

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 73/10
5161802

BETWEEN

GARY PARKER
Applicant

A N D

ALLIANCE GROUP LIMITED
Respondent

Member of Authority: Paul Montgomery

Representatives: Kellie Walker, Counsel for Applicant
Ken Smith, Counsel for Respondent

Investigation Meeting: 9 December 2009 at Oamaru

Submissions Received: 23 December 2009 from the Applicant
23 December 2009 from the Respondent

Determination: 24 March 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Parker claims to have been unjustifiably dismissed from his position as a meatworker at the respondent's Pukeuri plant. In his statement of problem, the applicant says he was constructively dismissed as he felt he had *no option but to leave the workplace after the Alliance Group failed to protect me from working in an unsafe environment.*

[2] Mr Parker seeks remedies of lost remuneration of \$14,400, compensation of \$10,000 and costs. He also asks for an acknowledgment that his situation was handled incorrectly and to know if *procedures have been put in place to ensure this does not happen again.*

[3] The respondent says Mr Parker was not constructively dismissed, but was dismissed when, on a current final warning for leaving the workplace without authorisation, he left the plant on 22 March 2007 without authorisation. It says at all stages of the disciplinary process Mr Parker was accorded the opportunity to explain his reasons for leaving the plant and to be represented by senior Union officials. Given what it calls the *fundamental conceptual difficulty with the claim*, it has defended the claim on the basis of constructive dismissal since that is the action brought against it.

Essential facts

[4] On 7 November 2006, Mr Parker left the workplace without permission. He says several employees came to him with sexual harassment complaints about another co-worker (MD) which, he says, made him lose concentration and thus caused a health and safety issue for him so he took himself from the workplace without authorisation.

[5] On the way from the workplace, the applicant met Mr Rob Lindsay (a production manager) and the applicant says he told Mr Lindsay the nature of the complaints. Mr Lindsay said he did not, and gave the reason for his departure as having been spoken to bluntly by MD.

[6] At a meeting on 13 November 2006, the applicant was counselled in relation to the above incident. He was not subjected to disciplinary action but told of the correct process to follow if he or others had complaints to make. Mr Parker was not a Union delegate.

[7] On 18 January 2007, Mr Parker again left the workplace without permission and claims that the main reason for his departure was he could not cope with the co-worker's behaviour. Later, however, in his statement of evidence in reply, the applicant said the reason for his leaving the plant on that occasion was *company inaction*.

[8] The following day, an investigation meeting was held and the allegation was made out. Mr Parker was placed on a final warning for leaving the workplace without permission and transferred to a different room to address the concerns he said he was having with a particular co-worker.

[9] At that meeting, a number of concerns came to light, among which the applicant's concern that people were still coming to him making complaints about the co-worker. The company says at this meeting no details were given about these incidents but again the applicant was told those affected needed to provide details and report their concerns to their supervisors.

[10] On 22 March 2007, Mr Parker approached Mr Wayne Thomas, a supervisor, and told him that he intended to resign. Mr Thomas spoke with the applicant to try and determine what the problem was and to see if there was anything he could do to assist. Mr Thomas says the applicant told him he could not work in the same room as MD and Mr Thomas asked if MD had been giving him *a hard time or harassing or intimidating him in any way*. He says Mr Parker replied *no – nothing he couldn't handle*. Further, Mr Thomas says the applicant told him he had been given an assurance previously that he would not be working in the same room as MD. The respondent denies its assurance went to that extent.

[11] Mr Thomas says he told Mr Parker that he was not privy to anything of undertakings given and asked the applicant to give him a couple of days to discuss the situation with his superiors and he would then get back to Mr Parker. He says he also asked Mr Parker if there was anything specific MD was doing that he could address but he says Mr Parker replied there was not.

[12] On 22 March 2007, Mr Parker again left the workplace without permission. Mr Thomas told the Authority *before I had any chance to respond to Gary about his issues, he left the workplace without permission and did not return*. Mr Thomas recorded the discussion he had had with the applicant in an email which he sent to Mr Lindsay.

[13] Nothing more was heard from Mr Parker by the company until 3 April 2007 when the applicant telephoned and asked that a meeting be convened. At that meeting, Mr Parker was represented by Mr David MacLean, the Union president, and Mr Tom Latimer, the Union secretary. Minutes of that meeting were recorded by Mr Charlie Horn, the personnel manager at the time. At the conclusion of that meeting, Mr Lindsay informed Mr Parker that the decision was to dismiss him as of 3 April 2007. The minutes record Mr Parker asking if he could apply to be re-employed by the company in the future to be told that he could apply and would be given consideration

The issues

[14] To resolve this matter, the Authority needs to make findings on the following issues:

- Was the applicant constructively dismissed or actually dismissed; and
- Was the dismissal, if actual, unjustified; and
- If the dismissal was constructive, did the alleged failure to provide a safe workplace amount to a sufficiently serious breach on the part of the respondent to justify the applicant repudiating the agreement; and
- If unjustifiably dismissed, to what remedies is the applicant entitled?

The test

[15] The test for justification in this matter is set out in s.103A of the Employment Relations Act 2000. It requires the Authority to determine the question of whether the dismissal was justifiable, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

The investigation meeting

[16] The Authority heard evidence from Mr Parker and his partner, Ms Deborah Glenie, in support of the applicant's claims. Evidence for the company was provided by Mr Lindsay, Mr Hailes, Mr Thomas and Mr Sinclair, a production supervisor at the plant.

[17] The Authority records its appreciation for the openness with which witnesses answered its questions and those put to it by respective counsel. I also wish to record my appreciation for the focused approach taken by both Ms Walker and Mr Smith which assisted in keeping the meeting firmly on track.

[18] I also wish to thank them for their considered submissions which I have taken into account in reaching this determination.

Analysis and discussion

[19] The essential difficulty with this case is the confused basis on which the applicant's claims rest. His evidence was that he left the plant on 22 March 2007 knowing he would be dismissed. Following the disciplinary meeting convened after Mr Parker contacted the company and at which he was dismissed, the applicant, having been advised his employment had ended, immediately inquired about the possibility of being re-employed in the plant. This request deals a somewhat lethal blow to his claim the working environment was *unsafe*.

[20] Curiously, the applicant has taken no issue with the respondent's actual dismissal of him. Rather, he appears to have locked that fact away in a compartment of his mind during the two years prior to lodging his grievance with the Authority. There is no doubt his claim is based on what he alleges was his constructive dismissal.

[21] A serious difficulty the applicant faces is his evidence, and in particular, his evidence in reply to Mr Lindsay's evidence, is not supported by contemporaneous notes taken at formal meetings over the earlier incidents. Mr Parker told the Authority his concerns at the first incident (7 November 2006) related to communication, unsafe work practices and supervision. Mr Parker says he discussed sexual harassment and named several workers subjected to this behaviour on the part of MD, and told Mr Lindsay to investigate those allegations as the applicant had now advised Mr Lindsay on behalf of those who had complained to him.

[22] The meeting notes do not record the names Mr Parker says he disclosed at that meeting. I find it highly improbable such a serious matter would not have been noted in a formal record if it was brought to the employer's attention at that time. Significantly, Mr Lindsay, who met the applicant in the carpark as the applicant left the plant on that occasion, says Mr Parker did not detail those complaints nor did he in a meeting on 13 November 2006 which both Mr Parker and Mr Sinclair, the room supervisor, attended.

[23] The question raised in Ms Walker's submission is whether the applicant had no reasonable alternative but to leave the workplace on 22 March 2007. The evidence before the Authority was that Wayne Thomas, the senior night shift supervisor, was approached by the applicant on 21 March 2007 and Mr Parker told Mr Thomas he wanted to resign. Mr Thomas said *I took him aside to find out what the problem was*

and see if there was anything I could do to help. Gary advised that he could not work in the same room as MD. I asked Gary if MD had been giving him a hard time or harassing or intimidating him in any way and he replied “no – nothing he couldn’t handle”.

[24] Mr Parker’s evidence was consistent generally with Mr Thomas’ account of the discussion except he said, *Wayne Thomas asked me if I could work out my shift and said he would organise a meeting with Rod Lindsay the following day. An email from Wayne Thomas to Wayne Lindsay dated 24 March 2007 confirms I asked to resign.*

[25] What the email confirms is Mr Thomas never mentioned Mr Lindsay nor arranging a meeting between Mr Lindsay and Mr Parker. Mr Thomas said *I told Gary ... to give me a couple of days to discuss this with my superiors and **I would get back to him*** (emphasis is mine).

