

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 248
5531837

BETWEEN EMMA LOUISE GRAHAM
 Applicant

A N D KMA GROUP LIMITED t/a
 KNOCKOUT SPORTSWEAR
 Respondent

Member of Authority: James Crichton

Representatives: Mark Beech, Counsel for the Applicant
 Ani Bennett, Counsel for the Respondent

Investigation Meeting: 2 and 3 June 2015 at Tauranga

Date of Determination: 17 August 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Graham) alleges that she was unjustifiably dismissed from her employment on 10 November 2014 and the respondent (Knockout Sportswear) resists that claim.

[2] Knockout Sportswear is a small family business manufacturing sports clothing with bases in Texas in the United States and Tauranga in New Zealand. There are three staff employed in New Zealand and seven in the United States.

[3] Essentially, the management of the enterprise is in the United States with four of the seven US staff belonging to the same family.

[4] The three New Zealand staff comprise two sales representatives and a graphic artist. Ms Graham was during her employment one of the sales representatives.

[5] The New Zealand staff operate out of a converted garage which is part of the former family home of Knockout Sportswear's senior managers. By virtue of the fact

that the management of the business is in the US and the New Zealand staff work out of property that is still effectively part of the family's domestic arrangement, supervision is all done remotely.

[6] Ms Graham was employed by Knockout Sportswear as a sales representative on 12 November 2012 and reported directly to Mr Roger Thomas, a member of the Thomas family which owned and operated Knockout Sportswear. Roger Thomas is and was based in Texas.

[7] For the sake of context, I note that Ms Graham had become concerned about some aspects of her role with Knockout Sportswear and in consequence become interested in the possibility of other opportunities.

[8] Contributing to Ms Graham's feelings around the continuity of the employment was an email sent to her by Mr Thomas on 20 October 2014 which flagged her disappointing sales figures. In summary, Ms Graham had not achieved sales targets for any of the previous nine months. Ms Graham says that the email was "*out of the blue*" and that Mr Thomas' email made unfair comparisons between her performance and the performance of the other sales representative based in New Zealand.

[9] Mr Thomas also offered Ms Graham a new company car if she "*hit the same annual sales as the other rep's target for the year*". Mr Thomas clearly thought that this was a fair proposal as Ms Graham had by far the largest sales territory (including Auckland) and therefore was in a better position potentially to generate greater sales than the other sales representative.

[10] While Mr Thomas thought his proposed incentive was achievable, Ms Graham's evidence is that she thought the converse and that Mr Thomas was "*setting me up for failure because he wanted to get rid of me*". According to Ms Graham, this email from Mr Thomas had the opposite effect to the one that Mr Thomas intended because it made her demoralised and caused her to start seeking alternative employment.

[11] At 5.15pm on Friday, 31 October 2014, Ms Graham had a recruitment agent contact her and asked her to attend an interview at very short notice the following Monday, 3 November 2014. The interview was to be in Auckland.

[12] Early on the morning of 3 November 2014, Ms Graham texted Mr Thomas in the following terms:

*Hey there Roger. Hope you had a great weekend. I am just feeling a bit blah today and staying at home. I guess classify it as a "duvet day". Feel free to take off as a leave day. I will have laptop with me so will be checking in and replying to any client emails. Cheers.
Emma*

[13] Mr Thomas' response was in the following terms:

Okidoki. Hope you feel better soon.

[14] Because of the language that Ms Graham used in her text message, Mr Thomas' evidence is that he treated the leave as sick leave and recorded it as such.

[15] It is common ground that shortly after this exchange, there was a further text message from Mr Thomas in which he sought to establish from Ms Graham whether she was in Papamoa (where she lived) or in Auckland, because on Mr Thomas' evidence, Ms Graham had a boyfriend in Auckland and Mr Thomas thought that Ms Graham may have been in Auckland over the weekend.

[16] That request met with a response from Ms Graham to the effect that she was in Papamoa "... *at home*".

[17] Because Mr Thomas had originally planned to telephone Ms Graham this day to discuss her "*top 10*" clients in furtherance of the two protagonists' discussions around Ms Graham's sales target, Mr Thomas sent another text to Ms Graham indicating his intention was still to talk to her about the top 10 clients and that he would ring Ms Graham on her landline because that was cheaper from the US.

[18] Then there was an issue around a particular order for a client; the problem had been notified to the Texas office on Saturday, 1 November 2014 and in pursuance of that, Mr Thomas telephoned the New Zealand graphic artist (the third member of the staff of Knockout Sportswear that was based in New Zealand) in order to follow up on this order problem.

[19] The order was a client of Ms Graham's and so the query had to be dealt with by her. The production artist told Mr Thomas that she had emailed Ms Graham but that Ms Graham had said that she was "*two hours away from her computer*".

[20] That came as a surprise to Mr Thomas because Ms Graham had told him in the first text message that she sent him that she would have her laptop with her and would be checking emails during the day.

[21] Then Mr Thomas sent Ms Graham an email asking for her landline number and included a comment that he could not understand why she was two hours away from her computer and further that he needed to talk to her urgently about the order problem because the factory in China was waiting for an answer.

[22] Then when Mr Thomas called Ms Graham's landline number, he having found the number from his own resources in the US, there was no answer and accordingly he directed the graphic artist to drive to Ms Graham's residence with the file so that they could get an urgent answer on the order problem,

[23] Then Mr Thomas sent a further text message to Ms Graham wondering whether he was being lied to and an hour and a half later (around midday New Zealand time) Ms Graham denied lying but said that she had her phone on silent:

... due to being at a specialist app. I not sure how much longer it will take it is a personal matter that I did not want to go into. Hence wanting to call it a duvet day.

[24] Mr Thomas responded with a text indicating that if she was seeing a specialist he imagined Ms Graham could produce a medical certificate.

[25] Then, because of the conviction Mr Thomas had that the specialist appointment had taken far longer than he would have anticipated was reasonably likely, he formed a view that he had in fact been lied to because of the time apparently being taken by Ms Graham at this putative specialist's appointment and because it seemed unlikely that a specialist appointment would be sprung on a patient at short notice, as appeared to be the case here.

[26] As a consequence of the foregoing, Mr Thomas discussed matters with his wife who is also involved in the business and between them they formed a view that they may have been lied to and that a formal disciplinary process was required.

[27] The following day, on Tuesday, 4 November 2014, Mr Thomas emailed Ms Graham in the Tauranga office to ask about the supposed medical certificate or in the alternative for an explanation as to why he was lied to. Ms Graham called back immediately and indicated that she had been at a job interview, that she was not home

sick and that she had lied to him. Ms Graham said that she apologised for not being honest and expressed her regrets but said that she had “*got myself into such a hole in response to Roger’s questioning*”.

[28] Mr Thomas undertook to think about what he had heard and by email received on Thursday, 6 November 2014 New Zealand time, Mr Thomas indicated formally that a disciplinary investigation meeting needed to take place. Ms Graham responded immediately to indicate that she was prepared to engage straightaway and a disciplinary meeting took place on 7 November 2014.

[29] In that disciplinary meeting which was conducted over the telephone, Ms Graham repeated the admissions that she had previously made and apologised again. Mr Thomas undertook to consider what he had heard and the parties spoke again by telephone on Monday, 10 November 2014 at which Knockout Sportswear indicated to Ms Graham that she was dismissed.

[30] A personal grievance was promptly raised and the matter proceeded first to mediation and then to the Authority in the usual way.

Issues

[31] I identified at the investigation meeting what I considered the issues for determination to be. These are:

- (a) What sort of leave did Ms Graham apply for;
- (b) What sort of leave was granted;
- (c) What are the obligations on an employer in this situation;
- (d) What are the obligations on an employee in this situation;
- (e) Was the disciplinary process fair;
- (f) Was it available to the employer to dismiss for the conduct acknowledged?

What sort of leave was applied for?

[32] The importance of addressing this question first ought to be self-evident, but for the avoidance of doubt, I record that the employer maintained that Ms Graham had applied for sick leave but was not in fact sick at all.

[33] But what if this was not a request for sick leave at all? Certainly, so far as Ms Graham's position is concerned, she denies that she was asking for sick leave. It is common ground that Ms Graham sought what she described in her initiating text message as a "*duvet day*". She says that is not sick leave at all but ought to be characterised as, to use her experienced counsel's expression in his submissions, a "*mental health*" day.

[34] In essence, it is suggested for Ms Graham that this is a request for leave without "*a specific reason for the leave*". Allegedly, this descriptor was used because it would be unusual to apply for an annual leave day at such short notice and of course as I have already made clear, Ms Graham required this day off in order to attend a job interview and the job interview that she was summoned to at very short notice, having received the request to attend at 5.15pm on the preceding working day, namely Friday 31 October 2014. Of course, the actual request for leave was made on Monday 3 November 2014 at 8.18am.

