

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 8  
5422513

BETWEEN

COLIN WIGHTMAN  
Applicant

A N D

SILVER FERN FARMS  
LIMITED  
Respondent

Member of Authority: David Appleton

Representatives: Applicant in person  
Tim Cleary, Counsel for Respondent

Investigation meeting: 12 and 13 December 2013 at Christchurch

Submissions Received: 13 December 2013 from Applicant  
13 December 2013 from Respondent

Date of Determination: 21 January 2014

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**DETERMINATION OF THE AUTHORITY**

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- A. The applicant was not unjustifiably constructively dismissed.**
- B. The applicant suffered an unjustified disadvantage in his employment when working in the ladder room.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] Mr Wightman claims that he was unjustifiably constructively dismissed on 16 June 2013 and that he was subjected to unjustified disadvantage in his employment by way of a number of alleged actions of the respondent. He seeks remedies from the respondent, including reinstatement to the employment of the respondent.

- [2] The respondent denies that it constructively dismissed Mr Wightman and denies that it subjected him to any unjustified actions during his employment. It also denies that Mr Wightman raised a personal grievance within the statutory 90 day period in respect of some of his complaints giving rise to an alleged unjustified disadvantage.

### **Preliminary issue**

- [3] During the Authority's investigation meeting evidence was given by two officials of the New Zealand Meat Workers and Related Trades Union, Mr Topp and Mr Reid, each of whom had been required to attend the investigation meeting pursuant to a witness summons issued by the Authority on the application of the respondent. Notes made by the two individuals of meetings and conversations were also put before the Authority.
- [4] After the conclusion of the investigation meeting, it occurred to me that some of the evidence given by Mr Topp in particular, as well as some of the contents of the notes referred to above, may have been privileged in accordance with the principles espoused in the Employment Court judgements of *Lloyd v Museum of New Zealand Te Papa Tongarewa* [2003] 2 ERNZ 685 and *Woolf v Kelston Girls High School Board of Trustees* AC28B/00 21 July 2000. In a nutshell, these cases found that the relationship between an employee, his or her union and the union's professional staff, has many of the attributes of a solicitor/client relationship and so may create expectations of confidentiality in regard to communications between the employee and the union staff member.
- [5] However, whether or not some of the evidence presented by the two union witnesses was privileged, given that I did not find most of their evidence particularly relevant in determining the key issues to be decided, I have been able to put the majority of it to one side without inviting the parties to give submissions on the issue of privilege. The one piece of evidence from these two gentlemen that I have taken into account constitutes part of the written record of a meeting made by Mr Reid on 26 April 2013. This meeting was held between Mr Wightman, Mr Reid, and members of the respondent's management, and so could not have attracted any element of confidentiality or privilege in any event.

**Brief account of the events leading to the resignation**

[6] Mr Wightman, who has worked as a farmer, horse breeder and trainer, amongst other roles, and who has a BA degree from Lincoln University, started working for the respondent at its Belfast plant in Christchurch in around March 2012, initially carrying out relatively unskilled work. In around October 2012, Mr Wightman started working in the lidder room of the Belfast plant, where cartons of the respondent's product are automatically sealed and stickers applied.

*Chiller unit issues*

[7] In early February 2013, a cooling unit was installed in the lidder room, the purpose of which was to ensure that the temperature of the room was maintained at a level compliant with food regulatory standards. It is understood that this meant that the temperature of the lidder room had to be kept below 12°C.

[8] Mr Wightman complains that the chiller unit initially caused the temperature of the lidder room to fluctuate down to near freezing conditions and, to make matters worse, created a significant wind chill factor because of the flow of cold air that was blown from it from time to time. Mr Wightman complained about these conditions over a period of several days, from the first day of its installation.

[9] It is clear from the evidence put before the Authority that the respondent tried to address the issues over a period of weeks by, for example, restricting the running times of the unit, fitting baffles to divert the wind flow, and other measures, but that these attempts did not work to Mr Wightman's satisfaction until March 2013. The evidence shows that a number of members of the respondent made efforts to rectify the problems (including the engineering department, the health and safety officer, supervisors and other staff), but the respondent concedes that *the work between supervisors, technical engineering and health and safety could have been a little smoother.*

[10] Mr Wightman complains that effective PPE (personal protective equipment) was not issued to him (in particular, a warm jersey) although this is disputed

by the respondent. It appears that jerseys were given to Mr Wightman and his colleague on the third day after he had first complained.

[11] After matters in the ladder room had settled down in March, Mr Wightman noticed that the cold began affecting him adversely again in April, possibly because of the weather outside the plant becoming colder, although Ms Bairds, the health and safety manager of the plant, denies that this could have been the case.

[12] On 20 April, Mr Wightman wrote to Andrew Hay, the plant manager of the Belfast plant, complaining about the temperature in the ladder room, and the way that the head engineer had handled the matter. The letter included the following paragraphs:

*I can report that my flu condition has not deteriorated but for the first time I added to my attire one of the full body aprons to cut the wind flow that is more than evident within the area of the MAF sticker application.*

*Of concern to me is the failure by your medical officer to follow up on my call to him on Tuesday which might well indicate that Health & Safety at this plant is more "claytons" provided than genuine intent and I would hope sincerely that my condition does not advance to pneumonia as this would bring serious consequence to Silver Fern Farms.*

[13] Mr Hay responded on Tuesday, 23 April in the following terms:

*Colin, your correspondence and phone message strongly suggests [sic] that your position in the ladder room is a threat to your health, I have spoken with your supervisors to resolve this issue.*

[14] On 24 April, Mr Wightman was advised that he was being taken off ladder room duties (where he worked night shifts) and would be moved back to day shift duties in two days' time. During the intervening two days, he was told to do a night shift packing job in which, he says, he had no training. Mr Hay's evidence is that Mr Wightman did not refuse to go on day shift. However, Mr Wightman complained about this transfer in a long email to Mr Hay on 24 April, in which he referred to the transfer to day shift as a breach of contract. Email correspondence continued between Mr Wightman and Mr Hay.

- [15] The evidence shows that, by 26 April 2013, a further hazard analysis of the boning room ladder area had been carried out by Ms Bairds. Ms Bairds concluded that *there was no issue in the room*, which I understand to mean that she concluded that the temperature and wind chill effect in the ladder room were not causing a health and safety hazard.

*Agreement between Mr Wightman and Mr Hay*

- [16] On 26 April 2013, a meeting took place between Mr Hay, Mr Wightman, and other members of the respondent, including Mr Reid and Mr Topp, during which it was agreed with Mr Wightman that he would move away from the ladder room, undergo knife training on day shift and then, once trained, go back to night shift trimming bones.
- [17] On 29 April 2013, Mr Wightman was signed off sick for 10 days with what I understand was a serious flu. During his sick leave, Mr Wightman emailed Mr Hay to advise him that he had advised *the Department of Labour* (presumably the Ministry of Business, Innovation and Employment) about the *chiller problem*.
- [18] With respect to the agreement that was reached on 26 April between Mr Wightman and Mr Hay, Mr Wightman maintains that the agreement was that the day shift night training would only last for two days. Mr Hay denies this, saying that they never had an agreement that training could only last two days. His evidence is that he said to Mr Wightman that the training should only take a couple of days as he thought, given Mr Wightman's experience as a farmer, that he would learn faster than other workers. Mr Hay says that he had also overlooked that training on a piece of equipment, known as a whiz knife, would also need to occur as an ability to use that equipment on the night shift was required. The respondent's notes of the meeting on 26 April state the following:

*Prepared for Colin to go onto d/s [day shift] to do knife sharpening bone trimming to learn to do it safely. Then once deemed okay, he can go back to night shift trimming bones.*

- [19] Notes taken by Mr Reid, the president of the Canterbury Branch of the NZ Meat Workers & Related Trades Union Inc., record that Mr Hay stated:

*Some conclusion to all this. CW on D/S knife handling course – then replace back in N/S trimming bones. 2/3 days training – back to N/S.(When Competent). Has upset people.*

- [20] It is my finding on this point that the respondent did not make a binding agreement with Mr Wightman that his training should only last two days, as Mr Wightman clearly could not have been allowed to have worked unsupervised without his trainers being satisfied that he was competent to do so, and there was no way of knowing for certain on 26 April how long it would take for Mr Wightman to reach a level of competence, despite Mr Wightman's background as a farmer.
- [21] This issue is relevant because, at the end of the second day of the day shift training, Mr Wightman was advised that he needed to do a third day of training because he was not yet competent. It would appear that Mr Beardsley, the day shift senior supervisor, told Mr Wightman that he had to do another day of knife training whereas Mr Hay later told him that he was required to carry out training on a separate piece of equipment known as the whiz knife. I do not accept that the apparent difference in what they told Mr Wightman arose from anything other than misunderstandings. I also accept that working on the night shift boning table required staff to be competent in both knife work and the whiz knife, because fewer staff are available on the night shift, and so they need to be more flexible in their skills.
- [22] In the event, ultimately, Mr Wightman was required to carry out a further three days' of training and assessment on the day shift (a total of five) before he was signed off as competent on both the boning knife and the whiz knife. Mr Wightman refers to this decision to make him do a further three days of training as "*further punishment*" and Mr Hay "*dishonouring their agreement*".
- [23] During his knife training, Mr Wightman sent an email to Mr Hay headed "*dishonoured agreement*", complaining about being told that he had to undergo further knife training. On 17 May, Mr Wightman wrote again to

Mr Hay complaining about being told that needed further training. He stated in this email:

*Once again I question whether the company is seeking retribution and victimising me once again for exercising my rights particularly in light of my recent formal complaint to the Labour Department over the treatment dished out to me over the still unresolved issue involving the newly installed blast chiller unit.*

[24] Mr Hay responded the same day as follows:

*Colin we cannot put you on a knife, or a whizz knife until your trainers have signed you off, should you get injured and you are not signed off we will get prosecuted.*

*Mr Wightman's second complaint to the Ministry of Business, Innovation and Employment*

[25] In or around early May 2013, Mr Wightman sent a seven page written complaint to the Health and Safety Group of the MBIE (although he referred to that department as the Department of Labour) complaining about a range of issues, including those in the lidder room; alleged bullying by the head supervisor, Mr Burt, of himself and other staff; general concerns about health and safety; an alleged bullying management style in the respondent; age discrimination and a lack of adequate training. (Mr Wightman has confirmed that he is not pursuing an age discrimination personal grievance in the Authority).

[26] In his written complaint, Mr Wightman included a number of sentences relating his experiences and those of colleagues on what he called *death row*; namely, working under the supervision of Mr Burt on a task involving the lifting of *something like 3000 cartons a day of up to 27.2 KG*. In his narrative he stated that he *stuck at it without complaint for 2 months*. He also described working on a vacuum packing machine, saying it was *speed work*, where *supervisors were often yelling out to go faster*. He also described solving several problems with the lidder machine, where he says he was described, by Mr Hay it is understood, as the *number one man*.

[27] This seven page complaint, which had been sent to the respondent by the MBIE for comment, eventually formed the basis of an internal investigation by the respondent, which commenced in June 2013, carried out by Mr Williams, Human resources Adviser, Operations, based in Hastings.

*Allegations of bullying during his knife training*

[28] Mr Wightman complains that, during the five days of training (which is, effectively, training on-the-job), he was subjected to bullying by Mr Burt which included:

- a. Being allocated to work next to a very slow worker on the second day, so that he had to work at speed to keep up;
- b. Mr Burt staring at him for 15 minutes;
- c. Mr Burt throwing trim back at him;
- d. Mr Burt throwing bones away implying that Mr Wightman was being too slow;
- e. Mr Burt saying that he needed more knife training;
- f. No rotation or relief being given whilst he was training to use the whiz knife; and
- g. being left on his own for several hours when, normally, three workers would be working, so that he had to work at excess speeds.

[29] Mr Wightman alleges that, as a result of this period of training when he had to work at speeds, he suffered an injury to his right arm for which he has made an ACC claim.

*Events leading to Mr Wightman's resignation*

[30] A mediation took place on 28 May between the parties and, shortly afterwards, Mr Wightman sent an email to Mr Williams who, by now, had been tasked with investigating Mr Wightman's complaints. In this email, Mr Wightman wrote the following:

3. *My own protection: I have referred this matter to a specialist employment court lawyer who has advised me to seek employer protection within my current workplace from those who are subject to my serious allegations and complaint to the Department Of Labour. With your support I would like to ask that the boning room Manager, Warren Beardsley, place me in a job that does not come directly under Mr Burts supervisory role for the duration of the internal investigation. I will submit this request tomorrow. The reason for my request is that Mr Burt acted in a contrary bullying manner while I was on knife training [day shift] last week after Mike Rutherford your H&S manager released the contents of my DOL complaint to Andrew Hay.*

[31] On 31 May 2013, Mr Wightman wrote to Mr Beardsley noting that Mr Williams proposed to start his internal investigation on 11 June and that Mr Wightman had offered to assist in that process. Mr Wightman's letter went on to say the following:

*Leading up to that time and during that process I will seek your help in asking for a suitable job within the factory which removes me from any potential conflict or bullying by Mr Burt which will be no longer tolerated. Just as I will call on your support if any attempt of intimidation or bullying is made by "associated" parties acting in his interests or on his behalf.*

*Alternatively, if this is not practically possible, I would be happy to take annual leave once the night shift is over but where I return to work for just one day to assist GaryJohn Williams on his first day arrival might be a sensible solution.*

*Investigations like this are not pleasant but I will offer you my support as much as I can in respect of the issues I have raised as I don't believe you are the person directly responsible. However, this might still compromise our relationship when I return to day shift. I'm not sure.*

*As another alternative I am happy to terminate my employment on the day shift, offer my resignation, if a secure transfer to the night shift contract team can be guaranteed where I can then offer myself up for a suitable position next season when that shift returns. That could be a better solution where I still meet with GaryJohn when he visits the first day from Dunedin.*

*Please give these matters your consideration and let me know what suits you best in the current circumstances.*

[32] On 10 June 2013, Mr Beardsley emailed Mr Wightman saying:

*Once night shift has finished you will be back on day shift as per your contract. I envisage that you will be on pre trim at this stage but of course we place people in the room to maintain manning levels in order to maximise through put.*

[33] In response to this email, Mr Wightman replied as follows:

*Good morning Warren*

*Thank you for your reply.*

*I am guessing that you referred my request to Andrew Hay and that the response below was under his instruction.*

*Given that you wish to place me in an area supervised and frequented by the bully accused Joe Burt on my return to day shift I have referred the matter to the Department of Labour for further mediation as a matter of Employment Relations which, at this time, is likely to be conducted tomorrow.*

*The basis of my further complaint to the Department is that I find it totally unacceptable that Silver Fern Farms would compromise the situation during an internal investigation into serious bullying allegations where they order me to work under hostile conditions which are perhaps designed around seeking my resignation and further risk to health.*

*I understand that someone from the Department will be in contact shortly to finalise those arrangements.*

*Thank you  
Colin Wightman*

[34] On 14 June 2013, Mr Wightman wrote to Mr Beardsley recording that Mr Williams had declined to participate in further mediation but that Mr Williams had given a “*verbal undertaking that my physical safety would be assured*”. Mr Wightman went on to say the following:

*This guarantee is not sufficient.*

*The decision and order made by you would still expose me to a very hostile environment because the accused person, Joe Burt, frequents and supervises the area in question and as such I would have to endure not just physical risk of his attendance but also psychological intimidation which he has already been accused of as part of the management style.*

*As such I would be left with no alternative but to resign from my employment as I consider the position to be unsafe and it would further compromise my health.*

*Given that Mr Williams has refused dialogue and mediation to hear my concerns I now require an urgent reply from you by 5pm today as to what steps you intend to take in respect of my return to work on Monday in declining my previous request.*

*Thank-you  
Colin Wightman*

- [35] Later that day, Mr Beardsley forwarded to Mr Wightman a copy of an email Mr Beardsley had received from Mr Hay the previous afternoon which stated as follows:

*As you are aware an investigation has taken place following a complaint made by Colin Wightman, as part of this investigation (until it's [sic] conclusion) I have said Joe [Burt] will not be involved in supervising Colin, as Colin will be placed on the pre-trim could you please be directly responsible for him.*

*I will advise when there is a conclusion to the complaint.*

*Thank you  
Andrew*

- [36] Mr Wightman responded to Mr Beardsley on Sunday, 16 June 2013 in the following terms:

*Subject: Forced resignation ... Colin Wightman ...*

*Dear Warren,*

*Thank you for your very brief reply below.*

*Unfortunately I cannot take from this reply sufficient guarantees that my health & safety in the circumstances can be assured on my ordered return to day shift on Monday in the position of pre-trim advised by you.*

*I sent to you a formal request that I be placed in a factory position away from the area that is supervised by the bully accused Joe Burt but you have denied me of that right at a time when mediation and internal investigation is being carried out into matters concerning health & safety within your factory including that of the alleged bullying practices identified in my formal complaint to the Department Of Labour.*

*You are well aware that I have other skills for which I have been trained within the chilled meat packing and lidder room areas which are supervised by other persons not named in my formal complaint but you have chosen to expose me to further health risk within the area identified.*

*For this reason I can only assume that you and Andrew Hay wish to further submit me to a hostile working environment where irrespective of who is my designated supervisor, whether it be yourself or Mr Burt, I would still be subjected to his presence within that area he supervises which is totally unacceptable.*

*You are already well aware that I suffered health issues while subjected to the blast chiller unit problems on night shift where my doctor forced me into taking 2 weeks sick/stress leave [largely unpaid] as a consequence of that and where on my return to day shift 2 days knife training you and Mr Burt subjected me to considerable*

*bullying during that period where Mr Hay dishonoured the 2 day undertaking and allowed you to extend that training period out to 3 then 5 days training to include other skills not previously arranged, as part of union negotiations, for my return to night shift in another role beyond the ladder room and where that bullying culture does not exist.*

*The details of that bullying are contained in my updated complaint to the Department of Labour .....*

*Given that you and Andrew Hay have chosen to hold firm in your decision to place me within the area supervised by Joe Burt on my return to day shift this Monday, and given that you have rejected my 3 option request/proposal contained in my letter dated 31st of May designed around avoiding further threat to my health & safety during this difficult period, I can no longer accept that you and Mr Hay are acting in Good Faith.*

*Just as I have no other choice than to tender my resignation as from midnight Friday the 14th of June given that I fear for further compromisation of my health & safety within your factory under the directions that you and Mr Hay have confirmed while your Human Resource Manager, Gary Williams, has refused mediation to allow me to properly articulate those concerns as requested by the MBIE on Thursday the 13th of June.*

*This is a hugely disappointing outcome given the hard work I have provided your factory with over this last 15 months where I worked well beyond the call of duty in working through the multitude of complex problems associated with the newly installed ladder machine which prior to my appointment to that job was causing considerable production time loss.*

*From a more positive perspective I will still assist and support SFF and MBIE in the formal process of mediation and further investigations into the serious allegations I had been hoping that as a member of the farming community I can make a welcome return visit to your factory to see workers who are truly passionate about their jobs in difference to what you have there now.*

*Inbetween times I will seek legal advice as to my rights in relation to my forced resignation herein.*

*Yours Truly  
Colin Wightman*

- [37] Mr Williams says that he had been in the process of preparing his investigation report into Mr Wightman's allegations when he was told to stop because of Mr Wightman's resignation. The Authority was shown a copy of this report, which appeared to be in complete form, and included reference to Mr Wightman rejecting Mr Beardsley as his direct report, which only occurred, I understand, in Mr Wightman's email of resignation dated 16 June.

[38] Mr Williams' evidence was that Mr Wightman had resigned before he could show him the draft for comment. This I accept, although I suspect that the contents of the report were augmented or finessed after Mr Wightman's resignation. Ultimately, however, as the report was not shown to Mr Wightman, and did not form part of his reason for resigning, I do not consider that that is a matter that needs further investigation.

[39] The conclusion of Mr Williams' draft report was that there was no evidence to substantiate a claim that management staff in the boning room bullied or intimidated Mr Wightman. On the face of the report, and given the evidence I heard from Mr Wightman and Mr Burt, I believe that that was a reasonable conclusion to have reached. I say more about that below.

### **The issues**

[40] The Authority must consider the following issues:

- (a) Whether Mr Wightman was unjustifiably constructively dismissed on 16 June 2013 by the actions of the respondent;
- (b) Whether Mr Wightman raised a valid personal grievance in respect of each of the following:
  - (i) Being subjected to the blast chiller with insufficient action being taken by the respondent to alleviate the problems;
  - (ii) Being removed from the ligger room after he had complained;
  - (iii) The lack of consultation about that removal;
  - (iv) A breach of an oral agreement to allow him to stay on night shift after two days of knife training;
  - (v) Bullying by Joe Burt during the knife training;
  - (vi) Failing to protect Mr Wightman during his knife training;
  - (vii) Being ordered to return to the day shift in the same locality as Mr Burt; and

- (viii) The respondent refusing to attend a mediation;
- (c) If valid personal grievances were raised, whether Mr Wightman was subjected to unjustified disadvantage in his employment in respect of the alleged actions of the respondent listed in (i) to (viii) above.

**Was Mr Wightman unjustifiably constructively dismissed by the respondent on 16 June 2013? -**

[41] The starting point when considering any unjustified dismissal application is s.103A of the Employment Relations Act 2000 (the Act), which provides as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether 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*
  - (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 considers 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.*

[42] The seminal case in New Zealand relating to constructive dismissals is *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372. It was held that constructive dismissals can arise in one of three ways:

- (a) The employer gives the employee a choice between resigning or being dismissed;
- (b) The employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
- (c) There was a breach of duty by the employer which leads the employee to resign.

[43] It is understood that Mr Wightman is relying on the second of these situations. However, I shall also explore the third, as Mr Wightman's allegations tend to suggest such a possibility.

[44] In *Wellington etc Clerical etc IUOW v. Greenwich (t/a Greenwich & Associates Employment Agency and Complete Fitness Centre)* [1983] ERNZ Sel Cas 95 (AC) it was held that the key questions to be addressed in constructive dismissal cases are, what the terms of the contract were and whether there was a breach of those terms by the employer that was serious enough to warrant the employee leaving.

[45] A typical constructive dismissal situation occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. In such a case, it is not necessary to show that the employer intended any repudiation of the contract (*Review Publishing Co Ltd v. Walker* [1996] 2 ERNZ 407).

[46] In this particular matter, another implied duty of relevance is the duty of the employer to provide and maintain a safe workplace *Attorney-General v Gilbert* [2002] 1 ERNZ 31. A breach of this duty is capable of entailing repudiation of the employment agreement.

[47] To succeed in a claim of constructive dismissal, the breach of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable (*Western v. Advkit Para Legal Services Ltd* [2010] NZEmpC 140).

[48] On the face of it, Mr Wightman resigned because he was not satisfied that he would be protected from bullying by Mr Burt while working on the day shift. He did

not believe that Mr Hay's statement that Mr Burt would not be involved in supervising Mr Wightman, as Mr Beardsley would be directly responsible for him, would adequately protect him from the bullying he feared.

[49] In general terms, I accept that placing an employee within the control of a supervisor, by whom that employee has been bullied, and about whom that employee has made a written complaint of bullying to the employer (or, as in this case, an outside agency such as the health and safety group of MBIE) is capable of constituting a breach of the statutory duty of good faith, and/or the implied contractual duty of trust and confidence and/or the implied contractual duty to provide a safe workplace, so that, if the employee resigned as a result of such breach or breaches, that resignation could amount to an unjustified constructive dismissal.

[50] In *Waikato District Health Board v Clear* [2010] NZCA 305, a case involving allegations of repeated bullying of an employee by a manager and the employer's inadequate investigations into some of those allegations, the Court of Appeal approved the Employment Court's statement that its role was *to objectively review the circumstances as they existed at the time and to judge whether in all the circumstances the employer acted fairly and reasonably*. *Waikato* can otherwise be distinguished, I believe, because Mr Wightman did not resign because of an inadequate investigation but because he felt the respondent's intended supervisory arrangements rendered his workplace unsafe.

[51] The question to examine, therefore, is whether the respondent acted reasonably in placing Mr Wightman on pre-trim, stating that Mr Burt would not be supervising him, but that Mr Beardsley would be directly responsible for him. Mr Wightman argues that this arrangement was insufficient and that he wanted to be *"placed in a factory position away from the area that is supervised by the bully accused Joe Burt"*.

[52] First, it is not my view that Mr Hay sent his email to Mr Beardsley deliberately intending to provoke Mr Wightman into resigning, and I do not accept that the respondent followed a course of conduct with the deliberate and dominant purpose of coercing Mr Wightman to resign. I say this for the following reasons:

- (a) For reasons that I examine in detail below, I do not believe that Mr Wightman had been targeted by Mr Burt or treated by Mr Burt in breach of the respondent's duties to Mr Wightman;
- (b) For reasons explained below, I do not believe that Mr Hay treated Mr Wightman in breach of the respondent's duties to Mr Wightman;
- (c) The email from Mr Hay to Mr Beardsley expressly instructed Mr Beardsley to be directly responsible for Mr Wightman rather than Mr Burt. There is no evidence that the instruction in the email was a sham;
- (d) I accept Mr Hay's evidence that he believed that Mr Wightman would be protected from direct supervision of Mr Burt by doing pre-trim and by having Mr Beardsley being directly responsible to him; and
- (e) Mr Hay's evidence is supported by that of Mr Beardsley.

[53] I now turn to whether there was any breach of duty by the respondent in the way that it proposed to protect Mr Wightman from Mr Burt, so as to satisfy the third limb of the test in *Auckland Shop Employees Union v. Woolworths (NZ) Ltd.* The problem that Mr Wightman faces in my view is that, at the stage at which he resigned, the respondent had not done anything that clearly presented a breach of duty or an intention to breach its duty to Mr Wightman. On the face of it, by removing Mr Wightman from the ambit of Mr Burt's direct supervision, Mr Hay was thereby also removing him from the risk of bullying by Mr Burt.

[54] Mr Wightman said in evidence that Mr Burt would still have done a daily roll call, and would have been the first person he would have seen in the morning. He also said that Mr Beardsley would have spent 90% of his time in the office, which Mr Beardsley denied. These points by Mr Wightman are, however, speculative, and the respondent never had the opportunity to address these concerns before Mr Wightman resigned. It may be that Mr Wightman had reached a point where even seeing Mr Burt would have caused him distress. However, he did not articulate this to Mr Hay prior to resigning, nor otherwise explain why Mr Hay's proposed arrangements would not protect him.

[55] If Mr Wightman had done so, and on reasonable grounds made a case for him not being protected by Mr Hay's arrangement, Mr Hay continuing to insist that Mr Wightman comply with it may well have breached a duty of care to Mr Wightman. However, not having made any representations to Mr Hay or Mr Beardsley about the arrangement prior to his resignation, I can only conclude that Mr Wightman jumped the gun in resigning and that his resignation was therefore not foreseeable, so as to satisfy *Western v. Advkit Para Legal Services Ltd.*

[56] It is my view that the respondent asking Mr Wightman to work on pre-trim under the direct supervision of Mr Beardsley, rather than Mr Burt, was an action that a fair and reasonable employer could have done in all the circumstances at the time that Mr Wightman resigned.

[57] Finally, I note that Mr Wightman had stated in his complaint sent to the MBIE in May 2013 that *I will likely be leaving this factory within the next few months for reasons of disgust....* This suggests that Mr Wightman's resignation was pre-planned in any event, and was not in response to Mr Hay's decision to have Mr Wightman work in pre-trim under the direct supervision of Mr Beardsley.

[58] In summary, I do not agree that Mr Wightman was unjustifiably constructively dismissed.

**Did Mr Wightman raise his personal grievance within the statutory period in respect of the alleged actions of the employer constituting unjustified disadvantage?**

*Being subjected to the blast chiller with insufficient action being taken by the respondent to alleviate the problems*

[59] Mr Wightman wrote several emails to his employer, as well as raising his concerns orally, about being exposed to cold temperatures and excessive wind flow while working in the ladder room. The concerns were articulated in detail and satisfy the specificity requirements set out in *Creedy v. Commissioner of Police* [2006] ERNZ 517. They were raised during the period when his concerns were live. Accordingly, I accept that Mr Wightman raised a valid personal grievance in respect of this issue.

*Being removed from the ladder room after he had complained*

[60] Mr Wightman clearly complained about the order that he would be transferred to day shift in his email to Mr Hay dated 24 April 2013. It was expressed with sufficient specificity to be clearly understood by the respondent as a personal grievance.

*Alleged lack of consultation about that removal*

[61] I believe that this aspect of Mr Wightman's complaint is inherently stated in the email dated 24 April referred to above, together with a second email sent by Mr Wightman to Mr Hay on the same day. If this is wrong, it was referred to expressly in Mr Wightman's statement of problem which was received by the Authority on 19 July 2013, and sent to the respondent the same day by the Authority. There is no submission that this aspect of Mr Wightman personal grievance was not raised in time.

*Alleged breach by Mr Hay of an oral agreement to allow Mr Wightman to stay on night shift after two days of knife training*

[62] Mr Wightman's personal grievance was clearly raised in his email to Mr Hay dated 15 May 2013.

*Alleged bullying by Joe Burt during the knife training*

[63] The first time that the details of the alleged bullying by Mr Burt during the knife training were articulated appears to have been in documents sent to the Authority, in accordance with its direction, and received by the Authority (and presumably the respondent's counsel) on 24 September 2013. This would be outside of the 90 day time limit and no application has been received from Mr Wightman seeking leave for the personal grievance to be raised outside of that 90 day time limit. Accordingly, I cannot accept that the Authority has the jurisdiction to consider these complaints. However, as they form the background of the constructive dismissal claim by Mr Wightman, I do examine each allegation of bullying below.

*Failing to protect Mr Wightman during his knife training*

[64] For the same reason that I do not accept the personal grievance raised about the alleged bullying itself, I do not accept that Mr Wightman raised a personal grievance about the respondent's failure to protect him during the knife training from that alleged bullying, as there appears to have been no mention of this until the documents received by the Authority on 24 September 2013. Accordingly, I cannot accept that the Authority has the jurisdiction to consider this complaint.

*Being ordered to return to the day shift in the same locality as Mr Burt*

[65] This concern was clearly raised by Mr Wightman, specifically, in his emails dated 13 and 14 June 2013. I believe that these constitute a personal grievance.

*The respondent refusing to attend a second mediation*

[66] I believe that this concern was raised with sufficient specificity in Mr Wightman's email dated 14 June 2013 to amount to a personal grievance.

**Did Mr Wightman suffer unjustified disadvantage in his employment by the actions of the respondent?**

*Being subjected to the blast chiller with insufficient action being taken by the respondent to alleviate the problems*

[67] It took two days before warm jerseys were issued to Mr Wightman and his colleague, and I have no doubt that, until that point, working in the ladder room was very unpleasant. It appears that warm jerseys were not immediately available but there does not appear to be a reasonable reason for the respondent not urgently

obtaining them, and I therefore accept that that failure to do so caused Mr Wightman an unjustified disadvantage in his employment, as no fair and reasonable employer could have failed to have issued warm jerseys as a matter of urgency in all the circumstances.

[68] I also accept that, even after the issue of the jerseys, the conditions in the ladder room were unpleasant, but believe that the respondent was by then taking reasonable steps to address these conditions. The steps took some time to resolve the issues entirely, but it appears that there was no quick fix and that the respondent had to try different ways of mitigating the effects of the chiller unit's operation.

[69] Mr Wightman was unable to suggest any obvious additional steps that should have been taken by the respondent and also did not suggest that additional PPE should have been issued. Accordingly, it is my view that the steps taken by the respondent after the second day were not less than what a fair and reasonable employer could have taken in all the circumstances at the time.

[70] As for the reoccurrence of the cold temperatures in the ladder room in April 2013, I heard no cogent evidence to suggest that this was due to any unreasonable failure on the part of the respondent.

[71] Therefore, all in all I accept that Mr Wightman suffered an unjustified disadvantage in his employment in the first two days after the chiller unit had been installed but that the respondent did not fail to act reasonably to address the issues thereafter.

*Being removed from the ladder room after he had complained*

[72] It would appear that Mr Wightman was being viewed as a bit of a nuisance by the time that Mr Hay decided to remove him from the ladder room. It is possible that this was partially behind Mr Hay's decision. However, on balance, I accept that even if Mr Hay did have negative feelings towards Mr Wightman by this time, Mr Hay had a duty to ensure that Mr Wightman did not suffer ill health, especially as it appears that, by then, all reasonable steps had been taken to alleviate the temperature and wind flow factors.

[73] Therefore, whilst the decision to remove Mr Wightman from the ladder room may have been to his disadvantage, it was not unjustified, as a fair and reasonable

employer could have taken this decision in all the circumstances. Also, I am mindful that Mr Wightman and Mr Hay later reached an agreement that he would leave the ladder room for knife training, and then boning work on the night shift.

*The lack of consultation about that removal*

[74] I find that there was consultation with Mr Wightman, as that consultation led to the agreement that he would leave the ladder room for knife training, and then boning work on the night shift. This allegation is therefore rejected.

*An alleged breach of an oral agreement to allow him to stay on night shift after two days of knife training*

[75] I do not accept that there was a binding agreement between Mr Wightman and Mr Hay that he would spend only two days on knife training. The contemporaneous notes of the meeting clearly indicate that Mr Wightman was to do training until competent, and Mr Hay could not have known accurately when that point would be reached. This allegation is therefore rejected.

*Being ordered to return to the day shift in the same locality as Mr Burt*

[76] For the reasons that I have articulated when considering whether Mr Wightman was constructively dismissed, I believe that a fair and reasonable employer could have asked Mr Wightman to work on pre-trim under the direct supervision of Mr Beardsley, rather than Mr Burt. Accordingly, it cannot be the case that Mr Wightman being asked to work on pre-trim during the day shift constituted an unjustified disadvantage in his employment; at least at the stage when Mr Wightman decided to resign.

*The respondent refusing to attend a second mediation*

[77] In my view, it was too early for the respondent to have been reasonably expected to attend a second mediation session. The last act of the respondent was to say that Mr Wightman would work under the direct responsibility of Mr Beardsley. Mr Wightman did not attempt to explore how that could be made to work in practice, nor argue why he thought it could not. He simply wrote an email of resignation.

Mediation may have become a reasonable step, but that stage had not yet been reached. Accordingly, I reject this aspect of Mr Wightman's complaint.

### **Was Mr Wightman bullied by Mr Burt?**

[78] I explore this as it forms the background to Mr Wightman's resignation, and supports his contention that the respondent followed a course of conduct with the deliberate and dominant purpose of coercing Mr Wightman to resign. It is Mr Wightman's contention that he was subjected to bullying by Mr Burt during his five day knife training during May 2013. The allegations that Mr Wightman makes are as follows:

- (a) That Mr Wightman was made to work next to a much slower worker on the second day of his training;
- (b) That Mr Burt stared at him for 15 minutes;
- (c) That Mr Burt threw trim back at him;
- (d) That Mr Burt took bones off his work table and threw them on the waste belt, implying that Mr Wightman was too slow;
- (e) That Mr Burt unreasonably said that Mr Wightman needed more knife training at the end of day two;
- (f) That Mr Burt unreasonably said that Mr Wightman needed more whiz knife training at the end of day three;
- (g) That Mr Wightman was not given any relief or rotation whilst learning the whiz knife; and
- (h) That Mr Wightman was left on his own for five hours on day 5 doing a job that three people normally do.

[79] The difficulty the Authority has with these allegations is that, essentially, in most cases it is Mr Wightman's word against Mr Burt's. Mr Burt denies that Mr Wightman was told to work next to a slow worker on day two; that he threw trim back at him; that he threw bones onto the waste belt in order to pressurise Mr Wightman; and that he knew that Mr Wightman was required to work for five

hours on his own doing the job of three men. Mr Burt also does not take responsibility for deciding that Mr Wightman needed further training.

[80] The training is essentially done on-the-job with the trainee working alongside more experienced workers. They are shown by the trainer how to sharpen their knives and how to use the knife effectively, without injuring themselves. However, they are then required to carry out boning work, the object being to remove as much meat as possible from the bones, which then go onto the rendering department.

