

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 140
5428304

BETWEEN

NEIL SILCOCK
First Applicant

LIAM MILNER
Second Applicant

A N D

EXTERIOR BUILDING CARE
GOLEMAN LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: David Beck, Counsel for the Applicants
Jackie Behrnes, Counsel for the Respondent

Investigation Meeting: 9 June 2015 at Christchurch

Submissions Received: 19 June 2015 from all parties

Date of Determination: 22 September 2015

DETERMINATION OF THE AUTHORITY

A Neil Silcock and Liam Milner were unjustifiably constructively dismissed.

B Exterior Building Care Goleman Limited is ordered to:

- (i) reimburse Neil Silcock for unpaid wages between 24 April to 20 May 2013.**
- (ii) reimburse Neil Silcock for two month's lost wages from the date of his resignation on 20 May 2013 under s 123(1)(b) of the Employment Relations Act 2000.**

(iii) reimburse Liam Milner for one month's lost wages from the date of his resignation on 20 May 2013 under s 123(1)(b) of the Employment Relations Act 2000.

(iv) pay Liam Milner and Neil Silcock the sum of \$9000 each without deduction for compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

C Either party can return to the Authority if there are difficulties in reaching agreement as to the amount owing for lost wages.

D Costs are reserved and a timetable set for an exchange of submissions.

Employment relationship problem

[1] Neil Silcock was employed as an Industrial Abseiler with Exterior Building Care Goleman Limited from March/April 2012 in Wellington before moving to the Christchurch Goleman team in August 2012. He was party to an individual employment agreement with the company.

[2] Liam Milner began working for Exterior Building Care Goleman Limited in or about April 2011 as an Industrial Abseiler. He was initially a casual employee but was a permanent employee at the material time in April/May 2013, and was also party to an individual employment agreement with the company.

[3] Exterior Building Care Goleman Limited (Goleman) is a duly incorporated company having its registered office in Christchurch. It operates a business maintaining the exterior of commercial buildings.

[4] Mr Silcock and Mr Milner say that there were breaches of Goleman's obligations to take reasonable steps to provide them with a safe workplace and minimise their risk of exposure to asbestos. They also say that they were not provided with work after 10 April 2013. Mr Silcock said he was singled out amongst other employees and there was an inducement made to him to resign.

[5] Mr Silcock and Mr Milner went to the Christchurch Press with two previous employees of Goleman's about the asbestos concerns. Following that on 6 May 2013 there was an article in the Christchurch Press about the concerns raised with a

photograph of Mr Silcock and Mr Milner and the two previous employees. By letter dated 6 May 2013 they were invited to attend a disciplinary meeting by Goleman for that action on 14 May 2013. They were represented by Mr Beck. The General Manager at that time, Luke Goleman, and Goleman's solicitor Fiona McMillan attended the disciplinary meeting.

[6] Mr Goleman in a letter dated 16 May 2013 stated that whilst disappointed with the action of Mr Milner and Mr Silcock in going to the newspaper he did not find that it amounted to serious misconduct and it had not damaged its client base. Mr Silcock and Mr Milner were invited to return to work on 21 May 2013 and Mr Goleman said that he was available to discuss any health and safety concerns.

[7] By email dated 20 May 2013 Mr Beck recorded that his clients had decided to resign on the basis that they had suffered significant breaches of the obligation to keep them safe at work and they had no indication after the meeting on 14 May 2013 that Goleman acknowledged this. Mr Silcock and Mr Milner say their resignations were in the nature of an unjustified constructive dismissal.

[8] Mr Silcock and Mr Milner say that they have been unjustifiably constructively dismissed and/or suffered unjustified actions that caused them to be disadvantaged. They say that Goleman's has breached the duty of good faith it owed them.

[9] They seek compensation in the sum of \$15,000 and wages lost after 11 April and before they resigned. After resignation Mr Milner seeks one month's lost wages and Mr Silcock three months lost wages. There is also a claim for a penalty for a breach of good faith.

[10] Goleman says that it did not breach Mr Silcock and Mr Milner's employment agreements and it provided them with a safe workplace. It does not accept that they were subject to unjustified actions that caused them disadvantage and further that they resigned of their free will and were not unjustifiably constructively dismissed. It says that it acted in good faith throughout their employment and has a very strong health and safety culture and zero tolerance to any health and safety breach.

The investigation process

[11] These matters have progressed slowly. A statement of problem was lodged with the Authority on 9 August 2013 and the parties then attended mediation.

[12] There seems to have been delay in receiving any advice as to whether or not mediation had been successful. The administrative file indicates that in or about March 2014 an Authority Officer followed progress on the file up with Mr Beck and was advised that the matter had not been resolved at mediation and a telephone conference was required.

[13] The Authority duly held a telephone conference with Mr Beck and the then advocate for the respondent, Gwen Drewitt. Both representatives agreed that a determination in this matter would benefit from a decision in a related MBIE prosecution. On that basis, the Authority agreed to hold the matter over until the outcome of that prosecution was known and recorded that it was an obligation of Mr Beck to advise the Authority when the matter was ready to proceed.

[14] In or about May 2014 the Authority was advised that MBIE, now WorkSafe, had withdrawn charges under the Health and Safety in Employment Act 1992 against Goleman and this current matter could therefore proceed to be set down.

[15] The Authority then held a further telephone conference at which it was agreed there would be an investigation meeting on 28 and 29 August 2014. There was a timetable set for the lodging and serving of statements of evidence.

[16] Shortly after the timeframe for the lodging of the applicants' statement of evidence had expired, Mr Beck advised an Authority Officer that the applicants were both overseas and he was unable to obtain statements from them. The respondent's then counsel raised concerns about the delay.

[17] A further telephone conference was held on 22 August 2014 to deal with an application by Mr Beck for an adjournment to obtain further instructions from the applicants. Counsel for the respondent at that time, Mr Shaw, did not oppose the adjournment for Mr Beck to seek further instructions and the dates set down for 28 and 29 August 2014 were adjourned, but the timetable for the exchange of evidence remained.

[18] The Authority then proposed further dates from March/April 2015 and eventually dates in June 2015 were settled on. Mr Beck advised that the dates were suitable, however, his clients were overseas and it was understood that they would be able to be connected via Skype.

[19] On the day of the investigation meeting Mr Beck was unable to make a successful Skype connection with his clients, who were both overseas, and the only attendance by them was by way of telephone. Fortunately there are limited matters in dispute and a number of documents prepared at or about the material time which I have had careful regard to. It was not, however, the most satisfactory manner in which to conduct an investigation of such a serious matter.

[20] For Goleman the Authority heard from three witnesses. Aaron Plumridge who is now the operation manager of Goleman but was at the material time transitioning into the role. Luke Goleman who is the Managing Director of Goleman, and at the material time was responsible for the overall running of the Christchurch business. Abel Roche who is the National Health and Safety Manager for Goleman and was at the material time the Operations Manager for Goleman transitioning out of the role and job sharing with Mr Plumridge as he picked up the Operations Manager role.

The Relevant Background

Concerns about possibility of asbestos

26 March 2013

[21] From 25 March 2013 Goleman was undertaking several projects based from the Parkside and Christchurch Women's Hospital (Christchurch Women's) buildings operated by the Canterbury District Health Board (CDHB). Parkside and Christchurch Women's are two separate buildings which run alongside each other but are separated by a seismic gap which had been damaged in the earthquake. The jobs that were undertaken at that time by Goleman involved:

- (a) removing lichen from the roof of the Parkside building;
- (b) the *man cage* job on Christchurch Women's Hospital which is where both applicants were primarily working at the material time;
- (c) the spandrals job;
- (d) window washing for CDHB; and
- (e) confined space work in the basement.

[22] Two longstanding Goleman employees, Ben Greet and Stanko Stanilov, were working on the lichen removal job on the Parkside building roof on 25 March 2013 with a methodology to scrape the lichen off and then spray it. On 26 March 2013 Mr Greet contacted Mr Plumridge to advise that they were concerned fibres in the roof of the Parkside building may be asbestos.

[23] Mr Plumridge told Mr Greet and Mr Stanilov to stop work and get samples of lichen from the roof for testing. Mr Roche was advised of the asbestos concerns by Mr Plumridge and contacted Rob Bright who is the Site Maintenance Manager at the CDHB. Mr Plumridge said that Mr Bright advised that the Parkside building was built in 1992 and the roof was made of a Nuralite product which was cardboard and bitumen mixed. Mr Bright explained that what the employees would be seeing was cardboard and not asbestos. Mr Roche said that the CDHB did not require work to be stopped on the roof.

[24] On that same day Mr Plumridge asked the Health and Safety Officer for Goleman, Andrew Odgers, to find out about Nuralite. Mr Odgers, an employee of Goleman was appointed to that role as he had an interest in health and safety issues. It is unfortunate that I did not hear from Mr Odgers but as I understand it he is no longer an employee of Goleman. Nuralite advised Mr Odgers verbally that its product should not contain asbestos and if it was an old product and contained asbestos it would be fully encapsulated.

[25] Goleman's decided nevertheless to arrange for the samples to be tested at the CDHB laboratory.

[26] Mr Stanko and Mr Greet returned to work on 27 March the day after raising concerns and worked without scraping, but rather spraying the lichen and moss. At that time the results had not come back about whether asbestos was present or not.

Detection of white asbestos confirmed 2 April 2013 to CDHB

[27] Mr Bright was advised in a written report from Chemsafety dated 2 April 2013 and received 3 April 2013 that Chrysotile (white) asbestos was detected on the Parkside building roof. The presence of asbestos in the roof material was subsequently confirmed by the CDHB to Goleman. The exact date that occurred was unknown but Mr Roche considered it was in all likelihood after a meeting with Goleman staff on 2 April 2013. I do not imagine Mr Bright delayed in supplying

information that there had been asbestos detected in the sample from the roof to Goleman. Although it was in all likelihood supplied after 2 April it was probably, I find, the same day Mr Bright received the report himself from Chemsafety which was 3 April 2013.

[28] CDHB required a revised methodology from Goleman's for removing lichen and moss from the roof. The time of the preparation of the methodology and provision of it to the CDHB is somewhat unclear because it is undated. Mr Roche says it was forwarded to Mr Bright on 3 April 2013 which in my view supports the finding that I have made above as to when the detection of asbestos in the lichen sample was first confirmed with Goleman. The methodology confirmed the presence of white asbestos in the roof and some extra precautions are listed. These include wearing respirators with appropriate filters; use of disposable clothing such as booties and overalls; education of all personnel accessing the roof and appropriate disposal of any material removed from the roof.

Were employees advised about the presence of asbestos?

