

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 471/10
5032572

BETWEEN

QUENTIN UNSWORTH
Applicant

AND

ORAKEI KORAKO
GEYSERLAND RESORT
(2000) LIMITED
Respondent

Member of Authority: R A Monaghan
Representatives: Q Unsworth in person
B Wall, counsel for respondent
Investigation Meeting: 13 September 2010 at Rotorua
Additional information received: 16 September 2010
Determination: 4 November 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Quentin Unsworth says his former employer, Orakei Korako Geyserland Resort (2000) Limited (Orakei Korako) dismissed him unjustifiably.

[2] Orakei Korako says Mr Unsworth's dismissal was justified on the ground of his failure to report for work when instructed and after a request for leave had been declined, against a background of accumulated misconduct comprising: warnings regarding his refusal to follow the employer's directions; failures to provide medical certificates when requested; and his poor attitude to his employer and to colleagues over a lengthy period.

Background

[3] Mr Unsworth's employment at Orakei Korako began in 2001. Orakei Korako operates the Orakei Korako geothermal resort and tourist attraction, which offers a shop and café and features visits by ferry across a river to the geothermal activity site. Mr Unsworth's job title was 'boat driver/office administration/shop assistant', and his duties were to assist in those areas. He also resided on the property, although the written employment agreements are silent on this matter. The arrangement was described as a boarding arrangement.

[4] The first two years of Mr Unsworth's employment were uneventful, although Orakei Korako's directors, Craig and Philippa Gibson, said that by the end of 2002 they were becoming concerned that Mr Unsworth showed signs of depression.

[5] Mr and Mrs Gibson believe difficulties began in 2003 when Mr Unsworth accused another employee, Richard Leaf, of stealing an item belonging to him and conflict developed between the two. Mr Leaf was employed as a groundsman and relief boat driver. He denied the accusation.

[6] There was an incident in late 2004 involving an employee named Rachel Martelli after which, according to Mr and Mrs Gibson, Mr Unsworth communicated very little with other staff members or with them. For her part Ms Martelli felt able to deal with the incident herself and did not express any ongoing concern about it, but she also gave evidence in support of the view that Mr Unsworth did not have a good relationship with staff members and was uncommunicative with her.

[7] In or about March 2005 Mr Unsworth raised a concern that he was not receiving the weekends off to which he believed he was entitled. A written employment agreement dated August 2002 provided simply that Mr Unsworth's hours of work were 'as and when required by the employer'. A second written agreement dated August 2004 provided that Mr Unsworth's hours of work were 9 hours per day, generally between 8 am and 6 pm, from Monday to Sunday inclusive. Orakei Korako could fix the days to be worked, following consultation, and could require the employee to work weekends on a regular basis or when necessary to meet the demands of the business.

[8] In practice, and with the exception of the summer holiday period when a student was employed, Mr Unsworth worked most weekends as Mr Leaf was not available for weekend work. Mr Unsworth would usually have Tuesdays and Wednesdays off. The arrangement reached in March 2005 was that Mr Unsworth would receive one weekend off a month.

[9] In early August 2005 Mr Unsworth took some 5 days' sick leave, saying he had injured his foot while skiing. He advised Mrs Gibson of his absence by telephone. Because Mrs Gibson believed Mr Unsworth was phoning from a bar, she sought confirmation of the injury and asked for a medical certificate on Mr Unsworth's return. She said she did not receive one, while Mr Unsworth said he obtained a certificate which he left on Mr Gibson's desk. Mr Gibson denied that.

[10] I asked Mr Unsworth to obtain from his doctor copies of the records of his attendance and any medical certificate issued to him at the time. According to that record Mr Unsworth tripped on a step and injured his foot on 4 August, was x-rayed to check for a fracture, and was diagnosed with a sprain. No copy of any medical certificate was provided. At the time Mr and Mrs Gibson doubted that Mr Unsworth had been injured at all.

[11] I accept that Mr Unsworth was injured, but am not satisfied that he provided the medical certificate requested. The sick leave provision in the August 2004 employment agreement obliged the employee to provide a medical certificate in respect of any sick leave should one be required.

[12] On 9 September 2005 a helicopter was being used to transport packaged timber across the river. The timber was to be used in the construction of a boardwalk in the geothermal area. A strop broke and the timber fell from the helicopter into the river, whereupon the straps holding the timber in a bundle also broke. Mr Gibson instructed Mr Leaf to ask Mr Unsworth to launch a boat and pick the timber up.

[13] According to Mr Leaf, Mr Unsworth replied it would be a waste of time and could be done later, and that he was busy. Mr Leaf said 'ok' and reported the response to Mr Gibson. Mr Gibson tried to locate Mr Unsworth but was unsuccessful.

[14] According to Mr Unsworth, he was concerned about safety and his response was to ask Mr Leaf who had made the order that he pick up the timber. Mr Leaf said Mr Unsworth should do it for Mr Leaf. Mr Unsworth jokingly told him to f- off and went back to work in the shop.

[15] Mr Unsworth was in the shop when a second load of timber fell into the river. Mr Gibson and Mr Leaf launched a boat to collect it. Mr Unsworth saw the load fall, and went to help retrieve it. Mr Gibson was annoyed because he believed Mr Unsworth had ignored his instruction, he doubted that Mr Unsworth could have been busy, and because he could not find Mr Unsworth when he went to reinforce the instruction himself.

[16] On a date said to be Sunday 4 September 2005, but was probably Sunday 11 September, Mr Unsworth left work early at about 2.30 pm saying he was ill. He called in sick from Taupo the next day, saying he was still unwell. Mrs Gibson said she had seen Mr Unsworth leave the premises immediately on his departure on 11 September - rather than going to his residence as she expected he would if he was ill - so she asked him for a medical certificate in respect of his absence. No certificate was provided. Again there was a concern that Mr Unsworth was not genuinely ill, particularly as he acknowledged he had visited a friend during his time off work.

[17] Mr Unsworth said he was ill, and that he went home briefly for a rest before travelling into Taupo to buy some medication. He did not stay in Taupo overnight but went back again the next morning for some further medication. He denied being asked for a medical certificate, and said he thought it was obvious he was ill. He did not consult his doctor.

[18] On 18 September Mrs Gibson saw Mr Unsworth approaching the jetty in the ferry at a speed she considered excessive. When Mr Unsworth berthed at the jetty both the boat and the jetty shuddered. Concerns about speed and method of berthing had been raised with Mr Unsworth before. Mr Unsworth denied approaching the jetty too fast, or making the boat and jetty shudder when he berthed.

[19] On 23 September Mr Gibson observed that Mr Unsworth was not following an engine warm-up procedure required in a ferry which had just had its engine re-

conditioned. According to Mr Gibson Mr Unsworth had been instructed in the procedure, and other members of staff had previously reported that Mr Unsworth was not following it. Mr Unsworth denied failing to follow the warm up procedure.

[20] At or about the same time Mr Unsworth asked for the day off on Sunday 25 September. Mr Gibson advised that this could not be accommodated. When Mr Gibson asked Mr Unsworth why he wanted the day off, Mr Unsworth replied that he wished to attend a coffee festival in Taupo. At the investigation meeting Mr Unsworth denied giving that reason, and said further that the weekend in question was not the weekend of the festival. However the reason Mr Unsworth gave was recorded in a letter of 26 September 2005 confirming the dismissal, and a coffee festival was to be held in Taupo that weekend. I do not accept the denial.

[21] Mr Unsworth was to start work at 8 am on 25 September. At 7.30 am he telephoned Mr Gibson from a friend's house to say he had a headache and would not be reporting for work. Mr Gibson did not believe Mr Unsworth was ill and told Mr Unsworth so. An argument followed. There was a further disagreement about whether Mr Leaf could or should be called in to cover Mr Unsworth's absence, and the discussion became heated. Mr Gibson told Mr Unsworth that if he did not report for work that day he need not attend work on Monday. Mr Unsworth was due to take a week of annual leave commencing Tuesday 27 September.

[22] Mr Unsworth did not report to work on 25 September but did report to work on 26 September. Mr Gibson spoke to Mr Unsworth, asking what was going on. His evidence was that he did not intend to dismiss Mr Unsworth. Mr Unsworth's evidence was that the first thing Mr Gibson said to him was that he should resign or he was sacked. Then Mr Gibson asked Mr Unsworth what was going on.

[23] The content of most of the rest of the conversation was not disputed. Mr Unsworth replied that he was unhappy with his treatment, and in particular that he was not getting the time off to which he felt entitled. Mr Gibson suggested to Mr Unsworth that he had called in sick the previous day because he wished to attend the coffee festival. Mr Unsworth repeated that he was ill. Mr Gibson expressed the view that Mr Unsworth had taken a number of sick days off without medical certificates and had exceeded his annual entitlement to sick leave.

[24] The discussion then turned to the incidents of earlier that month. Mr Gibson raised the incident of 9 September, saying Mr Unsworth had failed to follow the instruction to launch the boat to pick up the timber. Mr Unsworth told Mr Gibson he and Mr Leaf had agreed to launch the boat later as Mr Unsworth was busy. Notably, he did not give as a reason his concern about safety. When Mr Gibson indicated Mr Leaf's account was different, Mr Unsworth suggested Mr Leaf had lied. A discussion of Mr Unsworth's view of Mr Leaf followed, with Mr Unsworth again raising his accusation of theft against Mr Leaf. Mr Unsworth was also asked about why he was uncommunicative with Ms Martelli, and replied that the relationship was fine.

[25] According to Mr Gibson, that is when he informed Mr Unsworth he could resign or be dismissed. Mr Unsworth refused to resign so Mr Gibson dismissed him.

[26] A heated dispute about Mr Unsworth's vacation of his residence on the premises then followed. Possibly wrongly, Mr Gibson required Mr Unsworth to leave within 7 days. Mr Unsworth became abusive and Mr Gibson became angry. Neither man conducted himself well.

[27] A letter of dismissal dated 26 September 2005 set out the concern about Mr Unsworth's absence in August and the lack of a medical certificate, and the concerns about the failures in September to act on the employer's instructions and the further failure to provide a medical certificate. It said Mr Unsworth's failure to report to work on 25 September, contrary to the instruction that he do so and without producing a medical certificate, had irrevocably broken the bond of trust and confidence. Finally it said Mr Unsworth's attitude to Mr and Mrs Gibson, as evidenced by his conduct on 26 September, was inconsistent with a continuing employment relationship.

[28] Mr Unsworth received one month's pay in lieu of notice.

Determination

[29] The test of the justification for a dismissal is whether dismissal was the action a fair and reasonable employer would have taken in all the circumstances at the time.

[30] Overall, Orakei Korako relied on Mr Unsworth's failure to attend work on 25 September as the serious misconduct justifying dismissal, with the seriousness of the conduct being assessed against the background set out.

[31] If, as he said was the case, Mr Gibson did not intend dismissing Mr Unsworth on 26 September, and did not begin the discussion in the terms Mr Unsworth said he did, it is very unfortunate that he allowed himself to be goaded to the point where dismissal was the outcome.

[32] In the light of his knowledge of Mr Unsworth's: dissatisfaction with the limitation on his weekends off; wish to attend the coffee festival on 25 September; failure to provide medical certificates in respect of two recent absences; and reluctance to accept instruction Mr Gibson had reason to be suspicious when Mr Unsworth reported a headache on 25 September.

[33] However that did not excuse him from conducting an investigation in respect of the absence of 25 September. Since the matter was relied on as a ground for dismissal, an investigation should have been carried out. Unfortunately Mr Gibson did nothing to investigate the absence beyond arguing with Mr Unsworth about whether he was absenting himself in order to attend the coffee festival. He should have taken the time to make such other enquiries as he could about Mr Unsworth's activities on 25 September, and to question Mr Unsworth more carefully.

[34] The discussion strayed even further from the path it should have taken when errors and misunderstandings regarding leave entitlements became apparent. For example, Mr Gibson sought to suggest that Mr Unsworth had exceeded his sick leave entitlement. Mr Unsworth was entitled to accumulate sick leave of up to 20 days, and whatever the precise content of the discussion on the point Mr Gibson was wrong when he said Mr Unsworth had exceeded that entitlement. He was also wrong when he said Mr Unsworth had breached the requirement in the employment agreement regarding the reporting of an absence on sick leave. The effect of the provision was that Mr Unsworth had until 9 am to report his absence.

[35] Matters worsened when both parties began to raise and argue about the rest of their respective concerns including, for example, the matter of whether Mr Leaf had

stolen an item of Mr Unsworth's in 2003 as well as the incidents of earlier in September 2005. If, as Mr Unsworth's employer, Mr Gibson had concerns about the incidents in September in particular, he should have addressed them more formally and not in the context of what became a slanging match.

[36] There are rare cases involving employees dismissed at the end of a meeting originally intended as only a discussion, with the dismissals found to be justified because of the effect of the employee's conduct during the meeting. This is not such a case. I will comment shortly on Mr Unsworth's behaviour in general, but for present purposes I find that it was not sufficient to warrant the move to dismiss during a meeting that was not intended to be disciplinary at all.

[37] Had Mr Unsworth's absence on 25 September been properly investigated, and as a result Mr Gibson was in possession of information on which he could fairly rely to form a conclusion that Mr Unsworth was not ill that day, I would have found the conduct was sufficiently serious to justify a decision to dismiss. This is particularly so against the background of the unco-operative attitude I find Mr Unsworth was exhibiting in September. Mr Wall cited a decision of the Arbitration Court in *Bragg v Ocean Beach Freezing Co Limited*¹ in further support of the employer's position, but I distinguish that decision because the employee concerned admitted in effect that when her request for leave was declined she took her planned holiday anyway. Moreover she did so in the face of warnings of the possibility of dismissal if she proceeded as she intended.

[38] Here, however, the reason for Mr Unsworth's absence was not investigated and there was no admission of the kind in *Bragg*. Mr Gibson relied on nothing more than his disbelief. In such circumstances and without more, there was not enough information on which to form a reasonably held view that Mr Unsworth was not ill, and in turn Mr Unsworth's failure to report for work as instructed on 25 September cannot be characterised as a failure to follow a lawful and reasonable instruction.

[39] A fair and reasonable employer would have investigated Mr Unsworth's absence and put the information it obtained to Mr Unsworth for comment before

¹ [1985] ACJ 249

deciding on any disciplinary response. Orakei Korako did not do so. For these reasons I find the dismissal was unjustified.

Remedies

[40] Mr Unsworth sought the sum of \$50,000 in respect of lost remuneration and injury to his feelings resulting from his personal grievance.

[41] Further to the claim for lost remuneration, Mr Unsworth's evidence was that after his dismissal he approached WINZ regarding employment, went to Australia because he did not wish to go on a benefit, returned to New Zealand and obtained work in Tauranga commencing on 5 December 2005.

[42] Mr Unsworth was paid a salary of \$31,200 per annum, or \$600 per week. He was out of work for some 10 weeks, but had received four weeks' pay in lieu of notice. He lost some 6 weeks' remuneration, or \$3,600.

[43] Further to his claim for compensation for injury to feelings arising from the personal grievance, Mr Unsworth said he was in a bad way, was feeling low and suffered a loss of confidence. However he did not seek medical attention and, taking into account that he spent time in Australia, obtained alternative employment in New Zealand relatively quickly. The evidence did not support a significant award.

[44] In assessing remedies I must also consider whether Mr Unsworth contributed in a blameworthy way to the circumstances of his personal grievance.

[45] Mr Unsworth claimed to be a loyal and trustworthy employee. His evidence was not indicative of any loyalty, and the articulate nature of his written evidence made his adverse comments about Mr Gibson in particular all the more cutting. Further, the comments he made about his former colleagues tended to support the view that these relationships were also dysfunctional, as did the evidence of the colleagues themselves.

[46] Next, although I do not accept that in September Mr Unsworth received any warning of a disciplinary nature, I accept that concerns about aspects of his driving of

the boat were raised with him and do not accept his denials that the conduct occurred. When he drove the boat as he did, he was acting contrary to instructions he had received regarding how the boat should be driven. As for the timber incident, I do not accept that Mr Unsworth's professed concern about safety was the motivation for his actions. He was in general disaffected and unco-operative, and made that clear.

[47] I also take into account the following statement by the Employment Court:

[145] The use of sick leave is, by its nature, a matter requiring a significant degree of trust of the employee by the employer. In most instances, the employer must trust the employee to exercise the right to take sick leave honestly because it is impractical to do otherwise. It may also be said that, in general, abuse of the right to paid sick leave will be serious because it involves obtaining payment by a false pretence or at least attempting to do so. Having said that, not every case of misuse of the right to sick leave will necessarily be capable of amounting to serious misconduct. In some cases there may be special factors suggesting that it ought not to be regarded in this way, either generally or in a particular case. It follows that each case must be determined on the facts.²

[48] Mr Unsworth had been acting in a manner that undermined the employer's trust and confidence in him in a number of respects including in aspects of his use of sick leave. The employer did not adequately address the absence of 25 September, which I have reflected in the finding that the dismissal was unjustified. However I consider that Mr Unsworth's undermining conduct was such that, by 25 September, Mr Gibson's trust in him to exercise the right to take sick leave honestly had been seriously impaired and on reasonable grounds.

[49] For these reasons I find Mr Unsworth contributed in a blameworthy way to the circumstances of his personal grievance, and reduce the amounts I would otherwise have awarded.

[50] I order that Orakei Korako pay to Mr Unsworth:

- a. \$1,200 as reimbursement of remuneration lost as a result of his personal grievance; and
- b. \$1,000 as compensation for injury to his feelings.

² *Griffith v Sunbeam Corporation Limited* Employment Court Wellington, Judge Couch, 28 July 2006, WC 13/06.

Costs

[51] Costs are reserved.

[52] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority