

[4] On Thursday 30 July 2009 Ms Katene injured her hand while at work. The injury occurred when she hit her hand against a metal lane divider. She reported the injury promptly to her team leader, Brent Prisk. The necessary accident report forms were completed and Ms Katene was able to continue working to the end of her shift at 2.30 pm.

[5] Later that afternoon she noticed an increase in pain and swelling, so went to her local medical centre for assistance. An x-ray was taken, the hand was taped and she was given a sling for her arm, and pain medication was prescribed. Ms Katene said she was advised later that the x-ray showed there was no fracture.

[6] Ms Katene also obtained a medical certificate saying she was unfit to work the next day. Accordingly she planned to take the next day, Friday, off and return to work the following Monday.

[7] That evening Ms Katene contacted Frucor and spoke to another team leader, Rob Baker, saying she had been injured at work but had a medical certificate from her own doctor. She asked Mr Baker to advise Mr Prisk that she would not be at work the next day. Mr Baker's understanding of company procedures led him to advise Ms Katene that she would still need to come into work so she could be examined by the company doctor. Ms Katene said she would not do so because she had seen her own doctor, who had told her to stay at home. Mr Baker believed Ms Katene misunderstood the requirement so handed the phone to another team leader, Lisa Heighway.

[8] Ms Heighway sought to explain that Ms Katene was required to report to the company doctor the following day even if she had a medical certificate from her own doctor. She would need to report to work first, so that she could collect the additional forms to be completed by the company doctor. One of these forms was necessary to enable an informed assessment of the availability of alternative duties, and required from the company doctor more detail than usually contained in medical certificates provided by GPs in general.

[9] Ms Katene responded by relying on the fact that she had seen her own doctor and obtained a medical certificate, and taking the view that action sufficed. She said

she would 'deal with it' the following Monday. She added that in any event her arm was in a sling and she could not drive.

[10] Ms Heighway had been Ms Katene's team leader in the past, and was familiar with aspects of Ms Katene's employment history including Ms Katene's previous injuries and their management. She believed Ms Katene was aware of the company's accident and injury procedures, including procedures for reporting to the company doctor, and had followed them in respect of a recent and unrelated injury. Ms Heighway also said, and I accept, that when Ms Katene said she could not drive an offer to provide alternative transport was made. The offer was declined. Ms Heighway went on to instruct Ms Katene to contact Mr Prisk so that the necessary arrangements could be made. Ms Katene refused to report to the company doctor, but agreed to contact Mr Prisk the next morning.

[11] Ms Katene did not contact Mr Prisk on Friday 31 July. Ms Heighway had advised Mr Prisk of the conversation of the night before, so Mr Prisk tried without success to contact Ms Katene. He spoke to Ms Katene's mother and left messages on Ms Katene's cell phone. Ms Katene said she did not receive any messages from Mr Prisk, and spent most of the day asleep because of her medication.

[12] Ms Katene reported to work to begin her scheduled shift at 2.30 pm on Monday 3 August. She was asked to meet Stephen Horn, the production co-ordinator, immediately. Mr Horn sought confirmation that Ms Katene was fit for full duties and told her that clearance to return to full duties would be required from the company doctor. Since Ms Katene had been unable to drive the previous Friday, Mr Prisk would drive her to the company medical centre.

[13] Mr Prisk duly accompanied Ms Katene to the company medical centre. After a brief discussion with the doctor Ms Katene was cleared to report for work.

Procedures following injury at work

[14] The applicable employment agreement was the Frucor Beverages Limited Food Worker and Storepersons Collective Agreement of June 2007 – May 2010. Clause 24 of the agreement provides:

Health and Safety

- a. *The parties are committed to ensuring a safe work environment is provided in Frucor's operation and that all legislative requirements in respect to health and safety matters are complied with. Employees acknowledge their role in partnership with Frucor for the maintenance of a safe and healthy work environment.*
- b. *Employees must promptly report all accidents, hazards, potential accidents and potential hazards to ensure they are recorded in the accident register and managed in such a way as to eliminate, isolate or minimise.*

[15] As well as seeking to observe its overall health and safety obligations, Frucor maintains close management of workplace injuries in association with its obligations under accident compensation legislation. This includes emphasis on finding alternative duties for injured employees who might not otherwise be able to work, and confirming that injured employees are fit to return to work. It has policies which address these objectives.

[16] A written health and safety policy in effect from 1 January 2006 was amended in May 2009. The policy incorporated some of the changes also notified in April 2009 to all staff together with their payslips, following changes in the management of workplace injuries and the rehabilitation of injured employees under the accident compensation system. The April 2009 document set out employees' reporting obligations when they experienced an injury at work, and advised:

As part of our normal H&S process you may be requested to attend a nominated Doctor for medical assessment (at Frucor's cost) to establish causal link even if you have a current ACC45 from another doctor. Frucor will arrange the Doctors appointment and invoicing is to be sent to our Health and Safety manager for payment. ...

[17] An associated document was a summary in diagram form of the procedures for reporting workplace incidents. Step 1 of the procedure, as identified in the diagram, required that an incident be reported immediately to the team leader. It also referred to the completion of the additional forms in the event that further medical treatment was sought. Step 2 provided that employees must speak to their team leader before seeking medical treatment. Step 3 provided that employees must attend a Frucor approved clinic for work injuries at Wiri.

[18] Two South Auckland medical centres were contracted to Frucor as approved medical providers. Any requirement to attend one of these medical centres did not prevent employees from attending their own GP as well if they wished.

[19] In an attempt to ensure employees understood the procedures, coaching sessions were arranged during mid-2009. Since the focus was on identifying and correcting gaps in employees' knowledge, the sessions were concerned with addressing incorrect responses to a questionnaire. The question and answer coaching sheet Ms Katene completed in June 2009 included the following questions, which she answered correctly:

4. You feel discomfort at home that you suspect might be related to your job, you should:

- (a) go and see your own doctor*
- (b) go and see the company doctor*
- (c) inform your manager prior to seeking medical treatment*

6. If medical treatment is required for a work related injury you must see:

- a. your own doctor*
- b. the company doctor*
- c. a specialist – eg a physiotherapist*

17. NOT following the complete accident procedure could result in:

- (a) less paperwork and hassle*
- (b) ACC payments being made quicker*
- (c) injury to others, incorrect pay and may result in disciplinary action*

[20] The answer to question 4 was (c), to question 6 was (b), and to question 17 was (c).

The disciplinary process

[21] By letter dated 5 August 2009 Ms Katene was asked to attend a meeting in order to discuss her: failure to follow health and safety procedures by not seeing the company doctor; refusing to follow a reasonable instruction that she see the company doctor as directed; and by not telephoning the team leader (Mr Prisk) as directed. The meeting was to be a disciplinary meeting.

[22] The meeting went ahead on 10 August. Ms Katene was supported by her union representative. She gave her account of how she was injured, her attendance on

her own doctor and her telephone conversation with Mr Baker and Ms Heighway on the evening of 30 July. She said she did not refuse to attend the company doctor, rather she refused to drive. She did not hear Ms Heighway offer to obtain alternative transport and denied that offer was made, although she acknowledged the company had provided her with transport before. She did not recall the instruction that she contact Mr Prisk, and although she did not receive any messages from Mr Prisk on 31 July she was aware that Mr Prisk had spoken to her mother. She was taken through the company procedures, but responded that she was not aware she was obliged to contact Frucor before seeking medical treatment. In summary, she said she was not aware she was breaking any rules.

[23] The meeting was adjourned. By letter dated 12 August 2009 Ms Katene was asked to attend another meeting on 13 August.

[24] At that meeting, Ms Katene was asked whether she had anything to add. Her representative expressed the view that there had been a communication breakdown, and that Ms Katene believed she had followed procedure and was being harassed to come to work. Ms Katene was uncertain about whether she could be required to come to work. The representative also pointed out that Ms Katene did not refuse to go to the company doctor, rather she said she would do so the following Monday.

[25] Mr Horn acknowledged that Ms Katene had followed the required procedure in some respects, but said the company had the right to request that she see the company doctor. An attempt to resolve the matter on 31 July was unsuccessful as Ms Katene could not be contacted. Mr Horn also acknowledged that the conversation on the evening of 30 July had become heated, but said the team leaders were frustrated because they were trying to get a message across to Ms Katene. He told Ms Katene she would receive a warning.

[26] Ms Katene was already in receipt of a first written warning dated 23 January 2009. The warning concerned Ms Katene's use of abusive language and being disrespectful to other employees. Frucor's disciplinary policy provided that warnings would be recorded on an employee's file for 'a reasonable period of time' and that warnings need not be confined to a repetition of the same offence.

[27] By letter dated 4 September Mr Horn issued Ms Katene with a final written warning for failure to follow a reasonable instruction from a team leader. The correspondence indicates that this was a reference to the failure to follow two instructions; namely the failure to follow the instruction that Ms Katene see the company doctor as directed and the refusal to follow the instruction that she telephone her team leader.

Whether the warning was justified

[28] It was common ground that giving a final written warning to an employee disadvantages the employee in employment. The question for determination here concerns the justification for Ms Katene's warning.

[29] The test of justification involves considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all of the circumstances at the time.

[30] Ms Katene's warning arose out of the disagreements with Mr Baker and Ms Heighway during the conversation of 30 July. Both team leaders were attempting to instruct Ms Katene on aspects of the procedure they believed she was obliged to follow after her work injury. They experienced resistance in the form of Ms Katene's view that she had a medical certificate saying she was unfit for work the next day, as a result she was not obliged to report to work or to the company doctor the next day, and that was the end of the matter until she 'dealt with it' when she returned to work the following Monday.

[31] The disciplinary meeting of 10 August covered the facts alleged in respect of the 30 July conversation. It was reasonable for the company to conclude from the discussion that: there had been a heated disagreement about whether Ms Katene would report to work and to the company doctor; in response to Ms Katene's assertion that she was unable to drive Ms Heighway had made an offer of alternative transport; Ms Katene had been instructed to telephone Mr Prisk regarding the necessary arrangements; and Ms Katene was aware she was obliged to contact Frucor before seeking medical treatment.

[32] In that Ms Katene was aware of the procedure following injury at work, and the reporting obligations in particular, the broadly-stated explanation that she was not aware she was breaking any rules was inadequate. However I construe the additional matters raised on Ms Katene's behalf in the discussion of 13 August as amounting to an amplification of why she did not believe she was breaking any rules. While it was not accurate for Ms Katene to say she had followed procedure - because she had not followed certain aspects of it - she also sought to say she was uncertain about whether she could be required to 'come to work' on 31 July.

[33] In that respect I conclude that Ms Katene was seeking to dispute that she was obliged to report to work (and in turn to the company doctor) on 31 July, although I could accept that was not made clear on 30 July and that other side issues obscured the point. Ms Katene was acting on her view that her medical certificate sufficed to justify her resting at home on 31 July, and taking no further steps in respect of her injury until her return to work on Monday 3 August.

[34] The submissions on behalf of Ms Katene addressed whether in principle an employer can direct an employee to undergo medical treatment or assessment. However I observe that *Radio New Zealand Limited v Snowdon*¹, which was relied on in the submissions, was decided on the basis of relevant provisions in a set of 'general principles' attached to the employee's letter of appointment rather than with reference to principles such as those in the New Zealand Bill of Rights Act 1990

[35] Using the approach in *Snowdon* it is appropriate to consider the relevant employment-related provisions here. The documents relating to company policy were inconsistent on whether an employee could be 'requested' or 'required' to attend a company doctor, although it appears from the questionnaire Ms Katene completed that there was an understanding that employees could be 'required' to attend the company doctor. However even if I construe the relevant documents as allowing an employer to require an employee to attend a company doctor, I do not construe them as permitting the employer to specify when the attendance is required in the circumstances facing the parties here.

¹ [2003] 1 ERNZ 12

[36] Further, even if there was a special procedure for employees at Wiri, a relevant policy document provided only that an injured employee must attend a Frucor approved clinic for work injuries. Again I do not read the policy as going further and entitling Frucor, without more, to require attendance on a particular day. It may be that in practice employees injured at work are referred immediately to an approved clinic if the need for medical attention is identified at the time, or that employees with longer-term injuries - such as Ms Katene herself had previously experienced - attend a clinic pursuant to arrangements made and either consented to or acquiesced in while they are off work. Here, however, Ms Katene did not identify a need for medical treatment until after she had finished work on 30 June, and she expected to be off work for only one day. On her return to work, she did attend the approved clinic.

[37] In general a lawful and reasonable instruction is one that does not require an employee to perform any act contrary to law, does not demand the performance of an impossible or dangerous task and is within the scope of the employee's obligations.² Where there is a genuine dispute, an attempt should be made at resolution³.

[38] For the reasons I have set out, I do not consider the instruction that Ms Katene report to work to collect the necessary forms for an attendance on the company doctor on 31 July was within the scope of her obligations. The company's policies did not expressly authorise such a specific requirement, and the required date of attendance was not otherwise the subject of discussion and agreement between the parties.

[39] For these reasons I conclude that issuing a warning for the reason given was not the action a fair and reasonable employer would have taken, and the action was unjustified.

Remedies

[40] One day's lost pay was claimed. That matter has been resolved between the parties.

[41] A claim in respect of a bonus was withdrawn.

² *Wellington etc Clerical etc IUOW v College Group Ltd* [1984] ACJ 315

³ *Sky Network Television Limited v Duncan* [1998] 3 ERNZ 917

[42] Regarding compensation for injury to Ms Katene's feelings resulting from her personal grievance, I take into account that Ms Katene was in breach of company policy in failing to report to her team leader before seeking medical attention, and I did not find persuasive her reason for not contacting Mr Prisk on 31 July. Her failure to contact Mr Prisk meant an opportunity to resolve the parties' dispute was lost. I find Ms Katene contributed so significantly to the circumstances giving rise to her personal grievance, and there was in any event minimal evidence in support of her claim for compensation, that I make no award.

Costs

[43] Costs are reserved.

[44] The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority