



## **The investigation**

[3] The matter was not resolved in prior mediation. To assist the investigation the Authority was supplied with written witness statements from the Applicant; his wife Tina Ashton; former fellow employees Sid Hall and Steve Frew; Engineering, Printing and Manufacturing Union (“EPMU”) organiser Libi Carr; the Respondent’s Christchurch group engineer, and the Applicant’s manager, Dave Packer; and the Respondent’s Christchurch site manager Steve Thompson. Each witness, except for Mr Frew, attended the one-day investigation meeting where they each answered questions from the Authority and additional questions from the parties’ representatives. The representatives spoke to written synopses of closing arguments.

## **Issues**

[4] Throughout the Respondent’s actions are subject to the statutory test of justification – s103A of the Employment Relations Act 2000 (“the Act”) – as to whether they were what a fair and reasonable employer would do in all the circumstances at that time. The specific issues requiring determination to resolve this problem are:

- (i) whether the Respondent had agreed to or otherwise acquiesced to an extended period of leave?
- (ii) whether the Respondent took reasonable steps to accommodate the Applicant’s leave wishes, including consideration of using other staff to fill in for the Applicant?
- (iii) whether the Respondent treated the Applicant’s differently from others, for the implied reason of spite or retaliation for his earlier involvement in a strike?
- (iv) whether the Respondent was entitled to treat as serious misconduct the Applicant’s extended absence during a period for which he had been refused leave?
- (v) whether the Applicant was given an adequate opportunity to be heard before the Respondent dismissed him?
- (vi) whether, overall, the Respondent’s decision to dismiss the Applicant was one that a fair and reasonable employer would have made in the circumstances?

- (vii) whether, if there were a personal grievance, the Applicant did enough to mitigate his losses, and, in considering remedies (if any were warranted) whether any reduction was required due to contribution by the Applicant to the circumstances of the grievance?

**Was the leave agreed or acquiesced to earlier?**

[5] In July 2004 the Applicant and his wife joined a group of couples saving to travel together to Germany for the 2006 World Cup. This syndicate included the Applicant's workmate Mr Hall. Its members planned to meet the cost of the trip by pooling regular contributions in bank term deposits attracting good rates of interest and organising fundraising activities, including workplace raffles.

[6] The syndicate had agreed rules that meant a couple withdrawing from the group could only recover their contributions but would forfeit their share of additional funds earned through interest and fundraising.

[7] The Applicant and his wife joined the syndicate by 'buying out' the share of a couple that had decided to drop out. This required an initial payment of \$6320 and then ongoing weekly payments of \$40.

[8] Shortly before joining the syndicate – a substantial financial commitment over a period of two years – the Applicant spoke with his manager about the prospect of getting leave around the weeks of the 2006 World Cup.

[9] The Applicant's evidence was that he asked his manager if it "would be a problem" for both him and Mr Hall to be away from the workshop at the same time for about six weeks. He says that Mr Packer replied: "*I can't see that being a problem*".

[10] The Applicant says that he also reminded Mr Packer of this plan in January 2005 when he was asked about his level of accrued leave – at that stage totalling around nine weeks. The Applicant says that he reminded Mr Packer of his World Cup travel plans and was told: "*You won't be able to take nine weeks leave*". He says that

he told Mr Packer again that he planned to take around six weeks and nothing more was said to him at any time during that year about his accumulated leave.

[11] Mr Packer accepts that the Applicant spoke with him, probably in July 2004, about using accumulated leave to go to the Soccer World Cup in 2006. He insists no specific plans or financial commitments were mentioned and that the Applicant told him no dates or length for the intended leave. He also accepts that he knew Mr Hall had similar plans and that he knew both Mr Hall and the Applicant were in a travel syndicate because of the fundraising activities they organised at the workplace. He denies talking with the Applicant in January 2005. Rather he says that in July 2004, although he does not recall specifically, he believes he would have told the Applicant to “*put in your form*”.

[12] The system of leave approval operated by the Respondent involved workers submitting a form to their managers for consideration. The Applicant’s evidence does not suggest that he was unaware of that system or that it did not in fact operate. It was not until 12 December 2005 that he applied for annual leave from 29 May to 30 June 2006, a period of 24 working days stretching over five full working weeks.

[13] The standard of proof in employment proceedings is “*the balance of probabilities flexibly applied according to the gravity of the matter*”.<sup>1</sup> In the present case the evidence of the Applicant alone is sufficient to conclude that, on the balance of probabilities, Mr Parker stated no more than an opinion in mid-2004 about the prospects for an extended period of leave by two staff members in mid-2006. He cannot have agreed to a specific period of leave or dates because at that stage neither the Applicant nor Mr Hall knew the intended dates of travel, and the Applicant does not suggest Mr Parker did.

[14] Neither did the Applicant attempt to use the familiar system of leave application to confirm leave dates well in advance. Rather he took what can only be called a risk, calculated or not, that the leave would be approved when formally applied for.

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<sup>1</sup> See *Whangarei College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at [20] (CA) and *Kostic v Dodd & Milligan* (unreported, EC, CC 14/07, 11 July 2007) at [79].

[15] In these circumstances I find that the Respondent did not, through the actions of Mr Parker in 2004 or early 2005, unequivocally commit itself to agreeing to the Applicant taking extended leave in 2006.

**Were reasonable steps taken to accommodate the Applicant's leave wishes?**

[16] The Applicant's leave application, submitted on 12 December 2005, was refused by Mr Thompson on 20 December 2005. There is a dispute in the evidence, that I need not resolve, about whether Mr Packer told the Applicant about this on the last day of work for that year, 23 December 2005, or whether the Applicant was told on his return to work after the Christmas and New Year statutory holidays. It is agreed that on 10 January 2006 the Applicant received a memo from Mr Thompson stating:

*Unfortunately the company is not able to grant you leave of this duration at this time of year due to engineering commitments in the Christchurch plant.*

*We would however, consider granting you leave of 15 working days at or around this time.*

*If you wish to pursue this option, please re-submit your application as soon as possible.*

[17] Unknown to Mr Packer or Mr Thompson the Applicant had met with his travel agent on 19 December 2005 to confirm bookings for flights and accommodation for his trip, even though at that stage his leave application, submitted on 12 December 2005, had not been approved. Under those arrangements with the travel agency, those bookings were paid for by credit card transfer in late January 2006.

[18] Only five days of the planned trip were to be spent in Germany, staying in a town near the World Cup venue of Munich. The remainder included eight days in the United States enroute to Europe, and then after visiting Germany, spending a further three weeks visiting Paris, Glasgow, London, Rome and Singapore.

[19] After finding out his leave application had been refused the Applicant talked with Mr Thompson and was told the refusal was based on Mr Packer's concern about engineering commitments later in the year. The dates of those commitments – involving installation of new equipment – were not settled and depended on arrival of imported machinery. The Applicant was asked to talk to Mr Packer. However

nothing was resolved and the Applicant wrote directly to the Respondent's Auckland-based General Manager Scott Hillberg on 26 March 2006. He advised that his "*application for five weeks annual leave to attend the Soccer World Cup in Germany and further travel in Europe*" had been declined because of engineering commitments. However he noted that a workshop wall-planner used to show upcoming commitments showed none during the time of his requested leave. He also told Mr Hillberg that in mid-March Mr Thompson had met with him and asked what he would do if not granted the leave. He said his reply was that "*due to the money already spent and the time spent planning, cancellation was not an option and I would have to resign*". He said Mr Thompson then referred to being 'held to ransom'. He asked Mr Hillberg to look into the matter.