[35] It is said for Ms Graham that the text message makes clear that she intends that the day off be debited against her leave because she says in the relevant text:

Feel free to take off as a leave day.

[36] Ms Graham's straightforward evidence on the point was that her expectation was that a "*duvet day*" was equivalent to an annual leave day and that in effect she expected that Knockout Sportswear would grant her a day's annual leave.

[37] At this point I draw attention to the distinction that Mr Roger Thomas drew in his own evidence about how Knockout Sportswear would treat staff on annual leave on the one hand and staff on sick leave on the other. So far as he was concerned, if the day was an annual leave day then he had no right to inquire into Ms Graham's whereabouts and presumably would have no right to engage with Ms Graham or seek to have her perform work functions in that situation.

[38] But because Mr Thomas took it that Ms Graham was applying for sick leave, he felt entitled to engage with her on her “*sick day*” in a way that apparently he would not have felt able to do, if she were on annual leave rather than on sick leave.

[39] It would seem to follow from the foregoing analysis that there is an alignment between the two principal protagonists if the leave that Ms Graham was applying for was in truth annual leave rather than sick leave because it would seem on Mr Thomas’ evidence that if it were annual leave that she applied for and that she was granted, then Mr Thomas would have felt obliged to leave Ms Graham substantially alone and would therefore not have come into possession of the information which caused him to develop doubts about what Ms Graham was telling him.

[40] That said, it is apparent on the evidence that, whatever else is true, Knockout Sportswear originally granted Ms Graham sick leave, although it subsequently changed that to annual leave, but contemporaneously with the events complained of, so far as Knockout Sportswear was concerned, the leave was sick leave.

[41] Ms Graham wants me to accept that what she was applying for was annual leave and as I have already noted, if it was annual leave that she was initially granted then the dispute between the parties which led to Ms Graham’s dismissal would probably not have occurred at all, for reasons that I have just enunciated.

[42] But can Ms Graham justify her stance that she was applying for annual leave? The second sentence of the initiating email says: “*I am just feeling a bit blah today and staying at home*”. Arguably, neither of those statements are accurate. It is self-evident that Ms Graham was not staying home at all; she lived in Papamoa and had an interview in Auckland on the day in question and it seems unlikely that she was feeling “*a bit blah*” if she was going for a job interview.

[43] Moreover, and worse for her, it is difficult not to see the words just referred to as deliberately trying to create an impression that is more consistent with sick leave than it is with annual leave because of the joint references to feeling “*a bit blah*” and “*staying at home*” both of which seem to have the specific purpose of encouraging Mr Thomas to think that she was sick.

[44] It follows that even if I were to accept Ms Graham’s contention that she considered that she was applying for annual leave, I would have to qualify that acceptance by reference to the two statements that I have just referred to both of

which seem designed to convince Mr Thomas that the leave that was being applied for was in truth not annual leave at all. Even if the *blah* reference can be somehow got around, the suggestion that she was staying at home (a suggestion which was completely untrue) is redolent of sick leave rather than of annual leave where presumably the recipient is fit and capable enough to leave the house.

[45] Put shortly, my considered view is that Ms Graham set out to deceive Mr Thomas into believing that she was if not sick then at least off colour to the extent that precluded her from attending to either her normal daily work or some other personal activity which she might have undertaken on a day's leave. The most that I am prepared to accept from Ms Graham's evidence is that she did not properly turn her mind to the question of what sort of leave it was that she was actually applying for. However, where she wants me to accept that in her initial request she was seeking annual leave and that that was clear from the way in which she expressed herself, I do not accept that proposition at all as I think it does violence to the facts. In particular, I think that Ms Graham deliberately set out to encourage Mr Thomas to believe that she was if not sick at least off colour and that simply was not the case at all.

What was the nature of the leave granted?

[46] Ironically, while on Mr Thomas' evidence the leave was granted as sick leave the only record of it is in fact as annual leave but that record post-dates the dismissal. Mr Thomas told my investigation meeting that in his opinion a request for a "*duvet day*" was a request for sick leave and that is the way the matter was treated for the purposes of the disciplinary process which ended in Ms Graham's termination for cause.

[47] It is also apparent that Mr Thomas never engaged with Ms Graham about precisely what kind of leave it was she was applying for. While I am critical of Ms Graham for being less than straightforward with her leave application, I am equally critical of Mr Thomas for failing to check that the leave applied for was indeed the kind of leave that he thought was being requested.

[48] In answer to a series of questions on the point, Mr Thomas denied that the employee was entitled to the benefit of any confusion, denied that a "*duvet day*" in common parlance was an annual leave day, and maintained that Ms Graham's

statement that he should “*feel free to take it as a leave day*” gave him the right to make an election as to what kind of leave it was.

[49] But that last statement cannot be right; if anything, the statement Ms Graham made should have put Mr Thomas on notice that he needed to make inquiry as to what sort of leave it was that Ms Graham was seeking.

[50] I accept without reservation that Ms Graham did not make things easy by implying that she was seeking sick leave with her statement about feeling “*blah*” and staying home, but Mr Thomas cannot be correct in his assertion that he can chose which leave account to debit for the request, particularly as the consequences of the choice that he ultimately made led to Ms Graham losing her position.

[51] Equally baffling from my perspective is Mr Thomas’ conviction that because Ms Graham was sick (allegedly) rather than on annual leave, it was appropriate that she continue working and particularly that he be able to engage with her while she was on sick leave. Mr Thomas was asked whether, given Ms Graham had said that she would check her emails she might not have been ill, and his response was to appear not to have considered the point but to say that if she were on annual leave she should not be working whereas if she was on sick leave she should be. That distinction seems to me completely wrong headed; a sick employee is every bit as entitled to be left alone by their employer as an employee on holiday, and indeed arguably more so.

[52] What is particularly important about Mr Thomas’ conviction that he had the right to choose which sort of leave was being applied for is that the consequences of that choice, as I mentioned before, turned out to be very grave indeed. In my view, a good and fair employer would not have proceeded down the disciplinary trail investigating an allegation of serious misconduct, without first being absolutely clear about the correctness of the election the employer was making to treat the leave as sick leave.

[53] In the particular circumstances of this case, I do not think it puts it too strongly to say that it would be incumbent on a good and fair employer to ascertain first what kind of leave was sought, and in particular, to establish if the parties were of one mind as to what the leave was, before commencing any disciplinary process.

[54] Even although I accept without reservation that Ms Graham set out to mislead the employer about what she was up to, I am still not persuaded that it is available to a good and fair employer to prosecute a disciplinary breach against an employee for alleged misuse of a kind of leave which the employee may not have requested.

What are the obligations on an employer in this situation?

[55] As I have already observed, this was a situation where the employer ought to have been absolutely clear with the employee as to precisely what kind of leave was being requested.

[56] Mr Thomas appeared to be quite explicit that the effect of the request Ms Graham made was to allow him the luxury of choosing which kind of leave she was to be granted (annual or sick). But that cannot be right. The employer, where there is doubt or confusion, has an absolute obligation to ensure that the parties are of one mind concerning which kind of leave was being applied for and which kind of leave was potentially to be granted.

[57] Moreover, the evidence for Mr Thomas to the effect that it was appropriate for him to engage on work matters with Ms Graham if she was on sick leave but not if she was on annual leave also cannot be behaviour redolent of a good and fair employer. Quite clearly, leave is leave and the whole point of an employee taking leave is to enable that employee to remove himself or herself from the obligations of the workplace in order to recover from illness or accident on the one hand, or to have rest or recreation in a holiday leave situation, on the other.

[58] In both cases, a good and fair employer would leave the employee alone and there cannot be any proper basis on which, except for an out and out emergency, an employer can properly seek to have the employee perform some of that employee's work obligations during a period of leave. That is the absolute antithesis of what leave is all about and ought not to be countenanced.

[59] The evidence is quite clear that Mr Thomas peppered Ms Graham with communications on 3 November 2014. While no doubt those communications can be explained to some extent by Mr Thomas' increasing suspicion over the course of the day that he had been lied to, it still seems to me important that I make the point explicitly that a good and fair employer would not conduct itself in the way that Mr Thomas did on the day in question.

[60] It is absolutely clear on the evidence that amongst other things (such as establishing what Ms Graham was up to), what Mr Thomas sought to do by engaging with Ms Graham was to conduct work-related matters with her on a day that she had requested to be on leave (even if the type of leave is unclear).

[61] Mr Thomas sought to discuss Ms Graham's top 10 clients with her on this day and sought to discuss with her a problem that had been raised with a particular order by the Chinese factory. Neither of those matters are properly matters that ought to be the subject of discussion with an employee on leave.

[62] Moreover, as part of the Chinese factory order problem, Mr Thomas caused the graphic artist to take a client file to Ms Graham's residence in order to have Ms Graham deal with the matter personally on her leave day. As I say, none of those actions are the actions of a good and fair employer.

[63] But as if that is not enough, Mr Thomas also indicated in one of the text messages that he sent on the afternoon of 3 November 2014 that the reason that he was taking such a close interest in what Ms Graham was doing was because her sales performance was not up to much and in the same text message he goes on to make a number of observations about Ms Graham's apparently troubling performance. The evidence before me suggests that this text message is the first detailed (if that is the right word) criticism of Ms Graham's sales performance and it is difficult to understand why Mr Thomas would think it appropriate to use an employee's leave day (again, whatever category of leave is involved) to express doubts about the employee's performance. Mr Thomas told my investigation meeting that the language that he used was professional and that may be so; the real issue is why he would choose to have that sort of exchange with an employee on a day when she was on leave.

[64] I conclude then that Knockout Sportswear did not behave as a good and fair employer could in expecting Ms Graham to be available to it on a day when she had requested leave and been granted it, albeit that there was a dispute about what sort of leave was in prospect. As I have already made clear, leave for an employee, whatever its category, is for the purpose of being released from the obligations of fidelity to the employer for the day or days in question and it is just wrong-headed of an employer, whatever the apparent justification, to imagine that it is appropriate to expect an employee to continue to be available notwithstanding that the employee is on an

agreed period of leave. While it is true that the nature of the leave granted is in dispute, what is indisputable is that leave was applied for and leave of some sort was granted. My point is that irrespective of the nature of the leave, the whole point of an employee taking leave is to be relieved of that employee's obligations to the employer for the period of the leave, and that is the position, whether the leave is sick leave or holiday leave.

What are the obligations on an employee in this situation?

[65] While I was roundly critical of the employer for its enthusiasm for engaging with Ms Graham on a leave day, I am not much impressed with Ms Graham's behaviour either. I have already made clear my view that I think Ms Graham's initial text message seeking the leave could best be described as deceitful and while she told me in the investigation meeting that her intention was to apply for annual leave, she certainly did not make that clear and indeed the language that she used in the initial text message application seems designed to create a false impression.

[66] It is apparent from an analysis of the subsequent text messages from Ms Graham that she persevered with that stance of trying to create a false impression. In the second text message that she sent, she referred to having let one of her co-workers know that she was "*at home today*".

[67] Then in the next text message that she sends, she maintains that she had her cellphone on silent "*due to being at a specialist app*", and that she was:

... not sure how much longer it will take. It is a personal matter that I did not want to go into. Hence wanting to call it a duvet day.

[68] None of this is consistent with Ms Graham's position that she was applying for annual leave. Of course, we now know that the reason Ms Graham behaved in the way that she did was that she had formed the view that if she told Mr Thomas the truth (namely that she needed the day off for a job interview) she would get in trouble.

[69] Ms Graham said in her oral evidence that she did not intend for Mr Thomas to see her as being ill, that she panicked and that she did not feel she had any choice but to lie to him. Ms Graham maintained that her use of the reference to a specialist appointment "*could mean anything*", but she then accepted that the plain ordinary meaning of those words would relate to a medical specialist and it is certainly the case

that she subsequently agreed, when discussing the matter with Mr Thomas, that she intended him to think that it was a medical specialist that she was referring to.

[70] Looked at in their totality, and without at this point considering any of the admissions that Ms Graham subsequently made during the disciplinary process (about which more later), the text messages Ms Graham sent the employer were all designed to create a false impression so that she did not have to tell Mr Thomas that in fact the day off that she needed was to enable her to attend a job interview. Whatever way you look at it, Ms Graham set out to give the employer false information about her intentions. She says that she panicked and felt she had no choice, but of course that cannot be right; however difficult Mr Thomas may or may not have been, a straightforward request for a day's annual leave, even at short notice, could not have been so difficult to ask for and that seems to me particularly the case given that she did not need to confront Mr Thomas face-to-face but could in fact engage with him electronically. What she did in applying for a "*duvet day*" and in the subsequent references to other matters that are redolent of health issues, was to create a deliberate ruse that she was sick or off colour at least to the extent that she did not feel able to work and she sought to dress that request up further by claiming that she would in fact be doing some work during the course of the day's leave.

[71] That further claim, also specious, given that in fact for much of the day Ms Graham was travelling to and from a job interview in Auckland and attending at that interview, may be seen to have encouraged Mr Thomas to commence his process of seeking to engage with Ms Graham on work matters during her leave day.

[72] Put another way, if Ms Graham had conveyed the impression in her request for a leave day that she was not so unwell as to not be able to do anything, it may be that that fictional construct was what provoked Mr Thomas into pursuing her on 3 November 2014.

[73] Either way, my conclusion is that Ms Graham did not act in good faith in her engagement with the employer during her request for leave on 3 November 2014 and indeed that she deliberately set out to mislead her employer as to what she was actually up to on that day.

Was the disciplinary process fair?

[74] The evidence is that Mr Thomas sent an email to Ms Graham on the morning of Tuesday, 4 November 2014 seeking a medical certificate for the specialist appointment or in the alternative an explanation as to why he had been lied to. Ms Graham responded immediately by telephone and there is dispute about exactly what happened in that telephone discussion.

[75] Both parties agree that Ms Graham responded immediately by telephone, that she confessed that she had been at a job interview the previous day, that she was not home sick and that she had lied to Mr Thomas. According to Mr Thomas, he terminated the conversation at that point on the basis that if she had lied to him (as she had just admitted), a disciplinary process might be required and he needed to consider matters further. His evidence is that he did that because he had previously sought legal advice on how to proceed.

[76] Ms Graham's evidence is different. She says that the conversation went on after that point and in particular she says that she expressed her sorrow at having lied to Mr Thomas and indicated that she had not felt able to tell him the truth because she needed the time off for a job interview. She told Mr Thomas, she says, that she had been summoned to the job interview at 5.15pm on the preceding Friday and she had concluded that an ordinary application for annual leave at such short notice would be seen as suspicious, Mr Thomas demurred that suggestion but said that he wanted to think about the matter and the conversation ended at that point.

[77] While there is dispute between the parties as to the extent of the conversation on 4 November 2014, I am not satisfied that much turns on whether the conversation ended when Mr Thomas said it did or when Ms Graham said it did. Either way, both parties agree that Ms Graham made certain fundamental admissions in the telephone discussion, that the air was effectively cleared as a consequence, and that Mr Thomas went away to consider his position. In particular it is common ground that Mr Thomas sought to take some time to consider whether a disciplinary process was required, or not.

[78] A disciplinary process was decided upon and Mr Thomas indicated to Ms Graham on 6 November 2014 that there would be a disciplinary investigation by telephone the following day.

[79] That meeting took place on Friday, 7 November 2014 commencing at 12 noon. Present were Mr Thomas, his wife, Pam Thomas, who took notes (both in the US) and Ms Graham in the Tauranga office of the employer. I note for the sake of completeness that I am clear that Ms Graham was invited to have a support person present but chose not to avail herself of that right.

[80] There is no agreement about how long this telephone meeting took; Ms Graham thought it took 10 minutes but was unsure and Mr Thomas thought it lasted 20 minutes. The notes taken by Ms Thomas do not assist in identifying which recollection is correct. Ms Graham gave evidence to the effect that she did not think the notes taken by Ms Thomas were an accurate reflection of the meeting and it is apparent on the evidence I heard that she did not even see them until well after dismissal.

[81] In any event it is common cause that Ms Graham accepted that she had been less than straightforward about where she was on 3 November 2014, she apologised for that and she reiterated a point that she had made in the discussion of 4 November 2014 (according to her), namely that she did not feel able to ask for a day off at short notice in order to go for a job interview.

[82] In the notes of the meeting taken by Ms Thomas, she lists a series of what amount to questions and answers, questions posed by Mr Thomas and responses provided by Ms Graham and while Ms Graham maintained in her evidence that the notes were not accurate, she does not seem to have any quarrel with this question and answer series which simply confirms in some detail that she misled Mr Thomas with each of the statements that she made by text message during the exchanges the two people had on 3 November 2014.

[83] Without adopting a minute scrutiny of the disciplinary process, I think I am entitled to conclude that this first meeting met most of the obligations of the employer to conduct a reasonably fair and balanced inquiry into the matters complained of. There seems to be a point-by-point inquiry into the components of the individual text messages with responses from Ms Graham one by one and the evidence of both parties (aside from the notes of the meeting) suggest an exchange of information which, looked at in the round, satisfies me that the matters of concern to the employer were put to the employee, that the employee had a proper opportunity to be heard, that she was heard, and that the employer went away to consider what it had

heard and to make whatever provisional decision it thought was appropriate in all the circumstances.

[84] I accept that there are challenges for an employer in conducting a disciplinary process over the telephone but in the particular circumstances of this case, there really was no other practical alternative. It could perhaps have been undertaken by Skype, but even that would not necessarily have improved the fairness of the process and in all the circumstances, I think I am entitled to conclude that this first meeting met the test set out in the statute, that is that the process used by this employer in the particular circumstances this employer was in, and having regard to this employer's size, was one that an employer in this position could have used.

[85] I have already noted that Ms Graham was offered the opportunity of having a support person and chose not to exercise that right. I also observe that although the meeting was short, it is fair to say that given the frank admissions that Ms Graham made, both in this conversation and in the earlier conversation on 4 November 2014, there is not much dispute about what actually happened and therefore very little need for the employer to conduct further inquiries. Here the employer was confronted with Ms Graham making straightforward admissions confirming the allegations that the employer put to her, so it is difficult to justify any further particularised inquiry.

[86] The principal area of difficulty with this part of the process is that the notes of the meeting are really not as good as they could have been, and were not made available to Ms Graham until after the dismissal. Ms Thomas, who took the notes agreed in evidence they were not a verbatim record, and was doubtful about whether all the notes were hers or not.

[87] On the morning of Monday, 10 November 2014, Mr Thomas, having considered the matter over the weekend, rang Ms Graham and indicated that she was summarily dismissed. It is common ground that Mr Thomas did not ask Ms Graham to comment on the proposed sanction; he simply indicated to her that she was dismissed.

[88] While the proper approach to consideration of penalty is to give the employee an opportunity to be heard before penalty is definitively determined, I do not consider that that failure damages my conclusion that the process the employer adopted was

reasonably fit for purpose. The real issue seems to me to be whether there was substantive justification for the conclusion the employer reached.

[89] That said, there are deficiencies in process. The notes could have been better for reasons I have just outlined, they could have been provided to Ms Graham and there could have been more effort to document the discussions between Mr and Mrs Thomas which led to the decision to first conduct a disciplinary enquiry and second to dismiss for cause. Moreover, the failure to give Ms Graham the opportunity to comment on penalty is a flaw but despite these infelicities, I have not been persuaded that the overall process was so unfair as to invalidate it.

Was it available to the employer to dismiss for the conduct acknowledged?

[90] I conclude that it was available to Knockout Sportswear to decide that Ms Graham was guilty of serious misconduct because a good and fair employer could place reliance on the admissions that Ms Graham made which confirmed that she had lied to her employer, dishonesty being a basis for a finding of serious misconduct in the employment agreement.

[91] Ms Graham urges on me the proposition that because Mr Thomas failed to take proper steps to ascertain just exactly what leave it was that she wanted that somehow flawed the ultimate decision to conclude that she was guilty of serious misconduct. But the finding of serious misconduct was based on Ms Graham's failure to tell the truth, a failure which she herself acknowledged and in fact the question of what leave it was that she applied for and/or was granted really is only a subset of the central issue which is that whatever leave was applied for and/or whatever leave was granted, it is common ground (indeed it is Ms Graham's own evidence), that Ms Graham lied, and I have formed the view based on the reasoning set out in this determination, that she did that for the specific purpose of deceiving her employer into believing that she was using her leave (however labelled) for one purpose when in fact she was using it for another.

[92] I have not been much attracted by attempts by Knockout Sportswear to portray the dismissal as for breach of sick leave since that does not seem to be the basis of the contemporaneous evidence (as for instance in the notes of the disciplinary meeting) and I agree with counsel for Ms Graham that the inclusion of the breach of sick leave argument was an after the fact addition. What Mr Thomas said he dismissed Ms

Graham for is for dishonesty going to trust and confidence; trust and confidence which was all the more important because of the remote nature of the employer from the employee. Moreover, given the parties were never at one on the nature of the leave that was requested, and I have been critical of Mr Thomas's failure to ensure he was granting the kind of leave that Ms Graham was requesting, it seems unreasonable to seek to justify the decision to dismiss on this alternative ground.

[93] That said, it does seem to me that Mr Thomas must take some part of the blame for the outcome because of his entirely inappropriate behaviour in pursuing Ms Graham on a leave day (whatever kind of leave it was).

[94] However, it cannot be right that Mr Thomas is exclusively responsible for Ms Graham's behaviour because her behaviour (trying to mislead her employer) began before he had sent any messages to her at all. In my opinion, Ms Graham set out to mislead Knockout Sportswear with her first text message and I am satisfied that that text message sets the scene for her subsequent behaviour which plainly exacerbated the initial wrongdoing.

[95] So if Mr Thomas can be held liable for escalating the issues between the parties by his persistent engagement with Ms Graham when she was supposed to be on leave, he cannot be responsible for all of her inappropriate behaviour because the die was cast before Mr Thomas responded in any way.

[96] Ms Graham's suggestion that her behaviour would not in fact "*deeply impair*" the relationship of trust and confidence that must exist between employer and employee is not accepted. As I was at pains to emphasise during the investigation meeting, it seemed to me that the peculiar nature of this employment relationship where the parties were effectively domiciled in different jurisdictions, meant that trust and confidence was of even greater significance as the cornerstone of the employment relationship, than would be the case where both parties had day-to-day contact. I find it difficult to conclude that Ms Graham's behaviour would not have fatally compromised the necessary trusting relationships which must be front and centre of any employment relationship.

Determination

[97] For reasons which I have already articulated, I am not persuaded that Ms Graham has satisfied the test at law for having a personal grievance for unjustified dismissal and her claim in that regard fails as a consequence.

[98] However, I do consider that Ms Graham has a personal grievance for unjustified disadvantage because it seems to me that the effect of Mr Thomas' behaviour on 3 November 2014 was without doubt to disadvantage Ms Graham when she was entitled to be left in peace on a leave day (however characterised) and in persistently contacting Ms Graham during that leave day, and requiring or seeking to have Ms Graham perform work functions, Mr Thomas was undertaking a succession of actions which were not actions that a good and fair employer could perform on an employee's leave day and were in consequence unjustified in terms of the law.

[99] While I accept counsel for the respondent's position that there is no claim for personal grievance for unjustified disadvantage, it is nonetheless a feature of the statute that there may be a finding of a different kind of personal grievance from that alleged: s.122 of the Act. In my considered opinion, the evidence does not support a personal grievance for unjustified dismissal but it does support one for unjustified disadvantage.

[100] It follows from the foregoing that Ms Graham has a personal grievance for unjustified disadvantage because, like any other employee, she is entitled to enjoy a leave day free of the obligations of the employer.

[101] That said, there must be an element of contribution because part of the reason that Mr Thomas was pursuing Ms Graham was because of his growing suspicion that he was in fact being lied to (which of course Ms Graham subsequently confirmed to him). Ms Graham's contribution must be judged first by way of its causal connection and second by relationship to its blameworthiness.

[102] It seems to me axiomatic that Ms Graham's initial text message which I conclude was designed to mislead the employer, really set the scene and causally contributed to Mr Thomas' subsequent behaviour because he became increasingly suspicious based on the scene that she had painted for him in that initial text message.

[103] Moreover, I am satisfied that any reasonable construction of the matter would conclude that an employee misleading an employer is a blameworthy course of behaviour. So I conclude that, as a matter of law, Ms Graham contributed to the personal grievance that she suffered. I assess that contribution at 20%. I am not persuaded that all of Mr Thomas' subsequent behaviour in pursuing Ms Graham during that day can be attributed to his conviction that he was being lied to; it is apparent on his evidence that he believed, independently of anything Ms Graham had done, that he was entitled to expect employees on a particular kind of leave (sick leave) to be available for work.

[104] Whatever the description of the leave, Mr Thomas' evidence was as clear as can be that he felt an entitlement to engage with staff on sick leave in respect of work matters, including matters to do with sales performance for example. On that basis, I think it appropriate to say that the majority of the wrong which I seek to remedy with my decision in this matter rests squarely with the employer and not with the improper initiation of it that Ms Graham was associated with in sending her initial misleading text message.

[105] Accordingly, and for those reasons, I assess Ms Graham as being entitled to receive compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 for the unjustified disadvantage in the sum of \$8,000, that sum taking account of the 20% reduction for her contribution to the matters complained of.

[106] Knockout Sportswear is also to pay to Ms Graham the filing fee of \$71.56.

Costs

[107] Costs are reserved.

James Crichton
Member of the Employment Relations Authority