

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 55
5431002

BETWEEN

SAMUELA LEUII
Applicant

A N D

REGIONAL FACILITIES
AUCKLAND
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
Katherine Burson, Counsel for Respondent

Investigation Meeting: 11 February 2014 at Auckland

Submissions Received: No submissions received from Applicant
11 February 2014 from Respondent

Date of Determination: 18 February 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant, Mr Sameula Leuii, was not unjustifiably dismissed by the respondent, Regional Facilities Auckland (RFA).**
- B. Mr Leuii has no claim that he was entitled to a higher rate of pay during his employment at RFA.**
- C. Mr Leuii's claims for a meal allowance is time barred under s.142 of the Employment Relations Act 2000 (the Act) and is accordingly struck out.**
- D. Costs are reserved.**

Employment relationship problem

[1] Regional Facilities Auckland (RFA) is an organisation controlled by the Auckland Council. RFA manages a number of “*major regional facilities and iconic venues across the city*”¹. Facilities managed by RFA include the Auckland Art Gallery, Mt Smart Stadium and the Auckland Zoo.

[2] Mr Leuii was employed as a security guard by the Aotea Centre Board of Management t/a THE EDGE (THE EDGE), initially in December 1999 in a casual position and subsequently in a permanent role.

[3] Following the local government reorganisation in the Auckland region, the RFA was created. Mr Leuii’s employer, THE EDGE became part of the RFA. THE EDGE is responsible for the management of Aotea Centre, Auckland Town Hall as well as Aotea Square.

[4] From 1 November 2010, Mr Leuii was employed by the RFA in a position similar to his security officer position with THE EDGE and on the same terms and conditions.

[5] During his employment by THE EDGE and RFA, issues were raised with Mr Leuii about his compliance with employment procedures including his absences from work at short notice, submitting inaccurate timesheets, leaving his rostered shift without permission and inappropriate email and text messages to his immediate supervisor, Mr Dean Kidd, the safety and security manager at RFA. Mr Leuii was spoken to and received warnings about these matters. On 5 March 2013, Mr Leuii received a final written warning about an email he sent to Mr Kidd which RFA considered to be “*threatening and intimidating*” and about his behaviour towards Mr Kidd which RFA considered to be “*harassment and inappropriate*”.

[6] On 22 May 2013, Mr Leuii left work for almost two hours and did not record his absence from the shift on his timesheet. RFA conducted an investigation into Mr Leuii’s absence and concluded that Mr Leuii had left work for almost two hours on 22 May without obtaining prior approval from his supervisor and had failed to record his absence from the shift on his timesheet.

¹ www.aucklandcity.govt.nz

[7] During the course of the investigation into Mr Leuii's absence from work on 22 May, Mr Leuii sent text messages to Mr Kidd which were of concern to Mr Kidd and to RFA. This matter was also investigated by RFA along with the issue of Mr Leuii's work attendances in general.

[8] Mr Leuii was dismissed by RFA on 12 July 2013. Mr Leuii says the dismissal was unjustified in all the circumstances. Mr Leuii seeks to be reinstated to his position as Security Officer at RFA and seeks compensation and loss of wages. Mr Leuii further claims that he was incorrectly paid by RFA and that RFA owes him money for meal allowances not paid by it to him.

[9] RFA denies Mr Leuii's dismissal was unjustified and says it was action a fair and reasonable employer could take in all the circumstances. RFA denies that Mr Leuii is entitled to remedies and strongly opposes his reinstatement. RFA says Mr Leuii's contribution to the situation that led to the dismissal was significant, the employment relationship has broken down and he should not be reinstated. Further, RFA says if the Authority was to award monetary remedies, they should be reduced significantly because of Mr Leuii's contribution to his dismissal.

[10] With regard to the meal allowance claim, RFA says such a claim is time-barred under s142 of the Act and should be struck-out as it relates to a period of time prior to 2006. With regard to Mr Leuii's claim that he was not paid at the correct rate, Mr Leuii accepted at the investigation meeting that he was paid correctly but felt he should have been paid more. This claim was not pursued further by Mr Leuii.

Issues

[11] The Authority must determine the following issues:

- (a) Was Mr Leuii's dismissal on 12 July 2013 unjustified;
- (b) If the dismissal was unjustified, what remedies (if any) should be awarded;
- (c) If remedies are awarded, should there be a reduction on the grounds of Mr Leuii's contribution (if any) and by what extent;
- (d) Is Mr Leuii's claim for a meal allowance prior to 2006 time-barred?

First issue: Was Mr Leuii’s dismissal on 12 July 2013 unjustified?

[12] RFA claims its dismissal of Mr Leuii on 12 July 2013 in circumstances in which he had received previous warnings and a final written warning on 5 March 2013 about similar conduct, is justified.

[13] Justification is to be determined in accordance with the test in s.103A of the Act. This test requires the Authority to assess RFA’s “*actions and how it acted*” to determine whether the decision to dismiss Mr Leuii and the process it followed were “*what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred*”².

[14] Mr Leuii signed written employment agreements with THE EDGE in January 2004 and in July 2006. Mr Leuii was employed by RFA following the local government reorganisation in the Auckland region and signed an employment agreement with it on 17 December 2011. Mr Leuii accepts that he was bound by RFA’s code of conduct which he accepts was included with his employment agreement and was accessible to him by way of RFA’s intranet.

[15] RFA’s code of conduct provides that:

All employees are expected to;

- *Maintain high standards of honesty, integrity, and confidentiality.*
- *Demonstrate courtesy and respect for colleagues and clients, respecting their cultural diversity, needs and rights.*
- ...
- *Maintain appropriate standards of behaviour ...*

[16] During his employment by THE EDGE and RFA, Mr Leuii was warned about not following proper procedures when absent from work, when leaving his rostered shift and when submitting timesheets. In addition, Mr Kidd spoke informally to Mr Leuii on a number of occasions about these matters and about his work attendances in general.

[17] On 10 April 2012, Mr Leuii received a letter from Mr Kidd entitled “*Outcome of Disciplinary Meeting- informal guidance.*” The letter said “*Having carefully considered your explanation, the appropriate outcome of this process is to provide*

² Section 103A of the Act

you with informal guidance. You will follow procedure when reporting an absence from work”

[18] From 14 December 2012 until 20 January 2013, Mr Leuii was absent on 10 occasions variously for “*late leave*” or “*leaving early*”. On 29 January 2013, Mr Kidd met with Mr Leuii to discuss his ongoing concerns about Mr Leuii’s completion of timesheets, his number of absences from work and his failure to notify his manager when leaving work early. Mr Leuii became angry and aggressive at the meeting and made what Mr Kidd described as veiled threats to him. Following the meeting, Mr Kidd sent Mr Leuii an email recording the issues discussed and confirming his expectation that Mr Leuii was to ensure timesheets were completed which included any breaks being entered on the timesheet and that Mr Leuii was not to leave work early without his manager’s approval.

[19] In response, Mr Leuii sent Mr Kidd an email which included a number of statements which were very concerning to Mr Kidd. Mr Leuii’s email included phrases such as:

God’s watching you man. He’ll correct you I can’t wait, maybe I should talk to the directors, and inform of who you really are???
Using your power to try and nail young victims ... If you don’t make things right I have no choice but to get the girls and report you so you better be quick sir ...

[20] Mr Kidd referred the matter to Mr Frank Bischoff, Head of Visitor Experience for the Centre of Performing Arts at RFA.

[21] On 1 February 2013, RFA commenced an investigation into the circumstances surrounding the email. The outcome of the investigation was the issuing of a final written warning to Mr Leuii on 25 February which was confirmed in a letter to him dated 3 March. The letter states that Mr Leuii has seriously breached the Code of Conduct which requires employees to “*...Demonstrate courtesy and respect for colleagues and clients; Maintain appropriate standards of behaviour; Demonstrate the key behaviours within the competencies in our interactions with staff, clients and patrons.*”:

[22] The letter specified RFA’s expectations of Mr Leuii including “*... to maintain appropriate standards of behaviour going forward;...to behave in a courteous,*

considerate and cooperative manner towards Dean Kidd in an effort to work toward repairing the relationship...”

22 May event

[23] On the night of 22 May 2013 Mr Leuii was rostered to work from 1630 to 0100am. One of the security leads, Ms Heleine Webster noticed on one of the security cameras that Mr Leuii had left the worksite in his car at 8pm. Ms Webster contacted Mr Leuii who told her he was at the Civic Theatre but when she had asked him to come into the office, he then said he was driving to pick up his kids.

[24] Ms Webster sent an email about Mr Leuii’s unauthorised absence to Mr Kidd with a copy to Mr Filipino Luamanavae, the assistant manager.

[25] As a result of Ms Webster’s email, an investigation was instigated by Mr Bischoff for RFA. Mr Bischoff’s investigation included meetings with Mr Leuii, Mr Luamanavae and Ms Webster. Ms Webster and Mr Luamanavae both denied that Mr Leuii had informed them that he was going to leave work on 22 May 2013. Mr Bischoff also discovered that Mr Leuii had completed his timesheet for the night of 22 May 2013 without recording the fact that he had been absent for almost 2 hours.

[26] During the course of RFA’s investigation and at the Authority’s investigation meeting Mr Leuii said he had informed Mr Luamanavae that he needed to leave the premises and that Mr Luamanavae had lied to Mr Bischoff when he said he was not told this. Mr Leuii explained his completion of the timesheet without reference to the break for almost 2 hours, by telling the Authority that that was the way all the security guards completed their time sheets even if they had a break.

[27] Mr Leuii was not a credible witness, his evidence was contradictory and inconsistent. In his witness statement, Mr Leuii gave evidence that *“I started work at 1630 hours and at around 1700 hours I mentioned to assistant manager Filipino Luamanavae how upset I was for my wife not taking the kids to our church bible study and now my sister Rosetta will be dropping the kids off and I might have to pick them up later on”*. This was not what he told Mr Bischoff or Ms Anna Collier, RFA’s Human Resources Consultant during the course of RFA’s investigation into his absence on the night of 22 May. Mr Leuii told Mr Bischoff and Ms Collier that he had had to leave work on the night of 22 May to attend to *“an emergency”*. At the Authority meeting Mr Leuii in response to questions claimed that picking his children

up from bible study on the night of 22 May was an emergency. I do not accept Mr Leuii's evidence as credible.

[28] At the Authority meeting, Mr Leuii gave inconsistent evidence about his sick leave. RFA's leave records provided to Mr Leuii at the investigation meeting demonstrate that Mr Leuii called in sick on 4, 6 and 7 June. Mr Leuii was due to attend a meeting with Mr Bischoff as part of its investigation in to the 22 May absence on 4 June but Mr Leuii called in sick.

[29] Mr Leuii, in response to questioning at the Authority's Investigation Meeting, said he had been sick on 4, 6 and 7 June. However, Mr Leuii's email to Mr Kidd on 9 June states it was his birthday on 4 June and he was "*spoiled a little by the kids*" and that on 5 and 6 June he had a "*late notice Boxing Event very sorry*". At the investigation meeting, Mr Leuii tried to explain that he was sick on both his birthday and during the day of the boxing event. Mr Leuii's evidence is contradictory.

[30] During the investigation by RFA into Mr Leuii's absence on 22 May 2013 and into his work attendances generally, Mr Leuii sent further text messages to Mr Kidd. At the Authority's investigation meeting, Mr Leuii denied sending text messages to Mr Kidd and said that he and Mr Kidd had enjoyed a good working relationship since he received the final written warning. Mr Leuii was shown a copy of text messages sent by him to Mr Kidd on 24 June, and accepted he had sent the messages. Another example of Mr Leuii's inconsistent and contradictory evidence.

[31] On 24 June Mr Kidd sent Mr Leuii a text confirming a meeting on 25 June with Mr Bischoff and Ms Collier. This meeting was part of RFA's investigation in to Mr Leuii's absence on 22 May. Mr Leuii sent a text back to Mr Kidd as follows: "*I find it off I sent him all info abt my side of da story wt Babaras email I was gona ask him as a CEO does he tolerate managers using dea power 2 sexual harass female staffs? C uz 2mro.*". Mr Kidd responded by asking Mr Leuii to raise the matter with HR. Mr Leuii's response was "*is NT a complain its da truth y are a bad man n u nd help dean ...*". Mr Leuii finished the text exchange by saying "*we all da same in gods eyes hw wld da media feel dey wil hav a fill day with you guys see you tomorrow.*".

[32] Mr Bischoff was extremely concerned when seeing the text messages from Mr Leuii especially given the final written warning issued on 5 March just a matter of

months prior to the investigation. The warning made it clear that such behaviour was in serious breach of RFA's Code of Conduct and that "*any further instances of misconduct...may result in further disciplinary action.*"

[33] A meeting was held on 26 June to discuss why Mr Leuii had left work on 22 May and his absences from work generally. Mr Bischoff was not satisfied with Mr Leuii's explanation. A formal disciplinary meeting was held with Mr Leuii on 3 July to discuss Mr Leuii's absence on 22 May, Mr Leuii's work attendance generally and the text messages that he had sent to Mr Kidd during the course of the investigation. After hearing Mr Leuii's explanations, Mr Bischoff formed the view that Mr Leuii's behaviour in each case was unacceptable.

[34] A further meeting was held with Mr Leuii on 5 July at which time Mr Leuii was informed of Mr Bischoff's proposed decision that he be dismissed for serious misconduct. Mr Leuii was requested to attend a further meeting and to bring a representative. A further meeting was held on 12 July and Mr Leuii did not bring a representative with him. The decision to dismiss Mr Leuii was confirmed and a letter sent to him.

[35] RFA must establish that Mr Leuii's dismissal was justified. The statutory test of justification is contained in s.103A of the Act. Whether the dismissal was justified must be assessed on an objective basis applying the test in s.103A, namely "*whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.*"

[36] In *Angus v. Ports of Auckland Ltd*³ the Full Court considered the amendments to s.103A and the ambit of the Court's inquiry in the light of its decision in *Air New Zealand v. V*⁴ decided prior to the amendment. The Court stated in *Angus* as follows:

[24] There are substantial and significant parts of former section 103A that are unaltered. The legislation does not preclude the Authority or the Court for examining and, if warranted, finding unjustified, the employer's decision as to consequence once sufficiently serious misconduct is established, as was argued unsuccessfully for the employer in V. That had never been the position and is not so under the most recent amendments. The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and the employer's response to those conducts.

³ [2011] NZEmpC 160

⁴ [2009] ERNZ 185

[37] Further, in *Angus*, the Court emphasised that its role is not to substitute its view for that of the employer. The Court's role is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[38] Mr Leuii was aware of RFA's expectations of its employees and how they were to act in the workplace. Mr Leuii was familiar with RFA's Code of Conduct and had been spoken to on a number of occasions, and had received informal guidance in writing about following the correct procedure when absent from work. On 5 March 2013, Mr Leuii received a final written warning after sending emails to his manager, Mr Kidd which were threatening and intimidating. The final written warning to Mr Leuii made it clear that he was to comply with the Code of Conduct and behave in a courteous and considerate manner towards Mr Kidd.

[39] Mr Leuii did not follow proper process when absenting himself from work on the night of 22 May. Mr Leuii did not seek permission to leave work and did not record his absence on his time sheet. During the course of the investigation which ensued Mr Leuii sent derogatory texts to Mr Kidd. RFA determined Mr Leuii's conduct to be in breach of its Code of Conduct.

[40] After carrying out a full investigation, RFA was entitled to form the view that Mr Leuii's conduct in absenting himself from work on 22 May without approval and in sending derogatory texts to his manager amounted to serious misconduct for which he could be dismissed.

[41] Having considered the evidence placed before the Authority, I find that the decision reached by RFA that Mr Leuii's actions did constitute serious misconduct, was a decision it could make in all the circumstances.

[42] Mr Leuii appeared at no stage of RFA's investigation, nor during the Authority's investigation, to have any insight into his actions. Mr Leuii claimed there was a "*conspiracy*" against him.

[43] Having decided Mr Leuii's actions amounted to serious misconduct, RFA was entitled to take the view that a dismissal was justified in the circumstances, especially given the recent final written warning.

[44] Section 103A(3) of the Act requires the Authority, when deciding if action is unjustified, to consider whether the employer:

- (a) sufficiently investigated the allegations;
- (b) raised concerns it had with the employee;
- (c) gave the employee a reasonable opportunity to respond to the employer's concerns;
- (d) genuinely considered the employee's explanation.

[45] I am satisfied the investigation by RFA was a full and thorough one which complied with each of the above elements of s.103A(3). I find that Mr Leuii's dismissal was justified.

[46] If I am not correct in determining that Mr Leuii's dismissal was justified, it is my view that Mr Leuii's contributory conduct was such as to deny him any remedies. The contributory fault was substantial and significant and as such reinstatement would not be appropriate and any award of compensation would be reduced by me by 100%.

Is Mr Leuii's claim for a meal allowance prior to 2006 time barred?

[47] Mr Leuii claims entitlement to a meal allowance of \$10 per week in the period of his employment prior to 2006.

[48] Section 142 of the Act sets a time limitation period for claims other than personal grievance claims. It states:

No action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.

[49] Mr Leuii has not pursued this claim within the required time period and the respondent no longer holds wage and time records for that period.

[50] This claim is struck out for failure to have been brought within a six year period of the alleged cause of action.

Costs

[51] Costs are reserved. RFA has 14 days within which to file and serve a memorandum as to costs and Mr Leuii has 14 days from receipt to file and serve his reply.

Anna Fitzgibbon
Member of the Employment Relations Authority