

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 516
5422567

BETWEEN ROBERT HELLESOE
Applicant

AND ALTO PACKAGING
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Sione Fonua, Counsel for the Applicant
Daniel Erickson, Counsel for the Respondent

Investigation Meeting: 6 and 7 November 2013

Determination: 13 November 2013

DETERMINATION OF THE AUTHORITY

- A. Robert Hellesoe's resignation from his employment with Alto Packaging Limited (APL) was not a constructive dismissal.**

- B. APL managers had fairly investigated allegations about Mr Hellesoe's conduct and had reasonably reached the findings put to him in a disciplinary meeting before he decided to resign.**

- C. Costs are reserved.**

Employment relationship problem

[1] During a disciplinary meeting on 19 February 2013 Robert Hellesoe resigned from his position as a leading hand at the Henderson factory of Alto Packaging Limited (APL). He did so after an adjournment in the meeting, during which he had

taken advice from his representatives who were with him: Engineering Printing and Manufacturing Union organiser Simon Atkins and the union's site delegate Paul Tua.

[2] The disciplinary meeting followed an investigation by APL day shift manager Richard Walker and operations manager Keith Sinton into two interrelated incidents on 14 February involving Mr Hellesoe and a production technician (who is referred to as Mr A in this determination).

[3] One incident concerned a report that Mr Hellesoe had caught his arm in a machine for manufacturing plastic bottles while attempting to remove a jammed bottle.

[4] The second incident involved a confrontation between Mr Hellesoe and Mr A. Parts of what Mr Hellesoe and Mr A said and did that day remained in dispute but both men agreed the following had occurred: Mr Hellesoe asked Mr A if he had told Mr Walker that Mr Hellesoe's arm was caught in the machine that morning; Mr A said he had; Mr Hellesoe, standing close to Mr A, said "*Don't make up the story or I'll smash your face*"; and Mr A then pushed Mr Hellesoe at least twice and Mr Hellesoe fell over. Mr Hellesoe said Mr A then kicked him while he was on the ground but Mr A denied doing so.

[5] Immediately after the confrontation Mr Hellesoe went to Mr Walker's office and reported that Mr A had pushed and kicked him.

[6] In the following hour Mr Walker and Mr Sinton held brief, separate interviews with Mr Hellesoe and Mr A. Both workers, with their agreement, were then suspended on pay while the incidents were investigated and arrangements were made for each of them to attend an interview the next morning.

[7] During the afternoon of 14 February Mr Walker talked to four other workers about what they had seen or heard of the two reported incidents that morning. The next morning he and Mr Sinton held formal interviews with Mr A, Mr Hellesoe and three of their co-workers: Garth Ludick, Greg Psaradelis and Pio Tu'u. Mr Walker and Mr Sinton met again with Mr Hellesoe on 18 February and held formal disciplinary meetings with both Mr Hellesoe and Mr A on 19 February. Mr A's

disciplinary meeting, held after Mr Hellesoe had resigned earlier in the afternoon, ended with a decision to issue Mr A with a written warning.

[8] Mr Tua, in his capacity as union delegate, attended all interviews with the various employees held on 15, 18 and 19 February. He had also talked to Mr Hellesoe, Mr A and the other workers early on the morning of 15 February to find out what they had to say about what had happened on 14 February.

[9] As a result of their investigation Mr Walker and Mr Sinton made three findings that they put to Mr Hellesoe for his response in the 19 February disciplinary meeting:

- (i) Mr Hellesoe's admitted comment about smashing Mr A's face was within the scope of verbal or physical threats and intimidation that APL's 'house rules' said could be serious misconduct.
- (ii) The allegation that Mr A kicked Mr Hellesoe was untrue and misleading because two other employees present at the time of the conflict did not see Mr A do it.
- (iii) Mr Hellesoe had jammed his hand in the machine and also breached Alto's health and safety procedures by not reporting the incident to Mr Walker.

[10] Mr Hellesoe declined to comment about the findings. After the adjournment in the disciplinary meeting Mr Atkins asked if APL would accept Mr Hellesoe's resignation rather than proceed with its disciplinary process. Mr Sinton asked Mr Hellesoe if he was sure he wanted to resign. Mr Hellesoe said he was and APL then accepted his resignation. Mr Atkins handwrote a resignation letter and Mr Hellesoe signed it.

[11] In the weeks following the meeting Mr Hellesoe resiled from his decision to resign. His application to the Authority said the end of his employment with APL was really a constructive dismissal brought about by the impression company representatives gave him that he would be dismissed anyway.

The issues

[12] Mr Hellesoe's personal grievance application raised the following issues for investigation and determination by the Authority:

- (i) Was APL's investigation of allegations about Robert Hellesoe's conduct full and fair (up to the point of his resignation) measured against the standard set in s103A of the Employment Relations Act 2000?
- (ii) Was Mr Hellesoe's resignation given freely (without duress or undue influence by Alto) or did it amount to a constructive dismissal?

[13] Because of the conclusions reached in this determination, issues regarding remedies did not need to be considered.

The Authority investigation

[14] As permitted by section 174 of the Employment Relations Act 2000 (the Act) this determination has not set out all the evidence and submissions received but has stated findings of fact and law and the conclusions reached on issues requiring determination. In preparing it I took account of written witness statements from Mr Hellesoe, Mr Atkins, Mr Ludick, Mr Psaradelis, Mr Tu'uu, Mr Sinton, Mr Walker and Alto human resources manager Andrea Smith; relevant background documents lodged by the parties; answers those witnesses gave (while under oath or affirmation) to questions asked by me or the parties' representatives; sworn oral evidence from Mr Tua, who appeared under a subpoena issued at the Authority's volition; and closing submissions that the representatives gave at the meeting.

Were Alto's findings fairly made and reasonably drawn?

[15] Mr Hellesoe's personal grievance case relied on his belief that the findings Mr Walker and Mr Sinton told him about on 19 February were unreasonable and unfairly reached, so that in turn resulted in unfair pressure on him to resign.

[16] His criticisms of the investigation undertaken and the conclusions reached by Mr Walker and Mr Sinton included that:

- (i) They preferred to believe the information from Mr Ludick, Mr Tu'uu, Mr Psaradelis and Mr A rather than him; and
- (ii) They questioned Mr Tu'uu about changing his account of events – who had first said he did not see Mr A kick Mr Hellesoe and then said he did

see that happen – and that questioning resulted in Mr Tu’uu changing his story back to his first version; and

- (iii) They concluded bruises on Mr Hellesoe’s arm were more likely to be the result of being caught in the machine rather than being kicked by Mr A.

[17] After considering the totality of the evidence available to the Authority, I have not found Mr Hellesoe’s criticisms establish any significant failure by Mr Walker and Mr Sinton to meet the requirements of s103A of the Act in how they carried out their investigation and told him of their conclusions.

[18] The Employment Court has described relevant requirements of the employer’s investigation in the following way:¹

[93] In general, it may well be acceptable when initiating an investigation into suspected misconduct for an employer to simply ask witnesses what they know and to listen uncritically to their replies. Equally, if what the witnesses say is consistent and apparently complete, it may be acceptable to rely on what they have said without further inquiry. Where, however, there are significant differences between the accounts given by witnesses or the responses are unsatisfactory, more will be required of the employer to ensure that the investigation is full and fair.

