

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 58
3073232

BETWEEN ANTHONY RICHARDSON
 Applicant

AND ALLIANCE GROUP LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Mary-Jane Thomas, counsel for the Applicant
 Shaun Brookes, counsel for the Respondent

Investigation Meeting: 9 and 10 December 2020 at Invercargill

Date of Determination: 18 February 2021

DETERMINATION OF THE AUTHORITY

A. The claim is dismissed.

B. I reserve costs, subject to the timetable for submissions set out below.

Employment relationship problem

[1] Anthony Richardson was employed as a seasonal worker for Alliance Group Limited at its Lorneville plant, starting in 2006. As a union member, he was covered by a collective agreement. On 16 January 2019, Mr Richardson signed a “Termination Advice” form. The form records the termination as “Voluntary”, effective from “16/1/19” with the reason given as “UNHAPPY WITH WORKPLACE”. Mr Richardson finished up that day.

[2] By letter dated 19 February 2019, Mr Richardson raised personal grievance claims of unjustified dismissal and unjustified disadvantages. Mr Richardson lodged a statement of problem in the Authority in September 2019. Remedies for the grievances were claimed. Mr Richardson also claimed a penalty under s 133 of the Employment Relations Act 2000 for breach of s 4A of the Act. Despite mediation, Mr Richardson's claims were unresolved. This determination resolves those claims.

[3] During the investigation meeting, counsel withdrew the personal grievance claim set out in the statement of problem that Mr Richardson had been unjustifiably dismissed. Counsel also withdrew Mr Richardson's claim that he had been unjustifiably disadvantaged "by the unsafe work environment he was required to work in". A personal grievance that remains for determination is Mr Richardson's claim that he was unjustifiably disadvantaged during his employment as Alliance failed to provide personal protective equipment (PPE) appropriate for the conditions he was required to work in. The unjustified dismissal grievance was recast on the basis that Mr Richardson was not given a sufficient "cooling down" period following his resignation.

[4] Counsel also withdrew the claim for a penalty for breach of s 4A of the Employment Relations Act.

[5] This determination resolves the remaining employment relationship problems that Mr Richardson was unjustifiably dismissed and that his employment was affected to his disadvantage by an unjustified action by Alliance, being a failure to provide appropriate PPE. I first set out more context for the remaining personal grievance claims.

Context for the claims

[6] The collective agreement provides:

30. Protective Clothing and Other Equipment

(a) All workers shall be supplied with materials reasonably necessary to carry on the work (to include warm protective clothing for workers required to work in refrigeration stores or freezers), such as overalls, aprons (waterproof where necessary), leggings, suitable footwear or boots, respirators, goggles, or eye shields, water proof coats, gloves, vamps, shears, knives, steels, stones, pouches, gumboots etc, or materials for making same. Slaughtermen shall be supplied with materials as above and spraymen on pigs and defrosters with waterproofs where necessary. All

such materials, when worn out as the result of fair wear and tear, shall be replaced by the employer.

(b) Where at any plant the employer and the workers' union representative mutually agree upon a monetary payment in lieu of the employer supplying all or any of the above items, either in respect of all workers or any group of workers, this practice shall not be deemed a breach of the Agreement.

(c) All wearing apparel provided under this clause shall be laundered at least once a week by the employer except where otherwise agreed between the employer and the workers' representative.

(d) Materials supplied to any workers pursuant to this clause shall be returned to the employer by the worker on termination...

(e) Protective clothing and devices and other equipment supplied by the employer under this clause to protect the workers from injury shall be worn or used by the worker. The workers' union representative undertakes to assist in this matter but the responsibility rests upon the employer to ensure this comes about.

(f) The workers' union representatives acknowledges the value to workers of this clause and do not condone any abuses or thefts of any materials supplied by the employer hereunder.

[7] Mr Richardson worked in the rendering department and also in the blood department and the blow room. The work involved a lot of hot hosing in all three areas. The hose water temperature was about 80C.

[8] For a period of time, Alliance supplied a brand and type of PPE called Betacraft Techniflex. Mr Richardson used this brand of PPE when hot hosing. At some point in about 2017, Alliance changed from supplying Betacraft PPE to supplying a different brand called Tornado Airflow. Mr Richardson continued to use the Betacraft PPE which had been supplied.

[9] On 18 October 2018 Mr Richardson was injured at work. Mr Richardson had been using the hot hose, but knocked off for dinner. As usual, he changed out of his PPE. After dinner, while putting the hose away, some hot water went down his gumboot and burnt his foot. Mr Richardson was not wearing PPE then. He was treated at hospital for these burns and was off work until 19 December 2018.

[10] There are evidential disputes about exchanges following the accident, but for the most part it is not necessary to canvass or resolve those. After Mr Richardson's employment

ended, counsel received file material from Alliance which included a report on the burn incident. It included the recommendation that “One of our life saving rules (wearing of PPE) has been broken and needs to result in some form of warning”. Mr Richardson’s evidence, which I accept, is that he was unaware of the recommendation or that the incident would be dealt with as a disciplinary matter.

[11] Jason Wilson became the senior supervisor in the rendering department in December 2018. Duncan Ellis is the operations manager covering the rendering department. On 9 January 2019 Mr Ellis asked Mr Wilson to arrange a meeting with Mr Richardson for 16 January. Mr Ellis says it was not a disciplinary meeting. Mr Wilson says he was asked to arrange the meeting, but it was not a disciplinary meeting. Mr Richardson says he was told at some point that there would be a meeting on 16 January at 1.00pm with Mr Ellis and Mr Wilson, but was not told it would be disciplinary. In response to my question, Mr Richardson said he was told by Mr Wilson that the meeting was about the accident but was not a disciplinary meeting. There is no reason to doubt Mr Richardson’s evidence just described, which I accept.

[12] Mr Richardson’s evidence is that he was not told that he could bring a representative to the meeting. He says that he spoke to the union nonetheless and was advised not to attend the meeting without representation. Mr Wilson’s evidence is that Mr Richardson said he wanted a union representative for the meeting, so he said that was fine. Whether or not it had been discussed, Mr Richardson sought union representation. As events transpired, the 1.00pm meeting did not take place.

[13] On about Monday 14 January, there was an exchange between Mr Wilson and Mr Richardson about his Betacraft PPE leggings, which were frayed or had a hole in them. Mr Wilson told Mr Richardson the PPE needed to be replaced. Because of the earlier change in brands, Alliance only supplied the Tornado Airflow brand. Mr Richardson’s evidence is that he explained the reasons for his preference for Betacraft PPE to Mr Wilson, went to the store but was told that Alliance only supplied Tornado PPE. Mr Wilson’s evidence is that he went to the store and got Tornado trousers. When he returned with them, Mr Richardson said he was not going to wear the company issued PPE. It is not necessary to resolve any conflict in these accounts. The exchange ended with Mr Richardson changing into Tornado PPE.

[14] After work on 14 January, Mr Richardson purchased new Betacraft Techniflex PPE. Mr Richardson wore the Betacraft PPE on 15 January. His evidence is that at the end of the day, Mr Wilson asked him to bring in the tags and receipts for his new PPE so he could try and get it reimbursed. Mr Wilson's evidence is that he saw Mr Richardson not wearing the company supplied PPE and spoke to him. Mr Richardson told him that he had purchased the Betacraft PPE himself. Mr Wilson asked Mr Richardson for the tags so he could show the store and thought he might be able to get it reimbursed. Mr Wilson says that he told Mr Richardson he had to wear the company supplied PPE meantime, so Mr Richardson changed into the Tornado PPE. Again, to the extent of any difference, it is not necessary to make any findings. It is common ground that Mr Wilson would attempt to arrange reimbursement.

[15] Next day, on 16 January, Mr Richardson gave Mr Wilson the tags and receipts for the Betacraft PPE. Mr Wilson took the tags to the store. They said they no longer used that supplier. Mr Wilson then spoke to Carl Stewart. Mr Stewart, at the relevant time, was the Lorneville plant senior safety advisor. His evidence is that Mr Wilson showed him the tags and receipts, they were not marked as meeting industry standards, he checked the supplier's and the manufacturer's websites for that information but there was none, so he could not agree to Mr Richardson using the Betacraft PPE. There is no reason to doubt Mr Stewart's evidence about these steps, so I accept that evidence.

[16] Mr Wilson's evidence is that when he spoke to Mr Stewart about Mr Richardson's PPE, Mr Stewart told him that Mr Richardson must use the company supplied PPE. He says that Mr Stewart told him that until there was confirmation that the newly purchased Betacraft PPE was within the company safety guidelines, the Betacraft PPE could not be used. There is no reason to doubt Mr Wilson's evidence just described, so I accept it.

[17] Mr Wilson then spoke to Mr Richardson. Mr Richardson says that Mr Wilson told him that Mr Stewart had prohibited him from wearing the Betacraft PPE and that if he did not take off the Betacraft PPE and put on the Tornado PPE, he would face disciplinary action. Mr Wilson's evidence is that he relayed Mr Stewart's response (as above) and asked Mr Richardson to "please use the PPE provided by the company", and Mr Richardson agreed. Mr Wilson specifically denies threatening disciplinary action. The context included the

accident report recommendation. In light of that, it is likely that Mr Wilson mentioned disciplinary action if Mr Richardson did not wear the company PPE.

[18] It is common ground that the last mentioned exchange between Mr Richardson and Mr Wilson was before lunch on 16 January, well before the meeting scheduled for 1.00pm. Mr Richardson's evidence is that he was "extremely frustrated" by the situation which had built up over some years about his health and safety concerns. About 10.30/11.00am he went to the smoko room to discuss "the situation" with Mr Wilson. Mr Wilson was there with two others, Kevin Blackburn and Brian Fraser. Mr Fraser and Mr Blackburn share the recollection that it was morning smoko time. Mr Wilson says it was about lunch time.

[19] Mr Richardson's evidence is that Mr Wilson said "What the hell do you want now?" or something similar. He replied "you'll be very happy to know I've had a gutsful and I'm going to finish at 5.00pm tonight". Mr Wilson's evidence is that Mr Richardson came into the room while he was at lunch, was agitated about the PPE, was blaming Mr Stewart for not allowing him to use it and was unhappy about the upcoming meeting. Before Mr Richardson left the smoko room, he said "at the end of the day I will be terminating". On Mr Wilson's account, he had relayed Mr Stewart's response on the PPE issue earlier.

[20] Mr Blackburn's evidence is that Mr Richardson came into the smoko room, was upset about something (not the PPE issue), Mr Wilson tried to calm him down without success, Mr Richardson started to go back to work, but Mr Wilson called him back and told him that he had discussed reimbursement for his PPE with Mr Stewart but could not get reimbursement for it as it was not suitable. Mr Richardson was critical about Mr Stewart. Mr Wilson again tried to calm him down. Mr Richardson then said he would be finishing at 5pm and left. Mr Fraser's evidence is to similar effect. Mr Richardson came in, was upset about something unrelated to PPE, Mr Wilson was unable to calm him down and then changed the conversation to tell him that he would not be getting reimbursed for the PPE. Mr Richardson was further aggravated and said he had a "guts' full and he was resigning".

[21] Neither Mr Blackburn nor Mr Fraser are interested parties in the dispute. They each impressed as reliable witnesses. To the extent of any differences between their accounts and those of Mr Richardson and Mr Wilson about this exchange in the smoko room, I prefer the evidence of Mr Blackburn and Mr Fraser.

[22] It is common ground that the 1.00pm meeting did not occur, that at some point that afternoon Mr Richardson signed the “Termination Advice” form and that he finished up work at the end of that day. There were also events after 16 January, about which both sides gave evidence. It is not necessary to set out the evidence or resolve any disputes at this point.

Does Mr Richardson have an unjustified disadvantage personal grievance?

[23] Mr Richardson’s claim is that his employment, or a condition of it, was affected to his disadvantage by some unjustifiable action by his employer.

[24] Mr Richardson says that Alliance failed to supply him with PPE adequate for the environment he was required to work in. He says he chose to wear Betacraft PPE because it was lightweight and flexible so more suitable to the working conditions. He was required to move around a lot, including going under tanks, and the lighter Betacraft brand fabric was more comfortable and allowed greater mobility. He says that the Betacraft brand is waterproof, acid resistant and stretchable, unlike the Tornado brand PPE.

[25] I do not accept that Alliance failed to supply adequate PPE for Mr Richardson when it supplied the Tornado PPE. Alliance complied with clause 30(a) of the collective agreement by supplying Mr Richardson with the Tornado PPE. One might expect that if the Tornado PPE was inadequate for working conditions, other workers would have raised that concern and would have found support from the union in doing so, at some point since the change to Tornado PPE in 2017. While I accept that Mr Richardson had a personal preference for the Betacraft PPE which he had been using before January 2019, his preference does not establish that the Tornado PPE was inadequate. Mr Richardson was obliged under clause 30(e) of the agreement to wear the Tornado PPE which Alliance supplied. Disciplinary action could have followed a failure or refusal by Mr Richardson to do so.

[26] I find that Mr Richardson’s employment and his conditions of employment were not affected to his disadvantage by him having to wear the Tornado PPE as directed.

[27] At some point in their exchanges, Mr Richardson told Mr Wilson about why he preferred the Betacraft PPE. Mr Richardson’s preference was made known to Mr Stewart. Mr Wilson attempted to obtain reimbursement for Mr Richardson’s personal purchase of new Betacraft PPE. Mr Wilson reported to Mr Richardson that the purchase would not be

refunded and that Mr Richardson was required to wear the Tornado brand PPE supplied by Alliance. Mr Stewart stipulated that, after taking steps to check whether the Betacraft PPE met any safety standards to be suitable for Mr Richardson's role. His evidence is that he was not satisfied that the PPE that Mr Richardson had purchased would provide sufficient protection. He could not in good conscience agree to its use. The context for these actions includes the employer's primary duty of care to ensure, so far as is reasonably practicable, the health and safety of its workers.¹ If Mr Stewart's instruction to Mr Richardson to wear the Tornado PPE had affected Mr Richardson's employment or a condition of it to his disadvantage, it is likely to have been a justifiable action.

[28] Mr Richardson does not have a sustainable personal grievance under s 103(1)(b) of the Employment Relations Act 2000.

Was Mr Richardson unjustifiably dismissed?

[29] This personal grievance now rests on the claim that Alliance did not allow sufficient time for a cooling down period following Mr Richardson's resignation. I am referred to *Boobyer v Good Health Wanganui Ltd*², *Kostic v Dodd*³ and several Authority determinations.

[30] Mr Richardson's evidence is that he had previously been advised he had to only give one hours' notice of his resignation. In light of that advice, at about 10.30am on 16 January Mr Richardson told Mr Wilson that he was "going to finish at 5.00pm tonight". I accept the evidence of both Mr Fraser and Mr Blackburn that Mr Richardson said that they were both witnesses to his resignation. Mr Richardson's brother (Chris Richardson) in a note dated 10 April 2019 stated that Mr Richardson came to see him at about 1.00pm on 16 January to say that he had resigned. I find that Mr Richardson's communication was an unambiguous resignation. His words were intended to be taken as his resignation.

[31] In *Kostic*, the Court found that the employee had not expressly resigned during an angry exchange on 8 March 2005. Later that day, the employee contacted the employer wanting to discuss what had happened. He repeated that attempt the next day. Despite the above factual finding, the Court went on to say that even if the employee had unequivocally resigned during the heated exchange, a fair and reasonable employer would not have rejected

¹ Health and Safety at Work Act 2015 s 36.

² Unreported, 24 February 1994, WEC 3/94.

³ Unreported, 11 July 2007, CC14/07.

the employee's proposal for discussion and acted on the resignation. The Court approvingly adopted a well-known passage from *Boobyer*. In *Boobyer*, Goddard CJ outlined distinct types of cases where an employee is against their will treated as having resigned. The first category was where the employee gives an unambiguous resignation and later seeks to resile from it. In such a case, the resignation cannot be withdrawn without the employer's consent. A second type of case involves an employee who becomes aware that the employer has misunderstood an equivocal communication as a resignation, but the employee does not within a reasonable time correct the employer's false impression. In that type of case, the employee bears the consequences of letting their employer think they have resigned. However, in other types of cases, employers cannot safely insist on what the employee said or wrote. Such cases include where words of resignation are an emotional reaction or an outburst of frustration and are not meant to be taken literally and it would become obvious upon inquiry once the heat of the moment had passed.⁴

[32] I am referred to *Milburn v Waikato District Health Board*.⁵ In *Milburn* the employee verbally resigned and promptly gave 3 months' notice in writing as required. The manager urged Dr Milburn to "sleep on it" and to think about whether she really wanted to resign. Later, the manager appeared to close off that option, rather than holding it open for the indicated period of time. The employer then wrote accepting the resignation. There followed an application to the Authority. Before the end of the notice period, the Authority determined that the WDHB could not regard the employee as having resigned. In *Dalebrook v Schuck Holdings Ltd*⁶ the Authority found that there was doubt about whether the employee intended a resignation, which was apparent to the employer before they accepted his resignation and organised his final pay.

[33] I turn to the events which followed Mr Richardson's finishing up on 16 January.

[34] Chris Richardson also worked at the Lorneville plant. At some point on 16 January, he told Mr Richardson that there was a 24 hour cooling off period. It is not suggested that he was saying this as an offer on behalf of Alliance. Chris Richardson told Mr Richardson to contact Mr Wilson the next day and say that he had changed his mind about the resignation. Mr Richardson did not. On 17 January, Chris Richardson told Mr Wilson that his brother

⁴ To paraphrase the words from the judgment, but omitting words which have no current application.

⁵ ERA Auckland AA49/04, 11 February 2004.

⁶ [2018] NZERA Auckland 246.

wanted his job back. Mr Wilson told Chris Richardson to ring his brother and tell him to come back. Chris Richardson replied that it was Mr Wilson's responsibility to contact Mr Richardson, not his. Mr Wilson did not contact Mr Richardson. However, Chris Richardson again told his brother to contact Mr Wilson. Mr Richardson did not.

[35] On 22 January, Mr Richardson phoned and spoke to Mr Wilson. There was a discussion about Mr Richardson wanting to return to his job and Mr Wilson wanting that as well. Mr Wilson's evidence is that he told Mr Richardson that it was not his decision though, so he first needed to check with Mr Ellis. There is no reason to doubt that evidence, so I accept it. Mr Wilson checked with Mr Ellis who said that Mr Richardson would have to reapply for the job as they had engaged someone else. Mr Wilson asked Chris Richardson to relay that message to his brother, which he did on 22 January.

[36] Mr Richardson did not reapply for his job.

[37] The starting point is that Mr Richardson unequivocally gave notice of resignation to Mr Wilson at about 10.30am on 16 January. He asked the two work colleagues who were present to witness his resignation. Mr Richardson gave his notice while he was angry and frustrated, but Alliance had not breached any duty owed to Mr Richardson so as to cause or contribute to his emotional state. Later, Mr Richardson signed the voluntary termination form. The circumstances are somewhat disputed, but Mr Richardson did not indicate to Mr Wilson that he wanted to reconsider his resignation. He finished up on 16 January.

[38] The next day, through Chris Richardson, Mr Wilson first learnt that Mr Richardson wanted to change his mind about the resignation. Chris Richardson was asked to tell Mr Richardson to return to work. No time frame was given, but it was understood that prompt action was required. While Chris Richardson told Mr Wilson that it was not his responsibility to do this, he actually relayed the information to Mr Richardson. Mr Richardson deferred contacting Mr Wilson until 22 January. Mr Richardson did not act in a timely manner on the invitation to come back to work. Given the passage of time, Alliance was then in the position of being entitled to rely on his unambiguous resignation.

[39] For these reasons, I find that Mr Richardson was not dismissed, but resigned. His personal grievance claim must be dismissed.

Summary

[40] Mr Richardson does not have personal grievances against Alliance.

[41] I am asked to reserve costs and will do so. Any application for costs is to be made within 28 days by lodging and serving supporting submissions and the other party will have 14 days from then to lodge and serve a reply. I will then determine costs based on those submissions.

Philip Cheyne
Member of the Employment Relations Authority