

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 163/07
File Number: 5085866

BETWEEN David Cooper
 Applicant

AND Mars New Zealand Limited t/a
 Mars Petcare
 Respondent

Member of Authority: Denis Asher

Representatives: Tony Wilton for Mr Cooper
 Katherine Burson for the Company

Investigation Meeting Wanganui, 4 December 2007

Submissions Received Submissions were provided by counsel on the day of
 the investigation

Determination: 6 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] In an application filed on 26 July 2007 Mr Cooper said he had been disadvantaged by the Company. He sought a determination that the issuing of a warning to him was unjustified, compensation of \$5,000 for humiliation, etc and costs.

- [2] In its statement in reply received on 13 August the Company denied the allegation. The Company said that Mr Cooper was justifiably issued with a 12-month warning in November 2006 as a result of his poor level of attendance at work.
- [3] The parties underwent mediation but their employment relationship problem remained unresolved.
- [4] Following a telephone conference the parties agreed to an investigation in Wanganui on Tuesday 4 December 2007. The parties usefully provided written statements in advance of the investigation and what I understood to be an agreed bundle of documents. Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

Background

- [5] There are few if any disputed facts between the parties.
- [6] The Company operates a pet food manufacturing plant at Wanganui.
- [7] Mr Cooper has been employed by the Company for over eight years. He is a machine operator.
- [8] During the latter part of 2005 and into 2006 Mr Cooper was absent from work on a number of occasions because of illness. He says that on each occasion he provided the Company with medical certificates. Mr Cooper took paid sick and annual leave.
- [9] The Company says that during the period 27 January to 17 November 2006 Mr Cooper was absent for a period of 23 days as a result of illness. It says he did not always produce medical certificates and those he did provide were general in nature, lacking in detail as to his sickness and some were post-dated.
- [10] The Company says Mr Cooper's absence, particularly because he is an expert operator in his key work area, caused it problems as transferring other staff to replace him, and finding contract labour in a shift-based environment at short notice to replace the staff substituting for the applicant, was difficult.
- [11] On 26 February 2006 the applicant's line manager, Mr Brian Wood, met with Mr Cooper to discuss the respondent's concerns about his absences during 2005 and the start of 2006.

- [12] On 12 September 2006 Mr Wood and the applicant's area leader, Ms Jackie Edwards, met with Mr Cooper to again discuss his attendance record.
- [13] The Company says on each occasion Mr Cooper was advised it would need to consider disciplinary action if his attendance did not improve. On the second occasion the Company advised the applicant he could seek EAP assistance or assistance from the Company doctor, if he wished. Mr Cooper did not accept either of these offers.
- [14] Mr Wood sent a memorandum to the applicant on 23 November 2006 inviting him to a formal disciplinary meeting to discuss the respondent's concerns about his continuing levels of absences.
- [15] A meeting followed on 25 November: Mr Cooper attended with a representative. Following the meeting, and after considering what the applicant had to say, the Company issued Mr Cooper with a first formal warning dated 28 November, to expire 12-months later.
- [16] Following the approach of a site delegate the Company agreed to modify its warning letter. A revised warning letter dated 20 December 2006 was issued to Mr Cooper on 4 January 2007 (document 9 in the agreed bundle). It repeated the Company's offer of EAP counselling assistance or to work through any issues with the Company's doctor.
- [17] Because of the applicant's ongoing concerns, the parties met again on 10 January 2007 during which Mr Cooper raised various concerns about the warning letter. Following that meeting the Company revised the warning again by removing the requirement that Mr Cooper make direct contact with Mr Wood to report any future absence.
- [18] The parties met again on 18 January during which Mr Cooper again repeated his view that it was inappropriate for the Company to issue a misconduct warning in respect of absenteeism arising out of genuine ill health.
- [19] After further consideration, and on 20 January, the Company advised the warning issued on 4 January (without the modifications discussed on 18 January) would remain in place until November 2007 (i.e. document 9).
- [20] Mr Cooper raised a grievance with the Company on 27 March.
- [21] At the Authority's investigation on 4 December the Company confirmed Mr Cooper's warning had expired and a note had been placed on his file to that effect.

Parties' Positions

Applicant's Position

- [22] Mr Cooper says he has never previously been issued with any kind of warning by the Company.
- [23] He says that on each occasion he has been absent because of illness he was genuinely sick, that he always rang in on the 0800 number as required and, he thinks, he has always supplied a medical certificate.
- [24] Mr Cooper says he was disadvantaged by the warning as he was concerned that if he was sick again he might lose his employment. He says the warning made his employment less secure and caused him (and his wife) worry and stress.
- [25] The warning was unjustified because a fair and reasonable employer would not regard absence for reasons of genuine illness as misconduct. While a fair and reasonable employer may properly address a situation where it feels an employee is not fulfilling his side of the employment bargain it would do so by way of a proper process and work through the situation; it would not commence a disciplinary process.
- [26] Mr Cooper does not understand how being sick can be construed as misconduct. He says the reason his attendance has improved is because he has not been as sick as in previous years. In the meantime, he says, he was distressed and hurt by the implication of the misconduct warning that his absenteeism for illness was not seen by the Company as genuine, but that it saw him instead as shirking or malingering.
- [27] Counsel for Mr Cooper, Mr Tony Wilton, said – amongst other submissions – that a warning by way of the Company's Code of Conduct was inappropriate as the applicant's illness was genuine, there was no abuse of his sick leave provisions and as there was no fault or intentional or wilful misconduct it was inappropriate for the respondent to take disciplinary action against the applicant.
- [28] Mr Wilton conceded on the applicant's behalf that the Company was entitled, if not required, to raise with Mr Cooper its concerns about his attendance (because of potential non performance and/or frustration of contract outcomes) but that in this instance – because of the connotations of misconduct, and despite vigorous protests from the outset

by the applicant and his union – the Company had unreasonably applied the wrong process.

Respondent's Position

- [29] The Company says that where someone has a large amount of sick leave there is an ongoing impact on the business and staff. The impact is greater if the person taking a high amount of sick leave is an expert operator, like Mr Cooper. The Company can incur additional costs because it transfers a less skilled person into another area for cover and then back-fills their role with contracted labour.
- [30] Mr Cooper mostly provided medical certificates but, as his sick leave had been exhausted, Mr Cooper was using his annual leave and that caused the respondent concern about the applicant's welfare, as he might have none left to take an extended break so as to recharge completely. At no time has the Company challenged the genuineness of Mr Cooper's absences.
- [31] The Company says it has behaved fairly and reasonably by attempting to first resolve its concerns through informal intervention, including offering EAP assistance and that of its doctor, and then by working through a correct, formal procedure, including taking into account Mr Cooper's views, before deciding to issue a warning.
- [32] The justification for the respondent's decision is borne out by the fact of Mr Cooper's attendance improving significantly since the warning was issued – he has only had 6-days off on sick leave.
- [33] The warning has been removed from Mr Cooper's personal file as it has expired.
- [34] The same process has been applied to other employees.

Discussion

- [35] At the heart of this employment relationship problem is a dispute as to whether the Company can or cannot use its code of conduct provisions to issue a misconduct warning in respect of non attendance because of genuine ill health.
- [36] During the investigation and by way of a wide ranging discussion, the parties accepted that – in this instance, and because of the extent of Mr Cooper's ill health and consistent with

the respondent's own policy requirements to promptly raise with employees any unsatisfactory aspects of their performance – the Company was entitled to put the applicant on notice as to the implications of future non attendance for genuine health reasons in respect of his ongoing employment.

[37] What is at issue is whether, in putting the applicant on notice, the Company 'ticked the correct box' or employed the wrong process.

Findings

[38] I accept the applicant's submission that the respondent was in error to use the misconduct process. That is because Mr Cooper's absences for ill health were for genuine reasons: the reasons are not disputed by the Company and there is no suggestion of any deliberate or wilful breach by the applicant of his attendance obligations.

[39] While the Company's code of conduct does provide for a warning in respect of "*poor time keeping and attendance*" par f, third page, document 2 in the agreed bundle) I am satisfied this provision is intended for an employee who without good reason or knowingly fails to report for duty: the provision is intended to address deliberate or wilful absenteeism. Mr Cooper was never deliberately or wilfully absent and therefore the Company is not able to rely on this provision in respect of his circumstances.

[40] Was Mr Cooper harmed or unjustifiably disadvantaged by this error? I do not think so. Or, if he was, I find that any compensation for the humiliation, etc experienced by the applicant would – with all respect to him – be negligible. That is because I am satisfied the warning would not have survived any scrutiny (as this determination illustrates) had the Company attempted to act on it, it was anyway a first warning only, the evidence by Mr Cooper as to his distress is slight and – most importantly – Mr Cooper accepts his absenteeism because of ill health was such that his employer could justifiably have raised their concerns with him in an otherwise identical fashion, other than by issuing a misconduct warning.

[41] In other words, the threat to Mr Cooper's employment – the fundamental issue – remained, because of the implications of any ongoing health problem.

[42] Finally, I note here that Mr Cooper will enjoy the benefits of a public determination that records his employer was wrong at law to apply to him a misconduct warning and that there was never any suggestion he was perceived as a shirker or malingerer.

Remedies

[43] For the reasons set out above, while I find the Company's misconduct warning was unjustified, I am not prepared to exercise my discretionary authority in favour of Mr Cooper and require that compensation for humiliation, etc be paid to him by the Company.

Determination

[44] The Company acted in error in issuing a misconduct warning against Mr Cooper in respect of his non attendance for reasons of genuine ill health, however I decline to issue any monetary compensation for humiliation, etc.

[45] Costs are by agreement reserved.

Denis Asher

Member of the Employment Relations Authority