

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 168/07
5074624

BETWEEN Walter Richard
 Applicant

AND Winstone Wallboards Ltd
 Respondent

Member of Authority: James Wilson

Representatives: Peter Devlin for the applicant
 Phillipa Muir for the respondent

Investigation Meeting: 2 May 2007 in Auckland

Determination: 8 June 2007

DETERMINATION OF THE AUTHORITY

Walter Richard's employment relationship problem

[1] Walter Richard was employed by Winston Wallboards Ltd for 15 years. As at December 2006 he held the position of shift supervisor at the company's wallboard manufacturing plant. He was dismissed from his position, according to Winstone's, for serious misconduct being *sleeping during (his) recognized hours of work*. Mr Richard says that his dismissal was unjustified and seeks reinstatement, reimbursement of wages lost, compensation for humiliation and loss of dignity etc of \$10,000 and costs.

The events leading to Mr Richard's dismissal

Previous work history

[2] In his evidence to the Authority, Winstone's Auckland Manufacturing Manager, Mr Alexander Vaughan, said that the company had, on several occasions had discussions with Mr Richard regarding his performance as a team leader. He says that on three separate occasions informal warnings were issued to Mr Richard. He produced file notes and memoranda to corroborate these discussions and warnings. Mr Richard accepts that there had been some discussions but denies having seen the memoranda. While not directly related to the reasons for his dismissal these informal warnings related to the way he communicated with the staff he supervised and carried out his supervisory role, leaving his work station without permission and taking unauthorised leave.

[3] In May 2006 Mr Vaughan and the Winstone's operations manager Mr Paul Thorn say that they found Mr Richard asleep on duty. Mr Richard denies that he was asleep and says that he was merely resting. Mr Richard says that he explained to Mr Vaughan and Mr Thorn that he had recently been diagnosed with diabetes and had some dietary issues and this caused tiredness.

[4] Mr Vaughan says that the Company acknowledged Mr Richard's reasons for falling asleep and offered him support through the employment assistance program (EAP). He says that they explained to Mr Richard that falling asleep during shifts was considered serious misconduct and that he could be dismissed if such conduct continued. Mr Vaughan says that over the next few months he had "counselling sessions" with Mr Richard in which he encouraged Mr Richard to step up his role as a team leader and to deal with his dietary issues so that they did not impact on his performance. Mr Richard strongly denies that there were further counselling sessions. He does agree that Winstone's offered him support through the EAP but says that he wished to attempt to control his diabetes by changing his diet and without external assistance before seeking further help.

The incident which precipitated the investigation and dismissal

[5] On 4 December 2006 Mr Vaughan received a photograph on his cell phone of a person lying underneath a sheet of paper on top of a pallet of wallboard. This photo had been sent to him from the production team's mobile telephone which is kept in the production room and is shared by the shift team i.e. the team supervised by Mr Richard. Mr Vaughan says he went immediately to the control room and asked a shift team member if he knew who had sent the photograph. He was informed by that team member (referred to as person A) that he had done so. Person A advised Mr Vaughan that the photograph had been taken by another team member (person B) at 5:59 a.m. on Tuesday 21 November. Mr Vaughan said that he then spoke to person B who said that he had been working in the area on the morning of 21 November and had witnessed Mr Richard lying in the position shown in the photograph. Person B advised Mr Vaughan that Mr Richard had been lying still for at least 30 minutes with the sheet of paper over his body and head for the entire time. Person B expressed the view that Mr Richard had been asleep for at least 30 minutes. Later that afternoon Mr Vaughan contacted Mr Thorn to discuss the photograph and his interviews with person's A and B

[6] On 5 December Mr Vaughan wrote to Mr Richard requesting that he attend a meeting to be held on 11 December. This letter advised Mr Richard that the purpose of the meeting was *to discuss an incident at 5:59 a.m. on Tuesday 21 November where he (Mr Richard) appeared to have been sleeping at work during his rostered nightshift*. Mr Richard was encouraged to bring a support person or representative and advised that *disciplinary action in line with the code of conduct in your employment agreement may be taken as a result of the outcome of this meeting*.

The Company's investigation

[7] On 11 December Mr Richard, accompanied by Mr Peter Devlin, (an organiser with the Building Trades Union (BTU)) met with Mr Vaughan and Mr Thorn. Three other employees, including the chairman of the site consultative committee, Mr Paul Kenny, were also at the meeting. At the commencement of the meeting Mr Thorn presented the photograph he had received and requested Mr Richard to explain what was going on in the photograph. Mr Devlin requested that he and Mr Richard be told

who had taken the photo and who had sent it to Mr Vaughan. Mr Thorn explained that the photo had been taken on the production cell phone. He showed Mr Richard and Mr Devlin the photo details (time and date) on the cell phone. However the company declined to provide the names of person A and person B because both had indicated that they were concerned about repercussions if their identities were disclosed.

[8] When again asked to explain what the photograph depicted, Mr Richard did not dispute that the person in the photograph was him. However he said that he did not believe he was asleep, that he often got tired and lay down to stretch and do back exercises. He explained that he pulled a sheet of paper over himself because he was embarrassed to be seen carrying out these exercises in front of other employees.

Meeting of 12 December 2006

[9] A further meeting was convened on 12 December. At the commencement of this meeting Mr Richard was given a copy of a typed statement from person B with the name and signature deleted: This statement read:

I, (name removed) can confirm that this photograph was taken on the Production Cell phone by myself on 21/11/06 and 5:59 a.m. The person in this photo is Walter Richard who was motionless for in excess of the 30 minutes and in my opinion appeared to be sleeping during our shift.

These are my observations alone and I have signed this note under my own accord.

Mr Devlin again requested that he be told that the name of this person. The company reiterated that the individual was concerned about reprisals and had requested that his name be removed before the note was handed to Mr Richard and Mr Devlin.

[10] The company representatives indicated that they did not accept Mr Richard's explanation and believed that he was in fact sleeping. Mr Thorn indicated that this was not the first time the company had spoken to Mr Richard regarding his performance and sleeping on shifts. The company drew Mr Richard's attention to the code of conduct pointing out in particular that sleeping during the employees recognized hours of work was serious misconduct which could result in instant dismissal. After some discussion regarding previous warnings the company indicated that they wished to adjourn the meeting and set up a time for a formal disciplinary meeting.

Disciplinary meeting and dismissal

[11] A further meeting was convened on 13 December 2006. The meeting commenced with a lengthy discussion regarding the minutes of the previous meeting. Mr Devlin then again requested that he told who had taken the photo and who had forwarded it to Mr Vaughan. The company again said that they would not be disclosing the names of the two staff concerned but that they had passed Mr Devlin's business card to them and advised that they were free to contact Mr Devlin directly and anonymously if they wished. Mr Richard repeated what he had said at the previous meeting regarding not being asleep but doing stretching exercises.

[12] During this meeting Mr Devlin reminded the company representatives that Mr Devlin was a married man with three children, had been employed by the company for 15 years and had no current disciplinary warnings. He asked that the company take these points into consideration when making their final decision.

[13] After an adjournment the Company representatives advised that they had reached the conclusion that Mr Richard had been asleep, had breached the code of conduct and that he was to be dismissed.

Mr Richard's arguments

[14] Mr Richard, through his representative raises three grounds which he says make his dismissal unjustified.

- The dismissal was carried out in breach of his employment agreement;
- Instead of exercising some discretion the company concluded that, once serious misconduct had been established Mr Richard had to be dismissed as provided for in his employment agreement and
- the investigation process was unfair in that the identity of the witnesses were not disclosed and matters were relied on by the company which were not put to Mr Richard for comment.

Did Winstone's breach Mr Richard's employment agreement?

[15] The collective employment agreement under which Mr Richard was employed included a schedule establishing a code of conduct. This code says that *no employee may be dismissed without first consulting with the General Manager of the business and the Human Resource Manager*. Mr Devlin argues that Mr Vaughan and Mr Thorn did not discharge this obligation. i.e. to *consult* with the GM and HR Manager. Rather Mr Devlin says that Mr Vaughan briefed Mr Eversfield (the HR manager) during the process but that *briefing* does not constitute *consultation*. However in his statement Mr Thorn said that that he met with both Mr Eversfield and the General Manager, Mr David Thomas, both after the preliminary meetings and immediately before the final dismissal meeting. He says that before the final meeting he discussed with Mr Thomas the conclusions that he and Mr Vaughan had reached and Mr Thomas agreed that, subject to anything new emerging, he should proceed to dismiss Mr Richard for serious misconduct. He says that as nothing new emerged at the final meeting it was not necessary to further consult with Mr Thomas.

[16] Mr Thorn had the authority to dismiss Mr Richard. The collective agreement required that he *consult* with Mr Eversfield and Mr Thomas before he made his decision. While I accept that *consultation* is somewhat more than *briefing* I am satisfied that Mr Thorn did *consult*. There is no doubt that he outlined to Mr Thomas and to Mr Eversfield how he had conducted the investigation and the preliminary conclusions he had reached, and sought their input. He was not required to get the

approval for his decision. Had this been the case the decision maker would have been Mr Thomas and/or Mr Eversfield. Mr Thorn consulted with Mr Thomas and Mr Eversfield immediately prior to the final meeting and it is clear from both the evidence I have heard and from the minutes of the meeting that no new information emerged which would require further consultation. In respect to consulting with the GM and the HR manager I find that the company did not breach Mr Richard's employment agreement.

Did Winstone's take a narrow and blinkered view?

[17] Mr Devlin also argues that, having established that Mr Richard had slept on the job, the company automatically held that instant dismissal must *therefore* be the outcome. He argues that the company took a narrow and blinkered view that because the CEA provided a mandatory outcome for sleeping on duty (instant dismissal) Mr Richard must be instantly dismissed. This, Mr Devlin says, does not take into account such matters as the absence of former disciplinary matters and matters raised in mitigation. Had the company acted in the way Mr Devlin suggests it would indeed have been unfair. However it is clear both from the written statements and from the responses to questions at the investigation meeting that the company did take into account Mr Richard's length of service, his family circumstances and the informal warnings and counselling he had received. There is no evidence that Winstone's took a narrow view. Rather they took some time to work through the investigation process while keeping open the options available to them, including imposing a lesser penalty.

Was the company's investigation process unfair

[18] Mr Devlin argues strongly that the company's failure to divulge the identities of the two witnesses prejudiced Mr Richards ability to respond to the allegations against him. He pointed out that a photograph is a *moment in time* and that the company relied on the evidence of the secret witnesses that Mr Richard was lying motionless for half an hour. He points out that Mr Richard disputes that evidence and says that he was not asleep and was certainly not lying in the position portrayed in the photograph for half an hour. Mr Devlin says that Mr Richard was entitled to know the identity of the witness so as to be able to raise matters as to his/her credibility and

possible motivation for fabrication or exaggeration. He says that it is possible that there is prevailing ill will or dissatisfaction between the informant and Mr Richard.

[19] As Mr Devlin quite rightly points out, under most circumstances it is appropriate for the identity of any informant to be provided to the employee who is the subject of a disciplinary enquiry. However there are circumstances in which an employer is justified in withholding details of the identity of an informant. (*Porter v BOT of Westlake Girls High School* [1998] 1 ERNZ, 377). Winstone's argue that the informants in this case were concerned that they might be intimidated if their identities were disclosed. They had signed formal statements attesting to what they had seen and these statements were made available to Mr Richard - albeit with the name and signature obscured. The company also say they were keen to protect the integrity of the companies "FairCall" policy. This policy establishes a protocol whereby employees can use an anonymous hotline to report unacceptable, unethical or illegal behaviour.

[20] The main consideration regarding whether or not Mr Richard should have been told of the identities of the informants is whether or not he was prejudiced in any way by not knowing their identities. In the face of the photographic evidence and the content of the statements from the informants Mr Richard was fully aware of the allegations against him. He knew that the photograph had been taken by a member of his team and forwarded to Mr Vaughan by another member of the same team. Mr Vaughan was fully aware of the relationships between Mr Richard and each of the individuals Mr Richard supervised. Even without knowing specifically the identity of the two staff concerned Mr Richard and/or his representative were in a position to raise any concerns they may have had regarding the malicious motivation which any of the 5 or so staff on his team may have had. Mr Vaughan was in a position to assess for himself the motivations of each of the informants in the light of his knowledge of their relationship with Mr Richard. Mr Richard simply denied that he had been asleep and insisted that he had been in the prone position captured by the photograph for "much less than 30 minutes". Under all of the circumstances I find that Mr Richard was not disadvantaged, and suffered no prejudice, as a result of not knowing the identities of the informants.

[21] Mr Devlin says that two matters which the company took into account when considering dismissal should have been put to Mr Richard for comment: the possibility of alternative disciplinary outcomes and whether or not Mr Richard was prepared to give a pledge not to behave in a similar fashion in future. I accept that these points were not put specifically to Mr Richard. However Mr Richard, and his representative, clearly understood that the company were considering dismissing him and had ample opportunity to suggest alternative disciplinary outcomes and/or give the company some assurances regarding future behaviour. On at least one occasion Mr Devlin offered several factors in mitigation (length of Mr Richard's service, family circumstances etc.) It is clear from the evidence that the company's representatives did consider alternative outcomes but considered that under all of the circumstances further warnings and/or demotion were not appropriate. While it may have been prudent to specifically ask Mr Richard to comment on these issues there was ample opportunity for him or his representative to do so. Mr Richard was not disadvantaged by not specifically been asked to comment on alternative disciplinary outcomes or to give assurances regarding the possibility of further indiscretions.

Determination

[22] Mr Richard knew, and had recently been reminded, that sleeping while on duty would be considered to be serious misconduct and could lead to his dismissal. When confronted with the photographic evidence Mr Richard's response was that he was not asleep. Given the weight of evidence this denial was not credible and, on balance, his employer was entitled to reach the conclusion that Mr Richard had been asleep while on duty. Winstone's had in fact been very supportive of Mr Richard and tolerant of his apparent reluctance to come terms with his health issues. Mr Richard failed to improve his performance despite several clear indications that the company were not happy with that performance. In the light of his work history and the very clear evidence, the Company were justified not only in reaching the conclusion that Mr Richard was guilty of serious misconduct (sleeping while on duty) but that dismissal was the appropriate sanction.

[23] Under all of the circumstances Winstone's actions in dismissing Mr Richard were *what a fair and reasonable employer would have done*. (s103A, Employment Relations Act.) Mr Richard's dismissal was justified and he does not have a personal grievance.

Costs

[24] Costs are reserved and the parties are invited to settle this issue between themselves in the first instance. If they are unable to do Ms Muir, on behalf of Winstone's, may file and serve a submission in respect to costs within 28 days of the date of this determination. Mr Devlin, for Mr Richard, will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority