

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 92  
3147821

BETWEEN                      JONATHAN YOUNG  
   Applicant  
  
AND                                TECHNOLOGY HOLDINGS  
   LIMITED  
   Respondent

Member of Authority:        Philip Cheyne  
  
Representatives:              Jonathan Young, the Applicant  
   Diccon Sim, counsel for the Respondent  
  
Investigation Meeting:        29 November 2022 in Dunedin  
  
Date of Determination:        28 February 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Jonathan Young was employed by Technology Holdings Limited (THL) from September 2020 until he resigned on two weeks' notice given on 26 February 2021.

[2]     Mr Young says that he was constructively dismissed. Mr Young also says that THL breached his privacy. In his personal grievance claim, Mr Young seeks reimbursement of lost wages, compensation and costs.

[3]     Mr Young's employment ended by his resignation. THL says that Mr Young's resignation was not caused by any breach by THL of duties it owed to Mr Young. If THL is found to have breached any duty, THL says that the breach was not of sufficient seriousness to warrant Mr Young's resignation.

## **The Authority's investigation**

[4] Through his then representative, Mr Young raised a personal grievance claim by letter dated 4 June 2021. In its initial statement in reply, THL claimed that Mr Young had not raised his personal grievance within time. The point turned on whether Mr Young's employment continued until the end of the notice period. Following a case management conference, THL lodged an amended statement of problem on the basis that the grievance had been raised with it within time, but Mr Young's employment had ended at his initiative by his resignation.

[5] It is now not necessary to determine whether Mr Young's employment ended on 26 February 2021 or at the end of the notice period, 12 March 2021.

[6] The problem was eventually rescheduled for an investigation meeting to be held in Dunedin. Shortly before this meeting, Mr Young sought to attend by AVL. I approved that request, to avoid delay which would have resulted from further rescheduling.

[7] Mr Young participated by AVL, gave evidence, questioned THL's witnesses and made submissions. Arran Guy and Tony Guy both gave evidence and counsel questioned Mr Young and made submissions. Arran Guy is THL's chief operations officer. Tony Guy is THL's managing director.

[8] During the investigation meeting, I was provided with a copy of the signed employment agreement. It includes an appendix with further information about the bonus targets and payments. Counsel for THL had forwarded it to Mr Young prior to the meeting. Mr Young accepted it as the applicable agreement.

[9] The documents provided, the evidence and the submissions have allowed me to reach a view about relevant factual findings and relevant legal findings. I will endeavour to set these out succinctly.

## **Issues**

[10] Employees may claim they have a personal grievance against their employer, including a claim that they have been unjustifiably dismissed. A dismissal is a sending away at the initiative of the employer, so can include an actual dismissal or a constructive dismissal.

[11] Constructive dismissal includes cases where the employer gives the employee a choice of resigning or being fired, where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee's resignation, and where a breach of duty causes the employee to resign. The last-mentioned category is relied on here by Mr Young. Mr Young relies on a series of matters, with the final instance on 26 February 2021, following which he resigned.

[12] In a breach of duty constructive dismissal case, the resignation must be caused by a breach of duty by the employer and the breach must be sufficiently serious to make it reasonably foreseeable by an employer that there was a substantial risk of the resignation.

[13] It is convenient to deal with the issues in the following order:

- (a) What caused Mr Young's resignation?
- (b) Did THL breach duties it owed to Mr Young?
- (c) What happened on 26 February 2021?
- (d) Were any breaches sufficiently serious to make a resignation reasonably foreseeable?
- (e) If yes to these issues, what remedies are appropriate?

### **What caused Mr Young's resignation?**

[14] Mr Young was aggrieved over a number of matters during his employment. It was Mr Young's view about these matters that caused him to resign. I need only summarise the main points at this stage.

[15] The agreement provided a fixed salary supplemented by sales bonuses. Mr Young considered he had been misled at the outset about the ability for sales staff to achieve bonuses, so his remuneration was lower than had been represented.

[16] Mr Young understood that there had been a significant data security breach. He also says he was able to access confidential staff records on a shared drive. Mr Young regarded this as a breach of the Privacy Act 2020.

[17] Mr Young considered that THL's systems and processes were archaic and inefficient. He believed that his suggestions to improve those inefficiencies were met with a lack of interest.

[18] Mr Young felt bored and unchallenged at work.

[19] Before he was employed, Mr Young had disclosed his ADHD condition. The foregoing issues caused Mr Young to become increasingly distressed and they exacerbated his ADHD symptoms.

[20] The issues mostly arose at an early stage, but Mr Young nonetheless continued his employment. As will be explained, I need not consider whether Mr Young had affirmed his employment agreement, with full knowledge of any breaches. However, Mr Young's view of the earlier matters was relevant to his response to events on 26 February 2021.

[21] There was a sales meeting on 26 February 2021. During the meeting, the company director spoke about sales performance. Mr Young took what was said as personal criticism of his low outbound sales performance, in front of other staff. He resigned soon afterwards.

### **Did THL breach any duties it owed to Mr Young?**

[22] I will deal with the background issues under sub-headings.

#### *Signing the agreement*

[23] Mr Young says he was not given an opportunity to seek independent advice and "felt pressured" to sign the employment agreement to get the job. In his evidence, Mr Young likens it to a sales technique he attributes to THL.

[24] It is common ground that Mr Young started work on 21 September 2020. The signed agreement is dated 15 September 2020. It was preceded by phone discussions and a face-to-face interview. The agreement was signed during the second interview. Mr Young did not raise any concerns about this process until after his resignation.

[25] Arran Guy is THL's chief operating officer. There is no reason to doubt his evidence that he had a copy of the proposed agreement printed with a watermark of "Draft" on it which he discussed with Mr Young during the second interview. Mr

Young did not dispute and I accept Mr Guy's evidence that he left Mr Young in the office to go and print a copy without the watermark for signing. Before then, they had discussed the proposed terms.

[26] If Mr Guy had intended to get Mr Young to sign the agreement without giving him an opportunity to seek independent advice, it is unlikely that Mr Guy would have had a copy marked with "Draft" at the start of the second interview. I accept Mr Guy's evidence that it was Mr Young who wanted to finalise the agreement and who said he did not need to take the agreement away or get advice on it.

[27] I note Mr Young's initials on page 11 of the agreement, alongside clause 38. That clause included an express acknowledgement that Mr Young had the right to seek advice prior to signing the agreement. In the absence of convincing evidence, there is no basis to discount that statement.

[28] I find that Mr Young was not pressured by Mr Guy and had an opportunity to seek advice before signing the agreement.

[29] In any event, the only term of the agreement of concern to Mr Young was the commission or bonus structure. I deal with that point now.

#### *Bonus structure*

[30] The agreement set remuneration at \$21.63 per hour "plus sales commissions as set out below". The hourly rate provided a fulltime wage of approximately \$45,000.00. Later in the employment, Mr Young reduced to working four days per week, affecting his fixed income. The reduced working hours was not material to the personal grievance issues.

[31] The agreement included a page headed "OUTBOUND SALES BONUS KPI" with specific provisions and a second page under the heading "APPENDIX" with tables "Example 1" and "Example 2". Mr Young's full signature and hand-written date are on the second page.

[32] Mr Young's claim is that he was misled about the ability to earn enough money. This concerns the commission component.

[33] In correspondence from his solicitor, Mr Young stated that he said when first interviewed that he would need remuneration in the "low \$60 thousands" and was told

that it would not be a problem. Mr Young gave that evidence. Arran Guy's evidence is that he "may have indicated that [the amount] ... was realistic if targets were met". Mr Guy also says that he was clear that bonuses depended on meeting targets. I accept Mr Young's evidence about what he stated for salary, but also find that Mr Guy included that rider.

[34] Mr Young's claim and the solicitor's correspondence does not expressly raise the following point. In evidence, Mr Young says he asked Arran Guy about the bonus structure during the interview, but Mr Guy told him he was not sure what some of it meant and they could look at it later. Mr Guy disputes saying that he did not understand the bonus structure and suggesting they could look at it later.

[35] During the employment, Mr Young did not ask Arran Guy about the bonus structure in the agreement. Mr Young gave evidence about his positive relationship with Arran Guy. Given that relationship, if an important point had been left unexplained from an interview, it is likely that Mr Young would have followed up.

[36] I note the evidence that the commission structure encourages sales generating activity as well as results. It is unlikely that a chief operating officer (Arran Guy's position) would not understand the operation of the sales commission component of a remuneration package or would say that during an interview. In his evidence, Mr Guy gave a detailed explanation of the operation of the two tables.

[37] I prefer Arran Guy's evidence on this point. I find that Mr Guy did not say to Mr Young that he was not sure about what some of the bonus structure meant and they could look at it later.

[38] In summary, I find that there was a discussion at first during which Mr Young indicated what he sought in remuneration and Arran Guy said this was realistic if targets were met. The draft agreement provided to Mr Young included a fixed wage and a commission/bonus structure. Mr Guy did not tell Mr Young that he did not understand the bonus structure and they could look at it later. Mr Young elected to sign the agreement without seeking independent advice.

[39] Mr Young says that after "about three days of training" it became evident that the job was not how it had been presented at interview. He viewed the company data and saw that nobody working in the same role as him had achieved the targets. He says he asked Arran Guy about this. Mr Guy disagreed, but Mr Young then showed

him the “data” so Mr Guy had to agree. However, I prefer Arran Guy’s evidence about whether the other staff referred to achieved targets and about the operation of the bonus scheme. It was at least possible for Mr Young to achieve the salary he sought, based on the fixed remuneration and the bonus structure.

[40] In these circumstances, I find that there was no contractual misrepresentation or breach of duty by THL.

#### *Privacy breach*

[41] THL encountered an IT issue in about November 2020. It is not necessary to set out details here. Arran Guy’s evidence is that forensic IT consultants advised the company at the time that no data was transmitted outside the company’s servers and there was no breach of privacy. There is no reason to doubt this evidence. While the management of this IT issue might have affected employees’ work processes, it did not amount to a breach of any duty owed by THL to employees such as Mr Young.

[42] As part of this concern, Mr Young also says that he was able to access personal information about other employees on a shared drive on THL’s computer system. Mr Young’s evidence is that he did not do so, despite having that access. There is no evidence that any other employee could or did access Mr Young’s personal information in this way.

[43] THL’s evidence is that Mr Young could not have accessed personal information regarding other employees through the shared drive.

[44] The difficulty for Mr Young is that even if I preferred his evidence to that of THL about the information available on the shared drive, there is no proof of any breach of his personal privacy rights by other employees accessing his information. The additional difficulty for Mr Young is that the Privacy Act does not give or impose obligations enforceable in a court, including the Authority.<sup>1</sup>

[45] I find that there was no breach of duty by THL.

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<sup>1</sup> *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614 (EmpC) at [218], cited in *Evans v JNJ Management Ltd* [2020] NZEmpC 181.

*THL's systems and processes*

[46] Mr Young says he had to spend considerable time correcting and re-entering information in THL's client database, so lost time which he could otherwise have spent on sales activities to meet commission targets. Mr Young also says the inefficiencies exacerbated his ADHD. Thirdly, Mr Young says his suggestions to improve processes was met with a lack of interest.

[47] In support of his view about THL's systems and processes, Mr Young says that THL's customer relationship management (CRM) software was a 2013 version of a Microsoft product that was no longer supported. However, Mr Young is not correct. I accept Arran Guy's evidence that THL's version of the CRM product is still supported and will be supported until 1 January 2024.

[48] I accept Mr Guy's evidence that Mr Young needed to check, correct and enter CRM information for 30 clients to meet his daily target. That was a core part of Mr Young's job. Checking and updating records other than those Mr Young was supposed to contact each day was not part of Mr Young's job. Mr Young spent time on this other activity, even though it was not part of his role.

[49] While I accept that Mr Young's ADHD was exacerbated by systems and processes which he considered were inefficient, THL did not breach any obligation owed to Mr Young by its continued use of those systems and processes.

[50] I was provided with an email dated 20 January 2021 from Mr Young to Tony Guy, the managing director. Mr Young had spoken to Tony Guy and followed up with an email, as requested. The email indicates that Mr Guy listened to Mr Young's suggestions. Mr Young's suggestions did not cause THL to implement changes. I accept that Mr Young was dissatisfied by that, but THL did not breach any obligation it owed to Mr Young by not implementing any of his suggestions.

[51] Overall, there is no reason to doubt Mr Young's evidence that he felt bored and unchallenged in his work. I accept this exacerbated his ADHD symptoms.

[52] Employers as a matter of course would prefer employees not to experience work in that way. However, the fact that Mr Young felt that way does not mean that THL breached a statutory or contractual duty it owed to him regarding its work systems and processes.

### *Office environment*

[53] There are several points.

[54] Mr Young's evidence is that the office environment was difficult for him because there was a set playlist of music managed by the customer service manager, while his co-worker beside him played different music.

[55] I accept Mr Young's evidence that he raised the matter with Arran Guy, there was a meeting with him and the music "stopped". By that, Mr Young meant that the co-worker's practice stopped. This was before Christmas. The matter does not add anything to Mr Young's later claim.

[56] Mr Young says in evidence that he was once told to meet with some potential clients with two colleagues, even though his role was telephone and email based. Internet access was not available in the meeting room. Mr Young was out of his "comfort zone" as it was face to face and involved products known to the colleagues but unfamiliar to him. His evidence is that it was "extremely embarrassing".

[57] There is no reason to doubt Arran Guy's evidence that Mr Young had not previously raised this matter. I also accept his evidence that THL would expect telephone sales staff (such as Mr Young) to be able to assist customers face to face, if need be.

[58] While Mr Young might have been embarrassed as a result of the interaction, one such experience is not a breach of obligation owed by the employer.

[59] The office environment did not constitute a breach of duty owed by THL to Mr Young.

[60] *Background matters - conclusion*

[61] In summary, none of the background matters amounted to a breach of duty by THL.

### **What happened on 26 February 2021?**

[62] There was a mandatory national sales meeting every Friday. Arran Guy and Tony Guy led the meeting. THL related businesses engage franchise field sales team members. Mr Young was not part of a franchise field sales team. There is no reason

to doubt Arran Guy's evidence that they were observing a downturn in the performance of the franchise field sales team. Arran Guy and Tony Guy say that the message delivered on 26 February 2021 was directed to the franchise field sales team members. There is no reason to doubt that evidence. However, the meeting included Mr Young and other outbound sales team members as well.

[63] Mr Young's evidence is that in the meeting Tony Guy said:

*Every day that you don't meet your target, the shareholders are subsidizing you.*

*You are being paid by the shareholders, instead of being paid by the income that you generate, and that's not sustainable.*

*If you are there is your job, and you see that you're not meeting your targets, you are actually being covered by the shareholders and stealing off your fellow workers.*

*Your fellow workers are paying to the shareholders, because you're relying on your colleagues to keep your household, pay your rent, support your family, and your savings. You ought to think about that.*

*You should think "its really important that I am not a drain on the company."*

*There's consequences when targets aren't met, and the consequences fall on your fellow workers and the shareholders.*

[64] Arran Guy and Tony Guy dispute this as a word for word record but accept that it reflects the "the thrust" of what was said. However, there is no reason to doubt Mr Young's evidence that he transcribed what was said during the meeting. On balance, I accept Mr Young's account as an accurate record.

[65] The presentation was part of a meeting that lasted about 45 minutes. No issue is raised about the other content, delivered by both Arran Guy and Tony Guy.

[66] It is common ground that there was a TV screen fixed to the wall in the area of the office used by the outbound sales team, which included Mr Young. I accept Arran Guy's evidence that the screen was not visible to staff based elsewhere in the country who were part of the sales meeting. The outbound sales team, including Mr Young, had team sales targets and the monitor displayed targets and achievements. There is no evidence to indicate that Mr Young objected during his employment or when he resigned to the sales information being displayed.

[67] Immediately after the sales meeting, Mr Young went to Arran Guy. Mr Young's evidence is that he told Mr Guy how humiliated he was, that he was upset and shocked by Tony Guy's words. Arran Guy asked him what he thought he should

do with that feeling. Mr Young said he was talking to Arran Guy as his manager, rather than “calling out” Tony Guy or approaching him. Mr Young’s evidence is that Arran Guy told him he should use the “energy” to make sales. Mr Young says that Arran Guy told him that although he did not agree with what “his father” (Tony Guy) had said, he was not prepared to say that to him.

[68] Mr Young’s evidence is that he then resigned. He says that Arran Guy told him he had to give two weeks’ notice and that he had better work hard during that time.

[69] Arran Guy’s evidence is that Mr Young came to him after the meeting and said that he was finding the job was not good for his mental health. Mr Guy says that Mr Young was “clearly challenged” by the message delivered in the sale meeting, he encouraged him to recognise that he was not being “individually targeted” by the comments, but could use the meeting to energise him for his role. Arran Guy’s evidence is that he did not disagree with Tony Guy, and did not tell Mr Young that he disagreed with Tony Guy. Arran Guy accepts that he told Mr Young that Tony Guy is more direct with his words than he was. Arran Guy’s evidence is that when Mr Young said he resigned, he encouraged Mr Young to reconsider.

[70] I accept Arran Guy’s evidence that this discussion was at about 10.00am. I find that Mr Young was humiliated, upset and shocked by Tony Guy’s words and said so to Arran Guy. That is consistent with Arran Guy’s evidence that Mr Young was “clearly challenged”. I accept Arran Guy told Mr Young that he was not being “individually targeted”. However, it did not completely assuage those feelings. At best, Mr Young was left to think he was part of those who Tony Guy said were “stealing off your fellow workers, ... relying on your colleagues to keep your household, ... a drain on the company”. I find that Arran Guy confirmed he agreed with Tony Guy’s views.

[71] It is common ground that Arran Guy and Mr Young had met that day before the sales meeting, or thereabouts. Arran Guy’s evidence is that Mr Young referred to the difficulty he was having living on what he was earning. Arran Guy says that this conversation was “nothing like” Tony Guy’s sales meeting presentation. However, Mr Young’s evidence is that the comments at the sales meeting were “almost word for word” the conversation he had had with Arran Guy the day before.

[72] I do not accept Mr Young's evidence that the earlier meeting with Arran Guy had been "almost word for word" like the presentation. If that had been the case, it is likely to have been so described in the 4 June 2001 letter from Mr Young's solicitor outlining the grievance. However, in that letter, the earlier meeting is described as Mr Young expressing his on-going concern that the way he had to carry out his duties was linked to "no sales". I find that in the earlier meeting, Mr Young spoke of his concern about lack of sales. There would have been no reason for Arran Guy to respond with words like those used the next day by Tony Guy.

[73] Returning to the 26 February meeting, I accept Arran Guy's evidence that he encouraged Mr Young to reconsider his resignation.

[74] Mr Young sent Arran Guy an email at 1.08pm the same day. The subject line reads "Thank you. Final day, Friday, 12 March." The text of the email does not indicate an employment relationship problem. Arran Guy responded in similar vein about an hour later. The messages indicate that a specific last day of work had been discussed between Mr Young and Arran Guy.

[75] Mr Young's evidence is that Arran Guy came to him later. Arran Guy's evidence is that there was not a second meeting. Considering the email exchange and the description of events in the 4 June 2021 letter, I accept Arran Guy's evidence that they did not meet a second time before the 1.08pm email.

[76] Mr Young and Arran must have discussed the contractual notice period during the 10.00am meeting, given that Mr Young said "As discussed, my last day of work will be Friday, 12 March" in his 1.08pm email.

[77] In response at 2.16pm, Arran Guy referred to Mr Young's comment about the job not being good for his health as the reason for the offer of paid leave instead of working out the notice. I accept Arran Guy's evidence that they had a discussion between the two emails. I accept Arran Guy's evidence that his offer of paid leave was based on the 10.00am meeting discussion, the 1.08pm email and the following discussion. Given the tone of the emails and the description in the 4 June 2021 letter, it is not likely that Arran Guy told Mr Young that he needed to work hard during the notice period, in the 10.00am conversation or later. I find that Arran Guy did not say that.

[78] In summary, Tony Guy delivered a presentation intended to motivate sales by characterising a failure to meet sales targets as “stealing off fellow workers”. The message was not targeted at Mr Young. However, Mr Young took it as aimed at his sales performance and was offended. Mr Young had that view because of his dissatisfaction with the job and his earnings, although his dissatisfaction was not caused by any breach of duty by THL. Mr Young spoke with his manager who did not completely assuage Mr Young’s offence. Mr Young resigned, was encouraged to reconsider and later confirmed his resignation.

[79] In the employment agreement, THL recognised that Mr Young was entitled to fair and equitable treatment. In any event, a similar duty would have been implied. In light of THL’s knowledge about Mr Young’s concern about his earnings, I find that Tony Guy’s presentation was inconsiderate without regard to the potential offence, and inconsistent with the duty of fair and equitable treatment.

**Were any breaches sufficiently serious to make a resignation reasonably foreseeable?**

[80] I accept that THL did not intend that Mr Young resign. THL demonstrated that by Arran Guy immediately inviting Mr Young to reconsider resigning.

[81] I also find that the breach by THL was not sufficiently serious to make it reasonably foreseeable that Mr Young would resign.

[82] The message of “stealing off your fellow workers” was not a direct accusation that Mr Young (or anyone else) was stealing, in a criminal sense. The offending messages were a small part of a sales meeting. Despite the discussion the day before the presentation, it was not reasonably foreseeable that Mr Young might resign. THL was not aware of Mr Young’s general level of dissatisfaction in the employment.

**Conclusion**

[83] Mr Young resigned and was not constructively dismissed. Mr Young’s personal grievance claim is dismissed.

[84] Costs are reserved. If there is a claim for costs, a memorandum setting out the basis of the claim must be lodged in the Authority and served on the other party within 14 days. The other party may lodge and serve a response within a further 14

days. I will then determine costs, taking account of those submissions in the context of the Authority's approach to costs.

Philip Cheyne  
Member of the Employment Relations Authority