

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 13/10
5163159

BETWEEN MALVERN GWIZO
 Applicant

AND AMCOR KIWI PACKAGING
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
 Lyal Graham for Respondent

Investigation Meeting: 21 January 2010 at Christchurch

Determination: 25 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Gwizo) alleges that he was constructively dismissed from his employment on or about 4 March 2009. The respondent (Amcor) resists that contention and says that Mr Gwizo resigned of his own accord, failed to work out his notice period, arbitrarily placed himself on stress leave without medical certification and then refused to engage with Amcor in respect of a complaint that he had raised immediately prior to resigning his employment and failed to engage with Amcor in relation to the resignation itself.

[2] Mr Gwizo was employed as a trainee operator on the night shift of Amcor's Christchurch factory and had been employed in that capacity since 9 January 2008. According to Mr Gwizo, he had regularly raised with his immediate supervisor, Barry Brown, issues about his employment. In particular, Mr Gwizo maintained that Amcor tolerated a climate of *covert racism* and that he had raised this issue on a number of occasions with Mr Brown but, he says, without satisfaction.

[3] Amcor vehemently denies the allegation of covert racism and draws attention to the many nationalities that it employs at its Christchurch operation as evidence for the view that its policies and procedures are robust and that racism of any sort is not tolerated. While the context in which Mr Gwizo brought his claim before the Authority involves his earnest conviction that Amcor is *racist*, the factual basis of the complaints before the Authority by Mr Gwizo, in my opinion, have no element whatever of racism, covert or otherwise, unless it can be alleged that any disagreement between a black man on the one hand and a white man on the other, is inherently racist.

[4] In the telephone conference I convened with the parties before the investigation meeting, Mr Gwizo referred to two written complaints that he had made to Amcor prior to the final complaint immediately before his resignation. On researching the matter, Amcor was not able to find one of those complaints and indeed gave clear and straightforward evidence that there was only one earlier complaint, not two. The alleged recipient of the *missing* complaint was Mr Brown and he gave evidence at my investigation meeting and was absolutely adamant that there was only ever one previous complaint. That earlier complaint was, according to Mr Brown, properly dealt with at the time. An examination of the text of that complaint, which was provided to the Authority, does not, in my opinion, disclose any racist element at all. Mr Gwizo gave evidence about the nature of the other complaint (the one about which Amcor had no recollection), and he indicated that his recollection was that the complaint concerned the training regime at the factory and Mr Gwizo's contention that the learning environment was *racist*. While denying receipt of this *other* complaint, Amcor witnesses observed that criticism of the pace of learning new skills directed at Mr Gwizo for instance was not racist but simply an observation about the speed at which he was learning those skills. The same criticism of other employees of different ethnicities applied as well.

[5] On Wednesday, 25 February 2009, Mr Gwizo raised a complaint of physical abuse against another employee who, like him, worked the night shift. The complaint was raised initially with the night team leader, Mr Marshall, who was not empowered to investigate such matters and who indicated to Mr Gwizo that he would refer the matter to management. There is an absence of common ground on the factual matrix throughout the process from here on. The evidence from Amcor is that Mr Marshall told Mr Gwizo that Mr Brown would investigate the complaint but Mr Gwizo denies

that he was told that. Notwithstanding that denial, Mr Gwizo sent the written complaint to Mr Brown, copied to Mr Dave Maple, the Factory Manager.

[6] Mr Maple became aware of the incident on Thursday morning, 26 February 2009 when he commenced work. Mr Maple worked day shifts. He gave evidence that he would have considered the advices from Mr Marshall who had left him *a bit of a report*, and of course he received the email complaint from Mr Gwizo. Mr Maple discussed the issue with Robert Busson, the Site Manager. That discussion determined that Mr Maple was to speak to Mr Gwizo, confirm that Mr Brown was to be seized of the complaint, give an indicative timeframe for completion of that task as the middle of the following week and establish if Mr Gwizo wished to be moved off the machine he was working on to protect him from any further incidents involving other staff.

[7] Mr Maple's evidence (which I am satisfied is truthful), was that he discussed each of those issues with Mr Gwizo and then reported back to Mr Busson that he had done so. The effect of this discussion with Mr Gwizo would have been that, Mr Gwizo would have been made aware that Mr Brown was to do the inquiry, but that because Mr Brown was at that point still on bereavement leave and was not returning to night shift duty until Friday, 27 February 2009, the investigation would not start until that date but would likely be finished by the middle of the following week. Mr Maple was also clear that he established that Mr Gwizo did not wish to be moved from his particular tasks.

[8] Mr Gwizo is adamant that he was not told about the timeline that Mr Brown would have been working to, although he acknowledges that he knew that Mr Brown was to do the investigation. On this basis then, Mr Gwizo would have been aware in any event that the investigation would not start until the Friday night (that is two days after the incident complained about), but on his evidence he had no idea that the investigation would potentially continue for some days. Indeed, Mr Gwizo was very strongly of the view that the investigation ought to have been completed on the Friday night (that is the first night that Mr Brown was back after his period of bereavement leave). From Mr Gwizo's perspective, the investigation ought to have been more important than anything else and the fact that Mr Brown did not give the investigation the priority that Mr Gwizo thought was appropriate was the subject of some criticism from Mr Gwizo.

[9] It is the essence of Mr Gwizo's complaint that he resigned his employment because he did not think that the employer was proceeding with sufficient diligence and expedition in relation to his complaint. His resignation was received by Mr Brown on 4 March 2009 via email. Amcor's position, of course, was that the resignation was all the more puzzling because Mr Gwizo knew or ought to have known that the investigation was not due to conclude until about the time that he tendered his resignation. For my part, in assessing the relevant evidence of Mr Maple on the one hand and Mr Gwizo on the other, I am lead inexorably to the conclusion that Mr Maple's recollection of that conversation with Mr Gwizo is to be preferred over Mr Gwizo's recollection.

[10] I reach this conclusion for two fundamental reasons. The first is that Mr Maple's recollection of events is consistent with the other Amcor evidence, particularly that of Mr Busson who confirmed both that he had set the parameters for the discussions Mr Maple was to have with Mr Gwizo and then he subsequently heard back from Mr Maple who confirmed to him that he (Mr Maple) had conveyed Mr Busson's instructions to Mr Gwizo. When I asked Mr Busson to tell me what those instructions were, he reiterated the three issues that were to be covered, namely that Mr Brown was to do the investigation, that it would be completed by the middle of the following week and that Mr Gwizo was to indicate whether he wished to be moved from his present role or not. Conversely, Mr Gwizo's evidence on significant points differed from the evidence of the Amcor witnesses and it seemed to me more likely than not that Mr Maple had conveyed the message that he was clearly instructed to convey and that, for whatever reason, Mr Gwizo failed to appreciate the point or overlooked the timeframe.

[11] Even if Mr Gwizo is right in his recollection of the discussion with Mr Maple, his contention that the investigation could be conducted and concluded in one night shift is, I hold, unreasonable and the view that Amcor advanced that the matter could be reasonably progressed in what amounts to about half a week is, I hold, perfectly realistic and fair in all the circumstances.

[12] Mr Brown's investigation clearly took the practical course of interviewing the protagonists. Many of the workers on the floor at the time saw nothing but the other worker who was accused by Mr Gwizo of the action complained of immediately conceded that he had done precisely what Mr Gwizo claimed he had done. However,

Mr Brown established from that individual that there was a cross-allegation that Mr Gwizo had assaulted him. When Mr Brown received Mr Gwizo's resignation by email on 4 March 2009, he had, to all intents and purposes finished the preliminary part of the investigation and was at that point keen to talk again to Mr Gwizo, particularly around the allegation that Mr Gwizo himself had been guilty of an assault on the co-worker. Mr Brown expressed himself greatly surprised when he received Mr Gwizo's resignation and made numerous attempts to get Mr Gwizo to engage with him so that the investigation could be concluded and so that the parties could discuss the sudden resignation received from Mr Gwizo.

[13] The email traffic between the parties has been provided to the Authority and Amcor maintains that it discloses that Mr Gwizo was unhelpful and contrary about meeting with Amcor to discuss either his resignation or the *ongoing* investigation, or both. Mr Gwizo denied to me that he was being difficult about a meeting and wanted to know why Amcor could not respond appropriately by email to the questions that he wanted answered before he would contemplate a meeting. In particular, Mr Gwizo sought to have an agenda for such a meeting before he would consider attending and he maintained, amongst other things, that Amcor had failed in its obligation to him by not making it clear that it had completed a preliminary investigation and wished to talk to him about that investigation and about the allegation that he had assaulted his co-worker. Mr Gwizo thought that that information ought to have been conveyed to him by email whereas Mr Busson made it quite clear that he had made the decision that material of that sensitivity ought not to be conveyed by email. Mr Gwizo retorted by saying that the alternative seemed worse, of being confronted with it at a meeting where he had no notice of the assault allegation.

[14] I must say that on that point I am inclined to agree with Mr Gwizo that the employer probably erred on the side of delicacy in failing to make clear the detail about what it wanted to talk to Mr Gwizo about, but it certainly was clear in a general sense from the email traffic that Amcor wished to engage with Mr Gwizo to talk about both his resignation and the investigation. That Mr Gwizo refused to participate in such a meeting without further and better particulars, in my judgement, does him no credit whatever. No doubt Amcor could have been more direct with Mr Gwizo by way of email, but equally Mr Gwizo, having raised a serious complaint, had an absolute obligation to follow it through and that included an obligation to properly engage with his employer (or former employer) in relation to the matters complained

about. Furthermore, when Amcor made it clear that it wished to talk to Mr Gwizo about his resignation (which is absolutely apparent from the email traffic), then Mr Gwizo ought to have at least registered the fact that his resignation had not been accepted.

[15] If that was in any doubt, then that doubt was cleared up by a letter from Mr Busson to Mr Gwizo dated 13 March 2009 (that is more than a full week after the resignation was received) in which Mr Busson sets out the company's many attempts to get hold of Mr Gwizo, the fact that the investigation was still open because it had been unable to talk again to Mr Gwizo, and the fact that the resignation was still not accepted.

Determination

[16] Mr Gwizo alleges that he was constructively dismissed from his employment. I hold that complaint is not made out. I am satisfied on the evidence before the Authority that Mr Gwizo was told in the clearest terms how long the investigation would take and the fact that he chose to resign his employment within that timeline indicates strongly that the resignation was not a foreseeable consequence of any want of process of Amcor. Even if I am mistaken in my conviction that Mr Gwizo was told what the timeline was for the investigation, his view that the investigation ought to have been completed in one night shift is, I hold, completely unrealistic and the fact that a preliminary investigation was concluded within half a week as Amcor originally indicated was the intention is, in my opinion, perfectly reasonable.

[17] It follows that I am satisfied that Mr Gwizo resigned his employment without given Amcor any proper opportunity to complete its inquiries and in circumstances where his failure to continue to engage with Amcor was a breach of his obligation of good faith. Having raised a serious complaint, Mr Gwizo then failed to follow that through, failed to accept the employer's many requests that he meet with them to discuss matters further and failed to even meet with the employer to discuss his resignation which plainly, even as much as a week after the receipt of it, had not been accepted by the employer.

[18] Even if those conclusions are mistaken, it is still the position that in his letter of 13 March 2009, Mr Busson, the Site Manager for Amcor, made it clear that Mr Gwizo's resignation had not been accepted and he again offered an opportunity for

Mr Gwizo to meet to discuss the preliminary investigation and the resignation issue. The letter made clear that in the event that Mr Gwizo did not respond, Amcor would have no alternative but to accept the resignation. In the event, that is precisely what happened and I am satisfied that no culpability can be sheeted home to Amcor in consequence. Mr Gwizo's case fails in its entirety.

Costs

[19] In the particular circumstances of this case, it is appropriate that I fix costs now. Neither party was represented by outside advocacy with each in effect acting for themselves. In those circumstances, I determine that any costs incurred by either party are to lie where they fall.

James Crichton
Member of the Employment Relations Authority