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Rerekura v A W Fraser Limited [2011] NZERA 122; [2011] NZERA Christchurch 20 (2 February 2011)

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Rerekura v A W Fraser Limited [2011] NZERA 122 (2 February 2011); [2011] NZERA Christchurch 20

Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 20
5160434

BETWEEN GEORGE REREKURA

Applicant

A N D A W FRASER LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Date of Determination:

James Crichton

Greg Lloyd, Counsel for Applicant Penny Shaw, Counsel for Respondent

3 December 2010 at Christchurch

2 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Rerekura) alleges that he was unjustifiably dismissed by his employer the respondent (A W Fraser). A W Fraser resists that claim.

[2] Mr Rerekura was employed by A W Fraser and its predecessors as a labourer for around 20 years. During the employment with A W Fraser, Mr Rerekura was a member of the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (the Union). His terms and conditions of employment are derived from the collective employment agreement between A W Fraser and the Union. A W Fraser collects and recycles scrap metal for further use.

[3] Mr Rerekura was scheduled to work the night shift on Friday, 19 December 2008. There was a private Christmas function organised for that night by some of Mr Rerekura's colleagues. The function was not the A W Fraser Christmas function. Mr Rerekura attended the 19 December function, became the worse for drink and did not attend the workplace that evening.

[4] In Mr Rerekura's absence without notification, A W Fraser marked him as sick as that was the company's default position in the absence of notification. When Mr Rerekura next attended work on Monday, 22 December 2008, he had a conversation with Mr Matthew Dixon, A W Fraser's Production Manager, about the absence on 19 December. When asked whether he was sick by Mr Dixon, Mr Rerekura alleged that he was, but when pressed, Mr Rerekura told the truth. Mr Dixon told Mr Rerekura that there would need to be a formal disciplinary meeting to discuss the matter further and that Mr Rerekura should bring a representative.

[5] At the end of the disciplinary process, Mr Rerekura was dismissed from his employment. A personal grievance was promptly raised by Mr Rerekura's union.

Issues

[6] The only issue for determination in the present case is whether A W Fraser's decision to dismiss Mr Rerekura was the decision a fair and reasonable employer would make. It will be helpful to consider the evidence of the three points of contact between the parties leading up to the dismissal.

What happened on 22 December 2008?

[7] It is common ground that Mr Rerekura was rostered to work on Friday, 19 December 2008, that he knew that his crew was already one short (because one of his co-workers had been granted annual leave) and that he failed to turn up for work as scheduled and did not ring in with any explanation.

[8] It is common ground that Mr Dixon confronted Mr Rerekura when the latter turned up for his Monday evening shift on 22 December 2008. Mr Dixon's evidence, which I accept, is that he endeavoured to be present at the shift changeover every day and that he was present for that purpose on 22 December 2008. He said that he wanted to see whether Mr Rerekura would offer an explanation for his absence the previous Friday night. The reason Mr Dixon was interested in what Mr Rerekura might say was that he had already been told by another employee, Mr Iggo, that Mr Rerekura was not sick at all but *on the piss*. Mr Iggo had remonstrated with Mr Dixon for marking Mr Rerekura sick for 19 December 2008. Mr Dixon's explanation to the Authority and to Mr Iggo was simply that, in the absence of any other information, that was the company's default position when a worker did not turn up for a scheduled shift.

[9] There is some difference between Mr Rerekura and Mr Dixon about the nature of the discussion the two men had on 22 December 2008. Mr Dixon says that he was simply sitting in the Foundry office at the change of shift when Mr Rerekura came in to collect some gloves. Mr Dixon says he initiated the conversation; Mr Rerekura did not speak to him first or approach him to offer any explanation or in any other way be proactive about his unexplained absence the previous working day.

[10] Mr Dixon's evidence is that he asked Mr Rerekura where he was on Friday and was told by Mr Rerekura that he was sick. Mr Dixon says that he asked Mr Rerekura again if he was sure about his answer and Mr Rerekura confirmed that he was sick.

Finally, Mr Dixon asked Mr Rerekura if he wanted to reconsider his answer because Mr Dixon had heard that he was not sick at all. Mr Rerekura then said *I was out on the piss*.

[11] Mr Dixon maintained in his evidence to the Authority that this discussion that he initiated with Mr Rerekura was not a disciplinary meeting but was his attempt *to ascertain if there was an issue ... to investigate or not*. Mr Dixon describes Mr Rerekura's categorisation of the discussion as *an ambush as preposterous*. Mr Dixon said *I asked him a simple question about his whereabouts on Friday night and he chose to lie about it. It wasn't a trick question - I just wanted an honest answer and he chose to lie; not once but twice*.

[12] Mr Rerekura, as I alluded to above, maintained that he was ambushed by Mr Dixon, refers to having been *called into a meeting* with Mr Dixon, not given warning about what the meeting was about, not told to have a support person present, and generally not behaving as if the meeting were a disciplinary meeting at all. In truth, of course, Mr Dixon did not regard the meeting as disciplinary; he characterises it as no more than an inquiry to see if a disciplinary meeting was required; in effect, Mr Dixon's evidence is that the meeting was a precursor to establish if a disciplinary process would be required, or not.

[13] Obviously this is not an academic discussion. If the contact between Mr Dixon and Mr Rerekura is in the nature of a disciplinary meeting, then A W Fraser has failed to provide to Mr Rerekura the necessary safeguards to ensure that his legal rights are protected. Conversely, if this contact as Mr Dixon describes was no more than a preliminary inquiry, then the employee's rights have not been breached and the matter need not be taken any further. Some elucidation on the appropriate treatment of this contact between the two men can be gained by considering the nature and extent of the disciplinary process which followed. In particular, it will be important to identify precisely what A W Fraser's allegation was.

What was A W Fraser's complaint?

[14] Mr Dixon's evidence is that, having established from talking to Mr Rerekura that the latter had been *out on the piss* when he should have been working and in the absence of any notification to the employer about his whereabouts, a disciplinary process needed to be commenced.

[15] There was an initial meeting between Mr Dixon on the one hand and Mr Rerekura on the other, the latter supported by Daniel Key, a union delegate. According to Mr Dixon's brief of evidence, in this disciplinary meeting, he outlined the allegations against Mr Rerekura as follows:

That instead of coming to work when he was rostered he had gone out drinking, and then he had lied when I had asked him about his whereabouts on Friday 19 December. I outlined the difficulties that had caused, by leaving the other employee having to cope on his own.

[16] Mr Dixon goes on to recite that Mr Rerekura seemed unmoved about the seriousness of the issue and refers to him indicating it was *no big deal* and that the other employee could *cope on his own*. Mr Dixon said that Mr Rerekura showed *no remorse*. Mr Key, for Mr Rerekura, said that Mr Rerekura had a good attendance record and that he had not had a sick day since May of that year. Mr Rerekura did not contest that statement.

[17] Mr Dixon explained in his evidence to the Authority that the importance of the number of people working on the shift that Mr Rerekura missed, had to do with the ability to keep the Foundry going, because the cost of not doing that was significant. Normally there were three men on Mr Rerekura's shift; Mr Rerekura knew that one of his co-workers had already been given annual leave and with Mr Rerekura's own absence without authority, that meant one man was doing the work of three.

[18] As to the issue around the sick leave that Mr Rerekura had or had not taken, it transpired on inquiry that the statement made by Mr Key on Mr Rerekura's behalf (presumably based on instructions from Mr Rerekura himself), was completely erroneous and that Mr Rerekura had a history of sick days on Fridays and had taken six such sick days on Fridays since May 2008.

[19] In the brief of evidence filed by Mr Rerekura, he refers to the various allegations made against him in the A W Fraser letter of 24 December 2008. Having referred to the allegations, Mr Rerekura then comments on the allegations. The first allegation is that Mr Rerekura failed to attend work on 19 December. Mr Rerekura acknowledges that that is factually correct. However, he goes on to say that the company has *blown the whole thing way out of proportion* in its response.

[20] Next is the allegation that Mr Rerekura failed to notify anyone of his non-attendance at work. Again, he acknowledges that is a factually accurate allegation, but again seeks to minimise its importance, noting that he had not been away long enough to have abandoned his employment and noting that three consecutive days without notification constitutes serious misconduct, but not one such day.

[21] Then there is the allegation that Mr Rerekura initially claimed to be sick. He says this is *a misrepresentation of what actually happened*. Again, Mr Rerekura seeks to minimise his culpability and claims that Mr Dixon ambushed him and that he told the truth *almost immediately* and therefore *that is not dishonest*. I beg to differ. I prefer Mr Dixon's recollection of events. Mr Dixon was adamant that Mr Rerekura twice claimed to be sick and only on the third occasion admitted that he was *on the piss*. That is straightforward dishonesty and there is no point in trying to dress it up as anything else.

[22] Next, Mr Rerekura is accused of breaching the company's drug and alcohol policy. His response suggests that A W Fraser is trying to have it both ways; on the one hand it complains that he has not turned up for work when he should have and on the other it accuses him of being under the influence of alcohol while at work. Actually, there is no evidence whatever that Mr Rerekura was under the influence of alcohol at work precisely because he did not turn up to work after a night out drinking. Mr Dixon, of course, says that it is appropriate for A W Fraser to point out this issue because Mr Rerekura's evidence is that he went out to the social function on 19 December 2008 intending to come on to work at the appropriate time. It follows, so the A W Fraser argument goes, that Mr Rerekura intended to breach the company's alcohol and drug policy. But even if that is right, an improper intention does not automatically translate into an improper action, and in the present case it is common ground that Mr Rerekura did not present himself under the influence of drink. Despite this conclusion, Mr Sutherland, A W Fraser's Managing Director, maintained in his evidence that Mr Rerekura was in breach of the company's drug and alcohol policy and in particular clause 4.1 of that policy which reads as follows:

Employees must limit their alcohol consumption prior to coming to work so that there is no alcohol in excess of the permissible limit in the body while at work.

[23] That is a laudable clause within a well drafted and clear policy, but it simply does not apply to Mr Rerekura. His brief of evidence is absolutely correct in maintaining that there is no evidence that he was under the influence of alcohol while at work. The whole point is that he became under the influence of alcohol and decided not to come to work.

[24] The penultimate allegation is that Mr Rerekura dishonestly represented his sick leave entitlement. Mr Rerekura protests that he never did that and he is right on the evidence before the Authority. There is no evidence to suggest that Mr Rerekura ever claimed sick pay to which he was not entitled. The position was that the company's default setting was that, in the absence of any notification from the employee, it was assumed that an absence meant sickness. Certainly Mr Rerekura ought to have properly and quickly notified the employer of the true nature of his absence for such is the behaviour expected of a party in a good faith environment but there is no evidence that Mr Rerekura claimed a financial entitlement which was not properly his.

[25] Finally, it is suggested that Mr Rerekura was not sufficiently remorseful. There is a difference between the parties on this issue; A W Fraser says that Mr Rerekura smiled in and throughout the initial disciplinary meeting on 23 December 2008 which it takes as evidence of a view that he was not taking the matter seriously. On the other hand, Mr Rerekura simply denies that he was not remorseful and claims to have apologised for what he did and be willing to produce a written apology if that would assist.

[26] So what was A W Fraser's complaint? While perhaps not as elegantly phrased as it might have been, it seems to the Authority that the message is clear enough that the employer was complaining about an employee who, without notification or lawful excuse, failed to attend at the workplace when he knew or ought to have known that his services would be particularly in demand because of the absence of one other person on annual leave, who failed to turn up at all, failed to provide any explanation or notification, and then was caught in a lie when asked for an explanation. Indeed, it might be said that had A W Fraser not been aware of the factual position when it sought Mr Rerekura's comments on the reasons for his absence, he might have been able to successfully mislead his employer. Certainly, it seems on the evidence before the Authority that Mr Rerekura's intention was in fact to mislead his employer about the reason for his absence on 19 December 2008.

What happened in the final disciplinary meetings?

[27] Because of the time of year, A W Fraser decided not to complete its disciplinary process until the new year. Prior to the

Christmas break, there had been the initial meeting between Mr Dixon and Mr Rerekura on 23 December 2008 followed up by the letter from Mr Dixon to Mr Rerekura on the following day setting out the allegations, the detail of which I have just referred to. That letter also indicated the seriousness of the position, noting that dismissal was a possible outcome, and proposed a date for a further meeting in the new year.

[28] At the meeting on 13 January 2009, Mr Rerekura was given the opportunity of offering an explanation to the allegations complained of by the employer. The evidence before the Authority suggests that the responses given by Mr Rerekura or on his behalf are consistent with the observations that he made in response to each allegation in his brief of evidence and which I have referred to above in the course of this determination.

[29] The final letter of dismissal from A W Fraser identifies that Mr Rerekura's failure to report for work *without due notification or authority* and his initial untruthfulness about the reason for his failure to report for work *amounts to serious misconduct*. It is not clear from the dismissal letter precisely what A W Fraser relies upon to reach the conclusion that Mr Rerekura's behaviour amounted to serious misconduct.

[30] In particular, there is no reference in the dismissal letter to a particular provision in the collective employment agreement. In the *house rules* attached and forming part of the collective employment agreement, there is a definition of serious misconduct. None of those definitions are referred to by A W Fraser in its dismissal letter. Nor does the dismissal letter refer to the company's drug and alcohol policy as being the basis for its decision.

[31] It follows that its conclusion that Mr Rerekura is guilty of serious misconduct must be justified on some other basis. Under common law, an employee who loses the trust and confidence of his employer because of proven wrongdoing may invite dismissal because of the conclusion reached by the employer that the total or substantial failure of the necessary trust and confidence between the parties makes the continuation of the employment relationship impossible.

[32] This is such a situation. Although perhaps not as clearly expressed as it might have been, I am satisfied that the employer had clearly expressed to Mr Rerekura in the meeting on 23 December 2008 that its central concerns were his failure to attend at work without notification or excuse knowing that that placed the workplace under unreasonable additional strain and his subsequent behaviour in being caught in a lie about what prevented him from attending work when he was supposed to. The fact that Mr Rerekura thought it appropriate to *go out on the piss* on a night when he should have been working must go to the root of the trust and confidence that ought to be maintained between parties to an employment relationship.

[33] Mr Rerekura's failure to appreciate the significance of what he had done and his enthusiasm for minimising his wrongdoing would, of necessity, have counted against him as well.

Determination

[34] I am satisfied on the balance of probabilities that a good and fair employer, after the conducting of a proper investigation, would have dismissed Mr Rerekura: s.103A [Employment Relations Act 2000](#) applied. It follows that Mr Rerekura's claim must be dismissed.

Costs

[35] Costs are reserved.

James Crichton
Member of the Employment Relations Authority