[26] Ms Walker submits the email was sent to Mr Lindsay two days after the event and *therefore it may not accurately record the events on 22 March 2007.* With respect to counsel, it is more probable Mr Thomas’ email some 48 hours after the event is more accurate than a recollection some 2½ years after the event. It is for this reason I prefer Mr Thomas’ account of this particularly important event.

[27] From this it follows I do not accept any meeting was to be organised but Mr Thomas was to talk to more senior management and then confer with Mr Parker in *a couple of days.*

[28] The applicant simply jumped before Mr Thomas could get back to him and I do not accept Mr Parker had no reasonable alternative but to leave the workplace without conferring with Mr Thomas as to progress. This is particularly so given the final warning for leaving the workplace unauthorised which would, in all probability, lead to Mr Parker’s dismissal. This is a fact which Mr Parker acknowledged in his evidence before the Authority.

[29] It was some days before the applicant contacted Mr Hailes, the plant manager. This was through his then representative, Mr Firth who wrote to Mr Hailes on 7 June 2007. Mr Hailes assembled the relevant documentation requested by Mr Firth and replied to the advocate’s letter on 26 June 2007.

[30] On 7 September, Mr Hailes received a telephone call from Mr Parker who asked if the respondent would attend mediation. During this conversation, Mr Hailes asked the applicant if he had any further information and why he left the plant without authorisation. Mr Hailes told the Authority Mr Parker said he had no explanation but said *he wanted to return to work in P2 with his partner.*

[31] Mr Hailes took a telephone call from Mr Firth on 18 October 2007 during which Mr Firth alleged an employee in the plant (MD) was sexually harassing and intimidating other staff. Mr Hailes told the Authority he asked who these other workers were and that Mr Firth had told him he had the names of 11 people, five of whom he had interviewed and from whom he would get written statements. Mr Hailes offered to meet Mr Firth and 9am on Wednesday, 24 October was agreed between the two men.

[32] In spite of Mr Firth arriving a day earlier than arranged, Mr Hailes met with him. No written statements were provided but Mr Firth undertook to secure those written complaints and then contact Mr Hailes to make further arrangements. Mr Hailes told the Authority *that was the last I heard from Mr Firth or Mr Parker until I received a letter from Mr Parker's now solicitors on 12 March 2009 requesting mediation.*

[33] The respondent's disciplinary meeting held on 3 April 2007 is thoroughly recorded in the minutes. Those minutes have not been challenged. They close with, *Peter [McLeod] said David MacLean [Union president] had gone over what action could be taken if he [the applicant] was not happy with the procedure or the decision. Gary replied that he was happy with the decision and the procedure.*

[34] The Authority is satisfied, on the evidence before it, that the respondent's decision to dismiss Mr Parker was, in all the circumstances, what a fair and reasonable employer would have done.

[35] The applicant's belated attempts to justify his leaving the plant on the occasions set out above are not particularly convincing. Those reasons have altered at various stages in the course of this matter's development. The particularly clear evidence of Mr Thomas confirming he told Mr Parker he would confer on the matter with his superiors and get back to him in a couple of days, was a strong indicator that

Mr Thomas was taking the applicant's concerns seriously but fell well short of arranging a meeting between the applicant and Mr Lindsay the following day.

[36] With that process under way, the applicant was not entitled to repudiate the employment agreement and thus justify his departure from the plant. In those circumstances, the claim of constructive dismissal must necessarily fail as no serious breach had been established nor, except for Mr Parker's statement to Mr Thomas that he intended to resign, made the day before the walk out, could the respondent have reasonably foreseen the likelihood of the walk out.

Determination

[37] Returning to the issues set out above in this determination, I find:

- The applicant was actually dismissed from his employment with the respondent.
- The dismissal of Mr Parker was justifiable in all the circumstances and is what a fair and reasonable employer would have done in the light of those circumstances.
- For the avoidance of doubt, the alleged failure to provide a safe workplace in the circumstances surrounding the applicant's allegations were yet to be established, and did not amount to a sufficiently serious breach to justify the applicant repudiating the agreement.

I find Mr Parker was justifiably dismissed from his employment with the respondent and the Authority is unable to assist him further.

Costs

[38] Costs are reserved. The parties are urged to attempt to resolve this matter between themselves. If this is not possible, Mr Smith is to have 14 days from the date of issue of this determination to lodge and serve his memorandum. Ms Walker is to have a further seven days to lodge and serve her memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority