

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 270
3024218

BETWEEN BELINDA LEE
 Applicant

A N D THE BOARD OF TRUSTEES,
 OTAMATEA HIGH SCHOOL
 Respondent

Member of Authority: T G Tetitaha

Representatives: B. Lee in person
 C. Child, counsel for Respondent

Investigation Meeting: 18 July 2018 at Whangarei

Submissions Received: 18 July 2018 from Applicant
 18 July 2018 from Respondent

Date of Determination: 23 August 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. The personal grievance is dismissed.

B. Costs reserved. I would encourage the parties in these circumstances to agree the issue of costs. Otherwise those seeking costs are to file the submissions within 14 days of the date of the determination. The other party has 14 days thereafter to file any reply.

Employment Relationship Problem

[1] Belinda Lee resigned following an incident involving the removal of asbestos from one of the school buildings at Otamatea High School. She submits she was

unjustifiably disadvantaged and constructively and unjustifiably dismissed by her employer's actions. Her employer, Otamatea High School Board of Trustees (OHS), denies it acted to Ms Lee's disadvantage or that it caused her resignation.

Relevant facts

[2] Ms Lee was employed as a cleaner on 26 October 2017. She worked 20 hours per week. Her duties included cleaning the technology block at the school.

Asbestos removal work

[3] OHS had been undertaking building works at the school property. They had contracted an architect to oversee the building works including demolishing a boiler room and replacing the roof of the technology block. Both buildings contained asbestos.

[4] An asbestos survey report was carried out. It advised there was asbestos present only in the lower sections of the downpipes and in the soffits and gable end cladding at the north end of the technology block. The report concluded the proposed re-roofing of the technology block could be undertaken without disturbing the asbestos. Therefore no asbestos removal work was planned for the technology block.

[5] OSH's contract required compliance with the New Zealand guidelines for the management and removal of asbestos and, in addition to the guidelines, the use of an independent expert to undertake air monitoring throughout the process of removal. Air monitoring was a recommendation from the Ministry of Education for asbestos removal work being done in schools.

Notification to staff

[6] Ms Lee became aware of asbestos removal work being undertaken at the school. She raised her concerns with her manager, RR on 30 November 2017 by email that a technology building roof was being replaced "because of asbestos and another building is also being condemned for the reason being asbestos."

[7] RR replied by email on 1 December below:

Good morning Belinda

This is incorrect.

No buildings have been condemned. The old T4 Graphics room that was demolished before you started was scheduled for removal due to a drop in the roll. This will be replaced with a nice new building sometime in the future when our roll increases again.

The current work on the Tech block is a straightforward re-roof due to the age of the metal sheeting over T2 (Woodwork) and a re-pitch of the roof over T3 (Metalwork) there is no asbestos removal involved in this work. In case anyone was wondering the large white cover over the building is not there to contain asbestos particles, it is there to keep the contractors dry should the weather turn against us as they will be working there for several weeks.

Several buildings around the school still have asbestos as part of their exterior cladding. This is something the school and Ministry are fully aware of and there are no plans to remove it unless part of a major building upgrade. The Ministry are happy for it to remain until then as long as it is sealed behind a good exterior paint finish, which the school had completed this year.

The old disused boiler house out the front of the school does have asbestos inside. However this is due to be demolished over the holiday period. The asbestos removal is being handled by a certified asbestos removal company before the rest of the building is pulled down.

I have ccd Rachel in my reply to you so she is aware of any concerns like this within the community. Thank you for asking and please feel free to ask again should you hear anything else.

Regards

[8] Ms Lee believed RR's above advice indicated there was no asbestos present in the technology building. This belief was wrong.

Unplanned asbestos removal work - 13 December 2017

[9] At the time the above email was sent no asbestos removal work was planned for the technology block.

[10] In early December 2017 the contractor undertaking the re-roofing contract on the technology block became concerned an area affected by re-roofing may contain asbestos. The architect instructed them to take a sample of the area for testing for asbestos around 8 December 2018. The results of the testing were positive for asbestos.

[11] On or about 11 December 2017 the architect advised Rachael Clothier-Simmonds, Principal of Otamatea High School of the unplanned asbestos removal work in the technology building. She advised them to go ahead and prepare a variation to the contract for removal of asbestos from the technology block. This included compliance with the asbestos removal guidelines and air monitoring.

