that the sets of instructions related to matters such as generating quote documents, purchase orders, work orders and invoicing. Subject to the matters to be raised in association with Mr Hill's performance-related warning, there was no evidence of any change in the associated requirements after Mr Stanley took up his position.

[30] In 2002 Visual was upgraded, and in June 2002 Mr Hill attended a three-day training course on the upgrade. He was offered the opportunity of further one on one training but did not take it up. At the same time Mr Stanley's evidence indicated the primary purpose of the upgrade was unrelated to Mr Hill's duties and thus the upgrade did not have or should not have had a significant effect on Mr Hill. If that is the case it is not surprising that Mr Hill struggled with the training course, because much of it would have covered matters with which he was unfamiliar and that were not directly relevant to his duties. However he did have an opportunity to raise other matters of concern regarding his use of Visual, and in particular to follow up on the chance of further training, but he did not do so.

[31] In any event it was apparent, and acknowledged at the investigation meeting, that Mr Hill does not have an affinity for computing. Moreover a telling aspect of the evidence about his workload was the evidence about his extensive reliance on his own manual filing system, which he attempted to run in parallel with Visual, and his general time management. The system was manifestly time-consuming and inefficient. It would inevitably have had a trickle down effect when

Mr Hill tried to train the staff appointed to assist him, making that process uncertain and inefficient too. Mr Stanley was unaware of these practices until he covered Mr Hill's duties himself during Mr Hill's absence in mid-2003.

3. Breach of duty - stress-related illness

[32] On 3 December 2002 Mr Stanley conducted what he called an annual performance review with Mr Hill, although Mr Hill described the conversation as 'a chat'. Mr Hill raised a concern that he was under too much pressure at times, but the discussion also covered the fact that Ms Blakelock's full time appointment and the appointment of the second clerical employee were intended to provide him with extra assistance. In effect a concern was raised and a remedy suggested. The conversation on the point went no further. I do not accept that the conversation was sufficiently detailed to alert Mr Stanley to the possibility that Mr Hill was having a problem with workplace stress.

[33] In March 2003 Mr Hill visited his doctor, complaining of work-related stress. He did not take time off and did not raise the matter with Mr Stanley.

[34] On or about 5 May 2003 Mr Hill visited his doctor again about the same matter, and said he took two days' sick leave. For some reason the company's records do not show this absence although I accept the leave was taken.

[35] In addition Mr Hill obtained a medical certificate, although it merely stated he was unfit to work. He said he showed it to Mr Stanley when he returned to work on 7 May. His evidence in his first written brief was that at the same time he told Mr Stanley he was under pressure and needed relief from the stress. Mr Stanley denied being told this. In a written brief of evidence in reply Mr Hill said he telephoned Mr Stanley on 5 May to say his doctor had advised him to take two days off work and that he handed his medical certificate to the office administrator when he returned. Overall I am afraid I did not find Mr Hill's evidence to be accurate enough to persuade me that he told Mr Stanley in early May that he was ill as a result of work-related stress.

[36] Mr Hill also said he raised his feelings of stress with Mr Stanley again later in May. Mr Stanley denied it. Again a fuller discussion revealed that, while Mr Hill might have planned or even attempted to approach Mr Stanley to discuss the matter, it was far from clear that he put his plan into effect. I therefore prefer Mr Stanley's evidence on the point and conclude either that Mr Hill did not carry out his intention, or he abandoned an attempt to do so without making his purpose clear to Mr Stanley.

[37] Mr Hill made further general statements to the effect that he raised his stress with Mr Stanley on a number of occasions. I assume he was referring in part to times when he complained about Adam and Essam, for example. No doubt there are other examples. However I do not accept that the raising of complaints in that way amounts to drawing an employer's attention to the existence of a more serious problem of work-related stress which the employee wants addressed. Mr Stanley did not interpret the conversations in that way and there was nothing to indicate he should have.

[38] Mr Hill did raise his stress squarely during the course of the disciplinary procedure which led to his receiving a warning. I now turn to the warning.

The disciplinary warning

[39] Soon after his employment commenced Mr Stanley became concerned about the company's inventory and accounts to the point where he commissioned Deloitte's to conduct an independent

investigation. Among other things the results indicated such anomalies as, for example, existing stock take records showing the presence of more material than Pyrotek had the facilities to hold. Moreover the result of Mr Stanley's own first stock take in June 2002 suggested that, on paper, one third of the company's inventory was missing. Mr Stanley said in evidence he could not believe the inventory could be so inaccurate. Overall the company had been losing more money than the accounts indicated, and had been making losses for years. Mr Stanley concluded he had inherited a company with huge problems.

[40] From June 2002 staff worked on improving the inventory system. Mr Stanley planned another stock take for June 2003, and to conduct a preliminary stock take in March 2003 to check on progress.

