

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 440  
5342951

BETWEEN KYLE DWAYNE COUNSELL  
Applicant

A N D REPCO NEW ZEALAND, a  
division of EXEGO LIMITED  
Respondent

Member of Authority: K J Anderson  
Representatives: J Humphrey, Counsel for Applicant  
A Lubbe, Counsel for Respondent  
Investigation Meeting: 27 June 2012 at Whakatane  
Submissions Received: 18 July 2012 and 8 August 2012 from Applicant  
1 August 2012 from Respondent  
Date of Determination: 6 December 2012

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] The applicant, Mr Counsell, pursues two claims with the Authority. First, Mr Counsell claims that he was disadvantaged in his employment by an unjustified action by his employer. This claim relates to Mr Counsell being issued with a final warning. The second claim of Mr Counsell is that he was unjustifiably constructively dismissed, as manifested by his written resignation on 20 April 2011.

[2] Mr Counsell asks the Authority to find that he has two personal grievances and award him the reimbursement of lost wages and compensation of \$16,000.

[3] The respondent, Repco New Zealand, a division of Exego Limited (Repco NZ) denies the claims of Mr Counsell and presents a counterclaim. It is alleged that Mr Counsell breached section 4(1)(b) of the Employment Relations Act 2000 (the

Act) in that he misled and deceived the respondent during the conduct of a disciplinary investigation. Repco NZ seeks that a penalty be awarded for the alleged breach of the Act.

### **Background**

[4] Mr Counsell worked as a sales person at the Whakatane branch of Repco New Zealand from September 2005 to April 2011. The evidence of the Whakatane branch manager, Mr Richard White, is that Mr Counsell, generally, worked well as part of the team. However, in January 2011 circumstances arose whereby Mr White had to issue Mr Counsell with a first written warning.

[5] The warning emanated from circumstances whereby Mr Counsell used his staff discount privileges to make a purchase from Repco NZ stock for another person; not being immediate family.

[6] The written warning dated 1 February 2011, records the breach of company policy involved and informs Mr Counsell that the action to be taken was:

First written warning and suspension of team member purchasing privileges to remain in place for a period of 6 months from 28 January 2011.

[7] It is further recorded that:

Kyle, any further incidents of this nature or any actions on your part which violates company policies or jeopardises the service we provide to customers or our reputation as a company will be investigated and if substantiated could result in further warnings or termination of your employment.

[8] The warning was signed by Mr Counsell and Mr White on 3 February 2011.

### **The arrival of the aliens**

[9] Certain events led up to Mr Counsell receiving a final written warning. On or about 17 March 2011, a sales representative from an automotive accessory company (Fusion) visited Mr Counsell's place of work. It seems that the sales representative showed Mr Counsell a blow-up plastic doll that resembled an alien figure. The alien doll is about 40-50cm high, presenting a stereotypical portrayal of a science fiction alien: i.e. green with a narrow body, large head and large distinctive eyes. Apparently Fusion had been using the alien figures for promotional purposes relating to products

available from the company. The sales representative had two unpackaged aliens that had apparently been used elsewhere for promotional purposes and he gave them to Mr Counsell for his personal use. It appears that the aliens did not have any resale value because they had been unwrapped.

[10] The evidence of Mr Counsell is that he put one of the aliens on a shelf where he works and he says that he intended to give it to the son of a work colleague. But after a disagreement with that person, he decided to take the alien home himself. Mr Counsell says he doesn't know what happened to the second alien that he was given by the sales representative, but he recalls last seeing it on the workplace counter.

[11] It appears that Mr Counsell was somewhat taken with the alien dolls and on 20 March 2011, he ordered five new ones for the store to sell or give away as promotional items. The five new aliens arrived at the store on 22 March 2011 and within a few days, another employee [Mr M],<sup>1</sup> purchased four of the five aliens for his son.

### **The missing alien**

[12] The evidence of Mr White is that on Friday 25 March 2011, he was advised by the assistant branch manager that there was a packaged alien in Mr Counsell's personal work tray (or shelf). Mr White then visually confirmed this. Mr White says that on Monday, 28 March 2011, the alien had disappeared from Mr Counsell's tray and could not be located. Mr White checked the stock inventory printout to ascertain if it had been sold. The sales data showed that only four aliens had been sold to Mr M.

[13] Mr White inquired of the duty manager [Mr W] if he had seen the alien and Mr W mentioned that he had seen it the day before in Mr Counsell's tray. Mr White then spoke to Mr M who informed that Mr Counsell had told him that the sales representative from Fusion gave him a free alien.

[14] Mr White then contacted the Fusion sales representative who advised that he had been at the Repco store on approximately 17 March 2011 but could not remember giving any "freebies" to any staff. [It was later established that the sales representative misled Mr White.]

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<sup>1</sup> A number of individuals who are not involved in these proceedings have their identity protected for privacy reasons.

[15] Mr White's enquiries led him to the conclusion that one of the five aliens purchased by Repco was missing and the last time it had been seen by Mr White and two other staff members, was in Mr Counsell's personal workplace tray. The evidence of Mr White is that while the item was not expensive<sup>2</sup>, he was concerned that Mr Counsell appeared to have taken property without following a proper process, and because the business has a high retail throughput, there needs to be absolute trust in all staff handling goods.

[16] Subsequent to seeking some advice Mr White wrote to Mr Counsell on 31 March 2011 inviting him to a disciplinary meeting on 6 April 2011. Mr White informed that:

We wish to discuss the following allegations:

1. That you removed a company product from the Repco Whakatane branch, in this case a Fusion alien product without authorisation or payment.
2. You admitted to me on Wednesday, 30 March 2011 that you took a Fusion alien product home with you.
3. You stated that you had taken the product home for an employee's son [Mr M]. Mr M has denied this claim.

[17] Mr Counsell was informed that his actions could be a breach of two policies as contained in the company Employment Policies Manual. The two policies were set out for Mr Counsell's information and he was advised that the meeting would give him an opportunity to have his say, and full consideration would be given to any explanation that he might provide, before a final decision is reached on the matter. Finally, Mr Counsell was advised that the findings of the meeting could jeopardise his employment with Repco NZ.

### **Disciplinary meeting – 6 April 2011**

[18] The meeting with Mr Counsell on 6 April 2011 was attended by Mr White and Mr Tony Read, Area Manager, for Repco NZ<sup>3</sup>. Notes of the meeting, prepared by Mr Read, have been produced to the Authority and they appear to be a reasonable (but not verbatim) record of the discussions that took place. The notes record that at one point

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<sup>2</sup> The cost value was \$2.60.

<sup>3</sup> Mr Counsell chose not to have a support person present.

Mr Counsell accused Mr White of being “a fucking liar” as well as alleging that: “the whole place is full of fucking liars” and later, upon being informed that the outcome of the meeting would be that he would be issued with a final warning, Mr Counsell: “became agitated and abusive saying we were a bunch of fucking liars and he would see us in Court”. Mr Counsell denies swearing and/or being abusive but I prefer the evidence of Mr White and Mr Read on this matter whereby they are categorical about the language used by Mr Counsell. But given that Repco NZ did not take issue with Mr Counsell about the use of his language or the allegations he made, the evidence only goes to credibility in regard to the respective accounts of what transpired at the meeting.

[19] Following the meeting on 6 April 2011, Mr Counsell sought legal advice from the Whakatane Community Law Service and the following day, a solicitor wrote to Repco NZ requesting that the issuing of a final warning should be postponed to allow Mr Counsell to have the sales representative verify that he had given Mr Counsell one unwrapped alien. This is rather odd, given that during an adjournment of the meeting on 6 April 2011, Mr Read spoke to the sales representative who recanted on his original denial of giving Mr Counsell a “freebie” and he confirmed that he gave Mr Counsell two unwrapped aliens from a box of “freebies” he had for a local pub promotion. Upon the disciplinary meeting reconvening, Mr Counsell was informed of this. It appears that Mr Counsell did not inform the Community Law Service solicitor of this and conveyed a different version of events. And I note that the letter from Mr Counsell’s current law firm (dated 20 April 2011) acknowledges Mr Counsell received two free alien dolls.

### **The absence of Mr Counsell from work**

[20] It seems that as a result of the letter received from the Community Law Service, Repco NZ did delay issuing Mr Counsell with a final warning. In the meantime, there is a conflict in the evidence about what Mr Counsell did after the meeting on 6 April 2011. His evidence is that when he returned to work none of the other employees spoke to him and he says that “things became very hostile at work.” Mr Counsell says that he felt “shut out” and was so “uncomfortable” at work he found it “impossible to continue working at Repco.” It is the evidence of Mr Counsell that his employment ended on 10 April 2011.

[21] On the other hand, the evidence of Mr White is that after the meeting on 6 April 2011, Mr Counsell never returned to work. Mr White attests that he tried to contact Mr Counsell on his cell phone and left messages for him to make contact. The evidence of Mr White is that on the morning of 11 April 2011, Mr Counsell's partner, Ms Glover, delivered a medical certificate to Repco NZ. The certificate is dated 11 April 2011 and records that:

The above patient was seen and examined by me on 11 April 2011  
and in my opinion is/has been medically unfit from 7/4/11 to 27/4/11.

[22] I find that on the evidence of Mr White, corroborated by the medical certificate, Mr Counsell's employment remained intact until he resigned via a letter from his solicitor dated 20 April 2011. This letter refers to Mr Counsell being given a final warning, but while he had been verbally informed on 6 April 2011 that the outcome of the meeting would be that he would receive a final written warning, the evidence is that this was not prepared until 15 April 2011. But Mr Counsell did not receive it until on or about 3 June 2011. This is because while Repco NZ arranged for the warning letter to be delivered to Mr Counsell's home by courier on or about 15 April 2011, because there was nobody there to receive it, a card was left advising that the letter could be collected from the courier's agent. It seems that the courier failed to notify Repco NZ of these circumstances. It also appears that Mr Counsell may not have visited the courier's local agent, if indeed he viewed the card. Another letter was sent on 3 June 2011, subsequent to Repco NZ becoming aware of the above circumstances.

[23] In any event, following the receipt of Mr Counsell's letter dated 20 April 2011, raising a personal grievance and informing of his resignation, Repco NZ responded to Mr Counsell on 28 April 2011. This letter, among other things, informs that:

We have at no point stated or indicated that Kyle couldn't come back to work and we are happy for his return should he wish to. We are also agreeable to proceed to mediation. We emphatically disagree that the warning amounts to an unjustified action on the part of Repco New Zealand or that Kyle was constructively dismissed. The decision was fair and reasonable and we will defend any suggestion otherwise.

### **The final written warning**

[24] The written warning, while not received until later than intended by Repco NZ, records that the reason for the warning was:

A breach of the false declarations policy on page 25 of our employment policy manual, and subsequent loss of trust and confidence.

The Repco *New Zealand Employment Policies Manual* records at page 25, under the heading False Declarations:

Wilfully making false declarations is not permitted and may result in disciplinary action.

[25] The letter sets out a summary of the pertinent matters taken into account by Repco NZ as reproduced below (summarised):

1. On the 30th of March 2011 during investigations held by Richard White, you were asked: “[Mr M] got 4 Fusion aliens, did you get one?” at which time you confirmed you had taken one home for Mr M’s son. Further investigations found that 3 employees had seen a Fusion alien (packaged as it would be for sale) on your shelf on the 25th, 26th and/or 27th March 2011.
2. Subsequently a disciplinary meeting was held where you alleged you were referring to a free alien you had received from [S] the Fusion representative (in which case it would not have been packaged). Confirmation was made by S that you had been given two Fusion aliens (unpackaged) on the 17th March 2011.
3. During the investigation and disciplinary meeting you could not provide any insight into the following disconnect between your version of events and the details presented during the investigation and subsequent disciplinary meeting:
  - (a) Throughout the disciplinary meeting and investigation you said you had been given one Fusion alien free from S, the Fusion rep on the 17th March 2011. However, S provided information on the day of the disciplinary meeting that he had given you two free aliens. Conversations with S prior to the disciplinary meeting stated that he did not recall giving anything away during his last visit to the branch, on the 17th March 2011.
  - (b) On the 25th March it was noted that the new and packaged Fusion alien had gone missing, the same day it was seen on your shelf. You claimed it had being [sic] on your shelf since the 17th March, unpackaged. However, three employees claimed it was packaged (as it would be if it was for sale) on your shelf. No-one saw the alien on your shelf prior to the 25th March 2011.
  - (c) You claimed you had taken the alien home to give to M’s son, as he was a work colleague, you provided no explanation as to why you did not give it to him at

work but rather took it home. Also having spoken to M on the 30th March 2011, he was not aware you had taken it for his son. If you had taken it for his son, why did he not know about this until the 1st April 2011 when you were issued with a disciplinary invitation?

4. Given the disconnect between the information gained from our investigation and your version of events, we were left with no option but to conclude, through a balance of probabilities, that you had provided us with false declarations during the investigation and disciplinary meeting which subsequently resulted in a loss of trust and confidence.

[26] Mr Counsell was informed that the final written warning was to remain in place for a period of six months, from 6 April 2011.

### **Analysis and conclusions**

[27] The first matter that Mr Counsell brings to the Authority for determination is whether the final written warning affected his employment to his disadvantage and was an unjustifiable action by his employer.

[28] In regard to what is commonly referred to as a “disadvantage grievance”, a two step analysis is adopted. The first question is: Was the employment of Mr Counsell affected to his disadvantage? I find that it was not. This is simply because he left the workplace on 6 April 2011 and never returned. Mr Counsell says that he was worried about his employment and his future and this made him “physically sick”. But I did not find his evidence to be credible. This is because firstly, his evidence about the reasons for leaving is not borne out by the evidence. In particular, his evidence that he returned to work after the meeting on 6 April 2011 is clearly a fabrication. Then there is the matter of the doctor’s certificate. Mr Counsell did not attend his doctor until 11 April 2011 and remarkably, was obliged with a retrospective certificate to 7 April 2011.

[29] I conclude that the reality is that Mr Counsell’s employment was not affected to his disadvantage, quite simply because he left his employment on 6 April 2011, before even receiving written confirmation of the warning. Given this conclusion, I am not required to determine whether the decision to issue a final written warning was an unjustifiable action by Mr Counsell’s employer. Nonetheless I note that when Mr Counsell received the earlier warning in February 2011, an issue as to his honesty arose then. And while it may be arguable as to whether a final written warning was



justified in regard to the alien dolls investigation, it seems to me that Repco NZ, most probably, again, had good reason for doubting Mr Counsell's credibility.

[30] The second claim that Mr Counsell brings to the Authority is that he was constructively dismissed and the alleged dismissal was unjustifiable.

[31] However, I conclude that the resignation of Mr Counsell cannot be converted to a constructive dismissal. As recorded earlier in this determination, the evidence from Mr Counsell about the ending of his employment (on 10 April 2011)<sup>4</sup> is just not credible. The truth of the matter is that Mr Counsell's employment remained intact until he resigned, via a letter from his solicitor, on 20 April 2011. But even then, I do not accept that there was any breach of duty on the part of the employer that caused the resignation of Mr Counsell.<sup>5</sup>

[32] It follows that I find the resignation of Mr Counsell from his employment was a voluntary action on his part and not brought about by any unjustifiable action on the part of his employer.

### **Determination**

[33] For the reasons set out above, I find that:

- a. The employment of Mr Counsell was not affected to his disadvantage by an unjustifiable action by his employer.
- b. Mr Counsell was not constructively dismissed from his employment.
- c. Mr Counsell does not have a personal grievance and his claims are dismissed.

### **The counterclaim of Repco NZ**

[34] It is submitted for the respondent that the mutual obligations of trust, confidence and fair dealing, require the employer and the employee to be open and

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<sup>4</sup> See para.18 of his statement of evidence.

<sup>5</sup> See *Auckland Electric Power Board v Auckland Provincial District Local Authorities IUOW* [1994] 1 ERNZ 169 (CA).

communicative with each other.<sup>6</sup> It is argued that Mr Counsell's approach to the disciplinary process and his response was "evasive and disingenuous" and he should be accountable for his deliberate disregard for open and honest communication. While I accept that Mr Counsell's credibility was certainly found to be wanting, I find that a breach of the Act is not established. But even if it was otherwise, it would not be appropriate to award a penalty in the circumstances.

### **Costs**

[35] Costs are reserved. Mr Counsell was in receipt of legal aid and the usual restrictions as to awarding costs in such circumstances most probably apply. However, I note the submission for the respondent that the extent of the legal aid available may be questionable. In the event that the respondent wishes to make submissions pertaining to costs, it should do so within 28 days of the date of this determination. The applicant shall have a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**

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<sup>6</sup> Pursuant to s.4 (1A) (b) of the Employment Relations Act 2000.