[12] Ms Clothier-Simmonds informed her teaching staff who worked in the technology building of the work of this unplanned asbestos removal work. She (wrongly) assumed there were no students or staff present at the technology block during the removal work because the school was closed for the school holidays.

[13] On 13 December 2017 the asbestos removal work was undertaken. There were signs and fencing around the areas where this was taking place. The work area in the technology block required all visitors to sign in and out. The sign in sheet produced at hearing noted asbestos removal work was completed by 4.20 pm on 13 December 2017. An asbestos clearance certificate inspection started at 3 pm but there is no indication when this was completed.

[14] It is not disputed Ms Lee had scheduled to clean that evening. Her hourly work records show she began cleaning at OHS at 7:49 pm until 11:00pm. Ms Lee was to clean the woodwork room but saw the surrounding construction signage stating it was an authorised area only and that safety equipment was required to enter. Despite the signage she started cleaning an adjacent area of the wood work room then decided to leave.¹ She did not enter the area where the asbestos removal work had occurred because it was a restricted area where she was required to sign in. She did not.

[15] The following day 14 December 2018 the work site was issued with an asbestos clearance certificate. Building work resumed that same morning at 7.45 am.

Further asbestos removal work

[16] Ms Lee subsequently became aware there may have been asbestos removal work on the technology block around 20 December 2017. She emailed RR and Ms Clothier-Simmonds asking for the dates the removal would be taking place. Ms Clothier-Simmonds was on leave and did not reply. RR replied on 20 December 2017 that asbestos removal was planned for 15 to 19 January 2018.

[17] RR provided an update on 17 January 2018 that the asbestos removal contractor had started that day. Unfortunately Ms Lee did not receive the email until later that day.

¹ Email B Lee to R Clothier-Simmonds dated 18 January 2018.

Concerns raised about notification of asbestos removal work

[18] Ms Lee arrived at school and saw the asbestos removal work being undertaken. She then emailed Ms Clothier-Simmonds on 17 January 2018 regarding the asbestos removal work being undertaken that day and enquired about why there was no notification to staff, students and the community. She pointed to the Health and Safety at Work asbestos regulations.

[19] This was the first time Ms Clothier-Simmonds had been made aware of notification issues regarding the asbestos work. She made further enquiries and on 19 January 2018 she sent Ms Lee a further email. She explained the work undertaken and offered to pay for a check-up by Ms Lee's GP:

Kia ora Belinda

Please see below regarding the asbestos removal in the Tech block. As the clearance had already taken place prior to your work as [RR] stated you were not at risk. However, I understand that you are likely to want to get a check up from your GP, so as a goodwill gesture due to the communication breakdown the school can pay for your initial GP appointment. Please bring in the receipt to [D] for reimbursement.

In terms of the boiler house asbestos removal the inspector carried out a visit yesterday and will be issuing a clearance report soon. As soon as that has been received either myself or RR will let you know so that we can work out a back to work plan.

Regards

[20] The asbestos removal work at OHS was completed by 18 January 2018. An asbestos clearance certificate was issued the same day.

[21] On 22 January 2018 Ms Lee contacted OHS raising concerns about the asbestos work on 13 December 2018 and the lack of notification to her about there being asbestos in her designated cleaning area.

[22] Ms Clothier-Simmonds then agreed to place Ms Lee on paid leave while she undertook further investigations.

Failure of air monitoring

[23] Ms Clothier-Simmonds asked the architect to review the asbestos removal work on 23 January 2018. The architect discovered that the asbestos removal contractor had not carried out the air monitoring as required by the contract. The contractor had decided on the day of removal that air monitoring was unnecessary. This was because the cladding materials containing asbestos could be removed

without being broken, so there was no risk of asbestos fibres being dispersed into the air.

Meeting 24 January 2018

[24] Ms Clothier-Simmonds then arranged to meet with Ms Lee to discuss her findings. She arranged for the architect to be present. They met with Ms Lee the following day to provide an update on the investigations. Ms Lee advised her doctor had conducted tests both of which showed no abnormalities. Ms Clothier-Simmonds was following up with the asbestos removal contractor regarding the failure to undertake air quality testing. She intended seeking advice about any further testing that may assist the situation. Ms Clothier-Simmonds also provided copies of the contract documents detailing the schools requirements for air monitoring. Ms Lee agreed to refrain from posting any further comments on Facebook.

[25] The following day Ms Clothier-Simmonds wrote to Ms Lee setting out the above summary of their meeting. She also advised she had spoken to Bob Mumford, an asbestos specialist whom explained there were no forms of testing that would validate this situation. She provided contact details for Ms Lee to contact Mr Mumford. She also sought an indication from Ms Lee on whether she intended to return to work.

Resignation

[26] On 26 January 2018 at 5:12 pm Ms Lee wrote an email resigning from her job. She was unhappy about the way OHS, RR and Ms Clothier-Simmonds had handled the asbestos removal work. She sent a copy of her resignation to Ms Clothier-Simmonds and an employee at the Ministry of Education.

[27] Later that evening Ms Clothier-Simmonds accepted the resignation by email. She also advised Ms Lee that she had made further enquiries with WorkSafe New Zealand about any possible testing. They advised it may be possible to conduct a disturbance test and she had directed this to be done.

[28] The disturbance testing indicated there were no measurable traces of asbestos in the work area of the technology block.

[29] Ms Lee subsequently made complaints to WorkSafe New Zealand, the Ombudsman's Office and the Ministry of Education about the asbestos removal at OHS.

[30] Ms Lee filed a statement problem on 1 February 2018. Her statement of problem raised her personal grievance of constructive and unjustified dismissal and unjustified disadvantage.

[31] A hearing was set down for 18 July 2018 in Whangarei. Following completion of the evidence and an oral indication about the likely outcome, the parties were given time to consider whether they could settle matters between themselves before any determination was issued.

[32] Ms Lee initially advised on 25 July 2018 that a settlement had been offered but she wanted to seek legal advice before proceeding. The assistance of an Authority Member to conduct a settlement conference was offered but declined by Ms Lee.

[33] Ms Lee now seeks a determination to issue.

Issues

[34] At an earlier telephone conference² the following two issues were identified for determination:

- (a) Was Ms Lee unjustifiably disadvantaged by not being advised of the asbestos removal occurring in her work area; and
- (b) Was Ms Lee constructively and unjustifiably dismissed by the school declining to undertake air testing and/or monitoring, making her subsequent resignation foreseeable?

Was Ms Lee unjustifiably disadvantaged by not being advised of the asbestos removal occurring in her work area?

[35] It was accepted Ms Lee was not told about the removal of asbestos from the technology building that occurred on 13 December 2018. The school was required to inform its staff working in the vicinity of where the asbestos removal was taking place of this potential hazard.

² Minute dated 29 May 2018.

[36] OHS submitted Ms Lees disadvantage grievance must be brought under s103(1)(j) of the Employment Relations Act 2000 (Act). This is because it pertains to a health and safety incident. I intend dealing with this issue first.

Section 103(1)(j) of the Act

[37] Section 103(1)(j) of the Act is a specific personal grievance set out below:

103 Personal grievance

(1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim— ...

(j) that the employee's employer has, in relation to the employee,—

- (i) engaged in adverse conduct for a prohibited health and safety reason or
- (ii) contravened section 92 of the Health and Safety at Work Act 2015 (which prohibits coercion or inducement).

[38] The facts of this matter do not show coercion or inducement under s92 of the HSW. Therefore Ms Lee's grievance would be confined to s103(1)(j)(i).

[39] The Act does not define "engaged in adverse conduct" and "prohibited health and safety reason". The Health and Safety at Work Act 2015 (HSW) does define these terms in Subpart 5 of the HSW entitled "Prohibition of adverse, coercive, or misleading conduct". The relevant sections are set out below:

88 Meaning of adverse conduct

(1) For the purposes of this subpart, a person engages in adverse conduct if—

- (a) the person—
 - (i) dismisses a worker who is an employee; or
 - (ii) terminates a contract for services with a worker; or
 - (iii) refuses or omits to employ or engage any person on work of any description that is available and for which that person is qualified; or
 - (iv) refuses or omits to offer or afford to the worker the same terms of employment or engagement, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available to other workers of the same or substantially similar qualifications, experience, or skills who are employed or engaged in the same or substantially similar circumstances; or

(v) subjects the worker to any detriment, in circumstances in which other workers employed or engaged by the person on work of that description are not or would not be subjected to such detriment; or

(vi) retires the worker, or requires or causes the worker to retire or resign or terminate a contract for services; or

(b) the person terminates a commercial arrangement with another person; or

(c) the person refuses or fails to enter into a commercial arrangement with another person.

(2) For the purposes of this subpart, a person also engages in adverse conduct if the person organises to take any action referred to in subsection (1) or threatens to organise or take that action.

(3) For the purposes of subsection (1)(a)(v), detriment includes anything that has a detrimental effect on the worker's employment or engagement, job performance, or job satisfaction. ...

89 Meaning of prohibited health and safety reason

For the purposes of this subpart, adverse conduct is engaged in for a prohibited health and safety reason if it is engaged in because the worker or prospective worker or the person referred to in section 88(1)(b) or (c) (as the case requires)—

(a) is, has been, or proposes to be a health and safety representative or a member of a health and safety committee; or

(b) undertakes, has undertaken, or proposes to undertake another role under this Act; or

(c) performs, has performed, or proposes to perform a function—

(i) as a health and safety representative or as a member of a health and safety committee; or

(ii) under this Act; or

(iii) under this Act in a particular way; or

(d) refrains from, has refrained from, or proposes to refrain from performing a function under this Act or under this Act in a particular way; or

(e) exercises, has exercised, or proposes to exercise a power—

(i) as a health and safety representative; or

(ii) under this Act; or

(iii) under this Act in a particular way; or

(f) refrains from, has refrained from, or proposes to refrain from exercising a power under this Act or under this Act in a particular way; or

(g) assists, has assisted, or proposes to assist, or gives, has given, or proposes to give, any information to any person performing a function or exercising a power under this Act; or

(h) raises, has raised, or proposes to raise an issue or concern about health and safety with—

- (i) the PCBU; or
- (ii) the regulator or an inspector; or
- (iii) a worker's representative; or
- (iv) another worker; or
- (v) a health and safety representative; or
- (vi) a member of a health and safety committee; or
- (vii) any other person who has a duty under this Act in relation to the matter; or
- (viii) any other person performing a function or exercising a power under this Act; or
- (i) is involved in, has been involved in, or proposes to be involved in resolving a health and safety issue under this Act; or
- (j) is taking action, has taken action, or proposes to take action to seek compliance by any person with any duty or obligation under this Act; or
- (k) has ceased work under section 83 or 84.

92 Prohibition on coercion or inducement

(1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce or induce the other person, or a third person,—

- (a) to perform or not to perform, or to propose to perform or not to perform, a function under this Act or a function under this Act in a particular way; or
- (b) to exercise or not to exercise, or propose to exercise or not to exercise, a power under this Act or a power under this Act in a particular way; or
- (c) to refrain from seeking, or continuing to undertake, a role under this Act.

(2) For the purposes of subsection (1), the following are not to be treated as an action with intent to coerce or induce a person:

- (a) a reasonable direction given by a constable;
- (b) a reasonable direction given by an emergency services worker in an emergency.

(3) A person who contravenes subsection (1) commits an offence and is liable on conviction,—

- (a) for an individual, to a fine not exceeding \$100,000;
- (b) for any other person, to a fine not exceeding \$500,000.

[40] There is little doubt the terms in section 103(1)(j) of the Act are linked to the relevant definitions set out in the HSW.

[41] The alleged “adverse conduct” here would be that described in s88(1)(a)(v) HSW that she was subjected “to any detriment, in circumstances in which other

workers employed or engaged by the person on work of that description are not or would not be subjected to such detriment” by the failure to notify her. OHS had contacted technology block teaching staff about the asbestos removal in the technology block, but not Ms Lee.

[42] However s88 confines “adverse conduct ... engaged in for a prohibited health and safety reason” to conduct against workers with health and safety responsibilities.

[43] Ms Lee clearly does not fall within the categories set out therein. She would be left without any remedy. It cannot have been the intention of Parliament when enacting this section to remove or limit actions under the Act by employees for adverse conduct pertaining to health and safety by employers.

