

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 252
5354603

BETWEEN BRUCE TAIAPA
 Applicant

A N D TE RUNANGA O
 TURANGANUI A KIWA
 TRADING AS TURANGA
 ARARAU PRIVATE
 TRAINING
 ESTABLISHMENT
 Respondent

Member of Authority: Rachel Larmer

Representatives: Gregory Bennett, Advocate for Applicant
 Elizabeth Inger, Counsel for Respondent

Investigation meeting: 26 June 2012 at Gisborne

Submissions Received 26 June 2012 from Applicant
 27 June 2012 from Respondent

Date of Determination: 25 July 2012

DETERMINATION OF THE AUTHORITY

A Te Runanga O Turanganui A Kiwa trading as Turanga Ararau Private Training Establishment (Turanga Ararau) was justified in finding that Mr Bruce Taiapa had committed serious misconduct and in deciding to summarily dismiss him for that conduct.

Employment Relationship Problem

[1] Mr Bruce Taiapa was employed by Turanga Ararau as a Programme Supervisor - Specialist Youth Services. He was summarily dismissed on 4 July 2011 for serious misconduct which involved the misuse of sick leave.

[2] Mr Taiapa claims his dismissal was unjustified because he was on certified sick leave. He says his employer cannot look behind his medical certificate because *he is entitled to manage his health as he sees fit*. He believes he did not do anything wrong by travelling with his whanau to Rotorua and Tauranga for seven days whilst on sick leave.

[3] Mr Taiapa withdrew his unjustified disadvantage personal grievance claim after he had given his evidence to the Authority. He also subsequently withdrew his claim for the remedy of reinstatement.

[4] Turanga Ararau says summary dismissal was justified because Mr Taiapa engaged in serious misconduct by dishonestly taking sick leave for his own personal reasons, namely to accompany his whanau to the New Zealand Secondary Schools Waka Ama Championships (Waka Ama) which was held in Rotorua from 29 March to 1 April 2011.

[5] On Thursday 24 March 2011 Mr Taiapa's partner Cath Deacon asked Winifred Ruru, Operations Manager, to approve five days' leave without pay (LWP) from Monday 28 March to Friday 1 April 2011 for him. Ms Deacon said the request was made at such short notice because Child Youth & Family Service (CYFS) had directed them to take one week's leave before the end of March from the CYFS home they ran. Because of the short notice Ms Ruru passed this request to the Manager, Sharon Maynard, to address.

[6] Ms Maynard spoke to Mr Taiapa about it on the morning of Friday 25 March and he repeated the short notice was due to the CYFS direction. At the Authority's investigation Mr Taiapa and Ms Deacon both denied ever saying anything about CYFS. I do not accept their evidence because it contradicts the documentary records. I consider on the balance of probabilities that Ms Deacon and Mr Taiapa sought to rely on an alleged CYPS instruction to explain their short notice LWP application.

[7] Mr Taiapa explained to Ms Maynard that his partner had organised a week away for the whanau which involved taking their mokopuna out of school and travelling out of the district. He also mentioned the trip would tie in with a squash tournament his mokupuna had in Tauranga on 2 and 3 April. Mr Taiapa said Ms Deacon required him to accompany the whanau so he had to go along with the arrangements because *family comes first*.

[8] Ms Maynard was reluctant to approve five days LWP because Mr Taiapa was needed at work and had already taken three blocks of leave in the previous 12 months. She offered to write to CYFS to explain that their direction to Mr Taiapa was negatively impacting on Turanga Ararau's operations and on his primary job. Her intention was to persuade CYFS to delay their requirement for Mr Taiapa to take leave until the mid year break when he would not be required to run any courses. Mr Taiapa did not take up that offer but instead pressed his request for LWP.

[9] Ms Maynard therefore proposed a compromise. She offered him Wednesday 30 March as a lieu day¹ and LWP for Thursday 31 March and Friday 1 April. She told Mr Taiapa he would have to work on Monday 28 and Tuesday 29 March because there was no one who could cover his work if he was away.

[10] Ms Maynard told Mr Taiapa she would be on leave from 12 pm the next day, so she asked him to respond to her offer before then. When he did not do so, she assumed he would be at work the following week.

[11] When Ms Maynard returned to work on Tuesday 29 March, Ms Ruru told her Mr Taiapa was on sick leave. Ms Ruru said Mr Taiapa had told her around 9am on Monday 28 March he *had been performing with a damaged calf muscle for some time and that he had been to the doctor on the previous Friday (25 March 2011) and needed to take two days off work right now.*

[12] Ms Ruru told Mr Taiapa that Ms Maynard would not be happy and that he had to provide a medical certificate on his return to work, which based on what he had said, she thought would be Wednesday 30 March.

[13] Mr Taiapa did not communicate with his employer at all while on sick leave. He acknowledged to the Authority that he was aware of the procedure for reporting sickness absence but could not explain why he had not followed it.

[14] Ms Maynard asked Ms Ruru to find out if Mr Taiapa could do light duties. Ms Ruru attempted to contact Mr Taiapa on the morning of Tuesday 29 March but did

¹ In recognition of his contribution at Matarini.

not manage to speak to him. A colleague, Bob Waitai, told Ms Maynard he had seen Mr Taiapa leaving town in a van with his whanau on Monday 28 March.²

[15] On Wednesday 30 March another staff member told Ms Maynard that Mr Taiapa would be in Rotorua at Waka Ama. Ms Maynard was later shown a photo which had been taken at Waka Ama that week and posted on Facebook which showed Mr Taiapa seated on a wooden grandstand with a large female sitting on his knee. Mr Taiapa was smiling and giving the thumbs up in the photograph.

[16] That made Ms Maynard recall a letter she had received a few weeks earlier from a fund raising representative which recorded that Mr Taiapa and Ms Deacon would be accompanying two competing teams to Waka Ama that year. The combination of this information together with Mr Taiapa's failure to respond to her counter proposal caused Mr Maynard to become suspicious that Mr Taiapa was using sick leave to attend Waka Ama in Rotorua.

[17] During the Authority's investigation Mr Taiapa admitted for the first time that on Monday 28 March he had travelled with Ms Deacon and two grandsons to Waka Ama in Rotorua. He was there for the whole competition and did not leave until after it had finished on Friday 1 April.

[18] Mr Taiapa accepted that teams he had coached were competing in Waka Ama and that he had other whanau present at the event. Mr Taiapa also admitted that when Waka Ama ended he and his whanau travelled to Tauranga where his grandsons competed in their squash tournament. Mr Taiapa and his whanau did not return to Gisborne until the evening of Sunday 3 April, seven days after they had left.

[19] Mr Taiapa saw a doctor at his local medical centre on 4 April and obtained a medical certificate which stated he had been *medical unfit for work from 28.3.2011 and should be fit to resume work on 7.4.2011*. This retrospective medical certificate covered the entire period he had been away from Gisborne with his whanau.

[20] Ms Deacon left a copy of Mr Taiapa's medical certificate unannounced on a desk at his work. His employer therefore did not know in advance when he would be returning. Mr Taiapa just turned up back at work on 7 April. When Ms Maynard heard

² It came out during the Authority's investigation that Mr Waitai's partner Honey had moved into the Taiapa/Deacon household to look after the CYFS children while Mr Taiapa and Ms Deacon were out of town.

he was back at work she arranged for her and Ms Ruru to meet with him later that day.

[21] Ms Maynard spent from 7 April until 12 May attempting without success to obtain some answers from Mr Taiapa around why he had requested LWP on short notice without following the correct procedures and why he had not responded on 25 March to her compromise offer.

[22] During this informal process Ms Maynard also provided Mr Taiapa with copies of the notes she had made of their meetings on 25 and 29 March and 4 April 2011. She asked Mr Taiapa to advise her of any inaccuracies or points he considered had been omitted from her record of their discussions. Mr Taiapa did not make any comments on the notes. I find that Ms Maynard's notes are an accurate record of what was discussed at each of the meetings with Mr Taiapa.

[23] Ms Maynard was concerned that Mr Taiapa was not being up front, honest, or telling the whole story about his leave so she commenced a formal disciplinary process on 25 May. Ms Maynard wrote to Mr Taiapa setting out the information she had and explaining her specific concerns regarding the genuineness of his sick leave.

[24] Ms Maynard noted she was interested in viewing the letter from CYFS regarding the direction to take leave, proof of his visit to the doctor on 25 March, and further information from his doctor about the nature of his injury/illness which had led to the 4 April 2011 medical certificate. Alternatively, she offered to contact Mr Taiapa's doctor and/or the CYFS's manager directly if he gave her written permission to do so.

[25] Mr Taiapa was advised that taking sick leave for non-genuine reasons could constitute serious misconduct and that taking leave which had previously been declined could be found to be purposefully dishonest. Mr Taiapa was advised that summary dismissal was a possibility so he was encouraged to attend the disciplinary meeting with a support person or representative.

[26] Mr Taiapa attended the disciplinary meeting on 1 June with Ms Deacon as his support person. An audio recording was made of the meeting and the Authority was presented with a transcript the parties accepted was accurate record of the meeting. The transcript has been a very useful resource in terms of assisting with the resolution

of issues of credibility. Ms Deacon and Mr Taiapa both gave evidence to the Authority which contradicted the transcript.

[27] Mr Taiapa told me he had admitted to his employer that he had been in Rotorua with his whanau during Waka Ama, but it is clear from the transcript he did not. The transcript also shows that explanations Mr Taiapa told me he gave during the disciplinary meeting were not in fact given.

[28] It is evident from the transcript that Mr Taiapa would not answer direct questions about whether or not he had attended Waka Ama. He also resisted attempts by Ms Maynard to obtain information regarding the nature of the illness/injury which had resulted in the medical certificate dated 4 April.

[29] During the disciplinary meeting Ms Deacon held up a letter which she said related to Mr Taiapa's doctor's appointment on 25 March but she refused to hand it to Ms Maynard. Despite many requests from the respondent and from the Authority a copy of that letter has never been disclosed. Inquiries made by the Authority with the Medical Centre determined that it did not have a copy of a letter dated 25 March relating to Mr Taiapa on file.

[30] While giving evidence to the Authority Ms Deacon produced a letter which she said was similar to the one that she had held up at the disciplinary meeting. This turned out to be a letter signed off by a nurse from the Medical Centre which recorded that an appointment had been made for Mr Taiapa on Friday 25 March.

[31] It came out during the Authority's investigation that Mr Taiapa had not seen a doctor on 25 March. Ms Deacon made the appointment for Mr Taiapa but he did not present. Ms Deacon said she spoke to the doctor about her concerns about Mr Taiapa's health and the doctor had recommended he come in for a consultation. Notwithstanding that advice Mr Taiapa did not see a doctor until 4 April, because left Gisborne from 28 March until 3 April.

[32] I find that Mr Taiapa and Ms Deacon deliberately mislead his employer about the 25 March doctor visit.

[33] On 23 June Ms Maynard summarised her preliminary findings that Mr Taiapa had engaged in serious misconduct and that summary dismissal was a likely outcome. She set up a meeting for 1 July to give Mr Taiapa an opportunity to present any

further relevant information and she specifically requested more medical information regarding the doctor's appointments on 25 March and 4 April.

[34] During the meeting on 1 July Mr Taiapa changed his story. On 28 March he told Ms Ruru he required time off for a long term calf injury he had seen the doctor about on 25 March. However, on 1 July Mr Taiapa claimed for the first time that he had taken sick leave because he had injured himself while he was taking his students on a 4km walk on the morning of Monday 28 March.

[35] Ms Ruru and Ms Maynard both gave evidence that Mr Taiapa could not have completed the walk with his students and then been back at work before 9am to speak with Ms Ruru. I accept their evidence.

[36] Mr Taiapa told me he knew on Monday 28 March he had gout but he did not want to face up to it. Mr Taiapa accepts he never informed his employer his certified sick leave was due to gout, so that was new information raised for the first time during the Authority's investigation.

[37] Ms Maynard provided a very helpful summary of the different explanations provided by Mr Taiapa and Ms Deacon relating to the LWP request and his sick leave. Ms Maynard identified 52 different explanations, many of which were contradictory, which were raised over the period 24 March 2011 (when the initial request for LWP was made by Ms Deacon) through to 25 May 2012 (when Ms Deacon and Mr Taiapa filed their witness statements with the Authority).

[38] I put Ms Maynard's summary to Mr Taiapa to respond to and he confirmed that he did not take issue with the information it contained.

Issues

[39] Justification of Mr Taiapa's summary dismissal is to be assessed in light of the justification test in s103A of the Employment Relations Act 2000 (the Act) as it applies from 1 April 2011.

[40] The full Employment Court in *Angus and McKean v Ports of Auckland*³ provides guidance on how the justification test is to be applied in practice. The Employment Court made it clear that under s103A so long as the outcome, and how it

³ [2011] NZEmpC 160.

was arrived at, is one of the outcomes that a fair and reasonable employer in all of the circumstances could have decided upon, then the decision will be justified.

[41] Section 103A of the Act requires the Authority to objectively assess whether what Turanga Ararau did (substantive justification) and how Turanga Ararau did it (procedural fairness) were what a fair and reasonable employer in all the circumstances could have done at the time Mr Taiapa was dismissed.

[42] Mr Taiapa presented new information to the Authority which he did not make available to his employer during the disciplinary process. Justification of his dismissal is determined at the time he was dismissed, so the new information is not relevant to the question of justification. It is however relevant to credibility issues because it contradicts information which Mr Taiapa and Ms Deacon had previously given to the employer.

[43] When assessing whether or not Mr Taiapa's dismissal was justified, the following issues must be determined:

- (i) Did the employer comply with the s.4(1A) good faith obligations in the Act?
- (ii) Did the employer comply with all of the s103A(3) tests in the Act⁴?
- (iii) Did the employer's investigation reveal conduct capable of being viewed as serious misconduct?
- (iv) If so, was summary dismissal an outcome which was available to a fair and reasonable employer in all of the circumstances?
- (v) If not, what if any remedies are appropriate?

Was summary dismissal justified?

Did the employer comply with its s.4(1A) good faith obligations?

[44] Under s.4(1A) of the Act an employer proposing to make a decision which may impact on an employee's ongoing employment must provide that employee with

⁴ The full Employment Court in *Angus and McKean v Ports of Auckland* held that failure to meet any one of the s103A(3) tests would render a dismissal unjustified.

relevant information⁵ and an opportunity to comment on it⁶ before making its final decision.

[45] I find Turanga Ararua compiled with its statutory good faith obligations. There was full disclosure because Mr Taiapa was given all of the information relevant to its disciplinary concerns. He was also given every opportunity to respond to that information before he was dismissed.

Did the employer comply with all of the s103A(3) tests?

[46] I have no hesitation in concluding that Turanga Ararau has met all of the tests in s.103A(3) of the Act. It comprehensively investigated the allegations against Mr Taiapa before it dismissed him.⁷ It fully and fairly raised its specific disciplinary concerns with Mr Taiapa before it dismissed him.⁸ It gave Mr Taiapa a real and genuine opportunity to respond to its specific concerns before he was dismissed.⁹ Contemporaneous documentation prepared by Ms Maynard indicated she fully and carefully considered Mr Taiapa's explanations before he was dismissed.¹⁰

[47] I am more than satisfied Ms Maynard approached this matter with an open mind and carefully considered and assessed all of the information available to her, including the various and conflicting explanations provided by Mr Taiapa and Ms Deacon.

Did the employer's investigation reveal conduct capable of being viewed as serious misconduct?

[48] Serious misconduct is *conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*¹¹ The Employment Court recognised in *Griffith v Sunbeam Corporation Limited*¹² that sick leave requires a significant degree of trust by an employer and that the abuse of it is generally serious.

⁵ S.4(1A)(c)(i) ERA.

⁶ S.4(1A)(c)(ii) ERA.

⁷ S. 103A(3)(a) of the ERA

⁸ S.103A(3)(b) of the ERA

⁹ S.103A(3)(c) of the ERA

¹⁰ S.103A(3)(d) of the ERA

¹¹ *Northern District Union v. BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA)

¹² Unreported, 26 July 2006, Couch J, WC 13/06.

[49] Clause 19.2.1(i) of Mr Taiapa's individual employment agreement specifically identified dishonesty as an example of serious misconduct which could result in summary dismissal.

[50] I recognise that evidence in support of an allegation of dishonesty must be commensurate with the seriousness of that allegation and I consider the evidence in this case met that high standard.

[51] There was more than enough evidence from which Turanga Ararau could reasonably have concluded Mr Taiapa had been in Rotorua at Waka Ama from 28 March to 1 April. Its conclusion about that was correct because Mr Taiapa finally admitted to the Authority he had been with his whanau at Waka Ama in Rotorua.

[52] Mr Taiapa's explanation to his employer's concern about his use of sick leave was that he was entitled to manage his health and the health of his family as he saw fit. He also declined to provide his employer with the additional medical information it sought or to explain the nature of the illness or injury which gave rise to the medical certificate dated 4 April.

[53] I consider it was open to a fair and reasonable employer to have concluded that Mr Taiapa's response to concern about him being with whanau at Waka Ama in Rotorua when he claimed to be on sick leave was unsatisfactory.

[54] I find that Ms Maynard was justified in concluding that Mr Taiapa's actions in not using his sick leave to rest and recuperate at home or to seek immediate medical assistance for his illness/injury and in travelling four hours to Rotorua and remaining away from Gisborne with his whānau for seven days amounted to a misuse of sick leave.

[55] I also find that Ms Maynard was entitled to view as aggravating features of Mr Taiapa's conduct:

- a. the fact that his recent request for LWP over the same period had been declined;
- b. he had been told he was required at work on 28 and 29 March because there was no-one to cover his work;
- c. that her counter offer of three days off work had not been responded to;

- d. he had provided contradictory explanations for his absence;
- e. he had refused to confirm or deny his whereabouts whilst on sick leave;
- f. he had declined to provide medical information about his illness;
- g. he had declined to explain why he had needed sick leave.

[56] It was also open to a fair and reasonable employer to have concluded that Mr Taiapa acted dishonestly because he had used sick leave for personal reasons, namely to travel four hours to another city to attend a sporting event at which teams he had been coaching were competing and which his whanau were attending. He had also had a weekend in Tauranga with his whanau before finally returning to Gisborne and seeing a doctor seven days later.

[57] I find that Turanga Ararau held an honest and reasonable belief that Mr Taiapa had engaged in serious misconduct by misusing sick leave. It was open to a fair and reasonable employer to view Mr Taiapa's actions were dishonest and to conclude that they undermined the necessary trust and confidence in the employment relationship.

Was summary dismissal an outcome which was available to a fair and reasonable employer in all of the circumstances?

[58] I am satisfied that summary dismissal was a disciplinary outcome which was available to a fair and reasonable employer in all of the circumstances.

[59] Mr Taiapa had been declined leave for the period 28 March – 1 April 2011 and Ms Maynard had explained to him why he was needed by the business. She tried to find out if he could do light duties but did not get anywhere with that because he failed to communicate with his employer for the entire time he was away.

[60] Ms Maynard had also attempted to reach a compromise solution with him which he had not responded to. It was open to Ms Maynard to have concluded, as she did, that his failure to respond to that offer was because he had decided to take sick leave for that period. She was entitled to conclude that Mr Taiapa had made deliberate decisions not to attend work the week commencing 28 March and not to communicate with his employer at all until he returned to work on 7 April.

[61] Ms Maynard was also justified in being concerned about Mr Taiapa's failure to answer simple and specific questions during the informal part of her inquiries. Another aggravating feature was that Mr Taiapa was also evasive and belligerent during the disciplinary process. Mr Bennett acknowledged in his submissions that Mr Taiapa had obviously breached his s.4 good faith obligations in the Act.

[62] I am satisfied that Ms Maynard considered sanctions short of dismissal and that she had good reasons for deciding against such action. Mr Taiapa held a position of trust and he was a role model to the young people that he was responsible for. I find that Ms Maynard was justified in deciding that she had lost trust and confidence in Mr Taiapa to act appropriately in future.

Outcome

[63] I find that Turanga Ararau was justified in finding that Mr Taiapa had committed serious misconduct in relation to his use of sick leave. It was also justified in responding to that conduct by summarily dismissing him.

Costs

[64] Turanga Ararua as the successful party is entitled to a contribution towards its costs. The parties are encouraged to attempt to resolve costs by agreement but if that is not possible the respondent has 14 days within which to file costs memoranda, Mr Taiapa has 14 days in which to respond, and the respondent has a further seven days within which to file any reply.

Rachel Larmer
Member of the Employment Relations Authority