[29] At that time Mr Silcock and Mr Milner worked on the man cage job which involved abseiling down the gap in the area between the Christchurch Women's Hospital and the Parkside building removing gib board and fixing it as required. Goleman says that the distance between the Parkside building roof and where Mr Silcock and Mr Milner were working was 20 – 30 metres. There was a rope access system that came out and ran across the Christchurch Women's and the Parkside building roof and to attach some of these ropes they walked across part of the Parkside roof. Mr Silcock said that he drilled into the roof to hold tarpaulins in place to keep the area watertight but Goleman deny that was part of the methodology. Mr Silcock also said that they kept most of the equipment on the membrane of the roof.

[30] I accept that Mr Silcock and Mr Milner accessed the Parkside roof as part of the job. Goleman said that both men also did some work on the spandrels job breaking up concrete and re-concreting and they would have rope access off the top of the Parkside building and would walk over the roof to access their worksite. Mr Silcock said that he did not do concrete repairs and only worked in the man cage and as a window cleaner.

[31] Goleman says the asbestos in the Parkside roof was discussed at a weekly safety meeting on 2 April 2013 at 7.45 am. Goleman produce typed notes from the meeting on that day that provide amongst other matters discussed – *possibility of asbestos on Hospital roof – don't scrape it. Stop think if not safe don't do.* Mr Silcock and Mr Milner are adamant that it was not raised with them at all and they had no formal knowledge of asbestos in the Parkside roof until 11 April 2013.

[32] Goleman's finalised internal CDHB asbestos investigation report (the finalised Goleman report) was sent to MBIE by Mr Roche on 24 April 2013. It sets out an alleged concern from employees that the confirmed presence of asbestos fibres in the roofing system was not relayed effectively to all staff working on the CDHB projects.

[33] The response in the finalised internal report to that is that the presence of asbestos was raised at a full staff meeting on 2 April 2013. I also note another entry in the report under 2 April 2013 that provides that the results of the asbestos test were talked about at a weekly safety meeting. I do not find that either entry in the report is supported by the evidence. The presence of asbestos at the time of the meeting on 2 April 2013 had not been confirmed until in all likelihood the following day. Its presence was at that time only a possibility so that is all that could have been said about asbestos on the Parkside roof.

[34] As to whether there was any mention of the possibility of asbestos on 2 April 2013 at all I accept Ms Behrnes submission that the allegation by both Mr Silcock and Mr Milner that the meeting minutes were simply *concocted* could not be tested as they only participated by telephone. Mr Plumridge, Mr Goleman and Mr Roche were all at the 2 April 2013 meeting and confirmed the possibility of asbestos was raised. I have two concerns about the 2 April 2013 meeting that I shall note.

[35] The first is that Mr Odgers prepared a draft report for the internal investigation into the asbestos. I shall call that the draft report. The draft formed the basis for the finalised Goleman report. Mr Beck provided that draft report for the first time to the Authority on the morning of the investigation meeting on 9 June 2014 after it was provided to him. That draft report makes no mention of the 2 April 2013 meeting.

[36] The second concern I have is that the finalised Goleman report contains factual inaccuracies about what was talked about at the weekly safety meeting on 2

April 2013 in that it refers to the results of the asbestos test being talked about. It is difficult to see how that error could occur if the notes taken at the 2 April meeting had been referred to in answering the important concern about employee awareness. When I questioned Mr Roche about the meeting on 2 April with the understanding that he had led that meeting he said that asbestos was mentioned but he could not recall if testing had been mentioned. He did agree that another matter recorded for discussion at the meeting may have been a focus for employees.

[37] If there was discussion on 2 April 2013 about the possibility of asbestos on the Parkside roof I find it did not register with Mr Silcock and Mr Milner. They would have in all likelihood reacted with concern if the possibility of asbestos on the roof had registered with them on 2 April 2013 and that they would have wanted to know what was going to happen about that possibility of asbestos being present on the roof. The finalised Goleman report also supports that a concern the confirmed presence of asbestos fibres in the roofing surface was not relayed effectively to all staff working on CDHB projects was a wider concern than simply Mr Milner and Mr Silcock. When I take all those matters into account I conclude there is a strong possibility that asbestos if raised was only done so briefly and as a possibility at the meeting on 2 April 2013.

[38] I find support in this conclusion from the finalised Goleman report under the concern *The confirmed presence of asbestos fibres in the roofing surface alleged not relayed effectively to all staff working on the CDHB projects:*

- a. *The presence of asbestos was raised at a full staff meeting on the 2nd April (I have already found that to be incorrect).*
- b. *The item was not given high priority due to all information available at the time indicated that any asbestos fibres would be encapsulated and one of the other works being carried out involved working directly with Nuralite.*

[39] Following the 2 April 2013 meeting which was on a Tuesday, the Monday being Easter Monday, there was no evidence of any advice given to Mr Milner and Mr Silcock that asbestos had been detected in the initial sample sent to Chemsafety and there had been a revised methodology provided to the CDHB.

[40] On 10 April 2013 Mr Silcock and Mr Milner said that there was mention of the presence of asbestos during the day by other employees. Four experienced Goleman employees then approached Fletchers health and safety officer about the presence of asbestos in the Nuralite. Fletchers were not aware at that time of the presence of asbestos and initiated a shutdown of all works on site meaning Goleman's work for the CDHB had to stop.

[41] Ms Behrnes submits that some other employees of Goleman signed the site hazard ID sheet which noted asbestos before 10 April 2013 when working on the Parkside roof. Up to 5 April 2013 the risk beside asbestos is rated as a 3 on the site hazard ID and from 8 to 10 April on the site hazard ID asbestos is rated as a 5 and the word asbestos on the sheet signed between 8 and 10 April is followed with *????!!*. The names additional to Mr Stanko and Mr Greet on those sheets from what I can make out are Bart, Jeff, Ross and Andrew.

11 April 2013 meeting

[42] Goleman called a meeting on 11 April 2013 which was attended by the 10 employees who worked on the CDHB site at the time including Mr Silcock and Mr Milner. The meeting was variously described as heated and difficult. Mr Goleman and Mr Roach were present. I find that Mr Goleman expressed concern that the employees had gone directly to Fletchers on 10 April instead of coming to Goleman's management. Mr Goleman said that the crew of 10 indicated that it was one employee who had discussed the matter with Fletchers directly and the evidence and documents support that Mr Goleman directed most of his disapproval towards him. I find it likely that some employees raised concerns about a lack of knowledge about the presence of asbestos at that meeting.

[43] Mr Roche did not accept that Mr Goleman was swearing or acting in an intimidating manner. It was not accepted as stated by Mr Silcock that Mr Goleman pointed him out and swore at him. Mr Goleman said that it was a very stressful situation and he was not worried about health and safety concerns but that they had not been brought to him first.

[44] Mr Odgers draft report did refer to swearing and intimidation at the 11 April 2013 meeting. Those entries were removed from the final report as they were considered an internal matter. Mr Silcock and Mr Milner's account of that meeting

was not able to be tested but I accept that they were concerned about the tone of the meeting and questions and concerns were not answered to their satisfaction. The concerns about that meeting were raised at the later disciplinary meeting attended before Mr Milner and Mr Silcock resigned. The disciplinary meeting was recorded and a transcript provided.

Further Chemsafety report

[45] On 11 April there was a site visit arranged by Goleman for Chemsafety to look at the roof and on 12 April 2013 Mr Odgers called Chemsafety to get a verbal summary which was followed up by a written report. Mr Odgers was advised that the asbestos fibre was no longer encapsulated in the bitumen and Mr Roche said he organised another staff meeting to inform staff of the verbal test results. He asked staff who thought they may have been exposed to the asbestos to give him their uniform and boots for testing. Two staff took up the offer.

[46] Mr Roche said that Mr Silcock that day or the day after stripped to his underwear and threw his uniform down at his feet saying *it was a pile of asbestos waste for him*. Mr Roche said that then Mr Silcock said Mr Roche could *go fuck himself* and that if the test came back free of asbestos it would be a victory for Goleman and he was not going to play that game. Mr Roche said that he then ran out of the door and down the street in his underwear carrying the uniform. Mr Silcock did not accept he used those words or ran down the street in his underwear.

[47] A disciplinary process was started and Mr Roche said that Mr Silcock received counselling. There is also a document headed written warning which refers to the events in a similar way to those described above date 16 April 2013. The statement of problem did not allege that the warning was unjustified although I accept that is Mr Silcock's view. I have treated it as part of the background circumstances to the resignation.

[48] There was a further staff meeting on 15 April 2013 to discuss the written report from Chemsafety dated 12 April 2013. The written report referred to both the earlier sample of lichen tested and another sample obtained during a site visit at which there was a visual inspection on 11 April 2013. Both samples showed Chrysotile (white) asbestos detected. The analyst who analysed the two samples commented that there was a high percentage of asbestos fibre in the sample of bitumen roofing

material and amongst the lichen and moss sample. It was noted in the report that where the lichen and moss has been scraped away is of particular high risk of fibre release. It was also noted that the moss and lichen cover on the roof would in some circumstances act as a natural barrier to the release of asbestos fibre but the roof had recently been sprayed and as the lichen and moss die they then come away from the roofing surface leaving patches of exposed asbestos fibre that could become airborne.

[49] The report stated that remediation work should be undertaken urgently and options discussed with a certified asbestos removal contractor. The extent of weathering of the roof resulted in it becoming friable and therefore is restricted work and must be undertaken by a certified asbestos removal contractor. In its current state the report confirmed that the roof surface was a high risk of fibre release and should not be used as an access way, as I understood Mr Milner and Mr Silcock had used the roof, until remediation work was undertaken.

Work availability after site shut down

Mr Milner

[50] Mr Milner was treated incorrectly as a casual employee by Goleman and advised that there was no more work until more contracts were secured in a letter from Mr Roche dated 16 April 2013. My understanding was that Mr Milner did get some work at Goleman's after 10 April and before 16 April although I was not provided with any specific hours worked. He provided Goleman's with a medical certificate that indicated he was unable to work from 17 April until 17 May 2013. The medical certificate described the sickness, injury or disability as *Endogenous depression first* and referred to stress and anxiety with the workplace.

[51] Mr Milner said when he was told that there would be no more work for him with the company by Mr Roche it was because he had a poor attitude and as a foreign worker he did not have the right to protest. Mr Roche denies that he made those statements and there are difficulties in resolving that matter because Mr Milner was only participating by telephone.

Mr Silcock

[52] Mr Silcock said that after he was issued what he referred to in his written evidence as a *bogus written warning* on 16 April 2013 he was told by Mr Roche to

look for another job because there was not going to be any more hours for him in the future and not to bother coming in for the rest of the work. Mr Silcock said that he was singled out and not provided work because he had raised concerns about the asbestos. Goleman do not accept that and say that the work had to be rationed out as there was not enough for everyone after the site was shut down.

