

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Debbie and Gordon Pullan (Applicant)
AND Villages of New Zealand (Pakuranga) Limited (Respondent)
REPRESENTATIVES Rowland Ingram, for Applicant
Alan Stuart, for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 19 January 2005
SUBMISSIONS RECEIVED 14 February 2005
DATE OF DETERMINATION 22 February 2005

DETERMINATION OF THE AUTHORITY

Preliminary matter

- [1] When this matter was lodged with the Employment Relations Authority the respondent was described as “Pakuranga Park Village”. At the investigation meeting it was confirmed that the employer was “Villages of New Zealand (Pakuranga) Limited”. With the agreement of Mr Ingram on behalf of the applicants, and Mr Stuart on behalf of the respondent, I have amended the intituling accordingly.

Employment relationship problem

- [2] In a statement of problem filed in the Authority on 19 July 2004 Mr and Mrs Pullan claim they were both unjustifiably dismissed from their employment at Villages of New Zealand (Pakuranga) Limited (VONZ).
- [3] Mr and Mrs Pullan claim remedies for lost wages, compensation for hurt and humiliation and costs.
- [4] In its statement in reply filed in the Authority on 16 August 2004 VONZ agrees that Mrs Pullan was dismissed from her position on 24 May 2004, and claims the dismissal was justified. VONZ does not accept that Mr Pullan was dismissed but says he was sent home on 22 May 2004 and has not returned to work thereby abandoning his employment.

Background

- [5] Pakuranga Park Village is a Rest home facility operated by VONZ. Ms Helen Murphy is the Manager of the facility and her father, Mr Erin Murphy, is a Director of VONZ.
- [6] Both applicants were employed by VONZ in a job share position as Chef. Ms Pullen worked Sunday to Thursday of each week commencing at 9.00am and finishing at 6.00pm. Ms Pullen was paid a salary of \$36,000 per annum.
- [7] Mr Pullan worked on Friday's and Saturday's from 9.00am to 6.00pm and was paid an hourly rate of \$16.00 per hour.
- [8] Both applicants were subject to signed written employment agreements.

Mrs Pullan

- [9] Mrs Pullan was employed in the full time chef position in November 2001.
- [10] Between November 2001 and July 2003 the employment relationship between Mrs Pullan and Ms Murphy proceeded without any difficulties.
- [11] Ms Murphy told the Authority that in July/August 2003 she had cause to meet with Mr and Mrs Pullan to discuss with them complaints received from staff about staff relations. Ms Murphy told the Authority that Mrs Pullan was advised at this meeting that "*...if you don't pull your socks up and do better you will be on your way.*"
- [12] On 28 September 2003 Mrs Pullan proceeded on a period of Annual Leave. Mrs Pullan was to return to work on 7 October 2003.
- [13] During Mrs Pullan's absence, VONZ employed an agency chef to cover the duties normally carried out by Mrs Pullan. The temporary chef discovered the freezer had been left open and its contents had defrosted. As a result of assisting in remedying this problem, Ms Murphy became aware that the kitchen had been left in what she described as a "*...filthy and chaotic state...*".
- [14] While still absent and on 3 October 2003, Mrs Pullan was issued with a final written warning relating to the state of the Pantry, Freezer and Food Store. Ms Murphy wrote the warning letter without discussing the matter with Mrs Pullan and without seeking Mrs Pullan's explanation.
- [15] Ms Murphy says she spoke to Mrs Pullan regarding the contents of the letter after she returned to work. Ms Murphy also told me that Mrs Pullan disagreed with aspects of the matters set out in the letter.
- [16] On 14 January 2004 Mrs Pullan was issued with a written warning for drinking on the premises and on 1 March 2004 Mrs Pullan was issued with a further final written warning for drinking on the premises on 17 February 2004. Both warning letters were written without any prior discussion with Mrs Pullan.

