IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 44
5529384

	BETWEEN	MATTHEW MILNE Applicant
	AND	PALMERSTON NORTH 24/7 LIMITED t/a SNAP FITNESS NZ Respondent

Member of Authority:	G J Wood
Representatives:	Tim Hesketh for Applicant Jenny Murphy for Respondent
Investigation Meeting:	26 February 2015 at Palmerston North
Submissions Received:	26 February 2015
Determination:	29 April 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant claims that his summary dismissal from the respondent was unjustified because the issues raised with him did not constitute misconduct by him and, even if they were, they were issues of performance rather than serious misconduct. He also considers that how his employer acted were not the actions of a fair and reasonable employer. The respondent denies all of the applicant's claims.

The facts

[2] Palmerston North 24/7 Limited (24/7) is one of a number of separate companies that trade under the Snap Fitness NZ banner (Snap Fitness). The principal of many but not all of these companies, including 24/7, is Mr Korey Gibson, who is based in Christchurch.

[3] Snap Fitness is a boutique gym, in that while it is open 24/7 as the name implies, it has limited floor space and does not run aerobic/dance classes etc. It focuses on personal rather than group fitness and engages a number of personal trainers who run their own businesses out of 24/7.

[4] After a period as one such personal trainer in the Manawatu, Mr Milne took up a job as the Assistant Manager at the Feilding branch of Snap Fitness. In April 2013 he was employed by 24/7 as its manager in Palmerston North. He commenced employment on 21 April 2013.

[5] As manager Mr Milne was also the sole employee of 24/7. This was a big promotion for a young man in his 20s. He was responsible to Mr Gibson, who carried out his duties as part of a "head office" structure of the Snap Fitness group of companies in Christchurch. The parties' employment was governed by a written agreement that included a comprehensive position description and remuneration structure. His employment agreement included a base salary and the ability to earn commissions depending upon revenue and profitability.

[6] As the Snap Fitness companies were small but growing and as competition was particularly strong in Palmerston North, overheads such as travel between Palmerston North and Christchurch were kept to a minimum. Thus 24/7 was very much dependent on Mr Milne for its success. Mr Milne was provided with some back office support and the occasional business trips to Christchurch, but otherwise as a new and young manager was little supported.

[7] Mr Milne's agreed hours of work were between 10am and 6.30-7pm five days a week, Monday to Friday, with a minimum of 42.5 hours per week. I accept, however, on the basis of his uncontested oral evidence, that Mr Milne worked in excess of those weekly hours. I also accept that Mr Milne was encouraged to continue his own private business training clients, but that that should be done on Snap Fitness' premises. Mr Milne had in fact a number of clients who he trained in the mornings at 24/7 before starting work for it.

[8] In essence, Mr Milne was responsible for running the establishment and thus ensuring that members and personal trainers were properly looked after, that financial issues were dealt with properly and that the business was properly promoted, including marketing. One such marketing initiative entitled "Outreach" was required

each day. This involved all sorts of initiatives such as leafleting to ensure that non-members to the gym were aware of Snap Fitness and its services.

[9] Clause 13.3 of the employment agreement provides for termination for serious misconduct. It states:

> *Notwithstanding any other provision in this agreement, the employer may terminate this agreement summarily and without notice for serious misconduct on the part of the employee. Serious misconduct includes, but is not limited to:*
>
> *(i) Theft;*
> *(ii) Dishonesty;*
> *(iii) Harassment of a work colleague or customer;*
> *(iv) Serious or repeated failure to follow a reasonable instruction;*
> *(v) Deliberate destruction of any property belonging to the employer;*
> *(vi) Actions which seriously damage the employer's reputation.*

[10] Mr Milne was given 12 weeks' leave at his request, between June and September 2014, in order for him to travel with his partner to the United States where she had been resident. This initially led to some difficulties for 24/7 because the first temporary manager engaged did not work out. By contrast, the second person engaged proved very popular with trainers and members alike.

[11] Upon his return, Mr Gibson was very concerned to hear that Mr Milne was considering another extended trip overseas, perhaps as early as that Christmas. Mr Gibson wrote to Mr Milne in very strong terms on 18 September 2014, advising that he wanted *"full steam ahead no bullshit"* and that he wanted to know whether Mr Milne was going to seek extended leave again.

[12] Mr Milne called Mr Gibson back and assured him that he was not going to be taking extended leave again and Mr Gibson was satisfied with that response. However, within days, Mr Gibson had brought to his attention a number of concerns about Mr Milne's performance. None of the people who complained about Mr Milne gave evidence.

[13] It was clear that at least one personal trainer had decided that if and when Mr Milne came back to 24/7 she would complain to head office about him, which she did. This, together with a letter of concern written by a member a month earlier, appears to have set the ball rolling whereby Mr Gibson appointed a senior member of his Christchurch staff to investigate concerns about Mr Milne. This led to that

manager discussing Mr Milne with all the personal trainers and thus obtaining a further three letters of complaint between 22 and 24 September 2014.

[14] The client's concern related to Mr Milne's alleged failure to deal with a complaint about an area of the gym being too hot and a preference that that client had for dealing with the fill-in manager. The first personal trainer to complain raised a complaint about misuse of another trainer's diet plan without authorisation by Mr Milne in his own business, which had taken place over a year ago. However the person actually involved made no complaint to Snap Fitness and I accept Mr Milne's consistent evidence that the matter was resolved by him with that person as soon as the issue was drawn to his attention.

[15] There was another complaint raised regarding issues with showers being too hot and thus potentially scalding patrons that had allegedly not been addressed by Mr Milne. Also it was alleged that Mr Milne had improperly treated a couple as new members rather than returning members and had not dealt with their concerns. Both of these complaints were raised indirectly by a trainer. Another indirect complaint was about equipment not being fixed promptly.

[16] One trainer alleged, in what was basically a throwaway line, that Mr Milne took four hour lunch breaks every day. There was no evidence to support this claim. I am sure that had Mr Milne been taking four hour lunch breaks within an 8.25 hour working day, this would have been readily apparent to other trainers, who made no such claims, and to the staff at "head office" who would have been unable to get hold of Mr Milne during extended periods each day. Instead I prefer Mr Milne's evidence that he worked in excess of the hours required, as he was 24/7's sole employee.

[17] Another personal trainer was worried about Mr Milne not properly looking after the interests of members and even being impolite to them on occasion. Mr Milne was also accused by some personal trainers of not fixing problems but rather blaming the messenger, and not meeting with let alone motivating personal trainers as required under his employment agreement, which also provided for weekly meetings between trainers and Mr Milne. Mr Milne was also accused by one personal trainer of not taking seriously suggestions left on the respondent's Facebook page.

[18] On 25 September, the "head office" manager sent Mr Milne an email advising him that an investigation was to be undertaken based on the attached written

complaints. Mr Milne was asked to give any initial comments he might want to make in writing. Mr Milne took advice from Mr Hesketh and responded on 29 September through him. In that letter, Mr Hesketh asked Snap Fitness to set out each specific allegation that 24/7 wished to pursue in writing and what the implications might be for Mr Milne's continued employment. He also noted that Mr Milne was open to a meeting to discuss any issues relating to his performance.

[19] On 29 September 2014, Mr Gibson responded, noting that the issues involved allegations of serious misconduct and therefore could involve Mr Milne's summary dismissal. A letter followed from Snap Fitness effectively setting out eight separate allegations. They were, as summarised where necessary in parentheses by me:

> 1. *Not fulfilling the required hours.* [Four hour lunches.]
> 2. *Plagiarising/stealing a Snap Fitness personal trainer's nutritional plan started on 27 August 2013.*
> 3. *Not following all aspects of OSH requirements.* [Scalding showers.].
> 4. *Not ensuring that the customer service needs and expectations are exceeded on a daily basis.* [Poor attitude and demeanour; overcharging two clients.]
> 5. *Not ensuring the property remains clean and well presented at all times.*
> 6. *Not ensuring that the personal trainers are fulfilling the requirements of their agreement and weekly meetings are being held.*
> 7. *Not responding to customer feedback and inquiries.* [I.e. feedback given on Facebook.]
> 8. *Not liaising with equipment suppliers to ensure all equipment is in a safe and operational capacity.* [Equipment not fixed]
> 9. *Not ensuring five minute weekly one-on-one meetings are held with PTs.* [As covered in 6.]

[20] In his formal response Mr Milne denied taking four hour breaks and stated that absences were due to him doing "Outreach" as required and that he regularly worked in excess of his contracted hours of work. Mr Milne accepted that he had made an error over the nutrition plans but resolved it as soon as it was drawn to his attention. He noted that the hot water system was inspected by a plumber who did not locate any faults. Mr Milne denied failing to greet the gym's guests and indicated that the issue with fees was dictated to by "head office". He also denied any problems with cleanliness and that some of these issues occurred during his absence. He noted that he did meet regularly with trainers but inconsistencies occurred due to trainer unavailability. Mr Milne also indicated he had dealt with all the concerns raised in the Facebook page, including the issue of the fan.

[21] Mr Hesketh concluded on Mr Milne's behalf by noting that these were issues that were not serious misconduct and therefore did not require disciplinary action. He repeated his view that the best way to deal with matters was to have a face-to-face meeting.

[22] In his response to Mr Milne Mr Gibson noted that he had had his manager investigate further into some of the matters and then referred to other matters which he said were not going to be dealt with as part of the disciplinary investigation. Further information was provided to Mr Milne as an attachment, together with the investigating manager's comments.

[23] In the additional comments provided by the manager, it was noted that there was no camera footage over the hours worked by Mr Milne and it was therefore a matter of Mr Milne's word against another staff member. It was noted that sales performance had not improved if "Outreach" was what was being done during Mr Milne's periods of absence. No further investigation was said to be necessary over Mr Milne having agreed that he had not paid for nutrition plans but that it was an oversight which had later been remedied.

[24] With respect to the shower temperature, it was noted that "head office" had no receipt or any invoice to suggest that a plumber was called. Further discussions with trainers indicated to the manager that Mr Milne rarely engaged with clients and that he did not address the payments issue promptly. Cleanliness was said to remain an issue and the manager indicated that this could be associated with increased costs impacting on Mr Milne's bonus.

[25] With respect to meeting with trainers, this was required weekly and it was suggested by trainers that very few meetings were held. It was also noted that Mr Milne did not respond to the allegation that someone felt frustrated by Mr Milne's failure to communicate effectively.

[26] Mr Gibson went on to state that:

> *I have considered whether there is any alternative to dismissal and have reached the conclusion that as a manager the options for training or supervision are impractical. As a manager there is a high level of trust and confidence that is required: my trust and confidence in you to remain in the role has been seriously eroded. My interim decision is to dismiss for serious misconduct.*

[27] Mr Gibson then gave Mr Milne a further opportunity to respond and noted that he was not available to meet in person as he was in the United States.

[28] Mr Milne did not receive the attachment and was disappointed that there would be no face-to-face meeting. Snap Fitness was simply invited to reconsider its decision.

[29] Mr Gibson's response that same day was that

> *As no further information received from you, under the circumstances my decision to dismiss you is confirmed.*
>
> *The reason for your dismissal is that you failed to perform your duties with all reasonable skill and diligence which has led to a lack of trust and confidence in your ability to continue in the role. Additionally you agreed that you purchased Brandon's nutrition plan to on-sell. This is considered a conflict of interest, as per your employment agreement and a breach of your implied duty of fidelity.*
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> *As advised, I consider this totality of actions and numerous complaints from various individuals to be serious misconduct, for which you are summarily dismissed.*

[30] In evidence, Mr Gibson explained that he dismissed Mr Milne for not fulfilling his duties as he had been negligent on a daily basis and that all of the allegations were serious, especially the use of someone else's nutrition plans, even though it had been resolved before a third party raised it as a complaint.

[31] Mr Gibson simply concluded that there were so many staff complaining that the complaints must all have substance, although he accepted that he did not meet with any of the staff, including Mr Milne, but this was due to the cost of travel between Christchurch and Palmerston North.

[32] One of the downsides of not holding a meeting was that it appeared that Mr Gibson was unaware that Mr Milne's explanation about the hot showers was not that a separate call had been made (for which there was no record), but that the plumber addressed the issue when called out on another matter. Similarly, Mr Gibson found against Mr Milne over the issue of his absences even although there were no particular grounds on the basis of the financial performance of the gym and the ability of "head office" to contact the gym at any point to so conclude. Similarly, Mr Gibson concluded that Mr Milne had been in a conflict of interest situation over his boot camps, from which the nutrition plan issue arose, whereas it was Mr Milne's evidence, which he had had no opportunity at any point before the Authority's

investigation meeting to explain, that he was unaware the boot camps were an issue and that all of those trained on the boot camps by him under his separate company were first enrolled as members of 24/7 before being able to do the boot camps. In these circumstances, there could be no conflict of interest. In any event it did not form part of the formal disciplinary investigation.

[33] Following his dismissal Mr Milne chose (rather than stay in New Zealand and look for work) to return to his partner's family in the United States. He stayed there for more than three months and made no efforts to find work during that period. Upon his return he has remained unemployed.

[34] The matter having been referred to mediation and not being resolved, it falls to the Authority to make a determination.

The law

[35] It is important to note at the outset that the standard of proof (i.e. level of evidence required) is to the civil standard (i.e. the balance of probabilities, that is, what is more likely than not) to a level commensurate with the seriousness of the allegations (*George v. Auckland City Council* [2014] NZCA 209). Thus the standard of proof required is higher in relation to claims of serious misconduct warranting summary dismissal than mere misconduct warranting a warning.

[36] The test of justification for dismissal is set out in s.103A of the Act. The Authority must determine on an objective basis whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In addition to any factors the Authority considers appropriate, the Authority must also consider:

- whether having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing;
- whether the employer raised the concerns that the employer had with the employee before dismissing;
- whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing; and

- whether the employer genuinely considered the employee's explanation in relation to the allegations against the employee before dismissing.

[37] The Authority must also not determine the dismissal unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

[38] What constitutes conduct justifying summary dismissal was set out in *Northern Distribution Union v. BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 at 487:

> *Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that an essential of the employment relationship. …*

[39] There the Court of Appeal referred to an earlier judgment to an English case that noted that:

> *The question must be whether the employee's conduct is compatible with the faithful discharge of his duty to his employer, not on his general level of competence or nous.*

[40] The full Court in *Lakeland Health Ltd v. Joseph* [1997] ERNZ 425 held on this issue at p.448:

> *The conclusion that LHL needed to reach, if it was to justify the termination of Dr Joseph's employment, was not only that his performance was deficient but also that it was so incorrigible that it was inappropriate to take the risk of giving him an opportunity, as Lord Bridge put it in* Polkey*, "to mend his ways" – or, alternatively, a conclusion that he had had such an opportunity but that conclusion was scarcely available given the short period of the employment and Dr Joseph's absence for various causes.*
>
> *It is, of course, the right of employers to set standards and to decide that an employment that is dependent on those standards being reached will not continue if they have not been reached after reasonable opportunities have been given for them to be reached, including any training that may be needed on the way.*

Determination

[41] The difficulty for 24/7 in this case can be summed up in its own letter of dismissal, in that the dismissal was for failure to *perform your duties with all reasonable skill and diligence which has led to a lack of trust and confidence in your ability to continue in the role.* Essentially what the letter refers to are (with one

possible exception – over the nutrition plan) matters of performance, not matters of serious misconduct. They are not matters encapsulated within or even reasonably extrapolated from the contract's provisions on serious misconduct. Instead the issues raised were about reasonable levels of skill or diligence allegedly not being maintained. These are issues of poor performance and perhaps misconduct, but not serious misconduct. Only in situations of gross negligence could these sorts of matters normally result in summary dismissal for serious misconduct. It was therefore not open to Snap Fitness to dismiss Mr Milne over the vast majority of the complaints raised against him.

[42] The dismissal letter also refers to alleged conflict of interest and breach of the implied duty of fidelity over the nutrition plan. Such a conclusion of serious misconduct was again one not open to a fair and reasonable employer. There was no evidence of breach of fidelity to Snap Fitness. This was a matter between Mr Milne, when running his own business, and another personal trainer running his own business. On that basis there can be no conflict of interest involving 24/7 as there was no suggestion that the activities for which the nutrition plan were used by Mr Milne were activities that were in conflict with 24/7. Furthermore there was never any complaint by the person whose nutrition plans had been used without proper payment and the matter itself was resolved with that person as soon as Mr Milne was queried about it.

[43] Assessing the other complaints one by one I have already noted that I do not accept that Mr Milne did fail to work the required hours in his employment agreement. Furthermore there was insufficient evidence for Snap Fitness to so conclude. Mr Milne adamantly denied being regularly absent during the working day. At the investigation meeting Mr Gibson could not adequately explain how such absences would not have been noticed by "head office" and how there had been no complaints raised by "head office" about Mr Milne's unavailability during the middle of the working day. I conclude that this would have been the case had Mr Milne regularly been absent on four hour lunches as claimed by one trainer with whom he clearly did not get on. Indeed, it is significant that no other complaint was received about Mr Milne's alleged regular absences given that staff had clearly been invited to raise any concerns they had with Mr Milne by Snap Fitness' investigator.

[44] It was also not open to Snap Fitness to conclude on the basis of its investigations that Mr Milne was not telling the truth about having a plumber look at the issue of the water heat in the showers. This was a serious matter that could have led to scalding of patrons and there was insufficient evidence from which Snap Fitness could draw an adverse conclusion against Mr Milne. There were no grounds, given the seriousness of the allegation, for not accepting his explanation that a plumber who had already been called in did look at the issue.

[45] Customer needs, cleanliness of the property, dealing with personal trainers, customer feedback and not fixing equipment are simply matters of performance as highlighted above. Indeed many of the issues relied on by Snap Fitness to dismiss Mr Milne were issues of customer service. Such issues are eminently remediable by counselling and/or further training and/or warnings. Importantly, these are not the sort of failures by a manager (even if true) that would justify summary dismissal without counselling and official warnings. With the greatest respect to Mr Gibson it appears that he was led to an unfair conclusion by the weight of the number of complaints, rather than their substance and/or their categorisation.

[46] Furthermore, in terms of how 24/7 acted, it was very difficult for Mr Milne to get a fair hearing in the absence of a formal meeting. While it is not essential in every case that a face to face meeting be held, here there was good reason to have a face to face meeting with Mr Milne. As I explained to Mr Gibson in the investigation meeting a face to face meeting, as the Authority's investigation meeting was, gave Mr Gibson his first opportunity to have a conversation with Mr Milne face to face about the issues and to hear his explanations and test them thoroughly. There must be sufficient investigation of complaints.

[47] What is also of concern as being unfair to Mr Milne was that Mr Gibson did not appear to give great weight to Mr Milne being on his own and being a young inexperienced manager. It was not clear what, if any, training he had received as such. These are the matters that should have led any fair and reasonable employer to consider that the matters could be dealt with by way of formal warning, if such was deemed necessary. It follows from the above that Mr Milne's dismissal was unjustified.

[48] While Mr Milne has claimed lost remuneration it is clear that he has failed to mitigate his loss. It is important for employees who have been dismissed to take

every opportunity to look for work, see for example *Waugh v. Commissioner of Police* [2004] 1 ERNZ 450 and *Nimon & Sons Limited v. Buckley* (unreported, Couch J, WC 26/07, 5 October 2007). No criticism of Mr Milne is meant by noting that he chose to return to the United States to be with his partner's family rather than look for work. However as a result Mr Milne is not entitled to any lost remuneration.

[49] Mr Milne was deeply affected by his dismissal. It affected his self-confidence in particular, as well as his standing in the Palmerston North fitness community and his career opportunities. In these circumstances I consider that compensation in the sum of $6,000 is appropriate.

[50] If there is to be any reduction for contribution there needs to be blameworthy behaviour by Mr Milne. While there were a number of genuine concerns about the way that Mr Milne conducted himself as manager of Snap Fitness in Palmerston North, none of those matters were proven as misconduct at the investigation meeting. I do not consider any reduction is warranted in this case because Mr Milne's dismissal was for serious misconduct when he should, even if his performance was not up to standard, have been subject to counselling and warnings.

[51] I therefore order the respondent, Palmerston North 24/7 Limited, T/A Snap Fitness NZ, to pay to the applicant, Mr Matthew Milne, the sum of $6,000 net in compensation.

Costs

[52] Costs are reserved.

G J Wood
Member of the Employment Relations Authority