

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Shane Kenyon (Applicant)  
**AND** Trustpower Limited (Respondent)  
**REPRESENTATIVES** Shane Kenyon, In person  
Chris Eggleston, Counsel for Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 1 March 2006  
**SUBMISSIONS RECEIVED** 14 March 2006  
4 April 2006  
**DATE OF DETERMINATION** 28 April 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

- [1] Mr Kenyon claims that he was constructively dismissed, effective from 22 March 2005. He seeks that the Authority finds that he has a personal grievance, in that he was unjustifiably dismissed, and award him the remedies of loss of earnings, and compensation of \$50,000.

Trustpower Limited (“the Company”) denies that Mr Kenyon was dismissed. Rather, the Company believes that Mr Kenyon resigned for personal reasons that were unrelated to his employment environment.

**Background Facts and Evidence**

- [2] In June 2003, Mr Kenyon commenced his employment in the role of Credit Manager. He signed his acceptance of the terms and conditions of employment on 14 May 2003. Attached to the conditions of employment, was a job description and it was conveyed to Mr Kenyon that:

“The position description is subject to continual review, driven off competitive market needs and the company’s business plans.”

- [3] Mr Kenyon’s evidence is that any changes to his conditions of employment had to be agreed and recorded in writing, but there is no provision for that in his conditions of employment. In regard to the staff reporting to Mr Kenyon, the job description indicated that there would be; “Up to 15 Customer Service Administrators.” The understanding of the Authority is that the Customer Service Administrators effectively had a credit collection function and were

responsible for making outbound calls, mostly to customers who had outstanding credit issues, but also the team took incoming calls concerning credit related matters. The call service was supplemented by the use of an outsourced call centre based in Oamaru.

- [4] When Mr Kenyon commenced his employment he reported to Mr Chris O’Hara, the Manager of the Energy Sales Division at Trustpower, but when the vacant position of Customer Services Manager was filled by Ms Joanne Drake in November 2003, Mr Kenyon then reported to her.
- [5] It appears that shortly after Mr Kenyon commenced his employment, an issue arose about the correct location/reporting responsibility for the Cash Team role of the Company. While this team was responsible for receipting all incoming money and allocating it against the correct customer accounts, it was not part of the Credit Team and historically had been managed elsewhere.
- [6] The evidence of Mr O’Hara is that Mr Kenyon agreed that it was commercially sensible for the Cash Team to be responsible to him as the Credit Manager and this duly occurred without objection from Mr Kenyon. The effect was that Mr Kenyon had the management responsibility for a further eight staff, (subsequently reduced to six). Mr Kenyon says that he agreed to the Cash Team move but he also expected the Credit Team to reduce in size from late 2003. However, Mr O’Hara disputes that any undertaking was given in regard to a reduction in the Credit Team reporting to Mr Kenyon.
- [7] There is evidence of an exchange of emails in early December 2003 between Mr Kenyon and Ms Drake, in which Mr Kenyon indicates that he wished to; [“move the process along of placing overdue calls back in the call centre and focussing the credit team on the collection function.” The response from Ms Drake was to the effect that she did not believe it was appropriate at that time to make the changes sought by Mr Kenyon and that further analysis of the overdue account calls in order to assess how customers could best be supported with their account problems was required. This would also have to involve Ms Fiona Smith, the Contact Centre Manager. When Ms Smith indicated in an email dated 1 December that there was a need to “recruit first”, Mr Kenyon indicated he was happy with that and that perhaps they could plan for the end of January 2004.

#### **Events of 2004**

- [8] While it seems that the matter of the appropriate allocation of staff continued to be an issue, there is no tangible evidence of it being a major concern to Mr Kenyon. Indeed, in October 2004, Mr Kenyon’s comments in his performance review record were:
- “I have enjoyed working for Trustpower over the past year and am enthusiastic about the advances we have made in Customer Services. I wish to learn more about the industry and get involved in areas other than credit. Issues around relationships have mainly been IS related and are a result of pushing to achieve quality enhancements. The implementation of Business Improvement Analysts I feel has ensured that Customer Services jobs are properly documented and timely and the need to “push” has reduced.”
- [9] However, despite this, earlier in October 2004, Mr Kenyon submitted a Computer Workstation Self Assessment form in which he checked the “Yes” box in response to a question asking if employees are worried about work/non work issues. Mr Kenyon indicated that his concern was about “workload”.

- [10] The evidence of Ms Drake is that she was concerned to see this and she made sure that she discussed with Mr Kenyon his workload concerns. There is an exchange of emails dated 19 October 2004, that allude to some recognition, albeit in rather brief terms, of Mr Kenyon being under some pressure,. Ms Drake says that she was concerned that following a meeting some time prior to 19 October 2004, where it was suggested that Mr Kenyon should reduce his “one-on-one meetings”, he had not done so and “was still not managing his workload and priorities correctly.”
- [11] The evidence of Ms Drake is that Mr Kenyon indicated that he thought his workload problems would be resolved with the addition of new staff but Ms Drake says that Mr Kenyon was aware that this was not likely to happen in the short term and that she had conveyed to him that he; [“could either delegate his workload or push it back.” [The Authority understands that “pushing it back” means to ensure that staff take greater responsibility for issues rather than giving them to the manager to resolve.]

### **Events of 2005**

- [12] The further evidence of Ms Drake is that the next discussion she had with Mr Kenyon regarding his workload and “alleged stress” was at the end of January 2005. Mr Kenyon had advised that he was contemplating talking with Ms Karen Boyte, the Human Resources Manager for the Company. Ms Drake says that she was unaware of any particular event that had brought Mr Kenyon to mentioning a possible discussion with Ms Boyte, but enquired from Mr Kenyon as to what was causing him stress and what could be done about it. It seems that Mr Kenyon still had concerns about Mr O’Hara not finalising the staffing structure. Ms Drake says that she gave a commitment to have a discussion with Mr O’Hara about when he was likely to have the new structure completed.
- [13] Ms Drake says that she also asked Mr Kenyon what steps he was taking to alleviate the work currently at hand and he responded that he was getting one of his staff to re-organise his schedule but still refused to “let go” his monthly one-on-one meetings with staff despite her encouragement to do so. Ms Drake also says that she asked Mr Kenyon if he had considered the Employee Assistance Programme or some other assistance in managing stress and again asked what she could do to assist him. The evidence of Ms Drake is that: “Mr Kenyon told me that he didn’t need help and that nothing was wrong with him that he could not cope with.”
- [14] Mr Kenyon did meet with Ms Boyte in February 2005. The evidence of Ms Boyte is that Mr Kenyon asked for a meeting to discuss concerns he had over the extent of his workload. Ms Boyte’s evidence is that Mr Kenyon advised her that he; [“felt under pressure and was feeling unwell as a result.” Ms Boyte says that she gave Mr Kenyon an undertaking to raise his concerns with Ms Drake and Mr O’Hara. She also asked Mr Kenyon if he had sought medical advice and upon Mr Kenyon stating he did not have a Doctor, she gave him the name of her medical practitioner and “urged” him to contact the Doctor. Ms Boyte also reminded Mr Kenyon of the Employee Assistance Programme.
- [15] There was a meeting on 2 February 2005 involving Ms Drake, Mr O’Hara and Mr Kenyon. The evidence of Mr O’Hara is that it was at this point that he first became aware that Mr Kenyon had claimed that he was not coping with his role and hence this meeting was arranged to assess what could be done to reduce Mr Kenyon’s workload. Mr O’Hara says that he expressed to Mr Kenyon that he was highly valued by the business and that he and Ms Drake wished to assist Mr Kenyon by taking over some tasks in order to reduce his workload. A plan to do this was agreed upon. As recorded in an email dated 3 February 2005, from Ms Drake to

Mr Kenyon, the plan identified eight areas that would “help relieve pressure” on Mr Kenyon’s role for “the next few months.” There was a ninth “bullet point” whereby Mr Kenyon agreed to; “review activities over the coming week and identify tasks that can either be delegated or delayed.”

The email message concluded with Ms Drake indicating that she and Mr Kenyon would; “catch up and review this” at their usual meeting the following week.

- [16] In late February 2005, Mr Kenyon had a most unfortunate and sudden family bereavement and was on bereavement leave, returning to work on 7 March 2005.
- [17] There was a meeting of various personnel on 8 March 2005. Ms Drake advised the team that she and Ms Smith would be away on 9 and 10 March 2005 and the matter of delegation for signing off billing transactions was discussed. Ms Drake advised that she would be delegating her authority to a Ms Mason. Ms Smith advised that as she was only going to be away for two days, she would not be delegating her authority and she requested that Mr Kenyon refrain from becoming involved with her transactions as he had done in the past without her approval.
- [18] The evidence of Ms Drake is that when the meeting concluded, Mr Kenyon came to her and advised that he was unhappy about her decision to delegate her authority to Ms Mason. Ms Drake explained her reasons for doing so and then Mr Kenyon advised that he also was not happy that Ms Smith had not delegated her authority to him. Ms Drake says she agreed with Mr Kenyon that there was an accepted structure for the delegation of authority but also pointed out that it was only for two days and also reminded Mr Kenyon of his current workload. There then followed some discussion about the interaction between Mr Kenyon and Ms Smith related to their respective approach to credit decisions and transactions. Ms Drake says that Mr Kenyon expressed a concern that Ms Smith may not have wanted to delegate her authority to him because she was concerned that he might make a different decision. Ms Drake suggested that she could work together with Mr Kenyon and Ms Smith to arrive at a “calibration process” in order to determine whether the business rules guiding the escalated transactions were working for them.
- [19] The evidence of Ms Drake is that Mr Kenyon was “clearly unhappy” about this and indicated; [“that he needed to go home and have a drink with his wife and decide whether he would hand in his resignation.” Ms Drake says that she “was startled” by Mr Kenyon’s reaction. “I told him that I didn’t think that a potential discrepancy in deciding a few escalated transactions was a good basis to resign and that I thought it was a totally workable issue.” Ms Drake says that she told Mr Kenyon to “sit tight” and not make any rash decisions. She also commented on how tired Mr Kenyon looked following his recent bereavement and that it probably wasn’t a good time to be making a “quick decision of that size.”
- [20] Ms Boyte met with Mr Kenyon on 9 March 2005. Her evidence is that upon enquiring from Mr Kenyon about the outcome of his previous meeting with Ms Drake and Mr O’Hara, his response was: “Taking work off me is not the answer.” The further evidence of Ms Boyte is that during this meeting Mr Kenyon stated that he was under considerable pressure from his wife to leave Trustpower and return to Blenheim and that he was considering resigning. Ms Boyte says that Mr Kenyon told her that before he made a decision about providing his resignation, he needed to speak to his Bank Manager and also a lawyer regarding a possible constructive dismissal claim. He also told Ms Boyte that he was looking to sell his property and then decide if he could take some time off before looking for another job.
- [21] The further evidence of Ms Boyte is that she asked Mr Kenyon whether this was an appropriate time to be making such decisions and he advised her that the circumstances were

not related to the recent bereavement. Ms Boyte says that she advised Mr Kenyon to think very carefully about the decision.

### **The resignation**

- [22] Despite the advice of Ms Boyte and Ms Drake, Mr Kenyon provided his written resignation via an email to Ms Drake, on 10 March 2005:

“Good morning Jo

As a result of the discussion we had on Tuesday, coupled with ongoing problems I have experienced I believe it is not in my best interests to continue.

It is appropriate to let you know I have discussed my situation with Karen.

I therefore tender my resignation effective after the 8<sup>th</sup> of April 2005.”

- [23] Ms Drake replied on 11 March 2005, accepting the resignation with disappointment and also requested an opportunity to discuss things with Mr Kenyon in order to understand the reasons behind the resignation. Ms Drake says that Mr Kenyon refused to meet with her or to discuss the matter at all.

### **Subsequent to the resignation**

- [24] Mr Kenyon was off work on sick leave for some days. The evidence of Ms Boyte is that he came to her office on 22 March 2005 and conveyed to her that he had been taken to hospital the previous evening “in extreme distress”. Ms Boyte says that Mr Kenyon stated that he was now unsure that he wanted to leave and wanted to “work out” how he could come back to work. Mr Kenyon asked about alternative roles within the Company and Ms Boyte advised that there were no alternative roles at that time. Ms Boyte says that Mr Kenyon also commented; “that his wife would kill him if he didn’t leave.” Ms Boyte also says that at no time did Mr Kenyon ever seek to withdraw his resignation.
- [25] It subsequently transpired that due to concerns about Mr Kenyon’s health, it was accepted that he would cease work at Trustpower on 22 March 2005 and was paid in lieu of the notice period. Ms Boyte says that Mr Kenyon “clearly articulated” that his family wanted to return to Blenheim and that their property had sold within one day of his resignation being received. Ms Boyte concluded that it was clear that it was Mr Kenyon’s intention to return to Blenheim.

### **Analysis and Conclusions**

- [26] Mr Kenyon says that his resignation was in fact, a constructive dismissal. The law relating to constructive dismissal is well established. The onus of showing that a constructive dismissal has occurred rests on the employee. In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd (1985) ERNZ Sel Cas 136*, the Court of Appeal held that a constructive dismissal could include cases where a breach of duty by the employer causes an employee to resign.
- [27] The matter of a breach of duty on the part of the employer was expounded upon further by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers’ IUOW [1994] 1 ERNZ 168*. The Court held that:

“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.”

- [28] Applying the above findings of the Court of Appeal to the circumstances surrounding Mr Kenyon, the first question to ask is: Was his resignation caused by a breach of duty on the part of his employer?
- [29] Mr Kenyon says that the heart of the matter is a breach of his employment agreement whereby he had the responsibility for more staff than his job description provided for and that his workload escalated to such a degree that he could no longer cope and hence had no choice but to resign.
- [30] It has been mutually accepted that Mr Kenyon had a substantial workload that was causing him some stress. However, the evidence also is that upon becoming aware of Mr Kenyon’s concerns about his workload, Ms Drake and Mr O’Hara acted reasonably promptly to relieve Mr Kenyon of some of his duties. Indeed, the evidence is that Mr Kenyon was actively involved in putting together the “9 point plan” as recorded in the email dated 3 February 2005. Furthermore, apart from Mr Kenyon’s comment to Ms Boyte, that taking work off him was not the answer, there is no tangible evidence that points to Mr Kenyon being unhappy about or dissatisfied with, the steps that were being taken to assist him. Furthermore, the evidence is that even prior to February 2005, suggestions had been made to Mr Kenyon as to how he could lighten his workload, but unfortunately, these appeared to have mostly gone unheeded. While one could be critical about the delay in getting the staff structures organised, I do not find that there was a breach of any duty owed to Mr Kenyon by Trustpower.
- [31] While it is clear that Mr Kenyon had a number of problems in regard to his health and overall wellbeing, there is no sustainable evidence to suggest that Mr Kenyon’s problems were brought about solely by his work environment, or that the actions of his employer were such that Mr Kenyon’s resignation can be seen as a constructive dismissal. While I can not be absolutely certain, it appears to me that for various, and largely personal reasons, Mr Kenyon had decided to return to Blenheim to live. That was a choice he was entitled to make but taking all of the evidence into account I can find nothing to suggest that there were any actions or inactions, on the part of the employer, that converts Mr Kenyon’s resignation into a constructive dismissal.

## **Determination**

- [32] I find that the resignation of Mr Kenyon was not a constructive dismissal and that he chose to resign of his own free will, more probably than not for personal reasons, substantially unrelated to his work environment. It follows that I must find that Mr Kenyon does not have a personal grievance and that the remedies he seeks must be declined.

**Costs**

[33] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**