

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Allister Beckett (applicant)
AND	Whakatu Wool Scour Limited (respondent)
REPRESENTATIVES	Simon Mitchell for Mr Beckett David McLeod for the Company
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Napier, 9 August 2007
SUBMISSIONS RECEIVED BY	16 August 2007
DATE OF DETERMINATION	21 August 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In his statement of problem filed on 12 April 2007 Mr Beckett said he was unjustifiably dismissed. He claimed unspecified lost wages, compensation for humiliation, etc and costs.
2. In its statement in reply received on 26 April the Company said Mr Beckett's dismissal was procedurally and substantively justified.
3. The parties have undertaken mediation.

4. During a telephone conference on 1 June the parties agreed to a one day investigation in Napier on 9 August and relevant timetabling for the provision of witness statements. As it happened, the investigation was completed in half a day.

Background

5. I am satisfied from the evidence that the key events in this employment relationship problem can be accurately summarised as follows.
6. The Company operates its wool scouring business on a 24/7 basis for a large portion of the year, with a staff of 36.
7. Mr Beckett was a permanent employee whose terms and conditions of employment were set out in the Whakatu Wool Scour Limited Collective Agreement 2005-2006, as well as in the Company's House Rules which are attached as appendix 2 to that agreement.
8. In a letter dated 1 June 2006 the Company raised with the applicant, in addition to an allegation he was late arriving at work on 1 June, a concern regarding his non-availability for wash downs/overtime.
9. By letter dated 7 June Mr Beckett's union was pursuing those matters on his behalf. Amongst other matters, the union's letter pointed out that its member was only 1-minute late and that overtime, per the collective agreement, was voluntary.
10. In a reply dated 8 June the Company said Mr Beckett was persistently late, that his arrival time annoyed and frustrated other staff at the designated shift changeover and the applicant was seen as not doing his fair share of work. Management made clear its view that its requirement Mr Beckett do overtime was fair and reasonable. It proposed the parties meet to discuss these issues, rather than exchange letters.
11. By letter dated 21 July the Company raised with the applicant various areas of concern and warned that, if established, misconduct or serious misconduct could place his employment at jeopardy. A disciplinary meeting was sought. Mr Beckett and his representatives met with the Company first on 2 August and again on 3 August: the latter meeting culminated in the applicant's dismissal, on that day. At that time Mr Beckett's service totalled nearly 3 years.

12. At the time of his dismissal Mr Beckett was under a verbal warning for lateness: consistent with par 1.5.3 of the House Rules, the warning was dated 5 August 2005 and would expire after 12 months.
13. In a letter dated 7 August the Company set out its reasons for dismissing the applicant. They included:
 - a. Being absent from work on 19, 20 & 21 July 2006;
 - b. The notification of his absence on those three days.
 - c. Mr Beckett's sick leave record.
 - d. The impact of this ongoing situation on both the Company's business and staff morale.
 - e. A complaint of sub standard work performance.
14. Other factors cited in the letter of 7 August that clearly contributed to the respondent's decision to dismiss Mr Beckett included a claim that, following the 2 August meeting, the applicant said to a management representative that he expected to be dismissed, had another job lined up and if he was paid out would go. Management concluded (as the letter makes clear) it believed Mr Beckett was calculatedly absent on 19, 20 & 21 July so as to disrupt operations.
15. In his statement to the Authority, the Company's Operations Manager, says (at par 52) his reasons for dismissing the applicant were:
 - a. The applicant lied to him;
 - b. Mr Beckett did not acknowledge his high absence rate was unsustainable or that it would change;
 - c. Mr Beckett similarly did not acknowledge that his continued failure to properly communicate was unsustainable or that it would change; and
 - d. The timing of Mr Beckett's communication was designed to disrupt operations.

16. During the Authority's investigation Mr Beckett confirmed he was seeking 8-weeks lost wages and \$8,000 compensation for humiliation, etc. His costs were approximately \$3,500 to date.

Mr Beckett's Position

17. In submissions dated 15 August from the applicant's counsel, Mr Simon Mitchell, the following is submitted, amongst other things.
18. The respondent's view that the applicant's approach to time keeping was unacceptable was never communicated to him. Per s. 64 of the Holidays Act 2003, and consistent with Mr Beckett's right to take sick leave, he notified his employer as early as possible before he was due to start work of his intention to take sick leave. There is no obligation to advise an employer during the course of business hours (a time when, because of his shift work, Mr Beckett would often be asleep). That Act does not impose obligations as severe as those suggested by the Company.
19. If the Company was of the view that the timing of Mr Beckett's advice of his sick leave was designed to disrupt operations, it was entitled to require proof of sickness: it never did.
20. A criticism of the applicant is that he had 23 days off in 13 months: however, his collective agreement provides for an accumulation of up to 50 days sick leave. The employer therefore considers lengthy absences to be acceptable. The letter of 21 July calling the applicant to a disciplinary meeting does not cite his sick leave record (other than for the past month) as a reason for the meeting.
21. Mr Beckett denies the comments attributed to him on 2 August: he does accept he made comments similar to those attributed to him, in particular that he expected he would be sacked on that day. The Company clearly considers these comments to be important. There is no misconduct in the words attributed to Mr Beckett, and it is not unreasonable for an employee to have in mind a plan 'B'. It is unreasonable for the Company to give them any weight. Instead an employer is obliged to avoid being drawn into irrelevant issues, and to keep an open mind in assessing, dispassionately, whether there is evidence of misconduct.
22. The approaches of the Employment Court to s. 103A of the Act are now clearly known: *Fuiava v Air New Zealand Limited* [2007] 1 ERNZ 806, see par 50. In this case a fair and

reasonable employer would not have taken into account the comments attributed to Mr Beckett as they were irrelevant and unrelated to the matters before the Company.

23. Similarly, in the absence of evidence and without putting the matter to the applicant, a fair and reasonable employer would not have found that Mr Beckett set out to disrupt. It is clear that the Operations Manager did not like the applicant: he believed the applicant was unreasonable and unsupportive of the employer. This is demonstrated by the issues surrounding overtime. In reality it was the Company that behaved unreasonably.
24. The procedure used by the Company was unfair as it failed to fully and properly consider his explanations and submissions. It rushed to find fault, taking into account issues which did not indicate misconduct or were irrelevant. As a result this is not an appropriate situation for remedies to be reduced by way of contribution.
25. Mr Beckett was out of work for 8 weeks. He then obtained labouring work at around \$8.00 per hour between 20 and 30 hours per week. (I note at this point that his hourly rate is less than the adult minimum rate but that is a matter between Mr Beckett and his employer, who is also his brother). It is therefore appropriate he be awarded 3-months lost wages and a substantial payment pursuant to s. 123 (1) (c) (i).

The Company's Position

26. The Company says it conducted a thorough and complete investigation into all relevant matters, allowed Mr Beckett an appropriate opportunity to comment and only made a decision once the investigation was complete. All matters considered by the Company were properly put to the applicant. The Company reached the view that its relationship with the applicant was so deeply impaired that it could not continue. Mr Beckett had a troubled history with the Company during his two years employment. He was spoken to by the Operations Manager about his performance, timekeeping and absences on many occasions.
27. At the time of his dismissal, the applicant was on a live warning from August 2005. Mr Beckett had been involved in a formal review of his performance in May 2006 and had been given a formal notification of the requirement to improve.
28. Because of his shift system Mr Beckett would have known that a failure to properly advise the plant of his impending absence on sick leave would disrupt its operation.

29. Mr Beckett's advice, that he later denied, that he did not care if he was dismissed and that he expected he would be was relevant as it clearly displayed an intransigent attitude: the matter for the Company to resolve was whether Mr Beckett was a trustworthy employee or was he prepared to lie about his actions.
30. The Company relies on *Air New Zealand v Hudson* [2006] ERNZ 415, in demonstrating the adequacy of its investigation and the conclusion it reached. Mr Beckett was properly dismissed for serious misconduct, consistent with the provisions of his collective employment agreement.
31. In the alternative, Mr Beckett's efforts to mitigate his loss are scant and unconvincing: no good reason was provided for the 6-week delay in his obtaining employment. It should also be noted that Mr Beckett seeks 8-weeks lost earnings, yet his pay record shows the gap was only of 6-weeks duration. The claim for humiliation, etc was similarly unsupported by any reasonable evidence. Any award should therefore be modest.

Discussion and Findings

32. The issue before the Authority is whether the action taken by the Company in dismissing Mr Beckett for the reasons set out in its letter of 7 August 2006, objectively measured, was within the range of actions a fair and reasonable employer would have taken in all the circumstances prevailing at that time: s. 103A of the Act.
33. I am satisfied the Company's decision to dismiss Mr Beckett did not, for the following reasons, meet the requirements of s. 103A.
34. I am satisfied from the evidence that Mr Beckett was on sufficient notice of his employer's legitimate concerns about his timekeeping, his absenteeism/sick leave, work performance and the impact those issues had on staff morale. However, I do not accept that the Company fairly and reasonably, after interviewing the applicant and taking account of his concerns, properly satisfied itself that Mr Beckett's performance did not meet the standards required of him as set out in the Company's House Rules at par 1.5 onward, such that it could effectively dismiss him summarily for serious misconduct.
35. The Company is unable to put forward any evidence of egregious performance by Mr Beckett such that it was justified in dismissing him for serious misconduct. That is because: Mr Beckett's lateness was of the order of one or 2 minutes; on 21 July he was suspended and not absent as a result of sick leave; he did comply with his contractual

requirements to notify in advance of his absence from shift work because of illness (par 10 (g) of the collective agreement) even though the Company preferred he contact them during normal hours; there was no requirement on the applicant that he undertake overtime as directed; the comments allegedly made by Mr Beckett between the meetings on 2 & 3 August were irrelevant to the substantive issues before the employer and did not amount to misconduct any way; and there was no reliable (indeed any) evidence his absence was intended to cause the Company maximum disruption. The operations manager may have been entirely justified in doubting the likelihood of Mr Beckett's improving his attitude and hence work performance but was still beholden to putting the applicant on a second and final warning.

36. I am also satisfied, in the alternative and in the event that the Company, objectively measured, was able to say it had proper reason to conclude the applicant's performance was unsatisfactory, it was contractually obliged to adhere to its own House Rules and extend to Mr Beckett a second and final formal warning: par 1.5.2.: as conceded by the respondent's operations manager during the Authority's investigation, the Company failed to adhere to the agreed process and extend to the applicant a second warning, but instead jumped to a finding of a third offence and thereby dismissed him (above) in breach of its own procedure.

Remedies

37. Mr Beckett's evidence of attempting to mitigate his losses by finding alternative employment was limited to oral evidence provided during the Authority's investigation. In particular Mr Beckett said the jobs suitable for him were limited because of what he was after: consistent with his training and qualifications, the applicant was seeking employment as a chef, within the Hawkes Bay.
38. As it happened, and no doubt because of the time of year, his recent work history and his geographic and employment preferences, no work was forthcoming until his brother offered him part-time labouring work, at a lesser hourly rate than that paid to him at the wool scour. The applicant could not explain why he did not consider such work sooner.
39. Because of Mr Beckett's self-imposed employment option limits, I am satisfied he is properly entitled to receive only one-month's wages as compensation per ss. 128 (2) of the Act.

40. The applicant's evidence of humiliation, etc was similarly limited: I am satisfied that Mr Beckett is properly compensated by way of \$5,000 under this heading.

Contributory Fault

41. While Mr Beckett attributes some of his time keeping problems to a rare medical disorder (but with little medical evidence in support), he was on notice – since the arrival of the operations manager in March 2006 – that aspects of his performance were under close scrutiny. The applicant's response was nonetheless lukewarm. His behaviour comes close to meeting the requirements of s. 124 of the Act, to the extent that his actions during the 3-years of his employment contributed to the situation that gave rise to the personal grievance. However, having regard to the modest remedies awarded the applicant and the Company's obligations to (and control over) its own disciplinary process, and the finding that – if the process was properly applied – Mr Beckett was in line only for a final warning, I am satisfied that no contributory fault should be awarded in this case.

Determination

42. For the reasons set out above the Company is to pay Mr Beckett one month's lost remuneration and compensation for humiliation of \$5,000 (five thousand dollars).
43. While costs are reserved I note that the amount claimed by Mr Beckett is – subject to the Company's submissions – a realistic starting point from which the parties should readily reach agreement on a fair and reasonable contribution to the applicant's costs.

Denis Asher

Member of Employment Relations Authority