[53] Mr Silcock after 16 April 2013 turned up at work again on 22 April and was offered a few hours window cleaning which he declined. He said he declined the work because he had been told that was the last work he would get. Later that day Mr Silcock accompanied by another worker Evan had a meeting with Mr Roche. What was said at that meeting is in dispute. Mr Silcock said that he was told that he was a *ring leader and had a negative attitude* and was not getting any more work. He said there was reference made to other employees of Goleman not wanting to work with him. He said that he was offered two weeks redundancy. Mr Roche said that he was honest about the difficulties with finding work and he was concerned that Mr Silcock seemed to *hate Mr Goleman*. He denied that he offered redundancy or otherwise tried to get rid of Mr Silcock or made comments about what other employees thought of Mr Silcock.

[54] Mr Silcock said that there was a follow up telephone call about the offer on 24 April 2013 and Mr Silcock was advised his options *were to quit or to take the two week payment*. Mr Roche does not accept that was said. Mr Silcock said that he declined the offer. Mr Silcock said that the telephone call on 24 April was the last contact he had with Goleman until The Press article on 6 May 2013 and that he was not offered any further work.

The Issues

[55] The main issue is whether Mr Silcock and Mr Milner were unjustifiably constructively dismissed and the other allegations of unjustified actions causing disadvantage, not particularly clearly set out and the duty to provide a safe workplace are all required to be considered in respect of that issue. There is also an issue about whether Goleman acted in good faith.

[56] Mr Beck in his submission confirmed that the claim is based on the third of the non-exhaustive categories of constructive dismissal referred to by the Court of

Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd*¹ that Mr Milner and Mr Silcock's resignations were caused by a breach of duty on the part of Goleman.

[57] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Inc*² held that the relevant questions to be asked where it is claimed that the resignation was caused by a breach of duty are as follows:

- (i) Was the resignation caused by a breach of duty on the part of the employer requiring examination of all the circumstances of the resignation?
- (ii) If it was then was the breach of duty of sufficient seriousness a substantial risk of resignation was reasonably foreseeable.

Was the resignation of Mr Milner and Mr Silcock caused by a breach of duty on the part of Goleman?

[58] Mr Beck's email dated 20 May 2013 gave reasons for the resignations of Mr Milner and Mr Silcock. Mr Beck states in his email that Mr Milner and Mr Silcock have decided to resign on the basis they have suffered significant breaches of the obligation to keep them safe at work and have no indication that this is acknowledged after the disciplinary meeting on 14 May 2013.

[59] Mr Milner and Mr Silcock by telephone said they both had concerns about Goleman trying to get them to leave. Mr Milner said that he wanted answers and hard facts about the asbestos contamination and there was no apology offered. He said there was no trust left with Goleman's.

[60] Mr Silcock said he was not happy with the *blasé* approach of Goleman's to health and safety with the asbestos issue and that there had been a previous issue. I did not hear evidence about that matter which involved a different company as I understand. He also said that he could not keep going without any wages.

¹ [1985] 2 NZLR 372 (CA) at 374 - 375

² [1994] 2 NZLR

[61] I find that the reason for Mr Milner and Mr Silcock was primarily health and safety concerns about the asbestos on the Parkside roof and how Goleman had dealt with the matter but the fact they had both been without pay and work for a considerable period was part of the circumstances at that time.

Was there a breach of the duty by Goleman to provide a safe and healthy workplace?

[62] Clause 19.1 and clause 19.4 of the employment agreements require Goleman's take all practicable steps to ensure a healthy and safe workplace for its employees Mr Milner and Mr Silcock. The obligations in clause 19.4 include compliance with the relevant provisions of the Health and Safety in Employment Act 1992.

[63] The Court of Appeal considered what the requirements are on an employer to do what is practicable in the context of the Health and Safety in Employment Act 1992 in *A-G v Gilbert*.³ It was stated in *Gilbert* that the employer is required to do what is practicable to contain known and unacceptable risks and that the Act seeks to prevent harm to employees by promoting health and safety management. The Court of Appeal stated *The reasonableness of the employer's conduct must therefore be measured against knowledge reasonably attained by employers mindful of their responsibilities*.⁴

[64] Goleman knew the risk of harm to their employees' health including Mr Silcock and Mr Milner through exposure to asbestos and inhalation of asbestos fibres. With that knowledge and a duty to take reasonable steps to minimise that risk I have considered whether the steps taken between 25 March 2013 and 11 April 2013 were sufficient to minimise or avoid a risk of exposure to asbestos to Mr Milner and Mr Silcock. Taking Easter into account there was a period of ten working days exposure to asbestos after its possibility was brought to Goleman's attention on 26 March 2013.

[65] Ms Behrnes submits that the possibility of asbestos being present in the roof of the Parkside building was considered low by Golemans because the building was built in 1992. Goleman's were aware Ms Behrnes submitted of MBIE's factsheet on asbestos published at the time in 2013 which states that *asbestos is most likely to be*

³ [2002] 1 ERNZ at 31

⁴ [88]

*found in buildings that were constructed before the mid-1980's and after 1990 it is highly unlikely that it will have materials containing asbestos.*⁵

[66] The MBIE fact sheet on asbestos also states the difficulty in identifying the presence of asbestos by sight and makes it clear that the only way to be certain if asbestos is present is to have a sample analysed. Under managing asbestos risk in buildings the fact sheet provides in the event that the building is suspected to contain asbestos there are a range of things that can be done to safely manage the hazards. The fact sheet provides that if in doubt always arrange for building material to be tested and analysed before work starts.

[67] The Parkside building had been excluded from the 1997 audit carried out by Chemsafety because of its age and it was not on the asbestos register held by the CDHB. There was also advice from Nuralite received on the day the concern of asbestos was raised that the product should not contain asbestos but if it did it would be fully encapsulated. Mr Bright did not believe that what Mr Greet saw was asbestos and more likely cardboard fibre. Nevertheless Mr Greet had seen fibres of some description and that would support that there was at least a possibility that if there was asbestos it was no longer encapsulated.

[68] Goleman's proceeded to have the CDHB test the lichen sample notwithstanding its view the presence of asbestos was low but did not consider the likelihood of risk required it to cease work on the roof top or on the sites close to the roof top. Goleman says that although Mr Silcock and Mr Milner had to walk across the roof to access the seismic joint they did not in doing so disturb the membrane. There was still a hazard if asbestos was not fully encapsulated in that it could become airborne and inhaled or attached to clothing.

[69] I do not find that a failure to pre-test in the circumstances could be said to be unreasonable but after Mr Greet raised concerns a shutdown of the Parkside roof job and those job sites close by until the test results had come back would have been a reasonable and practicable step to minimise risk. Had Goleman taken steps short of that to alert Mr Milner and Mr Silcock to the possibility of asbestos on 26 March 2013 and suggested that in accessing the roof they were to wear protective clothing such as disposable foot coverings and overalls and appropriate face mask with filters until the

⁵ Document 6 in the respondent's bundle

results of testing then it may have been able to say that it had taken reasonable steps to avoid or minimise the known risk of exposure to asbestos to them. It did not.

[70] The advice to staff on 2 April of a possibility of asbestos on the roof without further advice to Mr Silcock and Mr Milner that protective clothing had to be worn when accessing the roof was not a reasonable step to minimise or avoid ongoing risk.

[71] On 3 April 2013 the presence of asbestos in a lichen sample was confirmed and there was a risk of inhalation of asbestos fibres or clothing contamination by those who worked in close proximity to and accessed the Parkside roof. The risk was known to Goleman on that date but the revised methodology was not shown to Mr Silcock or Mr Milner and they were not advised to take any precautionary steps or wear any protective clothing or mask when accessing the roof notwithstanding that methodology provided for education of those accessing the roof.

[72] Mr Milner and Mr Silcock were not formally advised of the presence of asbestos by Goleman until 11 April 2013. Further inquiries were undertaken that day about the extent of the asbestos in the roof. Mr Odgers in his draft internal report about the asbestos made a comment to the effect that the secondary sample taken and the full report initiated on 11 April, more than one week after initial indicators, only occurred *because the crew had approached FPM*. This statement is not found in the finalised report. It would have been a reasonable step in managing the risk to get a further report promptly after 3 April about the extent of the asbestos on the Parkside roof and whether it was still safe to continue work on the roof and allow access on the roof.

[73] Goleman placed some reliance on the Chemsafety representative who inspected the rooftop on 11 April 2013 being comfortable to walk across the roof without protective equipment but his written report dated 12 April 2013 noted that the *roof surface is a high risk of fibre release in its current state* and should not be used as an access way until remediation work is undertaken in the area. Clothing from two staff was tested on 12 April 2013 and no asbestos was found in the clothing however I do not find as Ms Behrnes submits that the risk Mr Milner and Mr Silcock say they were exposed to be overstated. It is clear from that 12 April report that there was a high risk of fibre release to the extent that the roof was not to be used as an access way.

[74] Mr Goleman's reaction at the meeting on 11 April unfortunately caused Mr Milner and Mr Silcock to conclude that Goleman did not put the health and safety of their employees first but rather their commercial interests. There is an implied term of employment agreements that an employer should not without reasonable cause conduct itself in a manner calculated or likely to destroy or damage the relationship of trust and confidence. I can understand why Goleman would be concerned about employees going to Fletchers without firstly approaching Goleman management. Mr Milner and Mr Silcock though were concerned they had no knowledge about the asbestos hazard and the meeting unfortunately did not, I find, provide reassurance about the commitment of Goleman to their health and safety.

[75] I do not find that Goleman's took reasonable steps between 25 March and 11 April 2013 to minimise or avoid the risk of exposure to asbestos to Mr Silcock and Mr Milner. There was a failure by Goleman's to take all practicable steps to ensure Mr Silcock and Mr Milner had a safe and healthy workplace. This was in breach of the duty it owed towards them.

Provision of work after 11 April and treatment thereafter

[76] Mr Milner was not provided with further work after 16 April as he was treated incorrectly as a casual employee. He was from 17 April off work for medical reasons. There was no justification for Goleman to treat Mr Milner differently to other employees after 11 April 2013 as a casual. He was a permanent employee.

[77] Mr Silcock did not undertake any work after 16 April 2013 when he received a written warning although he turned down two hours of window cleaning on or about 22 April 2013. The offering to Mr Silcock of some form of payment did not seem to be denied in the disciplinary meeting notes although it is not accepted by Goleman's this was an inducement to leave.

[78] There is a claim for payment of wages before termination and given the difficulties in resolving some disputes in the evidence I have focussed on the employment agreement. Clause 6.1.1 of Mr Silcock's agreement provides that *the employee will be required to work the hours of work as set out in Schedule 1 to this Agreement*. Schedule 1 provides that the hours of work are *Min 40 hrs per week, Monday to Sunday*. Clause 6.1.5 provides that the employee agrees that the ability of the Employer to provide work will depend on weather conditions, business condition

and other circumstances. Clause 6.1.6 provides that the Employer cannot provide a minimum number of hours of work per week for Employees. There is ambiguity between the application of the hours of work in the schedule and clause 6.1.6.

[79] I find that as there was a requirement for Mr Silcock to work a minimum of 40 hours per week the provision in clause 6.1.6 that the employer cannot provide a minimum number of hours cannot apply. That then leaves the ability of the employer to provide work being dependant on a number of factors. Clause 6.1.6 does require reasonable notice when there is no work available on any specific day be given to an employee in those circumstances.

[80] Although Mr Roche said that he kept employees informed of work availability there was no evidence to satisfy me that in Mr Silcock's case there was reasonable notice in clause 6.1.6. The evidence supports Mr Silcock was advised there was no work for several days in advance. I note that Mr Silcock turned up to work on a day Mr Roche said that he had thought he had told him there was no work available.

[81] The evidence did support that Mr Silcock may have been treated in a different way to other workers because of his perceived negative attitude about the asbestos matter but that was not able to be properly tested because Mr Silcock only attended the investigation meeting by way of telephone. I was also not able to properly test whether Mr Silcock was being pressured to resign which was disputed by Mr Roche. I am satisfied because there is nothing to support otherwise that after 24 April there was no further work offered to Mr Silcock and in breach of the requirements of clause 6.1.6 after 24 April 2013 there was no reasonable notice about unavailability of work and no evidence of any contact between 24 April 2013 until 6 May after the Christchurch Press article.

[82] In conclusion I find that there were serious breaches of duty on the part of Goleman's for the reasons set out above. Goleman's continued to maintain even at the disciplinary meeting on 14 May 2013 that they had notified employees including Mr Silcock and Mr Milner on 2 April 2013 that testing had been carried out and that asbestos was found as a result.⁶ That was clearly incorrect and it is concerning that at that point incorrect information was being communicated.

⁶ Pg 141 of the bundle

[83] Mr Goleman did say in his letter of 16 May to both Mr Silcock and Mr Milner that their health and safety was the primary concern of Goleman but I do not find that was adequate reassurance. There was I find a clear failure to communicate with Mr Milner and Mr Silcock about the presence of asbestos and that was not acknowledged in a way that may have reassured them. There was no acceptance by Goleman's that they could have and should have dealt with the asbestos situation differently and I find that that did contribute to the view of Mr Milner and Mr Silcock that they could not have trust in the company in the future.

[84] Some reliance was placed by Goleman to support their actions on the fact that MBIE withdrew their prosecution that Goleman's had failed to take all practicable steps to ensure the safety of Mr Greet and Mr Stanilov. I have had regard to that but I find there were serious breaches of the employment agreements including the failure to take all practicable steps to provide a safe and healthy workplace for Mr Milner and Mr Silcock. I find that the breaches were serious enough to make their resignations reasonably foreseeable.

[85] Industrial abseiling is an occupation where there needs to be trust and confidence that reasonable steps to minimise or avoid harm will be taken. As Mr Odgers wrote in his draft internal report on the asbestos, staff in the surrounding areas should have been fully informed of the health risk so they could make appropriate decisions. It was clear Mr Milner and Mr Silcock remained concerned about the health and safety issues well after 10 and 11 April 2013. I think it very likely that Mr Silcock's attitude reflected that concern. They were concerned about what was said at the meeting on 11 April. Mr Beck raised the possibility of resignations in the nature of constructive dismissal at the disciplinary meeting.

[86] I do not find that the dismissal was justified under s 103A as it was not what a fair and reasonable employer could have done in all the circumstances.

[87] Mr Silcock and Mr Milner have personal grievances that they were unjustifiably constructively dismissed and are entitled to remedies. There are, I find, some unjustified actions on the part of Goleman about the provision of work to both Mr Milner and Mr Silcock. I shall consider any reimbursement of wages for the period before resignation separately. There will though only be a single compensatory award made that recognises issues about provision of work were part of the unjustified constructive dismissal.

Remedies

Lost wages

Before 20 May 2013

[88] There is a claim under this head for lost wages from after the site closed on 10 April 2013 until resignation 20 May 2013 for both Mr Milner and Mr Silcock.

Mr Milner

[89] I could not be satisfied that Mr Milner suffered any loss because he was unwell from 17 April and he did undertake some work after 10 April 2013. I make no award.

Mr Silcock

[90] Mr Silcock I find is entitled to be reimbursed wages from 24 April to 20 May 2013 for reason set out above. I have decided on this period to make some allowance for the offer and decline of some jobs. It seems to me clear though that after 24 April 2013 this time there was no contact made with Mr Silcock about work in breach of his employment agreement. Mr Beck and Ms Behrnes should attempt to resolve the matter failing which they can return to the Authority.

After 20 May 2013

Mr Milner

[91] Ms Behrnes submits that there was no evidence of any attempt to mitigate loss. Mr Milner said that he looked for work but felt hampered by the restraint of trade clause. He said that after a month he worked in a different industry.

[92] I find Mr Milner did obtain work reasonably quickly which does support mitigation of the loss and he is entitled subject to any finding of contribution to reimbursement of one month's lost wages.

Mr Silcock

[93] Mr Silcock produced very limited information about his search of jobs in support of his claim for three months lost wages. The evidence does support he left

New Zealand and travelled to Australia where he found work on 5 August 2013. He said that he felt constrained by the restraint of trade clause in his employment agreement but I accept that was not raised with the respondent for any waiving of that and Mr Silcock could have worked outside of Canterbury.

[94] Subject to any issue as to contribution I am going to limit any reimbursement of lost wages in the circumstances to two months for Mr Silcock as there is insufficient evidence of mitigation.

Compensation

[95] Both Mr Milner and Mr Silcock are somewhat disadvantaged under this head because I only heard from them by telephone. If I had heard from them in person and observed their demeanour when they gave evidence then the award under this head may have been different. I could not do that. The respective claims are \$15,000. I accept the exposure without their knowledge to asbestos caused them considerable stress and concern. They clearly suffered injury to their feelings as a result of the failure by Goleman to communicate its knowledge of the presence of asbestos to them and allow them to make decisions themselves about how to keep safe. They were, I have found, treated unjustifiably in terms of their employment agreements when work was not provided. The matter though which caused them the most humiliation and loss of dignity was the breach of the duty by Goleman to take all practicable steps to provide a safe and healthy workplace. Both spoke of suffering depression and they left New Zealand to find work.

[96] Subject to any issue about contribution I find that the sum of \$9000 is an appropriate award for both Mr Milner and Mr Silcock.

Contribution

[97] The Authority is required under s 124 in deciding the nature and the extent of the remedies to be provided to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance and if required reduce the remedies that would otherwise have been awarded.

[98] Mr Beck correctly submits that the conduct must be both causative and blameworthy. Ms Behrnes submits that Mr Milner and Mr Silcock instead of discussing their concerns with Goleman's about health and safety in breach of their

employment agreements went to The Press on 6 May 2013. Goleman was unable to address the concern that the applicants had and a contribution of 100% should apply.

[99] I have found that Mr Silcock and Mr Milner were unjustifiably constructively dismissed. I do not find that conduct of going to The Press, although I accept in breach of their employment agreements, was causative of the outcome because the breaches that gave rise to the personal grievance occurred prior to that time. If for example Mr Silcock and Mr Milner had been dismissed for going to the Press then an issue of contribution may have arisen if a grievance was found to have arisen but that was not the situation that gave rise to the personal grievance. It was the handling of the asbestos issue. There was an opportunity to discuss the handling of the asbestos issue at the meeting on 14 May 2013 and particularly the lack of communication about the positive test result for asbestos and failure to communicate that. Goleman did not accept that there was a failure to communicate those results. They did not accept that their handling of the matter was inadequate.

[100] I do not find that the remedies should be reduced for reason of contribution.

Penalty for a breach of good faith

[101] Ms Behrnes submits that a penalty should not be awarded for a breach of good faith under s 4A of the Act. She submits that there has been no evidence produced to show any breach, denied by Goleman's, was deliberate, serious or sustained or undermining of the employment relationship.

[102] Both counsel refer to the requirement for egregious bad faith before a penalty is to be awarded – *Waikato District Health Board v New Zealand Public Services Assoc Inc.*⁷

[103] Mr Beck submits that the various actions and omissions were deliberate and that the inadequate response to the asbestos was driven by a need to protect the reputation of Goleman's and was serious and sustained by the failure to provide work and attempt to procure Mr Silcock's resignation. He says that Goleman's were not communicative or responsive.

[104] I have focussed my assessment as to whether there should be a penalty awarded on the breaches I have found where there was a failure to be communicative

⁷ [2008] ERNZ 80

and responsive about the asbestos hazard. Clearly the breach was serious and it was sustained from the time of the positive test results on 3 April 2013 to the first formal advice on 11 April 2013. The matter I pause on is whether it was deliberate. If it was then it would be the sort of egregious bad faith for which a penalty should be awarded.

[105] To answer that last question I have had regard to Mr Odgers draft internal report under the heading *concern surrounding information flow from management to crew about the presence of asbestos*. Mr Odgers notes that the knowledge of the confirmed presence of asbestos fibres in the roofing surface was not and should have been relayed to all staff working in the presence of Nuralite roofing. He wrote that Mr Roche confirmed this had not happened and it was a fault of management. Mr Odgers wrote in his report that he did not believe this was intentional and that Mr Roche has expressed genuine concern and accepted fault. Mr Odgers put the matter down to workload.

[106] Those statements were not contained in the final internal report and there was no evidence from Goleman to suggest that there was any acceptance of fault except to the extent that with the benefit of hindsight the job should have been shut down until testing results were available. Nevertheless those statements do lead me to conclude that the breaches on the part of Goleman's which were serious, sustained and unacceptable may not have been deliberate. I could not be satisfied that there was an intention to undermine the employment relationship. I do not award a penalty.

Orders made

[107] I order reimbursement of wages for Mr Silcock from 24 April to 20 May 2013 when he resigned.

[108] There is insufficient information for me to calculate the wages lost for that period and I will leave that in the first instance to Mr Beck and Ms Behrnes and failing agreement they can return to the Authority.

[109] There is insufficient information to conclude that there was no work provided by Goleman to Mr Milner between 10 April and 17 April after which point he was not able to work for medical reasons. I make no award therefore.

[110] I order reimbursement of lost wages for Mr Milner for one month and for Mr Silcock for two months after 20 May 2013 under s 123 (1)(b) of the Act. Mr Beck and Ms Behrnes can return to the Authority if there are difficulties with a calculation of the amount owing.

[111] I order payment of compensation to Mr Milner and Mr Silcock in the sum of \$9000 each without deduction under s 123 (1)(c)(i) of the Act.

Costs

[112] I reserve the issue of costs. Mr Beck has until 2 October 2015 to lodge and serve submission as to costs and Ms Behrnes has until 16 October 2015 to lodge and serve submission in response.

Helen Doyle
Member of the Employment Relations Authority