[41] The result of the March 2003 stock take was disappointing and Mr Stanley identified a lengthy list of stock items to be addressed. He allocated these to several staff members, including Mr Hill, according to their respective areas of responsibility. He sought to have all of the items on the list addressed by June 2003. The items were identified by relevant stock number, the person responsible for taking action, and the action required. Those allocated to Mr Hill were allocated on the basis that he had counted the items himself as they were within his area of expertise. In addition Mr Hill was allocated the 'kanban' items (stock stored at the customer's premises) since he was involved in administering that stock.

[42] Mr Stanley's evidence was that, when in March or April he asked Mr Hill about progress, Mr Hill indicated that all his action points, with one exception, had been started or were in progress. In fact Mr Hill had asked the accountant to look into some of the points. More specifically he asked the accountant to complete tasks in Visual that were too complicated for him. However the problem was not merely one of completing steps in Visual: it involved finding out why the identified variances had occurred. If, as it seems he did at the time, Mr Hill thought a primary way of correcting the variances was to make adjustments in Visual then he had profoundly misunderstood the nature of the problem and what was being asked of him. It is no wonder that much has subsequently been made of the extent of his ability to use Visual.

[43] The initial result of the full stock take in June 2003 indicated \$100,000 worth of stock was missing - again on paper. This amount was so high that Mr Stanley acknowledged it could not be attributed to actual stock loss alone and concluded there must be other problems, for example the way in which stock movements were recorded. Since some of the problems with the stock take had been on Mr Hill's list, he decided to pursue them further with Mr Hill. He also pursued with other employees other problems according to their areas of responsibility.

[44] To that end, on Friday 27 June 2003 Mr Stanley sought a meeting with Mr Hill. Most unfortunately, and most inappropriately, one of the employees to whom Mr Stanley had already spoken informed Mr Hill immediately prior to the meeting that Mr Stanley was 'gunning for' Mr Hill. That was not an accurate reflection of Mr Stanley's intention, but the comment inevitably had an effect on Mr Hill's interpretation of what happened next.

[45] Mr Hill alleged that, during the course of the meeting, Mr Stanley said Mr Hill was responsible for 90% of the amount of the discrepancy and that Pyrotek could sue him for \$100,000. Mr Stanley said nothing of the kind, rather Mr Hill misinterpreted what Mr Stanley did say. Moreover Mr Hill accepted at the investigation meeting that the prospect of his being sued was an assumption he made, rather than a threat Mr Stanley made. Unfortunately Mr Hill informed other staff members that Mr Stanley had threatened to sue him for \$100,000, they took Mr Hill at his word and reacted accordingly. Thus the allegation joined the fund of apocryphal stories about Mr Stanley's attitude to them.

[46] Mr Hill also felt Mr Stanley was accusing him of theft. The conclusion was based on Mr Hill's emotional reaction and had no other foundation. There was no such accusation.

[47] According to Mr Hill, Mr Stanley also advised that Mr Hill would be receiving a final written warning. This caused Mr Hill to fear for his future and he found the threat severely distressing. However Mr Stanley's evidence was that he advised Mr Hill of the concern about the stock loss, and that the loss was unacceptable. He reminded Mr Hill of his responsibility for inventory, asked why losses were still occurring, and advised that he intended to conduct a disciplinary procedure and that the result could be a warning.

[48] While it is possible Mr Stanley framed his concerns more strongly than was portrayed in his evidence, the relevant question is whether he advised Mr Hill a warning would be issued, or whether he merely advised that the outcome of the disciplinary process could be a warning. If the latter is the more accurate account, then Mr Stanley was doing no more than he was obliged to in such circumstances. Mr Hill's overall tendency to read more into Mr Stanley's statements than was actually said leads me to prefer Mr Stanley's evidence.

[49] His view of the extent of the threat to him left Mr Hill so upset he visited his doctor again on Monday 30 June. He was anxious and depressed and was placed on medication. He was advised to take sick leave, but by subsequent agreement took paid special leave for 9 days.

[50] There was another meeting on Thursday 3 July 2003, attended by both parties and their lawyers. Mr Stanley had printed out a full stock list which identified variances between the actual stock count and the computer record, highlighting the stock items identified in the March list as requiring action and considered to be under Mr Hill's control. He sought to discuss the reasons for the variances, the failure to correct them, and why Mr Hill had led him to believe the items were being addressed. The immediate explanation was that Mr Hill had difficulty with Visual, and had not been adequately trained in its use. Mr Hill said further that Mr Stanley's permitting the staff unlimited access to the warehouse undermined his ability to control the inventory.

[51] There was also an agreement that Mr Stanley would provide Mr Hill with a copy of the list so he could consider and explain the variances at a further meeting.

[52] At the next meeting, on Thursday 10 July 2003, Mr Hill presented his written account of the status of the stock items he had been asked to address. The parties began working through it. The company's meeting note does not record the explanations for individual variances, rather that the items were addressed one at a time before turning to more general matters.

[53] The explanations were discussed at the investigation meeting, in what I assume were similar terms. For the most part Mr Hill was able to explain what had caused the variances he had been asked to address, and indicate that aspects of the variances had been corrected. Even so from Mr Stanley's point of view the explanations were indicative of a deeper problem and he found the explanations unsatisfactory.

[54] For example several items had not been invoiced, or had not been properly invoiced. The subsequent issuing of invoices corrected the immediate problem but raised a question about why the invoices had not been issued sooner than they were. Many of the items were kanban, or consignment stock stored at clients' premises. While it was not necessarily Mr Hill's direct responsibility to issue invoices when stock was used, it was his responsibility to monitor the inventory for the stock in question and take steps to ensure invoices were issued. He was not proactive in that respect, and had no systematic way of monitoring and addressing the inventory of kanban stock.

[55] As a further illustration of the nature of the problem, when discussing one of the items at the investigation meeting, Mr Hill said he worked off a manual stock sheet (not Visual at all) and, in effect, that he did not take action on that item unless he was told material had been used and needed to be replaced.

[56] Another example illustrates the nature of the problem as Mr Stanley saw it. One of the variances Mr Hill was asked to address concerned an item which had two part numbers instead of one coded on the Visual system. The totals recorded against the two part numbers did not correspond with the total number of items. Mr Hill saw the correction as requiring no more than an adjustment to Visual, but he did not know how to make the correction. To Mr Stanley the fact that Mr Hill did not know how to make the adjustment in Visual did not explain why the discrepancy had arisen, let alone why no action had been taken to address the existence of dual part numbers.

[57] Regarding the more general matters, the explanation that Mr Hill had not received enough training on Visual was raised again. Mr Stanley did not agree that difficulty with Visual was the cause of the variances, and considered the problem to be one of inventory management.

[58] It was also said on behalf of Mr Hill that the variances occurred because Mr Hill was under stress, and that Mr Stanley was aware of this. I have already accepted Mr Stanley's denial of such awareness. The discussion went on to cover Mr Hill's claim that he did not have a job description, which was not the case, and Mr Stanley raised his concern that Mr Hill was not taking responsibility for the inventory applicable to his area of responsibility.

[59] Mr Stanley agreed that he also said he had lost confidence in Mr Hill, explaining that the comment arose out of other problems he had identified in the preceding two weeks. While the comment was gratuitous, I do not consider it indicative of a wish to secure Mr Hill's resignation. Rather, it emphasised Mr Stanley's concern about Mr Hill's approach to his job.

[60] Mr Stanley found Mr Hill's explanations unacceptable. Accordingly a written warning dated 10 July 2003 advised that Pyrotek was not satisfied with Mr Hill's performance, in particular his failure to address some issues involving inventory despite being asked to do so. The warning letter recorded Mr Stanley's view that Mr Hill had led him to believe the matters arising out of the March stock take had been addressed when that was not the case, and said that was unacceptable. It also pointed out that it was part of Mr Hill's role as customer services manager to manage systems to control this inventory. The letter referred to the employment agreement, advised that a written warning was being issued and that a copy of it would be kept on Mr Hill's personal file for 12 months.

[61] By then Mr Hill's special leave had ended and he was on paid sick leave. He remained on sick leave for the rest of July and into August. His entitlement to paid sick leave as at 10 July was 15 working days. This entitlement expired in early August and unfortunately Pyrotek acted to cease payment to Mr Hill before warning him it would do so. From early August Mr Hill remained on unpaid sick leave.

[62] A registered psychologist has subsequently prepared a report on Mr Hill's state of health. Although I have not needed to refer to it I confirm an order that neither the whole nor any part of it is to be published.

[63] In a letter from counsel dated 16 August 2003 Mr Hill tendered his resignation, and raised the grievance to the effect that the resignation amounted to an unjustified constructive dismissal. The letter also raised a personal grievance in respect of the written warning.

Determination – existence of constructive dismissal

1. Conduct aimed at coercing Mr Hill's resignation

[64] The allegation that Pyrotek, or more specifically Mr Stanley, engaged in a course of conduct with the intent of coercing Mr Hill's resignation relied on: allegations that Mr Stanley wanted to get rid of old or long-serving employees; aspects of Mr Stanley's treatment of Mr Hill; and the issue of the written warning.

[65] For the reasons to which I have referred, the facts do not persuade me Mr Stanley was so motivated. His overall concern was to improve Pyrotek's performance in circumstances where, with justification, he considered there were serious problems with it. In Mr Hill's case that concern came to focus, validly, on the inventory problem. I do not accept that the warning arising out of the inventory problem was imposed for the purpose of securing Mr Hill's resignation.

[66] Accordingly this ground for the existence of a constructive dismissal is not made out.

2. Breach of duty - work overload and stress-related illness

[67] I accept Mr Hill suffered from the stress he said he did. According to his evidence Mr Hill saw the cause of the problem as an increase in his workload and lack of training in Visual. This in turn was a breach by Pyrotek of its duty to provide a safe place of work.

[68] Instead of being indicative of a problem caused by work overload, the evidence was indicative of a problem caused by the change from Mr Schweighoffer's approach to management to Mr Stanley's. People had helped each other out where necessary, to the point that Mr Schweighoffer would pick up duties of Mr Hill's if Mr Hill was too busy to carry them out just as Mr Hill carried out extra activities as Ms Blakelock described. That kind of assistance was no longer available to Mr Hill when Mr Schweighoffer left, although Mr Hill himself continued to provide it to customer services staff and to a lesser extent to the factory staff.

[69] However what was gained by the resulting sense of co-operation and camaraderie, was lost in the poor definition of accountability and responsibility for activities associated with particular job descriptions. In Mr Hill's case the responsibilities of his position became blurred both because of his reliance on Mr Schweighoffer to help him, as well as his preparedness to become more involved in production matters than would usually be the case.

[70] In my view that also meant Mr Schweighoffer tended to cover aspects of Mr Hill's duties which Mr Stanley quite reasonably treated as Mr Hill's responsibility in the absence of any other understanding. In addition it was obvious from Mr Hill's account of the way he carried out his duties that he had never been called upon to create, operate or take responsibility for systems that would allow him to take a proactive approach, and for that matter better manage his time. He tried to keep things ticking along by relying on his experience and knowledge of the industry and its participants, as well as his manual systems. While it may have been possible to do so successfully when Pyrotek was a small enterprise, that was not the case when Pyrotek expanded and was even less the case when Mr Schweighoffer left.

[71] Mr Hill must have felt as if he were swimming uphill against a tide of molasses. However, in circumstances for which both parties must take some responsibility, it was not possible to identify (let alone remedy) the true underlying problem until matters came to a head in July 2003.

[72] While all of this led to an unhappy state of affairs, I do not accept that it amounted to a breach of duty on Pyrotek's part.

[73] Overall I conclude Mr Hill was not dismissed. He does not have a personal grievance in that respect.

Determination - justification for the disciplinary warning

[74] Two concerns about Mr Hill's performance were expressed in the warning letter.

[75] The first was that Mr Hill had led Mr Stanley to believe matters arising out of the March stock take had been addressed when that was not the case. I consider it unlikely that Mr Hill set out deliberately to mislead Mr Stanley about the matter, rather Mr Hill had failed in a fundamental way to understand what was expected of him.

[76] Mr Stanley, however, was unaware of the practices that led Mr Hill to reply as he did. Because of those practices Mr Hill thought an adequate response was to ask someone else to make adjustments in Visual, and leave matters there. The response was not adequate and the reply to Mr Stanley was unintentionally misleading. Moreover when Mr Hill eventually did address the items on his list, he was able to address many of them without making an adjustment in Visual.

[77] Accordingly even if it was not open to Mr Stanley to conclude Mr Hill had deliberately misled him, it was open to him to consider unacceptable Mr Hill's indication that the items had been addressed when that was not the case. If Mr Stanley's conclusion went too far, I do not believe that vitiated the justification for the warning.

[78] The second concern was with Mr Hill's failure to address the inventory issues he had been asked to address. To the extent that he eventually found explanations for, and acted to correct, several of the variances on his list then Mr Hill did address the issues, but that was not the end of the matter. Mr Stanley had a wider concern about the need for proper management of the inventory, and his conclusion that Mr Hill had not properly managed the items on his list was justified.

[79] I believe there was such a fundamental need to reappraise Mr Hill's role, the way he carried out his duties, and a possible need for retraining that extended well beyond training in Visual, that any performance-related dismissal imposed without this being done would have been unjustified. As the employer, Pyrotek was obliged to address the ongoing effect of Mr Schweighoffer's management, and to manage the changes brought about by Mr Stanley's, in a way that was fair to the employees. However Mr Hill was merely warned. There was still room for the necessary reappraisal and any other adjustments without the loss of Mr Hill's employment, but Mr Hill's resignation prevented that. For the reasons I have indicated I find Mr Stanley was justified in concluding Mr Hill's performance warranted a warning.

[80] I therefore conclude that Mr Hill does not have a personal grievance in respect of the warning.

Costs

[81] Costs are reserved.

[82] The parties are invited to agree on the matter. If they seek a determination from the Authority they should file and serve memoranda setting out their positions.

[83] Counsel for the respondent has sought a timetable, but I leave it to the parties to agree on a timetable and advise the Authority of it.

R A Monaghan
Member, Employment Relations Authority