...
[102] *The Court of Appeal addressed the scope for an employer to make such findings in Whanganui College Board of Trustees v Lewis [2000] 1 ERNZ 397 (CA) where they said:*

*“[20] The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a Court or Tribunal that the dismissal was justified. The first does not involve any standard of proof, the second does. **In ascertaining the facts the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. That does not call for the application of any legal standard of proof.** Nor is it usual to impose the application of a legal standard of proof on decisions of a litigant. That is not needed; there is already the standard of reasonableness. But when required to prove that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that they warranted dismissal were reasonable. That must be shown on the standard of proof of the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances.”*

¹ *Timu v Waitemata District Health Board [2007] ERNZ 419 upheld by the Court of Appeal in Waitemata District Health Board [2007] ERNZ 673.*

[103] *What is clear from this dictum is that, while it is open to an employer faced with conflicting accounts to effectively make findings of credibility, that process is always subject to “the standard of reasonableness”.*

Preferring the accounts of other employees

[19] In his evidence to the Authority Mr Hellesoe said he thought Mr Ludick, Mr Psaradelis and Mr Tu’uu had lied to Mr Walker and Mr Sinton about what had happened on 14 February. Measured against the requirements expressed by the Court in the extract above, I found the two company managers met the standard of reasonableness in how they gathered and assessed information from the employees. There were no other employees who might have provided additional or alternative information and who were identified as having been missed out by the investigation. No evidence was provided that any of the employees interviewed (apart from Mr A) might have a motive or reason to lie. Mr Hellesoe had specifically identified Mr Ludick and Mr Tu’uu as the two workers who were best placed to say what had happened between him and Mr A. He said they were standing and watching him and Mr A at the time. Ultimately the evidence of those two men was that they did not see Mr A kick Mr Hellesoe but had seen Mr A push him. That evidence – from the men Mr Hellesoe identified as eye witnesses – was sufficient for Mr Walker and Mr Sinton to reasonably conclude that Mr Hellesoe was not telling them what really happened.

[20] The evidence about whether Mr Hellesoe had caught his hand in the machine was more complex – both for Mr Walker and Mr Sinton at the time of their inquiry and in the Authority investigation. However, in short, Mr Ludick said he “*definitely*” saw Mr Hellesoe’s arm get caught and Mr Psaradelis did not see that but had held back a part of the machine (the ‘takeout’ mechanism) while Mr Hellesoe removed a jammed bottle. Mr Psaradelis felt the takeout move when the machine was being restarted and said it would not have done so if the emergency stop button was engaged (because the air that operated the takeout mechanism would have been released). Mr Psaradelis said he had also seen Mr A walk around from the back of the machine and call out to “*turn the air off*”, which meant pressing the emergency stop button.

[21] From those accounts Mr Walker and Mr Sinton had information on which they could have reasonably relied to conclude that Mr Hellesoe’s account (of having engaged the emergency stop and not getting his arm caught) was unlikely to be true.

Checking the change of story of one employee

[22] In his evidence to the Authority and his closing submissions, through counsel, Mr Hellesoe suggested Mr Walker and Mr Sinton placed unfair pressure on Mr Tu'uu to change his account of what he saw.

[23] The evidence established that in a formal interview on 15 February Mr Tu'uu said he saw Mr A kick Mr Hellesoe on 14 February. That account was different from what Mr Tu'uu told Mr Walker in an informal interview on the afternoon of 14 February and in a discussion with Mr Tua on the morning of 15 February. Mr Tua asked to speak to Mr Tu'uu privately and the evidence of both men was that during that discussion Mr Tua asked Mr Tu'uu simply to tell the truth about what he saw and did not ask him to favour one or other account. Similarly Mr Sinton emphasised, when the 15 February formal interview with Mr Tu'uu reconvened, that Mr Tu'uu should tell the truth (whatever that was) rather than pressuring him to confirm the account of either Mr A or Mr Hellesoe.

[24] A possible explanation of the change of story was that Mr Tu'uu had overheard Mr Hellesoe talking to Mr Tua in the smoko room on the morning of 15 February and heard Mr Hellesoe say that Mr A had kicked him and that Mr Tu'uu had seen it happen. However Mr Tu'uu's sworn evidence to the Authority was that he did not see such a kick and that was also the final account he had given Mr Walker and Mr Sinton on 15 February. It was an account they could reasonably have accepted considering it was consistent with what Mr Tu'uu had earlier told Mr Walker and Mr Tua separately.

[25] There was nothing inappropriate in Mr Walker and Mr Sinton inquiring further of Mr Tu'uu about his apparent change of story. Rather it was the proper thing for them to do.

Believing bruises shown were not from being kicked

[26] Mr Hellesoe criticised Mr Walker and Mr Sinton for not taking more account of the bruises on his body during their inquiry. On 18 February he gave them a copy of a discharge summary from Waitakere Hospital's emergency department where he had sought medical attention on the evening of 15 February. He also showed them bruising on his arm, but not his chest. In his evidence to the Authority he provided two photos that he said showed his arm on the day of the incident and "*exactly one week after*". He had not provided the photos to Mr Walker and Mr Sinton before he resigned but said they had ignored his complaint of his arm and chest being painful from being kicked by Mr A.

[27] Mr Walker's evidence was that he believed the bruising was more likely to have been caused by Mr Hellesoe being caught in the machine rather than a kick. He said this conclusion was based on what Mr Hellesoe showed him and his own general knowledge of what different sorts of bruises looked like, such as those from rugby injuries.

[28] Mr Hellesoe could fairly argue that Mr Walker and Mr Sinton's reasoning on this point was weak. The hospital discharge sheet simply recorded Mr Hellesoe's account of the cause of his bruises ("*kicked with a working boot*"). As such it was not independent and well-informed evidence, but neither was Mr Walker's own assessment as a layperson rather than a health professional. It was surprising APL did not seek some medical assessment of its own at the time given that, on either account, Mr Hellesoe's bruises were said to be work injuries – either a kick or a machine safety incident – and subject to potential ACC or health and safety incident reporting requirements. However it is also possible that a doctor may not have been able to say much that would assist with identifying the likely cause of the bruising anyway.

[29] The photos Mr Hellesoe provided after his resignation were of little probative value and unknown provenance. There was no reliable evidence to establish when they were taken, that they were of him or that assisted in determining the likely cause of reddish marks around the elbow shown in one photo.

[30] If there was a flaw in APL's process around assessing the cause of Mr Hellesoe's bruises, it was not only a minor defect but I could not say – in terms of the element of the justification test described at s103A(5) of the Act – that it resulted in Mr Hellesoe being treated unfairly. Mr Walker and Mr Sinton had other information about what had happened on 14 February, from which I accepted they met the standard of reasonableness in drawing the conclusions that they did.

Was Mr Hellesoe's resignation induced or freely made?

[31] Mr Hellesoe's evidence was that he had resigned on the advice of his union organiser. However he said that he was only given that advice, and he only accepted it, because "*it was very clear in my mind that everything was stacked up against me and I would definitely be dismissed*".

[32] The evidence of Mr Walker and Mr Sinton confirmed that Mr Hellesoe was very subdued and did not want to comment when told of their findings at the beginning of the 19 February disciplinary meeting. They had also given him a shorter version of those findings in a 'feedback' meeting held the day before.

[33] Mr Hellesoe argued that Mr Walker and Mr Sinton should have known from his reluctance to comment on their conclusions that he was under stress and they should have given him more time to consider the resignation he offered rather than accepting it in the meeting on 19 February.

[34] However I have not found the evidence supports Mr Hellesoe's proposition that APL unfairly induced his resignation in a way that amounted to a constructive dismissal.

[35] Mr Hellesoe was accompanied at the meetings on 15, 18 and 19 February by his union delegate. After the 18 February meeting Mr Sinton arranged for Mr Atkins to attend the 19 February meeting in order to ensure Mr Hellesoe had further union assistance if he required it.

[36] The evidence of Mr Hellesoe, Mr Atkins and Mr Tua revealed no questions or issues about APL's investigation that were raised and left unanswered or ignored by the APL managers in the 19 February meeting.

[37] Significantly, I considered, Mr Tua (who had sat through the interviews with all the workers) said in answer to a question asked in the Authority investigation that he did not disagree with any of the conclusions reached by the managers in their investigation.

[38] For the purposes of the Authority investigation Mr Hellesoe waived his confidentiality in the advice he had received from Mr Atkins during the adjournment taken in the disciplinary meeting. From the resulting evidence given by Mr Hellesoe, Mr Atkins and Mr Tua about that discussion, it was clear Mr Atkins considered Mr Hellesoe was at risk of being dismissed due to the findings made by Mr Walker and Mr Sinton about his alleged conduct. His advice to Mr Hellesoe, in that context, was at Mr Atkins' initiative and not through any fault or failing by APL's managers. It was advice from one of the union's professional advisors and Mr Hellesoe was entitled to accept or reject it. Having decided to accept it, the consequences for it rested with Mr Hellesoe and not the company.

[39] Neither – measured on the standard of reasonableness – was there any need for APL to propose a 'cooling off' period before accepting the resignation offered. Mr Hellesoe had two union officials present and assisting him and did not ask, directly or through them, for any more time to consider his response.

[40] The disciplinary process was conducted promptly but was not hurried. It started with the interviews of Mr Hellesoe on a Thursday and Friday (14 and 15 February) and continued after a weekend break with the feedback meeting on a Monday (18 February) and the disciplinary meeting on the next day (19 February) – Mr Hellesoe had notice of the meetings and representation throughout. APL's representatives were, in those circumstances, entitled to accept Mr Hellesoe's resignation as a considered response rather than one rashly made in the heat of the moment.

Disparity

[41] Although not formally raised in Mr Hellesoe's statement of problem or his written evidence, his oral evidence and closing submissions implied that there was an unjustified disparity in the outcome for him as a result of the events of 14 February, compared with Mr A's written warning and continued employment.

[42] If that issue had been raised squarely I would not have found an unjustified disparity. The evidence of Mr Walker, Mr Sinton and Mr Tua confirmed that a parallel disciplinary proceeding for Mr A had reached a different outcome because of different conclusions about his conduct than that alleged by Mr Hellesoe. Mr A was found not to have kicked Mr Hellesoe – which I have accepted was a conclusion reasonably open to APL's managers on the information available to them from eyewitnesses that they had no reason not to believe. Mr A was said to have expressed remorse for his actions in pushing Mr Hellesoe, having done so in defence and in apprehension of an immediate physical threat from Mr Hellesoe, and was said to have had an otherwise unblemished disciplinary history over long service with APL.

[43] The comparable outcome for Mr Hellesoe cannot be identified with total certainty because he decided to resign rather than submit to APL proceeding to decide on a disciplinary outcome after hearing whatever response he might otherwise have made to the managers' findings. While a dismissal was a probable outcome, it was also possible that a different result may have come from whatever submissions Mr Atkins would no doubt have made about factors to be considered in mitigation. However, because Mr Hellesoe instead chose to proffer his resignation in circumstances where I have found there was no significant unfairness or unreasonable actions by the APL representatives, the outcome was not unjustifiably disparate to that for Mr A.

Costs

[44] Costs are reserved. I understand from a copy of correspondence between counsel held on the Authority file that Mr Hellesoe had a legal aid grant to pursue his case so any question of costs is subject to the requirements of sections 45 and 46 of the Legal Services Act 2011. If a determination of the Authority was nevertheless

required on costs, APL may lodge a memorandum within 28 days of the date of this determination and Mr Hellesoe would then have 14 days from the date of service to lodge a memorandum in reply. No submission on costs will be considered outside this timetable, unless prior leave has been sought. Unless appropriate to vary its usual practice because of legal aid requirements, other particular circumstances of the case, or due to the application of the general principles on costs, the Authority would likely determine costs on the basis of its usual daily tariff for a two day investigation meeting.²

Robin Arthur
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.