[20] Mr Hillberg replied by letter on 4 April 2006 after consulting with Mr Thompson. He confirmed the Respondent's view that the leave sought "*would have placed severe strains on our Christchurch engineering resources at a time when new bindery equipment is being installed and old equipment is being decommissioned*". Mr Hillberg said there were insufficient experienced and qualified staff to provide adequate cover for the Applicant going on leave then but reiterated the offer of 15 working days as "*the company's best efforts to offer a reasonable compromise solution, even though leave of even 15 working days would be very difficult, given the engineering work required at the Christchurch plant during that time*".

[21] The Applicant remained dissatisfied with the Respondent's decision and in early May Ms Carr, the EPMU organiser for his workplace, wrote to Mr Thompson. She advised that the Applicant was "*now in the position of not knowing whether if he takes the leave he will continue to be employed by PMP on his return*". She suggested there were staff available who "*could easily fill in*" for the additional nine days between the 24 days leave that the Applicant wanted and the 15 days that the Respondent was prepared to approve. She said the Respondent was acting unreasonably and referred to section 18 of the Holidays Act 2003:

***Taking of annual holidays***

*(1) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.*

*(2) If an employee elects to do so, the employer must allow the employee to take at least 2 weeks of his or her annual holiday's entitlement in a continuous period.*

*(3) When annual holidays are to be taken by the employee is to be agreed between the employer and employee.*

*(4) An employer must not unreasonably withhold consent to an employee's request to take annual holidays.*

[22] Respondent's counsel replied that "*proposed cover*" suggested by the Applicant would leave the Respondent "*to depend on the goodwill of independent contractors who have no loyalty to the company*" which was a risk it was not prepared to take.

[23] The availability of two former staff members – Steve Frew and Steve Fergusson – who the Applicant suggested could have provided cover for him was canvassed in detail in both the written and oral evidence available to the Authority's investigation. Having reviewed that evidence I am satisfied, for three reasons, that the Respondent's conclusion that this proposal would not meet its business needs was not an unreasonable conclusion.

[24] Firstly, Mr Thompson, based on experience of contracting Mr Frew to do other short periods of work in 2006, believed that Mr Frew had other commitments to which he gave priority and that he could not be relied on to turn up. Given that Mr Frew provided a witness statement but, without explanation, did not attend the investigation, and, I was told, could not be contacted by Applicant's counsel, I cannot say that Mr Thompson's belief was unfounded. Mr Ferguson worked for a contract labour company and his availability for the required days could not be guaranteed.

[25] Secondly, the Respondent had arranged for installation of sophisticated bindery equipment, imported from Europe, which it believed would take place during the period that the Applicant wished to be on leave. The actual timing of the installation depended on shipping schedules which were subject to change and delay. An installation crew was to come from Europe and the company's practice was to have its local engineers – such as the Applicant – spend as much time as possible with overseas installers in order to learn as much as possible from them about the operation and maintenance of the new machinery. The Respondent wanted the Applicant to be

involved in that process, either directly or by covering the work of other local engineers while they worked alongside the overseas specialists.

[26] Thirdly, I accept Mr Thompson's evidence that he made the decision on the Applicant's leave application on the basis of an overall assessment of risk of having the company's most experienced Christchurch engineer (as the Applicant agrees he was) absent for an extended period. Despite that assessment, and the factors weighed, the response was not an outright refusal of leave but an offer to provide 15 days. It did however draw the line at extending that offer by another nine days – as subsequently sought by the Applicant to achieve his desired 24 days – because of the factors already outlined. I find that, in terms of s18 of the Holidays Act, this did not amount to unreasonably withholding consent to a leave request or failing to attempt to agree annual holidays.

[27] However it does touch on another factor, which relates to the Applicant's own role in this matter. Mr Thompson's evidence was that on 20 December when he made the decision on the applicant's leave request, Mr Packer had told him that he understood the Applicant wanted the leave so he could attend the World Cup in 2006. However Mr Thompson assumed that the Applicant had not already committed himself to travel plans without first finding out the outcome of his leave application.

[28] That was not the case. The Applicant had not informed the company of his arrangements and he accepts that neither Mr Packer nor Mr Thompson would have known the extent or detail of the plans he had already made. As he put it in his evidence at the investigation meeting: *"I never volunteered the information and it was never asked for."*

[29] His approach was less than satisfactory and lies at the heart of the problems which then ensued. The statutory good faith obligations to be responsive and communicative lay equally on the Applicant as well as his employer. The Holidays Act was echoed in a provision of his collective agreement that *"annual leave will be taken at times which are mutually agreed between employer and employee."*

[30] Throughout, through his own advocacy and that of his union organiser, the Applicant never took anything other than the view that the full length of leave he

sought should be granted. He never gave any real consideration to or explored the possibility of adjusting his travel plans to fit within the 15 days offered by the company. As he admitted in his evidence at the investigation he made no inquiry about whether his airline bookings were refundable or could be changed. Neither did he ever contemplate cancelling his trip.

[31] In short the Applicant cannot be said, I find, to have met his own obligations to at least explore and consider the prospect of compromise or change in seeking mutual agreement on when annual holidays were to be taken.

[32] Rather he set his course at complete agreement by the company to his proposal without having informed them of the extent to which he was already bound, by his own bookings made in advance of the company's decision, and fettered his own ability – at least as he saw it – even to contemplate compromise or change to meet to meet the company's proposal of 15 working days.

**Was the Applicant treated differently because of earlier strike activity?**

[33] I find that the evidence does not support the Applicant's allegation that refusal of his extended leave application was "*some sort of corrupt punishment or continuing a personal vendetta*" because of his role as a union delegate during a strike at the workplace in November 2004.

[34] It is clear that the Applicant subsequently had a frosty relationship with his manager Mr Packer but he also felt disappointed by other employees who had not supported the union during collective contract negotiations.

[35] However the vendetta allegation was not raised at any stage prior to the Applicant filing his witness statement in June 2007. It is noticeably absent from his statement of problem filed by union counsel in December 2006 and all the prior documents and correspondence.

[36] Neither, I find, it is borne out in the evidence regarding decisions made about the leave of other staff, which the Applicant alleged showed inconsistency or unfairness.

[37] Mr Hall was initially not granted leave to attend the World Cup. His application was denied because it included a period of unpaid leave, which Mr Thompson operated a policy of not granting. Mr Hall was asked to resubmit his application including all accrued leave. He did not do so and decided to resign instead. However I accept Mr Thompson's evidence that an amended application for extended leave by Mr Hall would have been granted, and that this is not inconsistent with the decision made about the Applicant's leave request. Mr Hall was not a tradesman. He was a trade assistant or handyman. His skills were not as essential in the disputed period or, as it transpired, subsequently. He was not replaced when he resigned in April 2006. The Respondent was able to do without him or another person in his previous role.

[38] That also accounts for the extended leave that Mr Hall had been granted at short notice in 2004 to attend an unplanned family event in Britain.

[39] The leave arrangements and approvals of four other staff members over 2004-6 were also canvassed in evidence. Ultimately the Applicant's case on this point reduced to his view that the Respondent had been able to find staff to cover leave for those workers but not for him, which he considered to be inconsistent. In each case I am satisfied that the circumstances of those applications and the company's reliance on the four individuals in those positions at the time that leave was granted were not sufficiently similar to that of the Applicant. Accordingly his allegation of inconsistency and unfairness is not substantiated.

### **Leave without authorisation**

[40] Having failed to achieve the Respondent's agreement to his leave, the Applicant advised Mr Thompson by email on 21 May 2006 that he intended to take holidays from 29 May to 2 July in any event.

[41] The next day Mr Thompson met with the Applicant, accompanied by his union organiser, and cautioned him that going ahead with unauthorised leave would be seen as a wilful breach of his employment agreement and would result in disciplinary action for serious misconduct.

[42] This was followed by a letter from Mr Thompson stating:

*If you proceed with your plans as stated, you place your employment in jeopardy, and upon return you will be required to attend a disciplinary meeting, where it will be decided whether the company can continue to employ you.*

[43] Ms Carr promptly replied that such action on the Applicant's return to work would be "regarded as grounds for a Personal Grievance".

[44] On his return to work the Applicant was notified of a disciplinary meeting on 5 July 2006 which he attended with Ms Carr. In that meeting, and through an exchange of emails in the following days, Mr Thompson and Ms Carr re-examined all the elements in the Respondent's assessment and decision regarding the Applicant's leave application.

[45] Mr Thompson sought additional information about when the Applicant had made and paid for his travel and accommodation bookings. Ms Carr resisted providing these and did not do so before the parties met again on 25 July 2006 where the Applicant was advised of the company's decision to dismiss him.

[46] By letter of the same date, the reasons for the dismissal were set out:

*The Company does not believe that at any point you were given an indication or impression that the 5 weeks leave in dispute would be granted.*

*You have taken the 5 weeks leave without approval despite being advised that to do so would be regarded as serious misconduct and would place your employment in jeopardy.*

*Your failure to follow a Company instruction not to take the leave has seriously damaged the Company's trust and confidence in you as an employee. This along with the effect your unauthorized leave has had on the other members of Engineering team and staff morale overall has resulted in the Company taking the decision to terminate your employment. This termination is effective immediately.*

### **The statutory test of justification**

[47] The Respondent's actions in refusing leave to the Applicant and later dismissing him are measured against the test set out in s103A of the Act. As

explained by the Employment Court in *Air New Zealand v Hudson* [2006] 1 ERNZ 415, 441-2:

*... the test does not licence the wholesale substitution of the views of the Court [or Authority] for those of the employer but requires an objective evaluation of the actions of the employer against a statutorily imposed standard. The emphasis has shifted from the range of possible responses open to an individual fair and reasonable employer to an objective evaluation of the employer's response to misconduct against what a fair and reasonable employer would have done in all the circumstances.*

*[142] All the circumstances of the case includes not just the employer's reaction to the misconduct which it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and the employer. In other words, a return to the test as articulated by Williamson J.*

[48] That test is described in this way at 433:

*... Williamson J gave an early and authoritative articulation of the way the Court should evaluate the justification for dismissal in Wellington Road Transport Union of Workers v Fletcher Construction Co Ltd where he said that:*

*In each case the Court considers all of the circumstances. In a list not meant to be exhaustive . . . the Court considers: the conduct of the worker; the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract (express, incorporated and implied); the terms of any other relevant agreements; and the circumstances of the dismissal. The Court also has regard to good industrial practice which includes some consideration of the social and moral attitudes of the community.*

...

*[94] That is not to say that Williamson J advocated for the Court to have the unfettered ability to interfere with an employer's decision. He said :*

*In such circumstances we think some weight had to be given to what Judge Jamieson described as a right of proper assessment in Airline Stewards IUOW re Bell v Air New Zealand Limited:*

*'In such a case the Court does not feel that it should weigh in a nice balance the question whether or not it would have been as severe as the employer was. Something must be left to the employer in assessing what is proper in such a case and to what extent leniency is justified, once adequate grounds for dismissal have been found.'*

*Put in other words, an employer has some right of choice between those options which are within what is fair and reasonable. The Court has a duty of inquiry and a right of judgment and it is not much fettered by the decision under consideration. Where an employer chooses an option within allowable limits, we think the Court has to take some account*

*of the fact that it is reviewing the decision of someone else and is not itself making a decision de novo. If the decision is found to be one properly open to the decision maker, the Court should hesitate to interfere with that decision.*

### **Was going on leave anyway serious misconduct?**

[49] The Applicant's deliberate defiance of the Respondent's refusal to grant leave is clearly capable of being considered as serious misconduct by a fair and reasonable employer.

[50] It is a conclusion that, I find, a fair and reasonable employer – that is not the particular Respondent but the notional employer objectively evaluated – would have reached. The Applicant's decision to proceed with his holiday in defiance of the rejection of his leave application – which I have found was fairly considered – was a wilful and deliberate act which placed his employer at some risk. It would seriously undermine the confidence of a fair and reasonable employer that it could continue to rely on the faithful service of such an employee.

### **Was the disciplinary process conducted fairly?**

[51] Similarly there is no serious challenge to the fairness of the disciplinary process. The Applicant had clear notice of the meetings and the issues and was able to secure professional advocacy from his union organiser throughout.

### **Determination**

[52] Having accepted that the Applicant's conduct was capable of amounting to serious misconduct, and the disciplinary process was fairly conducted, the question is whether the step of dismissal was one that a fair and reasonable employer would have taken in these circumstances.

[53] Counsel referred to two decisions touching on the circumstances of a worker taking leave in defiance of an employer's refusal and the justifiability or otherwise of a subsequent decision to dismiss.

[54] In *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668 the Employment Court found the employer unjustifiably dismissed a worker when a manager had under-estimated the cultural importance of the leave requested, and refused the leave so shortly before the day sought there was no time to make alternative arrangements. While the leave application had been made outside the terms of the official process, previous such applications had been approved and the worker was not fully apprised of the consequences of going ahead and taking the leave.

[55] I am satisfied that the circumstances of the present case are significantly different from the *Burberry* case. Here the instruction not to take the leave was, I have found, both lawful and reasonable. The Applicant was clearly apprised of the decision well in advance – some five months – although he continued to dispute it. He was also clearly notified by the Respondent of the likely consequences should he flout the decision.

[56] A second case – *Brownless v Tasman Pulp & Paper Co Ltd* [1994] 2 ERNZ 647 – also had some relevance. There a worker, on the advice of his union organiser, took a week's leave after the employer had refused permission and was later dismissed for disobeying a lawful and reasonable instruction. Put shortly, the Court in *Brownless* found the dismissal unjustified because the worker was really a pawn in a wider dispute between the employer and the union and the consequence of dismissal was too harsh for the individual worker caught in the wrangle. The Court decided that Mr Brownless was being 'used' to make a point and the employer made a number of procedural errors in its dealings with him in response to that 'point'. That does not apply to the present case – and Ms Carr emphatically confirmed during the investigation that the Applicant did not go ahead with his holiday plans on the basis of any union advice that he could safely do so.

[57] Rather what was at stake in the present case was the individual resolution of the Applicant that he would take the leave he wanted when he wanted, regardless of his employer's refusal on clear and stated grounds. It was, I find, a wilful and deliberate act of disobedience that a fair and reasonable employer would consider serious misconduct fatally undermining its trust and confidence in that worker. Summary dismissal was an option open to the employer.

[58] The failure of the Applicant to be 'upfront' throughout about the extent to which he had already committed himself to travel plans, irrespective of his employer's decision, was not known to the Respondent at the time. However it is a part of all the circumstances at the time of the dismissal, which if known, would have supported its justifiability and is a factor I take account of now in not interfering with the employer's decision.

[59] The Applicant was clearly aware of the likely consequences of his actions in advance. In early May his union organiser, on his behalf, had referred to the prospect of not continuing to be employed on his return. He further prepared for that prospect by taking his tools home – rather than store them at work as usual – when he left for his holiday. His dismissal was a consequence that he contemplated and brought upon himself.

[60] In all the circumstances I find the Respondent's actions in refusing the leave and dismissing the Applicant were justified. The personal grievance application is dismissed.

### **Costs**

[61] The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do so, the Respondent may lodge within 28 days of the date of this determination an application for the Authority to determine the matter of costs. The Applicant may lodge any reply to such an application within 14 days of it being made. No application will be considered outside that timeframe.

Robin Arthur  
Member of the Employment Relations Authority