

The Advocate

A regular newsletter for clients of MGZ Employment Law



Breach of Duty leads to Burnout and Big Payout

A recent Employment Relations Authority case, *Perry v The Warehouse Group Limited*, is a good reminder that, while typically there is lower risk associated with constructive dismissal claims, they can still be very expensive if established.

Mr Perry commenced employment with Noel Leeming Group Limited ("Noel Leeming") in 2019. Noel Leeming is owned by The Warehouse Group Limited ("TWG").

Mr Perry's sales targets were incorrect for his first three months of employment. He said that this resulted in loss of commission, made his job less secure, and that this was the beginning of stress-related symptoms.

In June 2020 TWG commenced consultation about a proposed change to an "*agile way of working*". Mr Perry was told his role was not affected, however Mr Perry lost after-sales support as a result of the restructure. Mr Perry said this significantly impacted his role and raised this in his 2020 performance review.

In late 2020, Mr Perry told TWG that his sales targets were very high and his attempts to meet them were impacting his mental health. In November 2020 he asked that his targets be reviewed. His targets were corrected in December 2020. However, in January 2021 they were again incorrect, this time being set too low.

From late 2020 Noel Leeming switched to use TWG's business identity. Mr Perry said his business card, uniform, and email address were changed to TWG instead of Noel Leeming. Mr Perry said he was not consulted, and did not consent to, these changes.

In April 2021 Mr Perry began to experience severe stress-related medical symptoms. He was still operating without any sales support, and was left to do tasks previously undertaken by other staff. He said this exacerbated his health issues.

In mid-2021 Mr Perry requested a meeting with his manager, Benjamin Halling. He commenced sick leave because he was "*burnt out*" and said to Mr Halling that he "*was broken by the workload*". Mr Halling noted that Mr Perry had tears in his eyes and at one point Mr Perry banged his fists on the table. Mr Halling encouraged Mr Perry to stay in his role so that he would receive commission catch ups.

Mr Halling denied that Mr Perry's workload was excessive and said Mr Perry created situations where he would become behind in his work, such as personally delivering goods to customers rather than charging customers a delivery fee. Mr Halling also noted that he supported Mr Perry where needed: in one-on-one meetings, EAP counselling, and additional time off etc.

On 24 September 2021 Mr Perry attended a meeting with Mr Halling and Samuel Gibson, Mr Halling's direct manager. Mr Perry raised a number of concerns during this meeting, including:

- (a) The additional workload from cross-brands and loss of sales support;
- (b) Stress-related health issues; and
- (c) Budgets set too close to the beginning of each month and constant budget irregularities.

Mr Perry said that Mr Gibson made it clear he was required to cross-sell brands as it was now expected of all sales staff. Mr Perry also said Mr Halling advised they were too busy to take over his workload.

On 28 September 2021, Mr Gibson emailed Mr Perry to say he was happy to continue discussing Mr Perry's concerns, noting that Mr Perry had said at the meeting that he was "*facing burnout*". Mr Gibson offered EAP and for Mr Perry to take sick leave. Mr Gibson also said that Mr Perry indicated he was considering resigning, though Mr Gibson was happy to continue working with him in good faith to resolve any issues.

Mr Perry denied that he had discussed resigning from his job and said that Mr Gibson raised the idea of him leaving his job. Mr Perry responded to Mr Gibson's email on 1 October 2021 saying, among other things, that he was not "*facing burnout*" but had completely burned out at the end of June as a result of the changes during the merger with Noel Leeming.

On 21 October 2021, Mr Perry emailed TWG confirming the "*termination of [his] employment with TWG effective immediately*", because TWG had breached his employment agreement and due to "*mental burnout*" as a result of TWG's actions. He advised his last day of employment would be 5 November 2021. He continued to communicate with TWG regarding a number of matters, including trying to resolve his personal grievance.

On 26 October 2021, Mr Perry emailed a sales report containing customer information and sales figures to his personal email account, without TWG's permission. Mr Perry was subsequently invited to a disciplinary meeting to discuss this issue. He refused to attend the disciplinary meeting and refused to speak to anyone from TWG outside of mediation.

Mr Perry subsequently raised a personal grievance for unjustified constructive dismissal and six unjustified disadvantage personal grievances. The Authority held that the disadvantage grievances were raised outside of the 90-day limitation period, but considered the unjustified dismissal grievance.

There are three main categories of constructive dismissal:

- (a) An employer gives an employee a choice between resigning or being dismissed; or
- (b) An employer has followed a course of conduct with a deliberate and dominant purpose of coercing the employee to resign; or
- (c) A breach of a duty by an employer causes an employee to resign.

The Authority considered the requirements of the third category noting that:

- (a) Any breach of duty must be repudiatory, not merely inconsiderate or causing unhappiness;
- (b) There must be a causal link between the breach and the resignation; and
- (c) It must be foreseeable that the employee would resign as a result of the breach.

Mr Perry claimed that TWG breached its duty to provide him with a safe work environment and as a result he suffered from burnout.

The Authority held that Mr Perry made it clear to Mr Halling during the meeting in mid-2021 that he was considering resigning given the issues he was dealing with, including his health concerns. The Authority noted that Mr Halling took some steps to alleviate the pressure on Mr Perry, but that "*a fair and reasonable employer with [TWG's] resources would have taken more formal and proactive steps to understand Mr Perry's mental health situation at the time.*"

The Authority also held that Mr Perry reiterated at the 24 September 2021 meeting that he was suffering from burnout and indicated that he would resign. Mr Gibson contacted the HR department at that time, but Mr Perry's burnout issue was not escalated between then and his resignation on 21 October 2021. The Authority noted again that a fair and reasonable employer would have taken more formal and proactive steps in the circumstances. The Authority accepted that Mr Halling and/or Mr Gibson knew or ought to have known that it was likely Mr Perry would resign unless his burnout and other concerns were addressed.

The Authority determined that Mr Perry had been constructively dismissed. He was awarded \$25,000 compensation, \$21,410.40 in lost wages, and payment for five days of "*lifestyle leave*" that he had had to use in place of sick leave.

This case also serves as a good reminder that mental health and wellbeing, including burnout, can have serious consequences and should be handled carefully.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**