

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 314/09  
5141047

BETWEEN                      DARRELL TAYLOR  
   Applicant  
  
AND                                PRYSMIAN POWER CABLES  
   & SYSTEMS NEW ZEALAND  
   LIMITED  
   Respondent

Member of Authority:        Yvonne Oldfield  
  
Representatives:              Mr Taylor in person  
   Alison Maelzer for Respondent  
  
Investigation Meeting:        13 May 2009  
  
Submissions received:        25 May 2009 from Applicant  
   3 June 2009 from Respondent  
  
Determination:                3 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This employment relationship problem concerns an alleged constructive dismissal. Four factors led Mr Taylor to resign from his position as one of the respondent's team of development managers. They were:

- i. a belief that he was being undermined in his work by his immediate manager, Mr Hamamand Schroff;
- ii. the advertising of what Mr Taylor took to be his job;

- iii. receipt of a letter from Mr Schroff calling him to a disciplinary meeting, and
- iv. delays by Mr Schroff and human resources manager Kate McCormick in actioning the disciplinary process.

[2] At the investigation meeting Mr Schroff and Ms Atkinson acknowledged that a job (Business Development Manager, Industrial) was advertised only the day before he was called to a disciplinary meeting, but asserted that this was purely coincidental. They explained that the job was a new position, planned well before these events but approved by the parent company as they unfolded. The position was intended to expand the development team so that its structure would match that of its Australian counterpart, and to enable the respondent to move into a sector of the market in which it had not previously operated. Mr Taylor's job, which related to the utilities sector, would remain unchanged.

[3] After hearing what Mr Schroff and Ms McCormick had to say about the advertised position Mr Taylor told me that he accepted that there was no ulterior motive in the respondent advertising what was in fact a new role, although he noted that his mistrust around this issue would not have arisen if the respondent had informed him and the other development managers about its plans in relation to the expansion of the team. He confirmed in submissions that he sought to rely only on the other elements as the basis of his constructive dismissal claim, and argued that taken together these constituted either a course of conduct aimed at coercing him to resign, or a breach of duty such that he could not remain in the job.

[4] The issue for determination is whether the evidence supports one or both of these assertions, and if so, what remedies are in order.

### **Constructive dismissal**

[5] The respondent company manufactures and sells electrical cables throughout Australia, Europe, America and Asia. Mr Taylor started work as Business

Development Manager (Utilities)<sup>1</sup> in early 2008. His role was primarily to grow and maintain business from energy sector clients such as power companies.

[6] He had one direct report (Michelle Abraham) and in turn he reported to the General Manager, Sales and Marketing for New Zealand. In July the incumbent in that role resigned and on the 31<sup>st</sup> of that month Mr Taylor emailed Paul Atkinson (CEO –Oceania) to express interest in taking over the job. Mr Taylor conceded to me that with his relatively short period of service, he did not have a high expectation of being considered for the role. As it transpired, a successor (Mr Schroff) had already been appointed.

[7] Mr Schroff started work in August just as the economic downturn (and in particular, the contraction of the building sector) was having a significant impact on the respondent's business. Within a short time of taking up his role, Mr Schroff became concerned that Mr Taylor was not tackling his work with the sort of urgency the changed circumstances demanded. For his part, Mr Taylor had already begun to feel that he was *“heading in a different direction from the company”* and told Mr Atkinson so in an email dated 14 August, seeking to discuss with him *“whether my expectation of the company/role overall is accurate...I am starting to question what value I'm adding here.”*

[8] The August sales figures indicated that volumes in the Utilities sector were 50% down on the previous year. Production planning had been driven by sales forecasts supplied by Mr Taylor but now the respondent found itself overstocked. Mr Schroff was concerned that Mr Taylor was relying on old sales data and had failed to up date his forecasts with the changing environment. On 19 August he sought a line by line review of forecasts and planned to discuss this issue further with Mr Taylor at the August month end staff meeting. Unfortunately, without prior notice, Mr Taylor absented himself from that meeting. Mr Schroff emailed him noting:

*“I was absolutely shocked to find out that you were gone for the day and did not even have the courtesy to see me before leaving and give an update, particularly when your business is so far behind and bleeding the company.”*

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<sup>1</sup> Mr Taylor's role was also sometimes referred to as “Networks Business Manager.”

*In my view this is a lack of commitment and ownership which is a major concern to me”*

[9] Mr Schroff went on in this email to set out a list of requirements for Mr Taylor and his staff member for the month of September. These included specific reporting and forecasting requirements as well as targets for calls on customers. Mr Schroff also reiterated an earlier request that Mr Taylor arrange meetings to introduce him to Mr Taylor’s key clients. During September, when Mr Taylor had failed to organise more than a couple of meetings, Mr Schroff went ahead and met with some of these clients independently. Mr Taylor told me he felt undermined by this.

[10] On 22 September Mr Schroff spoke to the business development team about strategies for the current environment. Much of what he said was directed at Mr Taylor since sales in the Utilities sector had been particularly hard hit, and he asked Mr Taylor to provide him with an up to date customer visit plan within the next two days. When nothing eventuated, Mr Schroff emailed Mr Taylor with a reminder. He got a brief response setting out a few lines about what Mr Taylor and Ms Abraham were scheduled to do over the coming weeks.

[11] This was not sufficient to address Mr Schroff’s concerns about what was happening to the Utilities sector of the business. He decided a more formal approach was needed. Between them, he and Ms McCormick drafted a letter dated 25 September which they left on his desk on 26 September.

[12] The letter was headed “*Letter Informing of Disciplinary Meeting*” and set out the following areas of concern:

- i. Lack of urgency to grow our business and market share;*
- ii. Negative attitude-everybody else’s problem;*
- iii. No ownership of the business or drive to stem negative trend”*

[13] No more detail was provided. Mr Schroff told me he planned to give this in person at the meeting (proposed for 29 September.) It did not however proceed. On 26

September Mr Taylor wrote back, advising that he would not be able to commit to a meeting until he was provided with specifics of the concerns along with his position description and any other relevant material from his human resources file. Mr Taylor also advised that he would be pursuing a personal grievance, although he did not specify what this related to.

[14] Ms Atkinson handed Mr Taylor the position description on 30 September. Mr Taylor then heard nothing more about the matter for the next two weeks. In her evidence to me Ms McCormick explained that at this time in the organisation it “*seemed like crisis after crisis.*” The General Manager left on 30 September, an employee was in court on criminal charges and a decision had been taken to close the factory for a fortnight as a means of dealing with the over-production issues. As Human Resources manager, she was involved in all of this. She said in evidence:

*“I sincerely regret the delay in responding to Darrell’s 26 September letter. I should have (and would usually) have assisted the manager to respond to something like this much sooner. The length of the delay was simply because of the huge workload I was dealing with at the time.”*

[15] When no response had been provided to Mr Taylor by 14 October 2008, he wrote again, noting that he had still not been given further specifics of Mr Schroff’s concerns, or provided with his own file. In the letter dated 14 October he also noted that he would be seeking to bring a personal grievance claim based on a constructive dismissal.

[16] On 16 October Ms McCormick spoke briefly with Mr Taylor and told him that she and Mr Schroff would meet with him the next day. That meeting ended up being in two parts and taking up much of the day. Ms McCormick apologised for the delay and explained the work pressures at the time. Because Mr Taylor had identified the job advertisement of 24 September as a concern, she and Mr Schroff also told him a little more about the position, and clarified that it would focus on a different market and cable type to anything with which the respondent was currently involved in New Zealand.

[17] In her evidence to the Authority, Ms McCormick acknowledged (as the drafter of the letter of 25 September) that the header on the letter could have been taken to indicate that Mr Taylor's job was in jeopardy. She said she had come to believe that she should have removed it, and that on 17 September she was careful to reassure Mr Taylor that his job was not in jeopardy. She said she explained to Mr Taylor that while the respondent did have concerns about aspects of his performance, it remained confident that those could be addressed, and the company did not want him to resign. She and Mr Schroff already knew that the parent company was about to implement a recruitment freeze. If Mr Taylor left, or was dismissed, they would not be able to replace him. In addition, they had not yet filled the new role. They had planned for the development team to expand from three to four at a time when a vigorous sales team was needed to support the manufacturing side of the business. Instead, they now faced the risk that it would shrink to two. This is exactly what did happen when Mr Taylor left.

[18] Mr Taylor does not dispute that he received an explanation and apology for the delay. He also accepts that it was a stressful time in the organisation. However he was not reassured then and still does not find the explanation and apology sufficient amends for what happened. On 17 October, after hearing what Ms McCormick and Mr Schroff had to say, he reiterated that he felt he could no longer work with or trust Mr Schroff. On 20 October he confirmed this by giving notice of resignation effective 14 November. Neither party ever suggested that Mr Taylor might not work out his notice period. Mr Taylor told me he preferred to work out his notice so that he could maintain relationships and to finalise various projects. Several times during the notice period Ms McCormick reiterated to Mr Taylor that he could rescind his resignation if he wished but his mind was made up. He finished, as planned, on 14 November.

### **Determination**

[19] Mr Taylor argues in his submissions that he was constructively dismissed in that:

- i. the employer followed a deliberate course of conduct with the aim of inducing him to leave, and

- ii. there was breach of duty by the employer such that he felt he could not remain in the job.

[20] I find no evidence to support the first allegation. I am not satisfied that there was any wish or intention at all on the part of the respondent that Mr Taylor should leave. I accept that in fact it was a major inconvenience to the respondent that he did. It has not been established that the employer followed a course of conduct with the deliberate aim of coercing Mr Taylor into resigning.

[21] As for the second allegation, it has been established that in two important respects the actions of the respondent fell short of good employment practice. The first relates to the tone Mr Schroff took towards Mr Taylor in his communications with him. It was, I accept blunt, informal and capable of causing offence to individuals whose own style might be less direct. I accept that it did in fact cause significant offence to Mr Taylor. While it was reasonable for the respondent to raise performance concerns, the manner in which they were raised was not.

[22] The second respect in which the employer's conduct was wanting relates to the delays in the progressing of the disciplinary meeting. As Ms McCormick freely acknowledged, she would not normally have let something as important as this slide for over two weeks.

[23] Mr Taylor's concerns in relation to these two points are entirely valid. However, it is not the case that anything short of ideal behaviour towards an employee will entitle that employee to treat the contract as being at an end. I am not satisfied that (taken separately or together) the concerns in this case amounted to breaches of sufficient seriousness as to make the employment untenable. This view is further reinforced given the mitigating factors: the difficult circumstances facing the organisation at the time, and the explanation and unreserved apology offered to Mr Taylor at the meeting of 17 October.

[24] It must also be noted that Mr Taylor had been considering his future in the company since mid August, and he was not so distressed that he felt himself unable to work out his notice period. While this is not fatal to a claim of constructive dismissal,

it is a factor to be weighed in the balance when considering the seriousness and impact of the employer's actions.

[25] In summary, there was no course of conduct with the intention of forcing a resignation and no breach of sufficient seriousness that it could be said to amount to a constructive dismissal. Mr Taylor's personal grievance claim fails.

**Costs**

[26] This issue is reserved. Any request for an order for costs, with submissions in support, must be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority