

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 485
3102853

BETWEEN EDWARD REMIHANA
Applicant

AND RIGWELD ENGINEERING
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Lawrence Anderson, advocate for the Applicant
Matt McGoldrick, counsel for the Respondent

Investigation Meeting: 29 October 2020 at Auckland

Submissions and/or further 29 October 2020 from Applicant and from Respondent
evidence

Determination: 26 November 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Edward Remihana, claims he was constructively dismissed by the Respondent, Rigweld Engineering Limited (Rigweld), following a failed drug test.

[2] Mr Remihana also claims that he was unjustifiably disadvantaged by the process adopted by the Rigweld.

[3] Rigweld denies that Mr Remihana was unjustifiably dismissed or unjustifiably disadvantaged in his employment.

The Authority's investigation

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[5] The issues requiring investigation are whether or not Mr Remihana was:

- unjustifiably dismissed by Rigweld
- Unjustifiably disadvantaged by Rigweld:
 - Suspending him;
 - Not allowing him to give submissions on dismissal before making the decision to dismiss;
 - Failing to explore other employment options after a client did not allow him back on its site;
 - Not allowing him to take a saliva test;
 - Rigweld not having completed the process in terms of AS/NZS 4308:2008
- Should be reimbursed the sum of \$348.00 which was deducted from his final wages

Background

[6] Rigweld is involved in major construction projects. It erects and installs steel in major building and construction projects. Mr Damien Manihera is the sole director and shareholder.

[7] Rigweld is engaged when contacted by a main contractor on a construction project and becomes a subcontractor responsible for steel installation on a site. Rigweld's work involves working at heights, working and operating cranes, and operating in a highly technical environment and in construction sites which are hazardous. The crane operators, dogmen and riggers take direction from the main contractor on site about where to install the steel.

[8] Once directed, Rigweld take control of that part of the project, installing the steel based upon the main contractor's directions and the contract plans. Use of the work involves working on Elevated Platforms (EWP).

[9] Mr Manihera said that all clients for whom Rigweld work and have contracts have minimum requirements in terms of health and safety obligations. It is mandatory for all staff on site to have a Site Safety Passport. This is usually a prerequisite in a tender process. A Site Safety Passport is a course which gives an employee key knowledge about health and safety specific to the construction industry.

[10] Mr Remihana was employed by Rigweld on May 2019 as a Rigger, and later performed the role of Leading Hand. A Rigger takes direction from a Site Foreman or Site Manager about the installation of steel.

[11] Mr Remihana was provided with an individual employment agreement (the Employment Agreement) which he signed below a Declaration which confirmed that he had been given a reasonable opportunity to seek independent advice regarding it, and that he had read and understood it, and accepted and agreed to the terms contained in it.

[12] The Employment Agreement provided the following clauses:

Clause 13.3 If the Employee resigns or terminates their employment with the Employer within a period of six (6) months of completing a training course paid for by the Employer, then the Employee will be required to reimburse the employer the full cost of such course.

Clause 23.2: Under the Health and Safety in Employment Act 1992 the Employer has a legal duty to ensure the safety of Employees while at work. This legal duty requires the employer to take all practicable steps to provide a safe working environment. Accordingly the Employer reserves the right to require you to submit to random testing for non-prescribed drugs, stimulants and alcohol. These tests may be issued by us or by a customer that we work for and may be a requirement of entry on to their work sites.

Clause 23.5: The Employer reserves the right to stand you down without pay should you return a drug test result that indicates the presence of illegal substances in your body, no matter whom has conducted the test (the employer or the customer). This matter will be investigated and disciplinary action may be taken up to and including dismissal.

Clause 31.8 Where there is conduct or substandard work performance and/or some other circumstance that the Employer considers sufficiently serious that it may issue a final written warning or dismiss the Employee, without a prior oral or written warning.

[13] Mr Remihana confirmed that he had an induction upon commencing employment at Rigweld, but claimed this had been sparse in relation to Rigweld's approach to drugs and alcohol.

[14] Mr Manihera said that he conducted Mr Remihana's induction which involved taking Mr Remihana through Rigweld's drug and alcohol policy. Mr Remihana signed the form issued to employees at induction below a declaration that stated: "I acknowledge that I have reviewed and understand all ticked items on this form and I am aware of my responsibilities and continuing obligations with respect to health, safety and the environment."

[15] Mr Manihera said that inclusion of Rigweld's expectations concerning drug and alcohol was part of the regular monthly meetings held with the employees. He repeatedly stressed that he had a zero tolerance for drug use in the workplace.

[16] Mr Karl Dyster, Contracts Manager, confirmed that Rigweld had strict expectations regarding a drug and alcohol free work environment and this was emphasised to the employees by Mr Manihera at the monthly meetings. Mr Dyster said that random drug tests were a regular occurrence, he had been randomly drug tested, as had Mr Manihera.

Events 11 February 2020

[17] Mr Remihana said that he was informed on 11 February 2020 that he had been randomly selected for a drug test by Mr Dyster which was confirmed by Mr Manihera.

[18] The previous evening he had used cannabis. The following morning he had dropped his partner at the hospital before attending for work. When told he had to attend the drug testing, he had told Mr Manihera that he needed to leave to pick up his partner but was told he could leave after the test.

[19] Mr Remihana said he had told Mr Manihera that he would probably fail the test because he had used cannabis the night before.

[20] Mr Manihera confirmed Mr Remihana told him he would fail the test, and said that Mr Remihana had told him this was because: “he had THC in his system” and that he had only stopped smoking cannabis the evening before because he had run out of cannabis.

[21] Mr Remihana was one of two employees selected for random testing on 11 February 2020. After the test Mr Manihera was told by the tester from Auckland Drug Testing that both employees had failed the test.

[22] Mr Manihera said he did not request the non-negative test for Mr Remihana was submitted for additional testing because (i) Mr Remihana had told him before the test that he would fail it, (ii) Mr Remihana had failed the test, and (iii) Mr Remihana accepted he had failed the test.

[23] Before he left the site on 11 February 2020 Mr Remihana said Mr Manihera told him he would be suspended, and this was confirmed in an email dated 12 February 2020 which informed him he was placed on unpaid suspension. A further email dated the same day requested that he attend a disciplinary meeting: “to determine disciplinary action, up to and including dismissal”, and that he could be a support person.

Disciplinary Meeting 13 February 2020

[24] The meeting was attended by Mr Manihera and also by Mrs Suzanne Manihera, Business Manager, who took notes during the meeting. Mr Remihana attended without a support person, he was given the opportunity to have one, but declined.

[25] Mr Remihana confirmed during the Investigation meeting that the notes of the meeting compiled by Mrs Manihera were an accurate record of what was discussed during the meeting. The notes record that during the meeting Mr Remihana: “acknowledged he smoked weed the night before and does regularly ...”.

[26] During the meeting Mr Manihera told Mr Remihana that his decision was dismissal on the basis of serious misconduct. Mr Remihana asked if he could be stood down for three weeks and then retested. However Mr Manihera did not agree to this.

[27] Mr Remihana observed that a dismissal would not: “look good on his record” and Mr Manihera told him that he was willing to accept a resignation.

[28] Mr Manihera confirmed that the outcome he was considering would be dismissal and concluded the meeting by offering EAP services if Mr Remihana considered he needed some help for his drug addiction.

[29] During the investigation Meeting Mr Remihana said he had thought it would look better if he resigned, and this would make it easier for him to obtain alternative work.

Resignation 13 November 2020

[30] Mr Remihana later that day sent a letter of resignation which stated:

It's with a heavy heart I'm sending you my resignation in effect of immediately as of personal reasons. ...” I'd like to thank you for the past year it's been awesome and if my situation ever changes I'd like to think I can always come back to Rigweld. Anyway thanks heaps guys and wish yous the best for the future.

[31] Mr Manihera acknowledged Mr Remihana's resignation email and on 17 February 2020 Mrs Manihera emailed Mr Remihana attaching his final payslip and advising that there had been a deduction made of \$348.00 for his attendance at a Site Safe Supervisor course.

Was Mr Remihana unjustifiably dismissed by Rigweld?

[32] During the disciplinary meeting held on 13 February 2020 the only information provided by Mr Remihana was that he smoked cannabis on a regular basis, had done so the night before the non-negative test and he had asked for a period of stand-down and a further test.

[33] On that basis Mr Manihera advised him that the outcome would be termination based on Mr Remihana's non-negative test result for the presence of drugs in his system.

[34] Mr Remihana was concerned for his reputation and future employment opportunities and so Rigweld offered him the opportunity to resign.

[35] I find that the impetus for resignation came from Mr Remihana, there was no pressure placed on him to resign and had he not done so Rigweld would have proceeded to dismiss him on the basis of the non-negative drug test as indicated. However before Rigweld dismissed Mr Remihana he chose to resign by email dated 13 November 2020.

[36] I find that Mr Remihana's employment with Rigweld ended by way of resignation and determine on that basis that no dismissal had occurred and Mr Remihana was not unjustifiably dismissed by Rigweld.