- [17] On Saturday 22 May 2004 Mr Pullan was working in the kitchen when Ms Murphy became aware that Mr Pullan was not working to his usual standard and was sent home (as discussed later in this determination). Ms Murphy then took over the duties usually undertaken by Mr Pullan. Ms Murphy says she found the kitchen to be in a filthy and chaotic state.
- [18] On Sunday 23 May 2004 Mrs Pullan arrived at work at 9.15am. Mrs Pullan says that at 9.40pm she was approached by Mr Murphy who proceeded to inform her she was fired. Mrs Pullan says Mr Murphy told her she was dismissed because she sent her “...*husband to work half pissed*”. Mrs Pullan says that when she tried to provide an explanation to Mr Murphy he told her he “...*did not want to bloody hear.*” Mrs Pullan told the Authority that soon afterwards Ms Murphy arrived and went on about the kitchen mess the day before and broken eggs all over the floor.
- [19] Ms Murphy says she arrived at work before Mrs Pullan on Sunday 23 May 2004. Ms Murphy states that when Mrs Pullan arrived at work Ms Murphy and her father both discussed the state of the kitchen with Mrs Pullan. Ms Murphy told the Authority that she reminded Mrs Pullan about the final written warning she had received on 3 October 2003.
- [20] Ms Murphy says Mrs Pullan appeared to accept that she would lose her job and she asked for a reference.
- [21] After Mrs Pullan had left the premises, Ms Murphy went through the kitchen and constructed a list of all the food items and the state of the kitchen.
- [22] There is no dispute that Mrs Pullan was dismissed on 23 May 2004 without notice.

Mr Pullan

- [23] Mr Pullan commenced employment with VONZ on 23 October 2001. During his employment Mr Pullan was not subject to any form of disciplinary action.
- [24] On Saturday 22 May 2004 Mr Pullan says he was at work after lunch, when he was approached by Ms Murphy. Mr Pullan says Ms Murphy told him the residents had complained that his performance was not up to scratch. He says he was then summarily dismissed. Ms Murphy arranged for a taxi to take Mr Pullan home.
- [25] Ms Murphy told the Authority that Mr Pullan arrived at work in a drunken state and that as he was not able to carry out his duties she sent him home in a taxi.
- [26] It is common ground that Mr Pullan arrived at work late on Saturday morning. Ms Irene Singh who works as a Kitchen Assistant on Friday's and Saturdays and works with Mr Pullan in the kitchen arrived at work on Saturday at about 9.30am. Mr Pullan was not yet there. Ms Singh told the Authority that when Mr Pullan had not arrived at 10.15am she approached the office person to arrange a temp for the day. It was at about this time Ms Singh says Mr Pullan arrived at work. In answer to questions during the investigation meeting Mr Pullan acknowledged that he arrived at work sometime between 10.00am and 10.30am.
- [27] Ms Singh told the Authority that when Mr Pullan got into the kitchen he was smelly. Ms Singh says Mr Pullan told her he was “...*pissed...*” and had been partying all night.

- [28] Ms Singh told the authority that Mr Pullan tried to make some sandwiches for the residents' lunch and that the sandwiches were not up to his usual standard. By way of example Ms Singh told me that he used one piece of bread instead of two, and tried to just fold the bread over the fillings – and this did not work.
- [29] Ms Mary Morgan, the receptionist at VONZ told the Authority that when she first came across Mr Pullan on Saturday 22 May 2004 he was “...*slumped in a chair in the kitchen with glazed eyes and smelling strongly of alcohol.*”
- [30] Ms Morgan told me that she had received complaints about the lunch from residents and that when she went into the kitchen to investigate the complaints she found the kitchen in a mess. Ms Morgan says “*there were broken eggs right through the kitchen and on the pantry floor, broken sandwiches with no fillings and complete disarray.*”
- [31] Ms Singh confirmed Ms Morgan's evidence about the state of the kitchen.
- [32] Mr Pullan acknowledged at the investigation meeting that the sandwiches were not as good as usual.
- [33] Three witnesses for the respondent told me Mr Pullan went to sleep while he was at work on 22 May 2004. Mr Pullan says he was resting his head.
- [34] Due to the state in which Mr Pullan presented himself at work, and as Ms Morgan had been unable to locate Mrs Pullan to pick him up, Ms Murphy arranged a taxi to take Mr Pullan home.
- [35] At the investigation meeting Mr Pullan disclosed to the Authority that he had previously suffered from alcoholism but that it wasn't serious and he still drank alcohol.
- [36] Mr Pullan suffers from epilepsy and asthma. At the investigation meeting Mr Pullan told me that when he arrived at work he was feeling breathless. He used his ventalin inhaler and took too much ventalin. Mr Pullan told me that when taking high doses of ventalin, among other symptoms, the medication “...*can also give off an odour similar to alcohol or acetone.*” Mr Pullan also told me “*I have a bad asthmatic condition and epilepsy and when an attack occurs it resembles the affects of drunkenness.*”
- [37] I have difficulty accepting Mr Pullan's evidence. Dr J. Kam is Mr Pullan's doctor. The Authority arranged for Dr Kam to be interviewed in relation to the medication and its likely effects.
- [38] Dr Kam confirmed that a person taking a high dose of ventalin could suffer some effects but that a strong smell of alcohol is not normally a side effect and neither is sleepiness. Dr Kam advises that taking a high dose of ventalin would usually have the opposite effect. Taking a high dose of ventalin usually causes sleeplessness.
- [39] I am satisfied, having heard from all the witnesses, that on the balance of probabilities Mr Pullan arrived at work on Saturday 22 May 2004 suffering the after effects of a night spent drinking alcohol and for this reason was unable to carry out his days duties.
- [40] It was common ground at the investigation meeting that on Monday 24 May 2004 Ms Murphy made up Mr Pullan's final pay.

Discussion and determination

[41] In coming to my conclusions in this matter I have taken into consideration the evidence of the parties, their appearances at the investigation meeting and the submissions made on their behalf.

[42] The issues for determination are:

- Was the summary dismissal of Mrs Pullan justified in all the circumstances; and
- Was Mr Pullan dismissed or did he abandon his employment?

Was the summary dismissal of Mrs Pullan justified in all the circumstances?

[43] The legal principles to be applied to claims of unjustified dismissal have been clearly set out in a number of court decisions. When an employer takes disciplinary action against an employee it must ensure that what it does is just and fair in all the circumstances. The main focus of the Authority is not whether there was misconduct but is whether the employer had reasonable grounds for believing that there was misconduct.

[44] Of importance to a consideration of any personal grievance claim are the minimum requirements for a fair procedure to be followed by an employer in cases of dismissal (see *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35.

[45] Mrs Pullan's individual agreement set out for the parties, the process to be followed in the event that misconduct or serious misconduct occurs.

[46] VONZ was obliged to adhere to the following procedure:

- b. *Before considering any form of disciplinary action the employer will carry out an investigation into the alleged misconduct.*
 - c. *Prior to any formal disciplinary meeting, the employee will be advised of the specific allegation and of the likely consequences should the allegation be found to be true. The employee will also be advised that they are entitled to have a support person the formal disciplinary meeting. During the meeting the employee will be given an opportunity to explain or deny the allegation. The employee's explanation and any mitigating circumstances will be considered before the employer decides of the appropriate course of action.*
 - d. *If the employer decides to issue a warning, this will be formally and clearly issued and confirmed in writing. The employee will be advised of any corrective action that is required and the consequence of continued or further instances of misconduct or substandard job performance.*
 - e. *There are 4 steps in the formal disciplinary procedure that will generally be followed:*
 - i. *Verbal warning*
 - ii. *Written warning*
 - iii. *Final written warning*
 - iv. *Dismissal*
 - f. *If the employee is dismissed the employee is entitled to such notice as the employer may decide.*
- Note: Warnings are not limited to repetitions of the same or a similar offence but may be applied to offences of a different nature.*
- Note: All warnings will remain effective for a period of twelve months although they may remain on your employment file for the duration of your employment.*
- Note: A disciplinary meeting need not precede a verbal, written or final warning. Should a disciplinary meeting not proceed a verbal, written or final warning the employee may request to meet with the employer to discuss the warning.*

[47] Mrs Pullan was dismissed for performance related problems. It is well known that if an employer wishes to dismiss an employee for performance related problems an employee is entitled to know what aspects of her performance are not up to standard and to be provided with an opportunity to bring her performance up to the required standard.

- [48] The Authority is satisfied the respondent had concerns about Mrs Pullan's performance in relation to the standard of the kitchen. However, VONZ has failed to follow its own procedures when it issued the warnings and when dismissing Mrs Pullan. This omission is not a minor matter. The process has been specified by the respondent and agreed with the applicant to ensure a fair result would be reached before the issuing of warnings and/or dismissal. The failure to follow its own rules is difficult to reconcile with normal standards of fairness and reasonableness. The Authority expects, as matters of equity and good conscience, adherence by an employer to those rules it had set and agreed with its employees.

I find that in this case, the summary dismissal of Mrs Pullan was unjustified.

Was Mr Pullan dismissed or did he abandon his employment

- [49] Mr Pullan's employment agreement provided for abandonment in the following way:

Where the employee is absent from work for more than two consecutive working days without notification to the employer the employee will be deemed to have terminated their employment without notice provided that:

- a. The employer will make reasonable efforts to contact the employee prior to invoking this clause, and*
- b. The employer has sent a registered letter to the employee at the employee's last known address notifying the employee that they are deemed to have abandoned their employment.*

- [50] The individual employment agreement also sets out offences which VONZ regarded as serious misconduct and which may result in summary dismissal. Included in the list is:

Showing the effects of drug or alcohol consumption, or reporting for work in such a condition that in the opinion of the employer, the employee is unable to perform his/her duties properly and safely. Other drug or alcohol related offences such as the taking of drugs or consuming alcohol at work shall also fall into this category.

- [51] Ms Murphy says that as she had not received any communication from Mr Pullan by the Monday she assumed Mr Pullan had decided not to come back to work and so she arranged for Mr Pullan's final pay to be made up. This is misconceived. It could not be said that by Monday Mr Pullan had abandoned his employment. He was not due to work again until Friday 28 May 2004.

- [52] Not only had Mr Pullan not abandoned his employment by the Monday, the employment agreement between the parties clearly provides for two steps to be taken by VONZ before exercising its rights under the agreement to deem Mr Pullan's employment to be terminated. At not stage did VONZ attempt to contact Mr Pullan and neither did they send a registered letter to Mr Pullan notifying him that he was considered to have abandoned his employment. VONZ have failed, once again, to adhere to its own rules set by agreement with Mr Pullan.

- [53] By making up his final pay on the Monday the respondent has taken the step of terminating Mr Pullan's employment without notice and without due process.

I find that Mr Pullan was dismissed on 24 May 2004 and that dismissal is unjustified.

Remedies

[54] Both Mrs and Mr Pullan are entitled to remedies for their unjustified dismissals.

Lost wages

[55] Mrs Pullan was out of work for a period of four weeks with lost remuneration of \$2,769.23 (gross).

[56] Mr Pullan was out of work for a period of about six months. Following his dismissal Mr Pullan suffered from pneumonia and was hospitalised for 4 days. Also, he is reliant on his wife being able to drop him off and pick him up from any employment. This was a limiting factor in his ability to obtain alternative employment.

[57] In relation to Mr Pullan, section 128 of the Employment Relations Act provides that an applicant who has established they have a personal grievance and has lost wages as a consequence of that personal grievance should be reimbursed up to three months ordinary time remuneration unless the Authority is minded to exercise its discretion and award more. I am not minded to exercise my discretion and award more than the statutory three months reimbursement of lost wages for Mr Pullan. I appreciate that Mr Pullan made efforts to find alternative employment, however, the reasons for his being unsuccessful is due to his particular circumstances. These are not circumstances which I am satisfied are the direct consequence of the actions of VONZ.

Villages of New Zealand (Pakuranga) Limited is ordered to pay Mrs Pullan \$2,769.23 gross pursuant to section 123(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Villages of New Zealand (Pakuranga) Limited is ordered to pay Mr Pullan \$3,536.00 gross being lost wages of \$272.00 per week for 13 weeks pursuant to section 123(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Compensation

[58] There was no evidence of humiliation and loss of dignity advanced to the Authority by either applicant that would support a claim of \$15,000 each. The Authority can not assume that because a dismissal has occurred that humiliation and distress has necessarily occurred.

[59] I do however, appreciate that the impact of dismissal on both applicants was exacerbated by the fact that both income earners in the household suddenly found themselves without employment.

[60] Mrs Pullan is entitled to an award to compensate her for the hurt and humiliation suffered as a consequence of her dismissal. **Villages of New Zealand (Pakuranga) Limited is ordered to pay Mrs Pullan \$2,000 pursuant to section 123(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**

- [61] Mr Pullan is entitled to an award to compensate him for the hurt and humiliation suffered as a consequence of his dismissal. **Villages of New Zealand (Pakuranga) Limited is ordered to pay Mr Pullan \$2,000 pursuant to section 123(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**

Summary of orders

- [62] Villages of New Zealand (Pakuranga) Limited is ordered to pay Mrs Pullan \$2,769.23 gross pursuant to section 123(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.
- [63] Villages of New Zealand (Pakuranga) Limited is ordered to pay Mr Pullan \$3,536.00 gross being lost wages of \$272.00 per week for 13 weeks pursuant to section 123(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.
- [64] Villages of New Zealand (Pakuranga) Limited is ordered to pay Mrs Pullan \$2,000 pursuant to section 123(c)(i) of the Act within 28 days of the date of this determination.
- [65] Villages of New Zealand (Pakuranga) Limited is ordered to pay Mr Pullan \$2,000 pursuant to section 123(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

- [66] Costs are reserved.

Vicki Campbell
Member of Employment Relations Authority