

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Kevin Gorman (applicant)

**AND** General Distributors Limited t/a Countdown  
Johnsonville (respondent)

**REPRESENTATIVES** Ben Thompson and Hazel Armstrong for the  
applicant  
Stephen Langton for the respondent

**MEMBER OF THE AUTHORITY** Denis Asher

**INVESTIGATION** Wellington, 19 December 2006

**DATE OF DETERMINATION** 3 January 2007

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. In a statement of problem received on 9 August 2006 Mr Gorman says he was unjustifiably dismissed. He seeks compensation of \$10,000 for humiliation, etc, lost wages and legal costs.
2. In its statement in reply received on 28 August the Company says Mr Gorman was justifiably dismissed for misconduct that occurred whilst he was subject to a final written warning, and that his dismissal was effected in a procedurally fair manner.
3. The parties have undertaken mediation.

4. Following a telephone conference call on 8 September the parties agreed to an investigation in Wellington on Thursday 19 December, commencing at 10.00 a.m.
5. They usefully provided witness statements in advance of the investigation. At the investigation the parties agreed on a common bundle of documentary evidence and Mr Gorman identified his lost wages claim as \$6,624.
6. Efforts by the parties to settle this matter during the investigation were not successful.

## **Background**

7. Mr Gorman was employed by the Company as a nightfill assistant on 27 July 2004. In December of that year he was promoted to the position of chilled foods manager. He was dismissed with pay in lieu of notice from that position on 20 February 2006.
8. At the time of his dismissal Mr Gorman's terms and conditions of employment were set out in the Combined Supermarkets Collective Employment Agreement (CSCEA).
9. The CSCEA contains sick leave provisions. Amongst other things those provisions state:

*An employee shall ensure notice is given to their manager soon as is practical on the first day of absence.*

(clause 4.1)

10. The CSCEA also contains "Work Rules". They include the following:

*Employees not able to attend work for any reason must advise their direct manager (or, in their absence, the duty manager acting that day) before the scheduled start time on each day of absence.*

...

**A SERIOUS BREACH OF THESE RULES MAY RESULT IN DISMISSAL WITHOUT NOTICE**

(appendix III)

11. The CSCEA also provides for a “*Disciplinary Procedure*”. That procedure includes the following:

1. *In cases of serious misconduct, disobedience or serious neglect of duty an employee will be liable to dismissal without notice.*

...

2. *Less serious misconduct or unsatisfactory work performance will be subject to the following warning procedure:*

**First Occasion**

*A verbal first warning will be given ... .*

**Any Second Occasion**

*A written warning will be given ... .*

**Any Third Occasion**

*A final written warning referring to any previous warning(s) ... will be given. The final warning will make a clear statement that any further misconduct or unsatisfactory work performance may result in termination with notice ... or a demotion ... .*

**Any Fourth Occasion**

*This will result in termination or demotion.*

...

*If an employee has already received a warning, any subsequent disciplinary action may relate to dissimilar types of misconduct.*

...

(appendix I)

12. On 4 August 2005 Mr Gorman was issued with a verbal warning for poor work performance. He did not dispute that warning by way of raising a personal grievance.

13. On 11 November Mr Gorman was issued with a final written warning for falsification of company documents. That warning contained, amongst other things, the advice that “... any further breach of the rules and procedures may result in termination as per (the applicant’s) employment agreement”. The applicant did not dispute this second, and final, warning by

way of raising a grievance; he did, however, rip it up at the time it was given to him and leave the workplace despite the warning given at that time that he might be seen as abandoning his employment. As it happened, the employer did not respond to Mr Gorman's actions.