Was Mr Remihana unjustifiably disadvantaged by Rigweld suspending him?

[37] Mr Remihana had accepted the terms and conditions of employment as set out in the Employment Agreement. This including clause 23.5 which gave Rigweld the right to suspend him when a drug test indicated the presence of an illegal substance in his body.

[38] Mr Remihana had not been provided with an opportunity to comment on the suspension prior to it being implemented. In *Graham v Airways Corporation of New Zealand Ltd* it was noted that:

There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from *Tawhiwhirangi* set out at para [90] of this judgment confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct.

[39] Rigweld's operations involve hazardous work, including the need to work at heights erecting and operating cranes, in the installation of steel on construction site. Mr Remihana worked as a Rigger in that environment, a safety sensitive position.

[40] Mr Remihana was not only aware from the Employment Agreement that suspension was a possibility should he be detected as having illegal substances in his body following a drug test, but Rigweld's lack of tolerance of drugs had been confirmed during his induction and on a regular basis during his employment. However in light of this knowledge he chose to smoke cannabis on a regular basis, and had done so the night before he presented for work on 11 February 2020.

[41] Mr Remihana had also confirmed that he had smoked cannabis the night before the non-negative test and did do on a regular basis to Mr Manihera during the disciplinary process.

[42] In all the circumstances I find that Rigweld did not act unfairly in suspending Mr Remihana immediately following the non-negative drug test.

[43] I determine that Mr Remihana was not unjustifiably disadvantaged by Rigweld suspending him.

Was Mr Remihana unjustifiably disadvantaged by Rigweld not allowing him to give submissions on dismissal before making the decision to dismiss?

[44] Mr Remihana accepted during the Investigation Meeting that the notes compiled by Mrs Manihera were an accurate representation of the discussions in the disciplinary meeting held on 13 February 2020.

[45] The notes record Mr Remihana being asked by Mrs Manihera: “if he had anything to say as this was his chance”. Following that invitation Mr Remihana acknowledged his regular smoking of cannabis, including the night before the test.

[46] There is no indication that Mr Remihana was precluded from making further submissions.

[47] I determine that Mr Remihana was not unjustifiably disadvantaged by Rigweld not allowing him to give submissions on dismissal.

[48] Was Mr Remihana unjustifiably disadvantaged by Rigweld failing to explore other employment options after a client did not allow him back on its site?

[49] Mr Remihana’s employment relationship was with Rigweld. The Employment Agreement, the induction process and the regular updates by the management team set out Rigweld’s expectations of employees.

[50] Mr Remihana failed a drug test for the presence of illegal substances in his body.

[51] The indication of serious misconduct leading to dismissal was based on Rigweld’s notified view of illegal drug use by its employees. Mr Remihana resigned prior to any dismissal taking place.

[52] I determine in these circumstances that Mr Remihana was not unjustifiably disadvantaged by Rigweld failing to explore other employment options.

Was Mr Remihana unjustifiably disadvantaged by Rigweld not allowing him to take a saliva test?

[53] Rigweld did not send Mr Remihana's test for additional testing following the non-negative result. It had not done so because Mr Remihana (i) advised prior to the test that he would fail it because he had smoked cannabis the preceding evening; (ii) had failed the test as he predicted; and (iii) accepted he had failed the test.

[54] In these circumstances I find it was fair and reasonable for Rigweld not to seek additional testing to be carried out.

[55] I determine that Mr Remihana was not unjustifiably disadvantaged by Rigweld not allowing him to take a saliva test.

Was Mr Remihana unjustifiably disadvantaged by Rigweld not having completed the process in terms of AS/NZS 4308:2008?

[56] As observed above, given Mr Remihana's admission and the subsequent events, I determine that Rigweld acted reasonably and Mr Remihana was not unjustifiably disadvantaged by Rigweld not having completed the process in terms of AS/NZS 4308:2008.

Should Mr Remihana be reimbursed the sum of \$348.00 which was deducted from his final wages?

[57] Mr Remihana had attended a Site Safe Supervisor course within the six months prior to the termination of his employment.

[58] In accordance with clause 13.3 of the Employment Agreement, Rigweld deducted the cost of the course for which it had paid following Mr Remihana's resignation on 13 February 2020.

[59] During the investigation meeting Mr Remihana accepted that Rigweld had a contractual right to deduct the monies.

[60] I determine that Mr Remihana should not be reimbursed the sum of \$348.00 which was deducted from his final wages.

Costs

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[62] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[63] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[64] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹

Eleanor Robinson
Member of the Employment Relations Authority

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].