[44] The Authority has historically treated these types of matters of disadvantaging action due to health and safety concerns as a personal grievance arising under s103(1)(a) and (b) of the Act.³ I intend to treat Ms Lee’s grievance as arising thereunder.

Was there an unjustified disadvantage of failure to provide a safe workplace?

[45] For there to be a proven grievance of unjustified disadvantage, the actions of the employer must meet the requirements of s103A(3) of the Act. Section 103A of the Act is set out below:

103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

³ See for example *Silcock and Anor v Exterior Building Care Goleman Ltd* [2015] NZERA Christchurch 140.

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[46] It is accepted OHS failed to notify Ms Lee about the asbestos removal on 13 December 2017. Ms Lee would have a reasonable expectation her employer would adhere to these legal requirements.

[47] Soon after Ms Lee raised her concerns about notification, OHS took immediate steps to investigate. It paid for doctor's appointments and later placed her on paid leave.

[48] OHS engaged with Worksafe around the asbestos removal. Worksafe issued an improvement notice on 7 February 2018 regarding the failure to inform workers of asbestos removal at the workplace. The notice is remedial requiring OHS "to develop a system to ensure that affected parties are informed of asbestos removal work prior to work commencing." It also states "continuing or repeated non-compliance may result in formal action." No further action by Worksafe has occurred since the notice was issued.

[49] Air monitoring is also not always required by the HSW or the Health and Safety at Work (Asbestos) Regulations 2016. It is a best practice requirement from the Ministry of Education for asbestos removal in schools. OHS did require air monitoring to be undertaken during asbestos removal on 13 December 2017. The specialist contractor determined the asbestos could be removed without risk of asbestos fibres being dispersed into the air. As a consequence he did not implement the air monitoring. In this regard the failure was by a contracted supplier to adhere to the terms of its contract.

[50] Ms Lee was not in the area where the asbestos removal took place. She was in the nearby woodwork room. There was an asbestos clearance inspection undertaken before Ms Lee started work. An asbestos clearance certificate was issued the following day.

[51] The disturbance testing undertaken later indicated there were no measurable traces of asbestos in the work area of the technology block.

[52] I have considered Ms Lee's submission received 15 June 2018. She alleges she stopped going to work because of fear of exposure to asbestos. There is no evidence she has been exposed at all. At best it is speculative.

[53] Ms Lee refers to trust issues in employers and no longer wanting to be a cleaner. She also referred to feeling degraded because teaching staff were notified but not her. Those may be her personal views but they cannot override the legal test that requires an objective assessment of OHS's actions.

[54] Ms Lee states she felt she had "done something wrong by complaining and questioning the not notifying and asbestos removals. I have been told that it is in my head that I seem to think it is some kind of conspiracy." Again these are Ms Lee's views. I have not seen any evidence that would lead me to conclude this was action by OSH.

[55] There was no evidence of Ms Lee's reputation being tarnished by the non-notification of the asbestos removal. There is evidence Ms Lee and/or her supporters were publishing these issues by social media or otherwise. Ms Lee admitted telling other parents about her concerns. She also emailed the Ministry of Education with her resignation letter. She cannot blame OHS for reputational damage because there is no evidence it has taken any steps to notify the details of Ms Lee's grievance. If there is reputational damage it has been due to her own actions.

[56] I do not accept Ms Clothier-Simmonds ignored Ms Lee's concerns because she did not answer her emails in December 2017. Ms Clothier-Simmonds was on leave at the time. Ms Lee was also advised of the removal work being undertaken when she returned to school by RR on 20 December 2017 and 17 January 2018. There is no basis for her complaint there was a lack of notification about the work in January 2018.

[57] Ms Lee complains about RR advising the removal of the graphics room due to a drop in its roll. She alleges it was because of asbestos. She then alleges dishonesty because RR's email stated no asbestos removal work was planned for the technology block. There is no evidence to support RR's email was incorrect at the time. Subsequent events have shown the position about the technology block changed after the email had been sent. The basis for RR's belief the removal of the graphics room was related to the roll is irrelevant to this matter.

[58] Ms Lee has been diagnosed with anxiety and depression relating to her employment. Her evidence of the health concerns is in the form of WINZ Work Capacity Medical Certificates. One notes "stressful situation with last employer and risk exposure resulting in intense anxiety". As a result Ms Lee has no capacity to work. There is no evidence of physical symptoms resulting from exposure to asbestos. These medical certificates were not provided to OHS prior to resignation. They were filed with Ms Lee's Statement of Problem in February 2018.

[59] The test is "whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred" (s103A(2)).

[60] The entirety of the actions by OHS must be taken into account from the failure to notify and the steps taken thereafter to remedy the failure. Upon Ms Lee raising concerns, OHS investigated them through Ms Clothier-Simmonds. It then met with her and provided copies of its findings. At all times Ms Clothier-Simmonds kept her informed and made experts available to her for questioning including the architect and the asbestos specialist, Mr Mumford. Ms Lee resigned before any further investigation or steps could be completed. OHS's actions were fair and reasonable in all the circumstances it found itself at the time.

[61] Although I gave an oral indication there was an unjustified disadvantage, I have had time to reflect upon the evidence. I have now determined Ms Lee was not disadvantaged unjustifiably by OHS.

Whether Ms Lee was constructively and unjustifiably dismissed by the school declining to undertake air testing and/or monitoring, making her subsequent resignation foreseeable?

[62] There is a dispute about whether Ms Lee's resignation was a constructive dismissal. Ms Lee submits OHS should have foreseen her resignation because of her concerns about the lack of air monitoring and their refusal to undertake any further testing.

[63] Constructive dismissal includes, but is not limited to, cases where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign or there is a breach of duty by the employer causes an employee to resign.⁴ The essential questions in constructive dismissal cases are⁵:

(a) What were the terms of the contract?

(b) Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

[64] At hearing Ms Lee gave evidence of her belief Ms Clothier-Simmonds letter dated 24 January 2018 was an ultimatum to return to work or resign. Ms Lee chose to resign.

[65] I do not agree with her assessment of the letter. The letter states "that you let me know by the end of this week whether you intended to return to work". It clearly seeks information about her intended date for return to work by the end of the week which coincided with the end of her paid leave. This is because the school term commenced the following week and cleaning staff were required to be available. Ms Clothier-Simmonds would have to ensure sufficient staffing to meet the student needs. There was no basis for a reasonable employer to have known Ms Lee would resign because of this letter.

[66] There is also no basis for OHS to suspect Ms Lee would resign following OHS's refusal to undertake air testing/monitoring. Ms Clothier-Simmonds had taken expert advice that indicated air testing/monitoring would be unable to confirm at this

⁴ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA).

⁵ *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 112-113.

late stage whether asbestos air particles were present when Ms Lee entered the building. She informed Ms Lee of this advice and that the school declined to do any further testing. She invited Ms Lee to speak to their expert directly if she had concerns about the advice. This was set out in her letter dated 25 January 2018.

[67] Ms Lee's email resignation dated 26 January 2018 again details her concerns about the lack of air monitoring that had occurred on 13 December. As noted above, OHS had contracted with the asbestos removal specialist to provide this testing but he did not. Ms Lee then complained about being pressured to attend a meeting with Ms Clothier-Simmonds and the architect.

[68] This was a meeting to discuss her concerns and for her to receive material including a copy of the building works contract. The architect was attending as well. Ms Lee's support person, her sister Mandy did not note any concerns about the meeting. I cannot see how this was disadvantageous in any way to Ms Lee.

[69] Ms Clothier-Simmonds had been continuing to make enquiries with WorkSafe about testing to satisfy Ms Lee's concerns. It was Worksafe whom recommended disturbance testing that returned negative results for asbestos.

[70] Although Ms Lee was unhappy at hearing that Ms Clothier-Simmonds accepted her resignation, there was nothing to suggest OHS should have foreseen this was to occur. OHS was at the time of the resignation taking steps to address Ms Lee's concerns. It could not have reasonably foreseen that Ms Lee would resign.

[71] The personal grievance is dismissed.

[72] Costs reserved. I would encourage the parties in these circumstances to agree the issue of costs. Otherwise those seeking costs are to file the submissions within 14 days of the date of the determination. The other party has 14 days thereafter to file any reply.

T G Tetitaha
Member of the Employment Relations Authority