14. At a meeting on 14 November a "*serious complaint*" (page 3, of the minutes of that meeting, document 66 in the agreed bundle) was put to Mr Gorman concerning inappropriate conduct. The Company also raised other concerns which are set out in its letter dated 15 November (document 66). They included: his use of foul language, slamming of doors, being consistently late without notice and walking off the job during contracted shifts. I note here that the "*serious complaint*" is not expressly referred to in that letter, whereas another matter that was not recorded in the minutes of the 14 November meeting is raised, being problems with Mr Gorman's department having significant issues with large amounts of dated stock on sale. His improved effort was sought; no warning was issued. Mr Gorman did not raise a grievance in respect of the matters put to him.
15. At a meeting on 18 January 2006 Mr Gorman's manager put various concerns to the applicant, including the perception that he was attending work either intoxicated or obviously hung-over (document 36 in the agreed bundle). Counselling was offered but declined. No warning resulted. The applicant did not raise a grievance in respect of his employer's concerns.
16. A further meeting followed on 7 February when the Company, again, put to the applicant its concern about his walking off the job. Mr Gorman attributed his behaviour to work-induced stress. Counselling was again offered to the applicant. No warning resulted; the applicant did not dispute his employer's concerns.
17. The applicant was rostered to work a five day period starting Sunday, 12 February 2006. On that day Mr Gorman telephoned the Company to advise he would not be attending work because of illness.
18. Mr Gorman says he was even more ill on the following day, Monday 13 February: he concedes he did not notify his employer of his absence from work because of sickness.
19. On Tuesday 14 February Mr Gorman telephoned his employer to advise he was still unable to attend work because of illness.

20. Mr Gorman attended work the following day, Wednesday 15 February. During that day he was called into a disciplinary meeting. The applicant was represented, at that and subsequent meetings, by an experienced union organiser. The final meeting resulted in Mr Gorman's dismissal, effective 20 February. The grounds of Mr Gorman's dismissal are set out below (par 22).
21. Mr Gorman says he then took on casual employment (telemarketing) before finding full time, permanent employment on 15 June 2006.

## Discussion and Findings

22. The Company's letter of 20 February set outs the basis for the termination of the applicant's employment. It reads in part as follows:

*Dear Kevin*

**NOTICE OF TERMINATION OF EMPLOYMENT**

*On previous occasions you have received formal warnings as follows:*

1. *Verbal warning on 4<sup>th</sup> August 2005 for poor work performance.*
2. *Final written warning on 11<sup>th</sup> November 2005 for falsification of company document (time sheets).*

*This is to advise that your recent action on Monday 13<sup>th</sup> February, where you failed to notify management or any one for that matter of your absence, constitutes a further breach of the Company work rules under Appendix III, 1. – Attendance in the CSCEA by which you are covered. It was explained to you that if the misconduct was proved correct the consequences may be serious due to previously receiving a final written warning. This is also detailed in your employment Agreement.*

*We have held meetings regarding this recent incident. ...*

*These meetings were held to investigate an incident that occurred on Monday 13<sup>th</sup> February 2006 where it was alleged that you failed to notify management of your absence. Such an act is considered a breach of Company rules.*

*The Company has completed its investigation into this matter and having considered your explanation a decision can be confirmed. It is concluded you are guilty of misconduct and accordingly the Company advises the termination of your employment with notice effective from today.*

...

*Yours sincerely*

23. The Company says the applicant was justifiably dismissed. It relies on the disciplinary procedures set out in appendix I of the collective agreement, in particular on the final written warning for serious misconduct dated 11 November 2005 and his misconduct on 13 February 2006 when the applicant failed to call in and advise he would not be at work. He was then dismissed in accordance with the disciplinary procedures.
24. The respondent says, when examined in light of *Hudson v Air New Zealand Limited*, unreported, AC30/06, 30 May 2006 Shaw J, that Mr Gorman's dismissal was substantively justified.
25. It says there were no procedural shortcomings as its action met the requirements set out in *NZ (with exception) Food Processing etc IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35. That is, Mr Gorman was notified in advance of the specific allegation and the potential disciplinary sanction, afforded a real opportunity to explain, the explanation was considered in an unbiased manner and a decision arrived at which took account of the explanation as to an appropriate disciplinary sanction.
26. Mr Gorman says he was disadvantaged procedurally, by being called into the first disciplinary meeting on 15 February 2006 without prior knowledge as to its purpose and when he was still ill. I do not accept that claim. I reach this conclusion because, at the time of the first meeting, Mr Gorman enjoyed the support of an experienced union organiser: hence, he was well thereby well placed to seek to have the meeting adjourned either because he was too ill and/or so as to give him fair and reasonable opportunity to hear the Company's concerns, and to consider them before responding, if he had deemed it necessary to do so. The two subsequent meetings also provided ample opportunity for the applicant, unaffected by illness, to clarify his employer's concerns, and to respond to them.
27. It hardly need be recorded that the justifiability of the applicant's dismissal is to be determined in accordance with s.103A of the Act. A summary of the changes wrought by this amendment is set out at par 73 of *Angel & Hutton v Fonterra Co-operative Group*, unreported, CC13/06, 13 December 2006, Shaw J:
  1. *Justification for dismissal must be determined on an objective basis from the point of view of a neutral observer. It is not enough that an employer makes a decision which falls within an acceptable range of responses.*

2. *The standard against which the actions of an employer are objectively judged is that of a fair and reasonable employer.*
  3. *The Court may reach a different conclusion from the employer provided it is the result of an objective inquiry rather than a substitution of the Court's decision.*
  4. *The inquiry into justification must focus on all the circumstances which were relevant at the time of the inquiry and the dismissal.*
28. The Court went on to observe, at par 74, that: *"The effect of the change to the test is that the subjective views of an employer as to what constitutes serious misconduct and whether dismissal is the appropriate outcome are no longer virtually unassailable. Since s103A the Court has an obligation to evaluate the employer's subjective views against an objective standard."*
29. To put the issue in the words I used during the investigation, the Company's position – stripped to its fundamentals – is that Mr Gorman's failure to telephone in on 13 February and advise he would not be attending work that day because of illness, was the final straw that, from its perspective, justifiably broke the camel's back (so to speak). It says that, having excused the applicant's shortcomings on a number of occasions since the final written warning of 11 November 2005, it was fairly and reasonably able to say that enough was enough. I do not accept the respondent's position for the following reasons.
30. Mr Gorman has been on a final written warning since 11 November 2005. Since that date there were a number of performance or misconduct issues raised by the Company with the applicant. Objectively measured a number of these issues were clearly more serious than the performance shortcoming that culminated in Mr Gorman's termination. The first issue resulted in a letter of 15 November, only 4 days after the final warning. It was preceded by a meeting the day before in respect of *"a serious complaint"* (above). The 15 November letter set out various issues including Mr Gorman *"being consistently late without notice and walking off the job"* (document 66 in the agreed bundle). However, other than an admonishing, no action was taken. The meeting on 18 January raised the potentially serious issue of Mr Gorman attending work either intoxicated and/or extremely hung over. Again, no disciplinary action was taken by the Company. Another meeting followed on 7 February. The employer again raised, amongst other matters, its concern about the applicant walking off the job. No action was taken by the Company. While seemingly significant 'straws', the camel's back absorbed their shock. What was therefore exceptional about the applicant's failure to ring in on the second day of his three-day absence because of illness?

31. There is no evidence of Mr Gorman being previously warned for the misconduct of breaching the work rules requirement that he advise his manager of his absence from work before the scheduled start time on each day of absence. Mr Gorman's failure on 13 February 2006 was therefore unprecedented. The Company does not challenge Mr Gorman's claim that it has suffered no losses as a result of his failure to advise on that day. Furthermore, Mr Gorman clearly advised the Company of his absence on the preceding and subsequent days. And, prior to his termination, Mr Gorman provided the Company with a medical certificate for the period in question, including 13 February. There was therefore, properly, no issue by the Company as to the genuineness of the applicant's illness. However, in contrast to the basis for his final warning (falsification of Company documentation), his subsequent apparent repeated misconduct (walking off the job), a serious complaint and a significant performance issue (alcohol/stress), Mr Gorman's dismissal was effected as a consequence of failing to call in sick, on the second of three days when he otherwise complied with the Company's rules, i.e. a modest, if not minor, misconduct matter. Put another way, the trigger for his dismissal – I conclude – was disproportionate to matters previously tolerated by the Company.
32. I note here the conflict between the provisions in the collective agreement at clause 4.1 (that an employee shall ensure notice is given on the first day of absence) and the requirement in the work rules at appendix III that advice must be given on each day of absence. As it happens, and at the time of his disciplinary interviews, Mr Gorman said he had no knowledge of the collective agreement's provisions, as he had never been provided with a copy. The applicant cannot be said therefore to have knowingly breached the terms and conditions of his employment. Ignorance is not a defence, however: see *Chief Executive of the Department of Inland Revenue v Buchanan and Symes* [2005] 1 ERNZ 767. Any way, as he was ignorant of both provisions, Mr Gorman cannot rely on the credible argument that the provisions are significantly different and thereby confusing.
33. The Company says it had regard to Mr Gorman's advice of his absence, telephoned through as it was on 12 and 14 February, to his medical certificate and to his explanation he did not know he had to ring every time he was ill. No doubt that is correct, but I am satisfied – objectively – that it clearly failed to have proper regard to those factors. That is because, whereas Mr Gorman's earlier assurances that he would pick up his game had been accepted by the Company, it did not accept a similar assurance given at the meeting on 16 February that he wanted to return to work and "give 150 per cent" (par 16 of Roger Croskery's statement). The Company's explanation is that it was reasonable at some point to say, enough was enough (my words), and to decline to accept such assurances as otherwise it was open to an endless process. I accept that an employer must be able

to say enough is enough. But I am also satisfied that a fair and reasonable employer would have objective grounds to do so. Such grounds might include the situation where, having been given a chance on an earlier occasion, the employer is faced with a repeat of the same problem and a similar promise it would not happen again. As this was an unprecedented the respondent is unable – in this instance – to justify its refusal. It is also the case that the Company (as admitted during the investigation) failed to put to Mr Gorman that it was no longer prepared to accept his assurances of improved performance. He was thereby denied a significant opportunity to address his employer's concerns – concerns it relied on, in part, to effect his dismissal.

34. I am satisfied that, on an objective basis, from the point of view of a neutral observer, the Company has failed to justify its decision to terminate Mr Gorman's dismissal. Because of its disproportionate reaction, the respondent's standards were not those of a fair and reasonable employer. It is therefore appropriate for the Authority, having undertaken an objective inquiry, one focused on all the circumstances relevant at the time, to substitute its conclusion for that of the employer.

## **Remedies**

35. Detail of the basis of Mr Gorman's claim for humiliation, etc was only received by email on 18 December, through his counsel, Mr Ben Thompson. The same email particularised, for the first time, the applicant's claim for lost wages and the information that Mr Gorman's efforts to find full time work were not successful until 15 June. Before then the applicant was able only to obtain sporadic work as a casual telemarketer.
36. Mr Gorman's evidence of humiliation, etc is both late and underwhelming. It does not support his claim for \$10,000. I am satisfied instead that, having regard to that evidence, and in all the circumstances, an award of \$5,000 is appropriate. The evidence to date of Mr Gorman's efforts to mitigate his loses is similarly late and light. Details were lacking as to what effort he had made, when and to whom and how much he earned, and could have earned, from his casual telemarketing work. As advised to the parties during the investigation, this matter is best left for them to settle, failing which it can be brought back to the Authority.

## **Contributory Fault**

37. While process is power and rests in employers' hands it is clear that Mr Gorman contributed significantly to the situation that gave rise to his successful personal

grievance. That is because his performance, from 11 November 2005, was woeful. Had the employer moved to dismiss him in light of the contents of the meeting of 14 November and the letter of the following day, it is unlikely the applicant could have brought a successful grievance had he attempted to do so. Mr Gorman's contributory fault is, I find, properly set at 50%.

### **Determination**

38. For the reasons set out above I find in favour of Kevin Gorman's personal grievance claim against General Distributors Limited t/a Countdown Johnsonville and direct the respondent to pay to the applicant the sum of \$5,000 less 50% contributory fault, i.e. \$2,500.
39. The parties are to attempt to reach agreement on Mr Gorman's lost wages by having regard to what he would have earned working for the Company but for his unjustified dismissal, less actual monies earned by the applicant between the date of his dismissal, less 50% contributory fault. Failing agreement the matter will be returned to the Authority, along with a clear record of the applicant's earnings and details of his efforts to find employment.
40. Costs are reserved. The parties were given in the investigation a clear indication of the range of Authority costs award. With no disrespect intended to the parties, this was a typical case and costs outside of the usual range could not be justified.

**Denis Asher**

**Member of Employment Relations Authority**