[81] Mr Burt's evidence is that he had little to do with Mr Wightman.

[82] Mr Burt's evidence, generally speaking, is that it was his job to supervise the staff in the boning room and that required him to watch the work that was being carried out. It seemed to be the common evidence of the respondent's various witnesses that someone learning to use the knife would be watched by the trainer, the supervisor or supervisors and more experienced colleagues. As Mr Wightman was new to that particular job, Mr Burt said that he would probably have stood there watching him for a little longer than others. This does not seem unreasonable.

[83] With respect to deciding that Mr Wightman was not competent after two days of knife training, Mr Burt said that it would have been the trainer who would have said that Mr Wightman was not ready. He also said that the reason that he would have wanted Mr Wightman to do whiz knife training was because the night shift required competency in both jobs. He also said that the decision to do this would not have just been his decision but a collective one. He said that night shift workers always trained on both the whiz knife and the knife.

[84] Mr Burt said that if Mr Wightman had wanted to rotate, he should have said so. With respect to the allegation that he was working on day five doing the job of three people, he said that, sometimes, that particular table would have a reduced manning as it was not as much a priority as other work. However, when that happened, anybody working on it alone would not be expected to do the work of two or more men. He said that everybody works at their own speed and in accordance with their abilities. He said that Mr Wightman could have stood down if he felt that he was suffering strain or was unable to cope.

[85] Mr Burt also said that, during day five, Mr Wightman was essentially proving his competency to be signed off at that point and was no longer training. Mr Burt also

denied, as did Mr Beardsley, that the worker Mr Wightman was paired with on day two of his knife training was a particularly slow worker. They both believed that that worker (Joel) was a good worker, although it was conceded that he was essentially “*a fresh man*” with around one month’s experience at that point. This was more experience that Mr Wightman had on the knives at that point though, of course.

[86] It is my conclusion, having considered the evidence, that Mr Burt did not set out to intimidate or bully Mr Wightman. It would seem that Mr Burt had a management style that was tough or robust which some workers may have found intimidating. However, I do not believe there is any cogent evidence to suggest that Mr Wightman was in any way targeted by Mr Burt during his five days of training or treated adversely compared to other workers.

[87] I do not believe that Mr Wightman has deliberately misrepresented his experiences during the five days that he was doing knife and whiz knife training. However, it would appear that Mr Wightman’s belief about what he experienced has been strongly coloured by his beliefs generally about Mr Burt and his management style, which were the subject of his complaints to MBIE a few days before he commenced that training. It would appear that he commenced the training with trepidation about how Mr Burt would deal with him and interpreted Mr Burt’s style as being designed to somehow wear him down.

[88] However, when asked why he had not asked for help or stood himself down during day five when he reported that he had been under considerable pressure for five hours, Mr Wightman said that “*they wanted me to yell and scream*” and that he was on the point of giving up but that he had thought “*you won’t break me*”.

[89] Employees have a duty under s.19 of the Health and Safety in Employment Act 1992 (and, arguably, an implied contractual duty) to take all practicable steps to ensure their own safety while at work. In addition, under s.4 of the Act, employees are under a duty to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.

[90] Mr Wightman states that he did not know that he could walk away from the job (and he said the same thing about the conditions he worked under in the ladder room). However, Mr Wightman is a mature and experienced man who has held

senior positions with other employers, and who is certainly not afraid to speak his mind. I do not accept that he was motivated by fear or concern about his job in pushing himself during his knife training (although I make no express finding that he suffered an injury during knife training, as I am not in a position to do so). I believe that Mr Wightman was trying to prove himself. That was his choice (although, arguably, one he made in breach of his duties), and I do not believe that the employer can be blamed for this conduct.

[91] Therefore, in conclusion, I do not accept that Mr Wightman was bullied by Mr Burt.

### **Remedies**

[92] Mr Wightman suffered an unjustified disadvantage in his employment when the respondent failed to take urgent steps to issue him with a warm jersey when he first complained about the very cold conditions in the ladder room. He suffered no financial loss as a result of that failure, but I accept that he is entitled to compensation under s. 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to his feelings arising out of the failure. I accept in particular that having to work in very uncomfortable conditions without adequate clothing caused Mr Wightman to suffer loss of dignity.

[93] Mr Wightman suffered that effect for around two days until he was issued with a warm jersey. The effect was therefore of limited duration. I believe that compensation in the sum of \$500 is adequate to compensate Mr Wightman.

[94] Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. I am satisfied that Mr Wightman did not in any way contribute to the respondent's failure to provide urgently a warm jersey during the first two days after the installation of the chiller unit in the ladder room. Therefore, no reduction in the award is appropriate.

### **Order**

[95] I order the respondent to pay to Mr Wightman the sum of \$500 pursuant to s.123(1)(c)(i) of the Act.

**Costs**

[96] Costs are reserved. Mr Wightman was unrepresented and so, it is assumed, incurred no legal costs. If the respondent seeks a contribution towards its legal costs it is directed first to seek to agree with Mr Wightman how its costs are to be dealt with. In the absence of an agreement within 28 days of this determination, the respondent shall serve and lodge a memorandum of counsel setting out its position on costs, and Mr Wightman shall have a further 14 days within which to serve and lodge a response.

David Appleton  
Member of the Employment Relations Authority